



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 195 of 2002

CHRISTOPHER NGARI MWANGI.....PLAINTIFF

VERSUS

KENYA COMERCIAL BANK LTD.....1ST DEFENDANT

KENNEDY GUMBAU MULA.....2ND DEFENDANT

G. K. MEENYE.....3RD DEFENDANT

M. N. KIRIMA.....4TH DEFENDANT

RULING

The 3rd and 4th Defendants have by a chamber summons dated 13th October, 2006 applied for the consolidation of the instant case with H.C. Misc. Appl. No. 511 of 2004. The application is brought under Order XI, rule 1 and 2 of the Civil Procedure Rules.

The grounds of the application cited on the face of the application are two:-

- (a) That by its own ruling dated the 20th day of July 2005 in HC Misc. App. No. 511 of 2004, this Honourable Court intertwined these two matters such that the decision in the suit herein will directly determine the latter.**
- (b) That it is therefore just and fair that the two suits do be consolidated for final disposal.**

The application is supported by an affidavit sworn by the 3rd Defendant which I have considered. In summary the 3rd Defendant, an Advocate of this court, depones that in a ruling made by this court on 20th July, 2005, in H.C. Misc. Appl. No. 511 of 2004, it became clear that the outcome of the instant suit would directly determine the Miscellaneous Application suit between the 1st Defendant and the Applicant herein.

Several grounds of opposition were filed by the Respondents to the instant application. However only those filed by the 1st Defendant on 2nd November, 2006 were argued. Five grounds of opposition are raised as follows:-

- 1. The firm of Wachira Nderitu, Ngugi & Co. Advocates is not properly on record in the matter.**
- 2. That the matter Misc. Civil Application No. 511 of 2004 is not a suit within the context of the civil procedure rules hence the two (2) matters cannot be consolidated.**
- 3. That it is more appropriate to have the Advocates justify their claim in a normal suit where the client shall be afforded an opportunity to put forward a defence for professional negligence.**
- 4. That the orders sought herein seem to circumvent the ruling of the Honourable Mr. Justice Waweru.**
- 5. That it is in the interests of justice that the orders sought herein be declined.**

The first ground raised that the firm of Wachira Nderitu Ngugi and Co. Advocate not being properly on record in the instant case; Mr. Liku for the 1st Defendant/Respondent submitted that the instant suit HCCC 195/02 was finalized as evidenced in the Applicant's annexure. The Advocate argued that there is a judgment on record entered in Hon. Mwera's, J. ruling of 7th May, 2003 in which summary judgment was entered for the Plaintiff/Applicant against all four Respondents. Mr. Liku submitted that at the time of the entry of judgment, the 3rd and 4th Defendants were represented by Meenye and Kirima Advocate. That in the circumstances, Mr. Liku urged, the firm of Wachira Nderitu, Ngugi & Co. Advocate should have sought leave to come on record as provided under Order III, rule 9A of the Civil Procedure Rules.

Order III, rule 9A provides:-

"9A. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record."

Mr. Nderitu for the 3rd and 4th Defendants did not agree that the instant suit was finalized. Mr. Nderitu relied on annexure "G.K. N,2" and paragraph 7 in the affidavit sworn by one Gladys Blamah in which counsel claimed that the deponent alluded to the pendency of the instant suit long after the ruling by Hon. Mwera, J. on 7th May, 2003.

The issue whether the instant suit is finalized and therefore whether leave to come on record should have been sought under Order III, rule 9A turns on the ruling of Mwera, J. of 7th May, 2003.

Hon. Mwera, J. heard a notice of motion application by the Plaintiff dated 16th May, 2002 brought under Order XXXV, rule 1(a), 2 of the Civil Procedure Rules, Section 7 of Land Control Act and Section 3A of the Civil Procedure Act.

The application sought judgment against all the Defendants jointly and severally for Kshs.2.5 million at 25%p.a. w.e.f. 18th April, 2001 until payment in full. The learned Judge granted the application as prayed entering judgment for the Plaintiff against all four Defendants in sum of Kshs. 2.5 million at 25% p.a. w.e.f. 8th April, 2001 until payment in full and with costs and interest.

An examination of the plaint filed by the Plaintiff on 13th February, 2002 reveals that it prayed for judgment against the Defendants jointly and severally for:-

"(a) Kshs.2,500,000/= being a refund of deposit.

(b) Interest on the said Kshs.2,500,000/= at the rate of 25% from 18th April, 2001 till payment in full.

(c) Costs of this suit.

(d) Interest on (c) at court rates.

(e) Any other or further remedy this Hon. court may deem fit and just to grant.”

In other words it is clear that the prayers sought in the plaint were the same ones granted in Hon. Mwera J's ruling of 7th May, 2003 in response to the Applicant's notice of motion dated 16th May, 2002. It is therefore very clear that the Hon. Judges ruling disposed of the instant suit as there are no matters pending in the suit for determination.

