



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 794 of 2003

BONVENTRUE TOURS AND TRAVEL LTD..... PLAINTIFF

VERSUS

ROSE CHEBET AND OTHERSDEFENDANTS

RULING

The plaintiff herein filed an application by way of Notice of Motion dated 15th December, 2005 and sought orders inter alia that one M/s Myta Development Ltd., whose name already appeared on the face of the application be joined in the Plaint as the 6th Defendant and temporary injunction as prayed in prayer no.4 of the said application against the 1st to 7th Defendants (6th Defendant included) be issued.

The exparte orders were made which were as under:

- 1. THAT this Application be and is hereby certified as urgent**
- 2. THAT the application be served for inter-partes hearing on 28th December, 2005 subject to compliance with Vacation Rules.**
- 3. THAT leave be and is hereby given to the Plaintiff herein to re-amend its Plaint and join M/s Myta Development Limited as the 6th Defendant in this suit as per the draft Re-amended Plaint annexed and marked "AW 10" herein.**
- 4. THAT in view of the aforesaid joinder, leave be and is hereby given to the Plaintiff to re-amend its pleadings accordingly as per the Draft Plaint annexed and marked herein, and the same be deemed duly filed upon the payment of the requisite Court fees.**
- 5. That parties do observe the status quo obtaining on 15th December, 2005.**

Thereafter the Plaintiff filed an application dated 23rd December, 2005 seeking permission to hear the aforesaid application dated 15th December, 2005 during vacation.

The said application came up for hearing on 28th December, 2005. The Hon. Duty Judge declined to certify the application as urgent and to be heard during vacation, but proceeded to make an interim order only against the 6th Defendant which appeared to have the effect that the property currently registered in its name should not transferred further until the application on record i.e. of 15th December, 2005 is heard and determined.

The Defendants against whom the original order was sought including the 6th Defendant was not present when the said order was made. The application before the court was of 23rd December, 2005 which showed the service of original application dated 15th December, 2005 and not the one before the court. I also notice that the affidavit of service on record, except the posting by Registered Post on 21st December, 2005 on the 6th Defendant, did not show any acknowledgement by any other Advocates. The affidavit of service also did not state how the postal address of the 6th Defendant was obtained.

In the background of these events, the 6th Defendant through its Advocate M/s Akoto and Co. filed Notice of Preliminary objection dated 18th March, 2006.

The Notice raises points of law and they are as under:

- 1. Application dated 15th December 2005 is incurably defective and incompetent.**
- 2. There is no warrant under Order 1 rules 3 and 13 for joining a party ex parte.**
- 3. There is no warrant under order 1 rules 3 and 13 for amending the plaint ex parte where pleadings have closed.**
- 4. The Order dated 15th December 2005 joining the 6th Defendant and granting leave to the plaintiff to re-amend its plaint ex parte are all nullities and are for setting aside ex debito justitiae.**
- 5. The court has the inherent power to set aside its own order and an appeal is not necessary.**

Mr. Oriero the Learned Counsel for the 6th Defendant contended that the plaint was filed in the year 2003 and pleadings were closed. Thereafter the application dated 15th December, 2005 was filed seeking orders inter alia as mentioned hereinabove. It is not disputable that the order to enjoin the 6th Defendant as a party was made ex-parte and he submitted that it was irregular and against the Rules of procedure. The other Defendants who were already on record were also not present when the application was heard and order was given. There is no provision either under Order 1 Rules 3 or 13 to join a party ex parte. He relied also on Rule 10 of the said Order.

He thus urged that the order was without jurisdiction and is a nullity and thus should be set aside *ex debito justitiae*.

He relied on two unreported authorities to support his objections. The first was *Shanzu Villa Ltd. vs. Guardian Bank Ltd.* and another (H.C.C.S No.642/03 Milimani Commercial courts).

The facts in the said case were similar to those in the present case.

In that case Plaintiff realized that the charged property was sold and made application for leave to amend its plaint under certificate of Urgency. The learned Judge hearing the matter certified the matter as urgent and granted leave to amend the plaint as well as gave interim orders against the new party to be joined in.

The said order was objected under Notice of Preliminary objection and was heard by another judge.

Similar submissions were made before the said court.

I also note that the on 15th December, 2005 further order of status quo obtaining on 15th December, 2005 was also granted which included the 6th Defendant as he was already shown as a 6th Defendant even before the leave to join him was granted.

The insertion of the name of the 6th Defendant in the title of the application before the leave of the court is definitely irregular.

In Shanzu's case (*supra*) after hearing both sides, the judge found viz:-

“There is no warrant in the Civil Procedure Rules or in the authorities cited to me that an application for leave to amend a plaint under Order VI A Rule 3(1) may be made ex parte”

The court also found after concluding that the orders to amend the plaint by giving leave to add the defendant in an ex-parte proceedings were not proper, that the same were nullities and were for setting aside *ex debito justitiae*.

Reliance was also placed on a Court of Appeal decision in the case of **Provincial Insurance Company E.A. Ltd Vs. Mordekai Mwanza Nandwa CC.A.179/95 at Kisumu.**

I shall quote a passage from the judgment of Lord Green M. R. in *Orais vs. Kanseen* (1943) I.K.B. at page 262, which was adopted with approval in the said case, namely:-

“Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary. I say nothing on the question whether an appeal from the order, assuming that the appeal is made in proper time, would not be competent.

The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity, or whether it was something worse, which would give the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained.”

The Court of Appeal also found that to determine whether an order is or is not a nullity depends on the circumstances of the case in which it was made by, in main, one must ensure if there was jurisdiction to make the order and whether the principles of natural justice were followed.

