REPUBLIC OF KENYA

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

Civil Case 1299 of 1999

ALICE NJERI WAMUIGA.....APPLICANT

Versus

CENTRAL BANK OF KENYA.....RESPONDENT

RULING

To-day when pleadings like plaints, written statements of Defence with or without counter-claims are filed and proceedings are thereafter recorded in relation to those pleadings, it is important that such recorded proceedings clearly identify the plaint, the defence and other relevant documents being relied upon, at least by mention of the date of the document to avoid future mistakes or confusion because amendments and counter-amendments, further amendments and amendments of further amendments are the order of the day. As such amendments of amendments are filed, they are accompanied with a line of interlocutory applications with numerous affidavits either original or supplementary or further or further to further and so on. Similarly therefore it becomes necessary for the court record to identify each document at least by reference to its date to avoid future mistakes and confusion as the relevant case and the file move through several different hands.

Like in this case, the issue of amending the Plaintiff's plaint has engaged the court immediately after filing the suit about September 1999 and therefore a number of judges has dealt with that issue to-date when I am also made to handle the same issue. Apparently it is not realised that parties, many a time, take advantage of changes of judges or magistrates handling their cases to obtain court orders they ought not to have properly obtained. In this case for example, Justice M. K. Ibrahim on 30th April 2004 wanted the parties to be serious in the matter and after he had given them definite orders to help move the case towards the end, he never saw the case file again. As a result, the parties are still around today with this case. This is what the learned judge said:

"With much reluctance I do hereby grant adjournment to the Plaintiff and leave to file a Replying Affidavit out of time. I do not think that the Plaintiff is a serious claimant neither has counsel shown diligence in her representation. However, I have noted that this is a claim for terminal benefits after the Plaintiff's employment was terminated and one of the subject matters of the suit includes immovable property. The bank has not been stopped from realizing its security though there must be inconvenience by the delay in the hearing of this suit.

The Plaintiff shall file their replying affidavit within 14 days from the date hereof. For the record, it appears that the proposed amended plaint was never filed and served as ordered. The Plaintiff is warned that if she attempts to revive the application for amendment, the court will proceed to dismiss this suit. This is the condition for this adjournment and indulgence. I exercise my discretion with much resistance as this appears is case for dismissal for want of prosecution."

Although the learned judge gave the parties a consent hearing date 18th May 2004 apparently thinking the case was going to be before him, he has never seen this case file again to-date and as I have pointed out, the Plaintiff is still having her time around just talking about amendment of the plaint. The relevant Notice of Motion being dated 18th July 2005 and therefore filed on 19th July 2005 was no doubt the revival of the application to amend the plaint that Justice Ibrahim warned the Plaintiff about. That warning is now useless simply because the case file never went back to the learned judge, who, in my view, was the proper person to continue and finalize the case as he was proceeding in the right manner in the right direction with sufficient knowledge of what had already taken place in the case.

With the case outside the hands of Justice Ibrahim, there followed confusing court orders until the matter reached Justice Ransley on 30th September 2004 for the hearing of the Notice of Motion dated 18th July 2005, then being entertained in disregard of what Justice Ibrahim had said as seen above, and surprisingly, the Defendant's counsel not drawing that fact to the attention of Justice Ransley.

That is up to that time before Justice Ransley, the position was that on 20th December 2002 Justice Mbaluto had granted the Applicant's application to amend her plaint within seven days. But as Justice Ibrahim was pointing out in the above quoted passage, by 30th April 2004 the proposed amended plaint was never filed and served. The Plaintiff was therefore before Justice Ransley in the aforesaid Notice of Motion dated 18th July 2005 praying for the extension of time within which to file and serve the proposed amended plaint.

That Notice of Motion was, from the record, actually heard before the learned judge on 20th September 2005 and he ruled at the end of the hearing as follows:

"The applicant applies to extend the time for filing an amended plaint. Some 2½ years after an order was made allowing the amended plaint to be filed. The reason given is the lack of funds to pay the court fees. Mr. Ougo rightly points out that the applicant has been delaying in proceeding with the suit, which is some seven years old. My order is that the Plaintiff prosecutes her claim and that the question of liability be disposed of as a preliminary issue within two months from to-day. Failure to proceed with the hearing on that day will result in the plaint being dismissed. I will now fix a date. If liability is established, I will consider granting this application."

