REPUBLIC OF KENYA

HIGH COURT AT KITALE

CIVIL SUIT 7 OF 1998

ARTHUR MBATI IYADI ::PLAINTIFF

V E R S U S

CLETUS N. WAMALWA::DEFENDANT

R U L I N G

The defendant has moved the court by way of a Motion, which is said to have been brought pursuant to the provisions of Order 3 rules 3 and a, and Order 44 rule 1 of the Civil Procedure Rules, as read together with Section 32 rule 5 and Section 35 rule 4 of the Arbitration Act, and Section 3A of the Civil Procedure Act.

The two substantive reliefs sought are : -

(i) Review and setting aside of all proceedings from 12th May 2005 upto 25th May 2005

together with all consequential orders arising from such proceedings; and

(ii) Setting aside of the Arbitral award which had been adopted by the court, and a stay of execution in relation to the said award.

The primary reason given by the defendant for seeking the setting aside of the proceedings was that the application which formed the foundation thereof had been irregularly filed in court. The application in question is dated 11th May 2005, and the same was filed by the plaintiff, in person.

As the suit herein had been filed through the law firm of Sichale & Co., Advocates, the defendant contends that the plaintiff had no capacity to file the subsequent application in person, as his advocates were still on record.

The defendant also takes issue with the fact that Messrs Kiarie & Company Advocates thereafter came on record through a Notice of Appointment of Advocate, whereas they should have filed a Notice of Change of Advocate, with a view to replacing the firm of Sichale & Company.

I believe that it would be appropriate to first see the plaintiff's response to those two issues, before moving on to the other issues raised by the defendant.

The plaintiff explains that the circumstances prevailing in this case were such that he did not need to have filed a Notice of intention to act in person. He points out that on 28th February 2005, the court gave an order that the plaintiff be served in person. Therefore, to the plaintiff's mind, the advocates who were then acting for him, were allowed to cease acting.

From 28th February 2005 the plaintiff believed that he had been left without an advocate, as the court is said to have ordered that, henceforth, the advocate s who had until then been acting for him, were no longer to be served.

In the light of the court order, the plaintiff formed the view that he did not need to file a Notice of his intention to act in person. Instead, he went straight ahead to act in person, by filing the application dated 11th May 2005.

It is also the plaintiff's contention that when M/S Kiarie & Company Advocates came on record, as his new lawyers, on 20th September 2005, they were right to have done so through a Notice of Appointment of Advocate, as the plaintiff did not have any other lawyer in the case, as at that date.

In any event, the plaintiff submits that the issues now being raised were no more than a belated effort to frustrate his efforts, through a technicality. The reason why the plaintiff has that feeling is that the defendant's lawyers had been served with several Hearing Notices, through the firm of Kiarie & Company. Therefore, the defendant is said to have been well aware that the plaintiff's lawyers were Kiarie & Company, for a long period of time. In the circumstances, the plaintiff insists that the failure to serve the defendant with a Notice to act in person had not prejudiced the defendant at all.

In that regard, the plaintiff asked the court to find guidance from the decision of the ***Hon. Emukule J***; in ***KAMLESH M.D. PATTNI VS NASIR IBRAHIM ALI & 2 OTHERS MILIMANI HCCC NO.418 OF 1998.***

In that case the firm of Ochieng Oduol & Co., Advocates are said to have ceased to act for the defendants. However, they had not filed any formal notice to indicate that they were no longer acting for the defendants.

Notwithstanding that omission, the firm of D.P Kinyanjui & Co., Advocates took over the role of advocates for the defendants. In doing so, that firm did not place themselves on record as required by Order 3 rule 6 of the Civil Procedure Rules.

In view of those facts, the plaintiff raised a preliminary objection, seeking to block the firm of D.P Kinyanjui & Co., Advocates from having audience before the court. He also asked the court to hold that the said firm of advocates had no right to file any papers in court.