Another legal issue was raised although not specifically mentioned in the Notice of Preliminary Objections. It was allowed to be contended with no objection from any party.

It was then submitted that, on 28th December, 2005 another ex parte order was made which gave an injunctive order against the 6th Defendant pending hearing and determination of the application dated 15th December, 2005.

I have outlined the circumstances preceding the granting of the said order.

The said ex parte order was in non-compliance of the provisions of Order XXXIX Rule 3(2) of the Civil Procedure Rule which stipulates:

“An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter.”

It was further stressed that the court has inherent power to set aside the orders even *suo moto* which are

without jurisdiction and thus nullity.

The above submissions were supported by all the counsel appearing for other Defendants (namely 1st, 2nd, 3rd, 7th and 8th Defendants). It was contended that the procedure adopted by the plaintiff was irregular and is an abuse of the court process and should be arrested by this court. The order made without jurisdiction is one that will be set aside *ex debito justitiae* and the court has a power to set the same aside even suo moto. It was submitted that the court when performing vacation duties is under tremendous pressure and is prone to rely on the submissions and presentation of the facts made by the counsel for the applicants and the Plaintiff's counsel has failed in his duty as an officer of the court. This argument, in my opinion is made just to add a coat of paint to the legal submissions made and I shall consider the same as of that nature.

In opposition to the above submissions, Mr. Omindo the Learned Counsel for the Plaintiff stated that the only remedy available to the 6th Defendant is to make an application for review before the same court who made the orders. This court has no jurisdiction to hear this preliminary objection.

The plaintiff has a right to enjoin any party to the proceedings as per Rules 3 and 13 of order 1 of Civil Procedure Rules.

I do note that the insertion of 6th Defendant in the title of the application along with the other defendants is a fact on the record and it speaks for itself.

As regards the ex parte injunctive order asking for an indefinite period, it was submitted that the court has discretion to make such order.

I have considered opposing submissions and I think I shall start with reiterating the fundamental principle of justice system that an order in violation of principle of natural justice is an order which can be set aside *ex debito justitiae*.

I entirely agree and adopt the findings made by my brother judge, in the case of Shanzu Villa (*supra*), to the effect that the orders to substitute a defendant and to amend the plaint were not such orders as could have been properly given in ex parte proceedings, it follows that the same are nullities and are for setting aside *ex debito justitiae*.

In this case I have two facts which are peculiar. Firstly, the application seeking leave to amend the plaint by adding 6th Defendant as a party had already inserted 6th Defendant's name along with other defendants on the face of the application.

Secondly, the 6th Defendant has already filed its statement of defence prior to raising the preliminary objections.

The first peculiar fact furthers the irregularity in the process of seeking leave to re-amend the plaint. It is no doubt that the said order granting leave to re-amend the plaint and to join the 6th Defendant was made ex-parte without hearing the 6th Defendant or even any of the Defendants in that matter.

Should I, looking to the fact that the 6th Defendant has filed his statement of defence, raise an estoppee against him to question the validity of the said order?

I do not think so. The order which cannot be given ex parte is without jurisdiction and thus a nullity. It is trite law that nothing comes out from nothing. The effect of the order which is a nullity does not exist and nothing can stand on that order which was null and void.

Moreover, there cannot be an estoppee against law of the land. The issue can be raised at any stage of the proceedings. The issue before me is want or lack of jurisdiction of the court in granting the orders impugned and the same is an acknowledged issue to be dealt with by way of Preliminary objection (see

Mukisa Biscuit Co. Vs. West End Distributor (1969) EACA 696 at 700 D & E).

The contention that the Plaintiff has a right to add the party as the Defendant to the suit has also been very well covered by the case of Shanzu Villa (Supra). Even as per the record before me, it is clear that the pleadings were closed and leave of the court was needed which as per the provisions of Order I or Order VI A cannot be given ex-parte.

I can also add that the circumstances of the present case are such that an ex parte order to add a party was definitely not proper as per the rules of natural justice.

Coming to the second order, I would reiterate that the ex parte injunctive order was granted after the court refused to certify the application dated 23rd December, 2003 as urgent which sought the order that the application dated 15th December, 2005 be certified as urgent and be heard during vacation because an inter parte hearing date was fixed for 28th December, 2005.

Despite the refusal of the certificate of urgency, the court suo moto gave an interim injunctive order only against the 6th Defendant until the application dated 15th December, 2005 be heard and determined.

The necessary implication of the said order was that there was no urgency to hear the application dated 15th December, 2005 and yet the ex parte injunctive order was given which is not envisaged as per order XXXIX Rule 3(2).

Simple reading of the said sub-rule makes it clear that the court has discretion to grant ex parte injunction but that discretion is mandatorily restricted to the duration of fourteen days. The words “**and shall not be extended thereafter**” makes the above discretion restrictive in time.

Obviously the said order was made ex parte without the support of a statute and thus makes it devoid of principles of natural justice and jurisdiction. The issue thus before me is the one which could be determined by way of preliminary objection. In the premises, this court is also not sitting over an appeal against an order of the court of concurrent jurisdiction. This court is only exercising its jurisdiction under inherent powers which has been conferred on it by the constitution.

In the premises, I do not agree to the submissions made by Mr. Omino that only remedy for the Defendant is to apply for review before the court which has granted the order and that this court has no jurisdiction to hear the Preliminary Objections.

I would stress that this court can suo moto set aside the orders which merit the said order ex debito justitiae.

In the premises, I allow the preliminary objections and set aside the orders made in this case dated 15th December, 2005 and 28th December, 2005.

I shall not make an order on costs as the issues raised were against the orders made by the court.

K. H. RAWAL

JUDGE

23.4.07