REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT 1 OF 2006

BRITCOM INTERNATIONAL LIMITED ………….............…. PLAINTIFF

- Versus -

UNISTAR AUTOPARTS LIMITED ………..……………… DEFENDANT

Coram: Before Hon. Justice L. Njagi

Court clerk - Ibrahim

N/A for Applicant

Mr. Balala for Respondent

R U L I N G

By an application by notice of motion dated 11th July, 2007, and made under Order XXIV rule 6 and Order XI rule 1 of the Civil Procedure Rules, the plaintiff in the main sought two orders –

1. THAT this Honourable Court be pleased to consolidate this application with the summary judgment application dated 17th February, 2006 and that both applications be heard together.

2. THAT this Honourable Court be pleased to grant an order to the effect that the plaintiff's claim in this suit has been compromised and that judgment be entered as prayed in the plaint.

To this application, the defendant filed a notice of preliminary objection dated 6th October, 2006, on the following grounds –

1. THAT there is no legal provision for the plaintiff's omnibus application.

2. THAT the application is misconceived and the provisions relied on are inapplicable.

3. THAT the Court has no jurisdiction to grant the orders prayed for.

4. THAT there is no evidence upon which the court may determine the application.

When the application dated 11th July, 2006 came for hearing, it was the preliminary objection which was taken. Mr. Abeid argued the preliminary objection for the defendant, and Mr. Ushwin Khanna opposed it for the plaintiff. Mr. Abeid argued that Order XI under which the application is made refers to the consolidation of suits, and not applications, and that applications for consolidation should in any event be brought by summons in chambers and not by a notice of motion. Secondly, a compromise arises only after a suit has been filed, and in the instant case there has been no agreement since the filing of the suit. Furthermore, there is no evidence as to why the action should be consolidated, and the annexures to the affidavit are not sealed as required under Cap.15 – the Oaths and Statutory Declarations Act. These, counsel submitted, should therefore be expunged from the record. Mr. Abeid finally submitted that Mr. Khanna's affidavit deposes to contentious matters, and therefore the application should be disallowed.

Responding, Mr. Khanna argued that Mr. Abeid had relied on matters which were not pleaded, among them the sealing of documents, and an affidavit by an advocate. He argued that although Order XI refers to consolidation of suits, the definition of "suit" in section 2 of the Civil Procedure Act includes applications; and further that read with Order XI rule 1, which empowers the court to consolidate suits at its discretion, sections 3 and 3A of the Civil Procedure Act give the court a very wide and unfettered discretion. As for exhibits, he also contended that if an affidavit is sworn outside the country, then Cap. 15 does not apply. Mr. Khanna then submitted that the authority relied on is irrelevant and urged the court to dismiss the preliminary objection and allow the application.

In his reply, Mr. Abeid submitted that sections 3 and 3A are not of any assistance as they are intended to arrest the abuse of process and the defendants are not abusing process.

I have considered the above respective submissions by counsel. Before attending to the various issues raised by Mr. Abeid, it may be useful to refresh our minds as to what preliminary objections are all about. In MUKISA BISCUIT CO. LTD. v. WEST END DISTRIBUTORS LTD [1969] E.A. 696, Sir Charles Newbold, the President of the then Court of Appeal for East Africa, bemoaned the practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. He said at p. 701 –

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure print of law which is argued on the assumption that all the facts pleaded by the other side are correct … The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues …"

On his part, Law J.A., said of preliminary objections at p. 700 –

"… So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration …"

Bearing these pronouncements in mind, the first point taken by Mr. Abeid was that Order XI of the Civil Procedure Rules makes provision for consolidation of suits, but not applications. If this argument is stretched to its logical conclusion, and if a preliminary objection is, according to Law JA in MUKISA'S CASE, one which, if argued as a preliminary point, has the potential to dispose of the suit, then how does counsel argue his point to dispose of only an application and not the suit? I think that the word "suit" in MUKISAS CASE has the same meaning as the word "suit" in Order XI. To place the matter beyond controversy, section 2 of the Civil Procedure Act, Cap 21, defines "suit" to mean "all civil proceedings commenced in any manner prescribed." "Prescribed" means "prescribed by rules." And "rules" means "rules and forms made by the Rules Committee to regulate the procedure of courts." Applications to court are commenced by rules prescribed by the Rules Committee, and therefore fall into the same category as suits and are governed by the same rules. The first point raised by Mr. Abeid therefore fails, and in an appropriate case the court can consolidate applications.

The second point was that an application for consolidation should be made by a chamber summons and not by a notice of motion. The institution of an application by a notice of motion instead of a chamber summons, and vice versa, is not, per se, fatal. Order L rule 9 of the Civil Procedure Rules states as follows –

“Where an application authorized by these Rules to be made at chambers is made in court, any additional cost occasioned thereby shall be borne and paid by the party making the same unless the court shall order otherwise.”

This is the only risk that an applicant runs by filing an application by a notice of motion instead of a chamber summons. Otherwise it does not invalidate the application. The second point taken by Mr. Abeid also fails.

The third point which has some vestiges of a point of law is that the supporting affidavit and the exhibits attached thereto violate the requirements of Rule 9 of the Oaths and Statutory Declarations Rules which states -

“All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner, and shall be marked with serial letters of identification.”

Without belabouring the point, it is quite self evident that the supporting affidavit does not comply with this requirement. It should be remembered, however, that the supporting affidavit and the exhibits thereto were notarized in England but not commissioned in Kenya. In the event that the practice in England is at variance with that in Kenya on this matter, the notarized documents should also conform to the Kenyan requirements. Having said so, it would be a sad day if substantive justice were to be sacrificed at the altar of technicalities. Rules are handmaids of the law, and not its mistress, and every matter should be considered in the context of its own circumstances.

In the circumstances of this matter, where the supporting affidavit and the exhibits thereto were processed in England, I think that the parties should be given a chance to comply with the local law and practice. In order to do substantive justice, I strike out the supporting affidavit with leave to the applicant to file and serve a more compliant affidavit within 21 days from today. The applicant will, however, meet the costs of the preliminary objection.

It is so ordered.

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

L. NJAGI

JUDGE