After giving due consideration, the Hon. Emukule J stated, inter alia, that;

*" **All authorities that I have come across suggest that the point should be raised at once, or at the earliest possible time upon noticing or identifying the issue giving rise to such preliminary objection. I think this is a cardinal rule in raising preliminary Objections. If it is not raised promptly, proceedings will be taken in the matter. Applications will be heard and determined. Occasionally a whole suit may be heard. It is not advisable or even useful to raise the issue of representation well after proceedings in a suit have been heard."***

The rationale for that holding is that if issues of representation were not addressed promptly, the consequences of undoing actions, proceedings or decisions thereon long afterwards would be both far reaching and highly prejudicial to the litigants and indeed to the cause of justice.

Therefore, when the defendant was served with Hearing Notices and applications from persons whom he now describes as strangers, he should have taken an active role in objecting to such strangers taking steps in the matter. Instead, he chose to do nothing.

Meanwhile, the application which he had chosen to ignore, was heard and determined.

Notwithstanding the time spent by the plaintiff in prosecuting the application, and the time spent by the court in hearing and determining the said application, the defendant now chooses to argue that that amounts to nothing.

His said action appears to be exactly what the Hon. Emukule J. had in mind when he said [***in the case of KAMLESH M.D. PATTNI V NASIR IBRAHIM ALI & 2 OTHERS, above-cited]***

That it was ill-advised and not useful to raise issues of representation well after the proceedings in a suit have been heard.

Having so found, I now need to place the application within its factual perspective.

From the court records it is clear that on 28th February 2005, Mr. Kidiavai advocate informed the court that the plaintiff had not yet responded to the letter which Mr. Kidiavai had written to him. That gives rise to the question, what is it that Mr. Kidiavai had written about to the plaintiff, who was then his client?

In order to have a better understanding of the circumstances then prevailing, it is important to bear in mind the fact that on 20th March 1998, the Hon. Nambuye J. ordered that the dispute which was the subject matter of this suit be referred to arbitration.

It is common ground that the Hon. Togbor J. (retired) was appointed as the arbitrator. It is also common ground that after conducting the arbitration proceedings, that arbitrator wrote to both parties on 19th June 2001, notifying them that his award was ready for delivery. By his said letter of 19th June 2001, the arbitrator indicated that his costs were in the sum of K.Shs.200,000/=, which sum was to be paid in equal share by each of the two parties.

Apparently, both parties held the view that the fee demanded by the arbitrator was too high. Therefore, neither of them took any steps towards settling the arbitrator’s fees.

When the court felt that the case should not be left hanging for an unduly long period of time, the court served the parties with a Notice of dismissal of the suit, for want of prosecution. That notice required the parties to attend court on 28th November 2004.

When the matter came up before the court ***[on 28th November 2004]***, Mr. Kidiavai informed the court that he did not know the outcome of the arbitration proceedings. He therefore asked the court to summon the plaintiff personally, so that he could let the court know whether or not he still wished to pursue the suit further. Mr. Kidiavai offered to write to the plaintiff, with a view to letting him know of the date when he should attend court, and also to notify him that he [Kidiavai] was ceasing to act for the plaintiff.

The court granted the request for an adjournment, and directed that the case be mentioned on 28th February 2005.

Although there is no record of the letter which Mr. Kidiavai had written to the plaintiff, the presumption is that when he told

the court, [on 28th February 2005], that the plaintiff had not replied, that was in relation to the letter, inter alia, notifying the plaintiff that Mr. Kidiavai was no longer acting for him.

On that date the record shows that Mr. Kidiavai addressed the court thus;

"***The plaintiff has not yet replied to my letter. I ask to be allowed to put in a notice of cessation, I also ask that the plaintiff be served direct by the plaintiff" (sic)***

The learned judge then ordered that the Notice of dismissal be served upon the plaintiff in person.

According to Mr. Njoroge, learned counsel for the plaintiff, as soon as the court ordered that service be effected upon the plaintiff personally, the plaintiff did not need to file a notice of his intention to act in person.

In this case, the advocate who had been acting for the plaintiff had not ever purported to have ceased acting. He had only indicated an intention to file a " notice of cessation." Thereafter, he did not take the step of filing the notice.