A summary judgment entered under Order XXXV, rule 1(a) and 2 of the Civil Procedure Rules is a judgment especially where it disposes off the whole suit as happened in the instant case. There being a judgment on record, the firm of Wachira, Nderitu, Ngugi & Co. Advocate needed to seek leave to come on record for the 3rd and 4th Defendants as provided under Order III, rule 9A of the Civil Procedure Rules. The said firm of Advocates merely filed a notice of change of Advocates which in the circumstances was irregular. I do agree that the said firm of Advocates are not properly on record in this matter and therefore could not bring any application for determination by the court until they regularized their position.

In the event I am wrong in the position I have taken of this matter. I will now proceed to determine the merits of the application before the court.

The application seeks to join the instant suit with H.C. Misc. App. No. 511/04. The main ground argued in support of the prayer was that the ruling of Hon. Waweru, J. dated 20th July, 2005, the Hon. Judge declined to enter judgment for the Applicants herein on grounds instant suit was pending. Mr. Nderitu also relied on affidavits sworn by officers of the 1st Defendant Ms. Gladys Blamah which was annexure "GKM 2" of the supporting affidavit. The relevant paragraphs in Gladys Blamah's affidavit are 6 and 7. I will quote paragraph 7 which states thus:-

“THAT the respondent bank herein has a claim against the Advocates in excess of the amount claimed herein arising out of the advocate/client relationship between them in regard to a security realization transaction where the advocates received for and on behalf of the client/respondent and subsequently retained the amounts received for and on behalf of the client/respondent to the advocates own use and which is now the subject matter between the parties in HCCC 195/2002.”

It is worthy nothing that the parties in HC Misc. Appl. No. 511 of 2004 are Meenye & Kirima Advocates as Advocates versus Kenya Commercial Bank as client. There are no other parties in that Misc. Application.

The advocate in the Misc. Appl. No. 511 of 2004, by notice of motion dated 24th November, 2004 applied for:-

(a) Judgment for taxed costs under Section 51 (2) of the Advocates Act.

(b) Liberty to execute such judgment without further or other proceedings.

The ruling relied upon by the Applicant herein was the one made by Hon. Waweru, J. in answer to the Applicant/Advocate's application herein above referred to. I believe that it is the interpretation to that ruling which Mr. Nderitu now relies upon to say that the issue between the 3rd and 4th Defendants on one hand and the 1st Defendant in the HC Misc. Appl. No. 511 of 2004 will not be resolved until the instant suit is determined.

I have already found that the instant suit was disposed off when summary judgment was entered by Hon. Mwera, J. on 7th May 2003. There is no case pending either between the two Applicants herein and the 1st Defendant or all the parties in the instant suit. There is therefore nothing to consolidate in this matter with any other pending application or suit.

Secondly, I do not agree with Mr. Nderitu Advocate that the 1st Respondent through its officer Gladys Blamah in the paragraphs of her affidavit relied upon alluded to the pendency of the instant suit. There is no such allegations or averment. The learned Advocate misapprehended the deponent in the said paragraphs. All the deponent was saying was that the Advocate in the miscellaneous application, who are the 3rd and 4th Defendants in instant case, owed the 1st Defendant herein, who is the client in the miscellaneous application, money in excess of that claimed in the miscellaneous application and which money was the subject matter in HCCC 195/2002, that is, the instant suit.

As for the ruling of Hon. Waweru, J. it is on record and I need not reproduce it here. I will quote only a section of it thus:-

“The Advocate has admitted that he has retained money belonging to the client. The client asserts that it is entitled to raise a set-off on account of this money. In my view the client is so entitled, and it can do so only in a substantive suit commenced by plaintiff.”

After so finding Hon. Waweru, J declined to grant the Advocate’s application for judgment on taxed costs.

It is a misinterpretation of the learned Judge’s ruling to say that the Hon. Judge meant that the miscellaneous application could not be finalized unless the instant suit is finalized.

The Hon. Waweru, J’s view in that ruling was that the Advocate therein, the 3rd and 4th Defendants herein, should file a suit claiming costs from the client, who is the 1st Defendant to enable the client file a defence with a set-off or counter-claim. The Hon. Judge did not say that the Advocates consolidates the miscellaneous application with a suit, whether pending or not. Clearly the application before court is premised on a misunderstanding of the Hon. Judge Waweru’s ruling of 20th July, 2005 and a lack of proper comprehension of Section 51 of the Advocates Act,.

The application lacks in merit and is dismissed for the following reasons.

- 1) **The firm of Wachira, Nderiitu Ngugi & Co. Advocates are not properly on record.**
- 2.) **The instant suit was finalized upon entry of summary judgment in terms of all four prayers in the plaint.**
- 3.) **Hon. Waweru J. ruling of 20th July, 2005 was to effect the 3rd and 4th Defendants who were Advocate in the Misc. Appl No. 511 of 2004 should file a suit under Section 51 of Advocates Act to recover their costs from the client.**
- 4.) **Costs of this application be paid by the Applicant to the Respondents.**

Dated at Nairobi this 8th day of June, 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Masinde holding brief for Mr. Mwangi for 1st Defendant.

Mengitch holding brief for Nderitu for 3rd and 4th Defendant.

LESIT, J.

JUDGE