REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 189 of 2006

1. ABDULHALIM MOHAMED SHALLO

2. SHEIKH ABDULKADIR MOHAMED SHALLO ……..……. PLAINTIFFS

- Versus -

PANDYA MEMORIAL SOCIETY t/a PANDYA HOSPITAL ……..…. DEFENDANT

Coram: Before Hon. Justice Njagi

Court clerk - Ibrahim

Mr. Shallo, 1st Plaintiff

Mr. Shallo, 2nd Plaintiff

Mr. Noorani h/b for Kassam for Defendant

R U L I N G

The application before the court is brought by way of a chamber summons dated 26th October, 2007, and is expressed to be made under O.VI rules 13 (1) (b), (c) (d) and 16 of the Civil Procedure Rules, and section 3 A of the Civil Procedure Act. The plaintiffs/applicants seek from the court the following orders-

1. THAT the defence and counterclaim filed on 7th December, 2006 on behalf of the defendant be struck out.

2. THAT judgment be entered against the defendant as prayed in the plaint.

3. THAT the costs of this application and the suit be borne by the defendant.

The application is supported by the annexed affidavit of Abdulhalim Mohamed Shallo, the first plaintiff, and is based on the grounds that –

(a) The defence and counterclaim are frivolous, scandalous and vexatious;

(b) The defence and counterclaim may prejudice, embarrass or delay the trial of this suit ;

(c) The allegations in the defence and counterclaim are clearly false and the defence is therefore an abuse of the process of the court;

(d) The defence consists of mere denials and it is a sham

(e) The defence discloses no reasonable defence.

(f) Such other or further grounds and/or reasons as will be adduced at the hearing hereof.

In opposition to the application, the respondent filed, on 1st November, 2007, grounds of opposition dated 31st October, 2007. These were –

1. THAT the application is patently an abuse of the process of the court.

2. THAT in the alternative the defendant/respondent relies on the grounds of opposition dated 26th June, 2007, in response to the Applicant's application dated 14th June, 2007, and the matter is therefore res judicata.

3. THAT the notice of motion and the main suit in general are being purued in a vexatious manner.

4. THAT this application ought to be dismissed with an order as to costs, to be assessed by the court as to quantum and time with a default clause to discourage constant vexatious applications.

At the hearing of the application, the applicants appeared in person and Ms. Ileli appeared for the respondent. Mr. Abdulhalim M. Shallo argued that his application and supporting affidavit showed that the defendant's have no defence as he was never a patient in the hospital. The accounts attached to the application should be justified and certified, but the defendants have not been able to do so. He further contended that the defence and counterclaim will only delay the fair trial of this case, and that the defence consisted of mere denials and was a sham. He thereupon urged the court to strike out the defence and counterclaim with costs, and allow the applicants to proceed to formal proof.

Opposing the application for the respondent, Ms. Ileli relied on the grounds of opposition filed on 1st November, 2007. She argued that the applicants had filed a similar application dated 14th June, 2007, in which the prayers therein were similar to the ones in this application. The former application was withdrawn on 26th October 2007 which, she submitted, renders the present application res judicata. Ms. Ileli further submitted that the defence and counterclaim raise triable issues and therefore they are not frivolous. She also argued that the two plaintiffs do not disclose the capacity in which the 1st plaintiff is suing and submitted that he was indeed the patient at Pandya Hospital. The fact as to whether he was the patient or not, she further submitted, was a triable issue. Counsel also submitted that the defence herein responds to the issues raised in the plaint and gives a brief account at to how the debt arose. Therefore the issue of whether or not there is a debt of Kshs 433,244/= or Kshs 375,054/= is also a triable issue. She therefore asked the court to dismiss the application.

Replying to the above response, Mr. Shallo submitted that the entire defence did not disclose any defence; that the application dated 14th June, 2007, was consented to and was never argued and therefore it was not res judicata. He reiterated his prayer that the defence and counter claim should be struck out and dismissed with costs.

I have considered the pleadings and the rival submissions of the parties. From these, it seems to me that the two main issues to be determined are whether this application is resjudicata and, if not, whether the defence raises any triable issues. As a prelude to the determination of the first issue, I wish to observe

that there is now an abundance of authorities to the effect that the doctrine of ultra vires applies equally to interlocutory applications as it applies to ordinary suits. In the instant matter, an application by chamber summons dated 14th June, 2007, was filed in court on the same day. It sought exactly the same orders as those sought in the present application. However, it did not proceed to hearing as it was withdrawn by a notice of withdrawal dated and filed in court on 26th October, 2007. Does that render the issues in the present application res judicata?

Section 7 of the Civil Procedure Act is instructive in that regard. It states as follows –

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

From the above section, it is clear that for the doctrine of res judicata to be successfully invoked, the matter in question must have been heard and finally decided by the court. In Mullas Code of Civil Procedure, 16th Edition, Vol 1 at page 279, the learned authors have this to say of the last phrase on section 11 of the Indian Civil Procedure Code, which is in pari materia with our section 7 –

"…the expression 'heard and finally decided' in section 11 means a matter on which the court had exercised its judicial mind and has after argument and consideration come to a decision on a contested matter. It is essential that it should have been heard and finally decided …"

The application dated 14th June, 2007, was withdrawn on 26th October, 2007, before it could be argued and considered by the court. The court did not exercise its judicial mind on that application, as the same was never heard and finally decided as envisaged in section 7 of the Civil Procedure Act. I find, therefore, that res judicata does not apply to this matter.

On the second issue, I agree with Ms. Ileli that the court will exercise its discretion to strike out a defence only where, inter alia, the defence raised is a mere sham or does not raise a triable issue. Upon perusing the pleadings, I find that there are indeed many issues which arise for decision in this matter. The main issue is whether the defendants are owed any money by the plaintiffs in respect of a patient by the name of Abdulhamid Shallo. As a corollary thereto, did the first plaintiff, or the patient, by an acknowledgment in writing dated 11th August, 2005, admit that the sum of Kshs. 375,054/- was due to the defendant? If so, did the signatory request the defendant to accept a Title Deed as security? Did the second plaintiff also sign the document? Did the second plaintiff also guarantee the payment of the said sum? All these issues, among others, are raised by the defence filed by the defendants.

It may well be that the first plaintiff was not the patient. Indeed the name of the patient, as given by the plaintiffs in paragraph 3 of the plaint, was Abdulhamid Shallo. I note that the defendants have filed an application seeking leave to amend their defence and counter-claim. If granted, such an amendment will probably cure the confusion in the names of Abdulhalim Shallo, the first plaintiff, and Abdulhamid Shallo, the patient. In my view, it is in the interests of justice that they should be allowed to prosecute that application, and the plaintiffs will no doubt be allowed to object, if they so wish.

It is my humble opinion that, the defence on record is not a sham as alleged by the plaintiffs or at all. And being of that persuasion, I disallow the application to strike out the defence. The plaintiffs will pay the costs of this application to the defendant.

It is so ordered.

Dated and delivered at Mombasa this 18th day of December, 2007

L. NJAGI

JUDGE