



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 278 of 2006

ALI SALIM NGONIPLAINTIFF

VERSUS

KENNEDY OGERO MOKAYADEFENDANT

R U L I N G

Pursuant to the provision of Order LII rule 4 of the Civil Procedure Rules, Ali Salim Ngoni, the applicant herein, sought for the following orders against Kennedy Ogero Mokaya, the Respondent herein:

- (i) an order directing the respondent to account for and to deposit with this court a sum of Kshs.857,860/- being the decretal sum in Mombasa H.C.C.C. No. 549 of 2001.
- (ii) An order directing that the advocate/client bill to be determined so as the balance may be released to the applicant.

The applicant contemporaneously filed a summons under Order XXXIX rules 1,3, 8 and 9 of the Civil Procedure Rules in which he sought for inter alia a mandatory injunction to compel the Respondent by himself, his servants and or agents to deposit the sum of Kshs.857,860/- in court pending the hearing and determination of the originating summons. This is the subject matter of this ruling. The applicant swore an affidavit in support of the summons. The replying affidavit sworn by the Respondent dated 28th February 2006 was struck out on the basis that it infringed the provisions of order L rule 16(1) of the Civil Procedure Rules. However, the Respondent's advocate was permitted to oppose the summons on the basis of a notice of Preliminary Objection dated 27th February 2006.

The history behind this summons can easily be deduced from the supporting affidavit of Ali Salim Ngoni sworn on the 19th day of December 2005. On the 7th day of June 2001, the applicant's residential house which stood on Plot No. 2716 Diani got burnt down due to an electric fault. Sometimes in the month of October 2001, the applicant instructed the firm of advocates known as Mokaya Ogutu & Co. Advocates to commence an action against Kenya Power & Lighting Company Ltd., the supplier of electricity to the applicant's burnt house. This culminated to the filing of Mombasa H.C.C. No. 549 of 2001 between the applicant and Kenya Power & Lighting Co. Limited. The suit was heard and the applicant was given judgment in the sum of Kshs.1,050,000/- plus interest and costs.

It would appear the parties i.e the applicant or his counsels and Kenya Power and Lighting Co. Ltd. Commenced negotiations after the judgment and this gave rise to the consent reducing the judgment sum form Kshs. 1,050,000/- to Kshs. 857,860/-. A Cheque for the amount was forwarded to the firm of Mokaya Ogutu & Co. Advocates to settle the matter - sometimes in the month of May 2005. The applicant now claims that the money has not been released to him and he fears that the money may have

been misappropriated by the firm of Mokaya Ogutu & Co. Advocates. In response to the originating summons Mr. Kennedy Ogero Mokaya has filed a replying affidavit he swore on 9th February 2006 opposing the suit. What comes out clearly from that affidavit is that Kennedy Ogero Mokaya and T.M. Ogutu are partners and are practicing in the name and style of Mokaya Ogutu and Co. Advocates.

It is the submission of Mr. Abubakar advocate for the applicant that an order or mandatory injunction should be issued as prayed in the summons to safeguard the applicant's interest pending the hearing and determination of the Originating summons. On his part Mr. Maosa advocate for the Respondent argued against the summons relying on the Preliminary Objection. He was of the view that there was no nexus between the Respondent and the prayers sought in the Originating summons. It is argued that the firm of Mokaya Ogutu & Co. Advocates was instructed by the applicant and not the Respondent.

This court was further urged to hold that an application under Order XXXIX does not lie when one has filed a suit under Order LII of the Civil Procedure Rules.

After considering the material placed before this court and submissions of learned Counsels from both sides I think two main issues arose for my decision. First, is whether or not Kennedy Ogero Mokaya was properly sued. Two, whether the provisions of Order XXXIX of the Civil Procedure Rules can be invoked in an application filed under Order LII of the Civil Procedure Rules.