Justice Ransley made a separate further order at the same time saying:

"This suit to be heard on the question of liability on the 23.11.2005 before me."

Ordinarily, that is clearly a good and clear effort by a judge following in the footsteps of Justice Ibrahim to avoid further delay of justice in this matter. Ransley J. after hearing the Notice of Motion dated 18th July 2005, decided that application by ordering in his ruling dated 30th September 2005 that there be the hearing of the main suit on the question or issue of "liability" as a preliminary issue within two months. He clearly stated he was going to consider granting the Notice of Motion only if liability was established. That means his final decision whether to grant or not to grant the Notice of Motion depended on whether he found liability against the Defendant.

Unlike Justice Ibrahim before him, this time Justice Ransley gave the parties a hearing date for the main suit and managed to get them back before him to hear them, although the parties managed to secure two adjournments before the hearing actually took off on 3rd February 2006. Otherwise the Judge had remained available and focused for the hearing of the main suit not only on liability but also to the final end. He succeeded on the question of liability only as he was given no opportunity to reach the final end of the suit.

The Plaintiff was the only witness as the Defendant opted not to call evidence. But at the end of the two day's hearing M/S Alice Wahome, Counsel for the Plaintiff and Mr. Ougo, Counsel for the Defendant, made their respective submissions on the evidence adduced on the question of liability as that was the purpose for that hearing. M/S. Wahome submitting that the Plaintiff must succeed since the Defendant

adduced no evidence to rebut what the Plaintiff said, and Mr. Ougo replying that the evidence adduced by the Plaintiff did not prove or establish liability against the Defendant.

In his no less than eight page judgment dated 27th March 2006, the learned Judge found that the evidence had not proved or proved liability against the Defendant. The Judge stated as follows:

"…, I find that the Defendant had the right to dismiss the Plaintiff from their services and that the dismissal of the Plaintiff was not wrongful.

As the Plaintiff was dismissed for misconduct then the provision of Rule 6.21 apply which entitled the Plaintiff to three months notice in writing or three months salary in lieu of notice. This is in contrast to Rule 6.23 where instant dismissal only applies to gross misconduct.

Having so found, I will hear the Defendant as to what the Plaintiff is entitled to by way of compensation for lack of notice or payment of three month's salary in lieu of notice. I will also deal after those arguments with costs and the fate of the counter-claim."

That, to my mind, is the good work the good Judge did. But just by one stroke of the pen and upon a brief oral application by one Counsel supported by a mere oral "yes" from the Defendant's Counsel, learned counsels on both sides want me to-day to set aside Judge Ransley's judgment dated 27th March 2006

"So that the application is heard".

That is the application by Notice of Motion dated 18th July 2005 for the extension of time to file the amended plaint be left to be heard. The parties are now taking advantage of the change of Judges to obtain the orders Ransley, J. was not going to allow them obtain. Look at what he said at the end of his judgment. He was himself going to hear the remaining dispute in the case and he had identified the nature of the remaining dispute and that was to be the final determination of this suit. Today it is as if the two learned counsel are now telling me:

No Judge. We do not want to reach the end of this dispute in this Court the way Judge Ransley was making us do as that is too soon. We would like to stay here much much longer as the mere eight years we have been here is not long enough. Of course if there is any delay of justice, we are not bothered because the Court is always there to be blamed even when, properly, other people like us should be blamed, for the thinking generally is that those who are served by the Court, and they include advocates and the society in which the court operates, never do anything wrong and therefore whenever anything wrong happens in connection with the service the Court gives, that wrong is always the act of the court and the court must always be blamed wholly for all such actions because, in Kenya, those who are served in court remain clean and blameless a hundred percent.

Judge Ransley, like Judge Ibrahim before him, was not given the opportunity to finalize or wind up the case whose end he was the only human beholder. The parties who ignored Justice Ibrahim's order have therefore got the opportunity, this time to come up with the aim of completely destroying the existence of the orders made by Justice Ransley to enable them go back to square one to start with amending the original plaint with corresponding right to file amended defence followed by the right to reply and, of course, the concurrent right of either party to file a line of interlocutory applications, counter applications, and the newly emerging applications within applications especially prevalent in the Commercial and Taxation Division of the High Court

Where (and I say this with all due respect) Advocates handling commercial and taxation cases seem to have commercialized the cases so much that a simple case becomes a commercial complex whereby hearing of the main suit is completely forgotten or ignored as the parties keep the court busy hearing, not only a line of applications one after another, but also hearing another line of applications within applications including counter applications and counter-counter applications

leading into a confusion which makes the case confused and confusing to the extent of negating justice.

