



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

Civil Case 275 of 1995

NAJU INVESTMENTS LIMITEDPLAINTIFF

-VERSUS-

GEORGE ADONGO1ST DEFENDANT

ROTHS (K) LIMITED2ND DEFENDANT

DEPOSIT PROTECTION FUND BOARD3RD DEFENDANT

PERMANENT SECRETARY, OFFICE OF THE PRESIDENT4TH DEFENDANT

THE ATTORNEY-GENERAL5TH DEFENDANT

POST BANK CREDIT LIMITED (*In Liquidation*).....6TH DEFENDANT

JUDGMENT

The plaintiff's re-amended plaint of **28th June, 2004** was filed on 30th June, 2004. The 4th and 5th defendants' statement of defence dated 6th July, 2004 was filed on 9th July, 2004. The other defendants filed no pleadings. And on **4th March, 2005** M/s. Oduk & Company Advocates, I believe for the plaintiffs, wrote a letter to the Deputy Registrar of the High Court in these terms:

"We refer to the above matter herein [i.e. Nairobi High Court Civil Case No. 1418 of 1994 consolidated with Nairobi High Court Civil Case No. 275 of 1995] and request that you kindly enter judgment against the 1st, 2nd, 3rd and 6th defendants in default of appearance within the stipulated time despite being served".

M/s. Oduk & Company Advocates later wrote another letter to the Deputy Registrar, dated **30th March, 2005** indicating that the default judgment sought would now be limited to the **3rd defendant**.

On **1st April, 2005** the Deputy Registrar entered interlocutory judgment in the following terms:

"The 3rd defendant herein DEPOSIT PROTECTION [FUND] BOARD having been duly served with summons to enter appearance and having failed to enter appearance within the prescribed period and on the application by the plaintiff's advocates dated 4th day of March, 2005 I enter

interlocutory judgment against the said 3rd defendant as prayed in the plaint.

“The award of costs shall await judgment when the suit shall be set down for formal proof”.

So, against the 3rd defendant what is now expected is **formal proof**. In the meantime, on the basis of the re-amended plaint of **28th June, 2004** and in relation to the 3rd defendant, M/s. S. O. Owino & Associates Advocates acting for the plaintiff, forwarded to the Deputy Registrar an extracted Preliminary Decree, for signing and sealing (under cover letter of 17th June, 2005). On file there is the Deputy Registrar’s note on the extracted Preliminary Decree: “To Await Formal Proof”.

When **Mr. Owino** of S. O. Owino & Company Associates Advocates appeared before me on **10th November, 2005** he was presenting the case that in the interlocutory judgment which had been entered by the Deputy Registrar on 1st April, 2005 one specific element could be granted without formal proof: the **liquidated amount**.

The re-amended plaint of 28th June, 2004 at paragraph 19 states:

“In the circumstances the plaintiffs were constrained to sell all that property known as L.R. No. 205/81 and pay the 3rd and/or the 6th defendants the sum of Kshs.11,325,600/= which sum the plaintiffs now claim back from the defendants together with interest [thereon] at commercial rates”.

The specific prayer is for:

“(a) an Order that the defendants jointly and severally do refund and/or repay the plaintiffs the sum paid by the plaintiffs to the 3rd and/or 6th defendants.”

Learned counsel was requesting the Court to enter judgment for the liquidated amount, the unliquidated part to await formal proof. He invoked the provisions of Order IX A rule 3(2) in support of his request. That rule provides:

“Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 26 of Appendix C, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.”

Mr. Owino submitted that the sum of Kshs.11,325,600/= prayed for in the re-amended plaint was a liquidated amount; and he called in aid **Black’s Law Dictionary**, 8th edition which thus defines **“liquidated amount”**: “A figure readily computed, based on an agreement’s terms”. Counsel also invoked **Jowitt’s Dictionary of English Law** 2nd edition (London, 1977) page 949 on “liquidation demand” (page 1105):

“Where an action is brought for the debt or liquidated demand only, the writ must be endorsed with a statement of the amount claimed and for costs and also with a statement that further proceedings will be stayed if, within the time limited for appearing, the defendant pays the amount claimed to the plaintiff, his solicitor or agent or into Court ...”

Mr. Owino also relied on the English Court of Appeal decision in **G.L. Baker Limited v. Barclays Bank Limited & Others** [1956] 1W.L.R. 1409 in which **Lord Evershed, M.R.** remarked:

“I have come to the conclusion that it would not be right to give the phrase ‘liquidated demand’ so narrow and technical a significance. If I look at the writ, and take the case of the third defendants by way of illustration, it is quite plainly, according to the language and in its context, a claim to recover the sum of £10,648 exactly, that sum being, as the writ alleges, the plaintiffs’ money or property which had been fraudulently converted by the third defendants.”