Meanwhile, the court also did not order that the said advocate should cease acting for the plaintiff. The court only ordered that the Notice of dismissal of the suit, for want of prosecution, be served upon the plaintiff personally.

Pursuant to Order 3 rule 12 (1) of the Civil Procedure Rules, if an advocate has ceased to act in a matter, but the party for whom he had been acting had not given notice of change, the advocate is supposed to apply to the court for an order that he had ceased to act.

To my mind, the proviso to that sub-rule is particularly significant, because it makes is clear that;

"***Unless and until the advocate has –***

(i) served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the as the court may direct a copy of the said order; and

(ii) procured the order to be entered in the appropriate court; and

(iii) left at the said court a certificate signed by him that the order has been served as aforesaid; he shall (subject to this Order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal."

As there is no order by the court that Sichale & Co., Advocates had ceased to act for the plaintiff, by dint of the proviso to Order 3 rule 12 (1) of the Civil Procedure Rules the said firm are considered to have continued to act for the plaintiff.

Therefore, the plaintiff was not competent to have brought the application dated 11th May 2005, on his own behalf.

And thereafter, if the firm of Kiarie & Co., Advocates wished to take over as advocates for the plaintiff, they should have filed a Notice of change of Advocates.

The question that needs to be addressed now, is what should become of the application dated 11th May 2005 and the proceedings based thereon.

The plaintiff has submitted that the orders for review and for setting aside of proceedings, which have been sought by the defendant, cannot be granted under the provisions of Order 44 of the Civil Procedure Rules.

The basis of that submission was that before the court be moved for review, there had to be a decree or order. To support that legal argument, the plaintiff cited the decision of the Hon. Karanja J. in ***EXAKTA AGENCIES LTD V KAMUNJE FARM LTD, KITALE HCCC NO. 146 OF 2001.*** In that case the court re-echoed the decision in ***GULAMHUSEIN N. JIVANJI Vs EBRAHIM JIVANJI & ANOTHER [1920-30] 12 E.A.C.A. 41,*** and held that;

"***Unless a decree is drawn and attached to the application for review, then the application for review is incompetent and the same must be dismissed."***

In the face of that submission, the plaintiff put forward no direct answer. I believe that the plaintiff did not have an answer to that submission because of the following two authorities which were cited by the defendant.

First, in ***B.K. MATHENGE Vs CREDIT KENYA LIMITED, MILIMANI HCCC NO.4085 OF 1992***, the Hon. Mutungi J. said;

"***The biggest failing of the application for review is the absence of extracted order, and attachment of the same to the application. This is a crucial matter for all Applications for Review; that the applicant extracts and attaches the order/decree sought to be reviewed."***

Then, in ***KENYA SEED CO., LTD V ANN CHANDAI, KITALE CIVIL APPLICATION NO.7 OF 2000,*** the Hon. Karanja J. said ;

"***In reiterate, like I have done in many cases before, that the law requires that an application for review be accompanied by a copy of the decree or order that the applicant seeks to have reviewed. This decree or order must be extracted by the applicant himself and it matters not whether such a decree or order is in the court file."***

On the strength of those authorities, I do hold that the application, in so far as it seeks review, is incompetent. However, that still leaves the application for setting aside.

In my considered opinion, the application to set aside the proceedings founded on the application dated 11th May 2005, must succeed. I say so because the application was commenced irregularly, by the plaintiff in person, whilst there was still an advocate acting for him, as far as the records of the court go. For that reason, the application dated 11th May 2005 is expunged from record, together with all the proceedings founded thereupon. In the result, all court orders flowing from the said proceedings are also set aside.

However, because the defendant did not raise his objections timeously, his said omission resulted in the court holding sessions and issuing orders. Had the defendant raised an objection to the application straightaway, and later to the appearances by the firm of Kiarie & Company Advocates, as soon as they first appeared for the plaintiff, a lot of time would have been saved by both parties as well as by the court.

In the circumstances, even though the defendant's application is successful, I order that he shall meet the costs thereof, together with all the thrown-away costs.

Dated and Delivered at **KITALE**, this 25th Day of July, 2007.

FRED A. OCHIENG

JUDGE