Let me start with the first issue as to whether or not the Respondent was properly sued in this matter. It is not in dispute that M/s Mokaya Ogutu & co. Advocates is a law firm with two partners namely Kennedy Ogero Mokaya and one T.M. Ogutu. There is no dispute also that the aforesaid firm was instructed by the applicant to sue Kenya Power & Lighting Co. Ltd. for compensation for the burnt house standing on Plot No. 2716 Diani. There is also no dispute that a sum of Kshs. 857,860/- was paid to the firm of M/s Mokaya Ogutu & Co. Advocates. The originating summons is directed at Kennedy Ogero Mokaya practicing as Mokaya Ogutu & Co. Advocates. The provisions of Order XXIX of the Civil Procedure rules clearly provides guidelines in respect of suits by or against firms and persons carrying on business in names other than their own. Order XXIX rule 1 of the Civil Procedure rules provides as follows:-

“Any two or more persons claiming or being liable as partners and carrying on business in Kenya may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the court may direct.”

In this case I do not clearly understand the nature of objection by Mr. Kennedy Ogero Mokaya. His complaint is that the firm should have been sued instead of him as an individual. The view I have is that it is not mandatory for one to sue the partnership firm unless it is a limited liability company. Even if it were to be said that it is mandatory then it is not fatal hence it cannot amount to a preliminary point of law. The provisions of order XXIX rule 3(1)(a) provides as follows:

“Where persons are sued as partners in the name of their firm the service of the summons shall be effected either

(a) upon any one or more of the partners”

Order XXIX rule 5 is more explicit as follows:

“Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but subsequent proceedings shall, nevertheless, continue in the name of the firm.”

I have purposely set out those provisions to illustrate the fact that it is not fatal to sue a partner individually in respect of legal obligations arising out of a partnership relationship. In any case, any one who disputes his or her liability can seek the intervention of the court through the provisions of order XXIX rule 7 of the Civil Procedure Rules.

In the end I see no merit in the complaint raised by Mr. Kennedy Ogero Mokaya.

The remaining issue is whether or not the provisions of Order XXXIX can be invoked in suits filed under Order LII. The nature of the application before this court is that of a mandatory injunction as opposed to a prohibitory injunction. It is well established that mandatory injunctions are governed by the same principles that apply to other types of injunctions. This court dealt substantially with the circumstances in which a mandatory injunction may be issued in the case of **Nderu =vs= Kenya National Chamber of Commerce & Industry and Another [2003] K.L.R 161.** In this case Onyango Otieno, J (as he then was) ruled inter alia that:

(i) A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in clear cases where the court thinks that the matter ought to be decided at once or where the injunction is directed at a simple and summary act which can easily be remedied.”

(ii) A mandatory injunction at an interlocutory stage is rarely granted; only when the plaintiff’s case is clear and incontrovertible.

With great respect I entirely agree with the holding of the learned judge. The main suit is in respect of a dispute arising out of an advocate/client relationship. The nature of the complaint falls within the provisions of order LII rule 4 of the Civil Procedure Rules.

Order LII rule 4(1)(d) reads:

“When the relationship of Advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for

(a).....

(b).....

(c)

(d) the payment into or lodging in court of any such money or securities.”

The crux of the matter is that the applicant has beseeched this court to exercise its discretion under order XXXIX and order LII of the Civil Procedure Rules. The provisions of Order LII is meant to address the complaint now facing the applicant and the Respondent. In my humble view a mandatory injunction under order XXXIX is not available to a party who has invoked the provisions of order LII. It was therefore wrong for the applicant to invoke order XXXIX whereas the dispute could have been expeditiously determined under Order LII. I therefore agree with the submissions of Mr. Maosa learned counsel for the Respondent that the applicant has wrongly invoked the discretion of this court.

Even if I was to be faulted over my finding, I still hold that the applicant did not meet the necessary conditions for the grant of an order of injunction. Whereas it is clear that the applicant has shown that he has a prima facie case, he has however failed to establish that he would suffer irreparable loss. It is quite clear that the kind of damage anticipated is capable of being quantified in monetary terms.

The upshot of the matter is that the summons lacks merit. It is ordered struck out and dismissed. I will deny the Respondent costs in respect of the application in view of the fact that he has conducted himself in a manner bordering on professional misconduct.

Dated and delivered at Mombasa this 17th day of March 2006.

J.K. SERGON

J U D G E

In open Court in the presence of Mr. Abubakar for the applicant
and Mr. Maosa for Respondent