Learned counsel urged that on the basis of the relevant authority, the plaintiff's demand set out in paragraph 19 of the re-amended plaint of 28th June, 2004 *was* a liquidated demand and "therefore the Deputy Registrar should have entered judgment for the liquidated sum ...". Counsel went on to contend that "The Deputy Registrar misdirected herself".

As already noted, the Deputy Registrar had acted by entering interlocutory judgment on **1st April, 2005**. That cannot be, I think, what counsel is complaining about, since the Deputy Registrar was only responding to the requests received from M/s. Oduk & Company Advocates on behalf of the plaintiff.

It is, however, from S. O. Owino & Associates Advocates that the Deputy Registrar received the letter accompanied by the draft Preliminary Decree; and the letter dated **17th June, 2005** read, in substance, as follows:

"You will no doubt note that in paragraph 19 of the Re-Amended Plaint the Plaintiff has claimed the sum of Kshs.11,325,600/= which is a liquidated sum and which sum is prayed for in paragraph (a)."

That statement followed the paragraph requesting the Deputy Registrar to ***sign and seal the Preliminary Decree***.

I think counsel has imputed misdirection to the Deputy Registrar only for the reason that she did not sign and seal the preliminary decree and indeed, there is no signed and sealed preliminary decree on file. The Deputy Registrar's hand-written note on the letter of 17th June, 2005 is as follows: "As the plaint includes a claim for Declaration interlocutory judgment cannot be granted". Of course, interlocutory judgment had already been entered on 1st April, 2005. On the basis of the interlocutory judgment as entered (and which I will regard as regular) it would, I think, have been in order for the Plaintiff to proceed under Order ***IXA***, rule 3(2) of the Civil Procedure Rules, to seek judgment for the liquidated amount set out in paragraph 19 of the re-amended plaint of 28th June, 2004. I have taken into account the principles regarding liquidated demands, as set out in ***G.L. Baker Limited v. Barclays Bank Limited & Others*** [1956] 1 W.L.R.; and in that context, I believe, the money figures claimed by the plaintiff as stated in the said paragraph 19 of the plaint, are ***specific*** enough to be dealt with as liquidated demand.

However, I am not convinced that the plaintiff herein properly brought its case within the framework of Order ***IXA***, rule 3(2) which prescribes ***Form No. 26 of Appendix C*** in the Civil Procedure Rules, as the basis for invoking this Court's jurisdiction to consider the prayer now sought. Indeed, and with respect, there is the appearance of a design to overlook the requirement of Order ***IXA***, rule 3(2) when all the plaintiff asks is that the Deputy Registrar do ***sign and seal*** the draft Preliminary Decree.

As I have considered this matter, the lines of representation have not been entirely clear to me, and it is the responsibility of the parties herein to set it right, ***before further action is taken on this file***. The re-amended plaint of 28th June, 2004 was drawn and filed by M/s. Oduk & Company Advocates; the letter to the Deputy Registrar, of 4th March, 2005 was written by the same firm of advocates; the affidavit of service dated 4th March, 2005 was drawn and filed by the same firm of advocates; the letter to the Deputy Registrar dated and filed on 9th March, 2005 came from the same firm of advocates; the supplementary affidavit of 17th March, 2005 was drawn and filed by the same firm; the letter to the High Court dated 30th March, 2005 came from the same firm; but the Preliminary Decree was dispatched to the Deputy Registrar under the hand of M/s. S. O. Owino & Associates Advocates; it is M/s. S. O. Owino & Associates who, by their letter of 29th August, 2005 called upon the Deputy Registrar to list this matter for formal proof; and it is Mr. Owino of M/s. S. O. Owino & Associates who attended Court, on 10th November, 2005 and on 17th February, 2006. From the records, it is Mr. Owino who has on several occasions, before other Judges, appeared in this matter.

I will make Orders as follows:

1. The plaintiff's case for entry of judgment in the terms of paragraph 19 of the re-amended plaint

of 28th June, 2004 is refused.

2. On the basis of the interlocutory judgment entered by the Deputy Registrar on 1st April, 2005 the Registry shall allocate a date for formal proof before a Judge in the Civil Division, subject to the 3rd Order herein.

3. Counsel representing the plaintiff in this matter shall clarify for the purpose of the record, the status of representation; and any Court appearance in this regard shall be before the Duty Judge.

DATED and DELIVERED at Nairobi this of 24th March, 2006.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Mwangi

For the Plaintiff: Mr. Owino, instructed by

M/s, S. O. Owino & Associates Advocates

Other Parties: absent and unrepresented