That may be alright with the parties in this suit but have they seriously considered the legal implications of what they are asking me to do? The legal position to-day is not the same as what it was when the parties ignored, with impunity, Justice Ibrahim's "revival" warning dated 30th April 2004. It was not a mere warning. It was an order as it was a condition precedent which was not to be disobeyed. But it was disobeyed and those who disobeyed it were blessed when changes of hands occurred.

With Justice Ransley's judgment however, the situation is different notwithstanding the changed hands. Firstly, it is because I have no jurisdiction to set aside the judgment even if the parties are telling me I have their consent to do so. It is the Court of Appeal which has the jurisdiction to set that judgment aside in an appeal properly before them.

Secondly, even if I were having the jurisdiction to interfere with that judgment, and this would perhaps have been in a proper application for review, my sentiments are clear. To my mind, Justice Ransley did a good job trying his best to bring justice closer to parties who are now running away from that very same justice yet they came to this court for it. They came asking this court for that justice. That being the position, what are the good grounds in support of the review which the parties would have relied upon to persuade me review that judgment? It is not easy to find any such grounds.

Thirdly, although the fate of the Notice of Motion dated 18th July 2005 was finally sealed in that judgment when the learned Judge found no liability against the Defendant, the court order killing the said Notice of Motion emanates from the Ruling of the Judge dated 30th September 2005. Setting aside the judgment dated 27th March 2006 will therefore not be sufficient to bring the Notice of Motion dated 18th July 2005 to life when the Ruling dated 30th September 2005 still exists. I have already quoted that ruling and one needs only to look at its wording for example:

"My order is that the Plaintiff prosecutes her claim …"

That was a court order which had to be effective had the hearing of the suit which took place on 3rd February 2006 not taken place.

Fourthly, and I say this with all due respect, the thinking that the Notice of Motion dated 18th July 2005 is yet to be heard or that it is partly heard is erroneous. This is because that application was fully heard and decided by Justice Ransley on 30th September 2005 and the only element which remained thereafter was the issue of "liability" the Judge saying

"If liability is established I will consider granting this application."

"Liability" was to be established during the hearing of the suit which started on 3rds February 2006, and as it is already recorded elsewhere, the learned Judge in his judgment dated 27th March 2006 found no liability established. That meant the Notice of Motion was by that finding in that judgment completely and finally dismissed.

The setting aside of the judgment dated 27th March 2006 as I said earlier, will leave the Ruling dated 30th September 2005 which has a clause

"Failure to proceed with the hearing (meaning hearing of the main suit) on that day (within two months) will result in the plaint being dismissed".

As that situation will mean that the period of two months will have gone leaving the suit pending unheard, that would mean failure to proceed with the hearing, and the suit will, as per that Ruling, have been dismissed together with, the Notice of Motion which will therefore not remain in existence to be

prosecuted by the parties in this suit.

Fifthly, it may as well be said that even if this court were to extend the time to amend the plaint, the very time to extend is no longer there because the same expired years back, in fact after seven days from the date leave to amend was granted, and you cannot humanly and in law extend what does not exist.

Finally therefore, bearing in mind all the foregoing, I do hold the opinion that the consent oral application counsel on both sides have put before me that I do set aside Justice Ransley's judgment dated 27th March 2006 to pave the way for the hearing of the Plaintiff's Notice of Motion dated 18th July 2005 is improper, misconceived and legally, unsound. The same consent oral application is unmaintainable and is therefore hereby dismissed.

However, in the circumstances of this suit, it is my humble and gratuitous advice that the Plaintiff's counsel and the Defendant's counsel each reads carefully the Ruling dated 30th September 2005 together with the judgment dated 27th March, 2006 and immediately move forward as indicated in the judgment dated 27th March 2006 to avoid further delay in finalizing the resolution of the dispute in this suit.

For the purpose of proceedings resulting into this ruling, each party to bear its own costs because, in my view the parties stand on equal terms.

August 1, 2007

Khamoni J