



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 2314 of 1975

TIMOTHY JOWELL KAMANOPLAINTIFF

VERSUS

1. INDUSTRIAL & COMMERCIAL

DEVELOPMENT CORPORATION1ST DEFENDANT

2. J.M. MWANGI2ND

DEFENDANT

R U L I N G

This is a very interesting application.

Industrial & Commercial Development Corporation (“ICDC”), the First Defendant in this case, has taken out a Notice of Motion under Order 14 rules 5, 6 and 7 of the Civil Procedure Rules seeking among other orders:

- (1) That further proceedings be stayed in this suit pending the hearing and determination of this application;
- (2) That the court do make a finding that parties have not agreed on the issues in dispute in this suit; and
- (3) That the honourable court does frame issues for determination.

The grounds upon which the application is made are that the hearing of the suit is proceeding without the parties agreeing on the issues; that the issues being determined in the hearing are not in accordance with the pleadings; and that the Applicant will suffer grave loss if the real issues are not framed and determined.

The supporting affidavit was sworn by Grace M. Magunga, the Senior Legal Officer of ICDC and an Advocate of the High Court of Kenya. She states in her affidavit that she has noted that the parties have not yet agreed on the issues for determination by the court and that the issues alleged to have been agreed are insufficient and/or contrary to the pleadings. She also says that the issue regarding the legality of the auction held by ICDC in 1975, which she regards as the main issue, has been omitted.

The application is opposed both by the Plaintiff and the Second Defendant on various grounds ranging

from frivolity to abuse of process of the court.

The hearing of this suit commenced on the 27th October 2004, and the Plaintiff has already finished giving evidence. The First Defendant's first witness is still continuing with his evidence in chief. The First Defendant is represented by counsel and that has been the position throughout.

The application must fail for a number of reasons. First, because it was made for too late long after the trial had commenced and the Plaintiff had already given evidence and the First Defendant's first witness had nearly completed his evidence in chief. Secondly, at the commencement of the hearing, counsel confirmed to me that the only issue on which a decision was required was as regards who between the Plaintiff and the First Defendant should refund the Second Defendant the sum of K.Shs.185,000/= he paid after the auction in 1975. In my judgment, it is neither fair nor just that the First Defendant should now be allowed to raise new issues after the Plaintiff has closed his case. As the First Defendant is represented by counsel, I am at a loss to understand why the court was not asked to frame the legality of the auction as an issue in the case. Thirdly, under the provisions of Order 14 of the Civil Procedure Rules, the court is only required to frame the issues (rule 1(5)) if these have not been framed by the parties or their Advocates. In the present case, the issue for determination was agreed between counsel for the parties. It would be quite wrong to allow the First Defendant to raise a new issue after the Plaintiff has already finished leading evidence. The First Defendant must live with the decision taken with the consent of its own Advocate at the commencement of the trial. And finally, the First Defendant's claim that the court is dealing with the wrong issue cannot be a ground for seeking an order of stay of further proceedings. If in the end the First Defendant's claim turns out to be true, it can only form a ground of appeal against the decision of the court.

For the reasons I have given, the First Defendant's Notice of Motion dated and filed on the 21st January 2005 fails and I order that it be and is hereby dismissed with costs to the Plaintiff and the Second Defendant respectively.

Dated and delivered at Nairobi this Twenty-fourth day of March, 2006.

P. Kihara Kariuki

Judge