



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 849 of 1998

ARI BANK CORPORATION LTD (IN LIQUIDATION).....PLAINTIFF

VERSUS

LAKE VICTORIA FISH LTD (IN RECEIVERSHIP).....1ST DEFENDANT

GEORGE W. M. OMONDI.....2ND DEFENDANT

RULING

This is an application by the 1st defendant, who is seeking the setting aside of the default judgement which was entered against it on 17th October 2002.

When canvassing the application, Mr. K'opere advocate first notified the court that previously, the 2nd defendant had filed an application dated 1st March 2004, through which he sought to set aside the judgement against the 1st defendant.

It is not disputed that the 1st defendant is a company under receivership, whilst the 2nd defendant was a director of the 1st defendant.

The suit herein was filed on 16th December 1998. As at that date, the 1st defendant was named as follows;

"LAKE VICTORIA FISH LIMITED (in receivership through the appointed receiver, GRAHAM SILCOCK.)"

On 16th February 1999, M/s Rachuonyo & Rachuonyo Advocates entered appearance on behalf of the 1st Defendant. By their Memorandum of Appearance, the said advocates expressly stipulated as follows;

"ENTER APPEARANCE for GRAHAM SILCOCK, sued as receiver, Lake Victoria Fish Limited (in receivership), the First Defendant herein ..."

On the very same date, the firm of Rachuonyo & Rachuonyo Advocates filed a Defence on behalf of GRAHAM SILCOCK. At paragraph 1 of the defence, it was expressly stated that the statement of defence was;

"NOT FILED ON BEHALF OF LAKE VICTORIA FISH LIMITED (IN RECEIVERSHIP)."

And as if to further re-emphasize the non-existence of any agency relationship between himself and the 1st defendant company, Mr. Graham Silcock stated, at paragraph 3 of his defence that;

"In particular, it is denied that Graham Silcock is an agent or officer of Lake Victoria Fish Limited (in receivership) or that these proceedings can be properly brought against Lake Victoria Fish Limited through him."

Notwithstanding those express pleadings, the 1st defendant insists that there was a defence filed on its behalf on 16th February 1999.

That point was first canvassed by the 2nd defendant, when he prosecuted the application dated 1st March 2004. For that reason, the plaintiff submitted that it was not open to the 1st defendant to canvass the same point, as it had already been adjudicated by the Hon. Njagi J. Indeed, it was contended that the 1st defendant's application was res judicata. I was therefore asked to dismiss it on the grounds that it amounted to an abuse of the court process, for the 1st defendant to seek to argue matters which had already been determined.

Before addressing the issue of res judicata, I first note that the application before was, on the face of it, said to have been brought by the 2nd defendant. When, Mr. Mwangi, advocate for the plaintiff drew attention to that fact, Mr. K'opere, advocate for the applicant informed the court, from the bar, that the application was actually brought by the 1st defendant. He explained that the reference to the 2nd defendant, as the applicant, was no more than a typographical error. I find no reason to reject that statement from the bar.

On 2nd June 2004, the Hon. Njagi J. had delivered his ruling, in which he ruled, inter alia, that the 1st defendant was the right person to make its own application for setting aside of the judgement against it. Six days later, on 8th June 2004, T. O. K'opere & Co. Advocates filed a Notice of Appointment as advocates for the 1st defendant. Then, on 29th June 2004, the current application was filed. As the draft Defence annexed to the application in support of the application was for the 1st Defendant; and also because all other references in the application indicate that it was filed by the 1st defendant, I accept as plausible, the statement by the applicant's advocate that this application was brought by the 1st defendant.

Section 7 of the Civil Procedure Act spells out what constitutes res judicata. It provides 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, determined by such court."

In my understanding, the doctrine of res judicata cannot apply in this matter, as the decision of the Hon. Njagi J. was on an application which was between the 2nd defendant and the plaintiff. The 1st defendant was not a party to that application. In fact, the plaintiff itself had raised the issue as to the applicant's lack of the requisite locus standi.

After giving due consideration to the issue as to locus, the learned judge held that the 1st defendant was a separate party from the 2nd defendant. He found that **"the first defendant is a party to these proceedings in its own right."**

Therefore, as the applicant is a distinct legal person, who was separate from the 2nd defendant, it could not be barred from bringing its own application in this matter, simply because a similar application by the 2nd defendant had failed.

However, I also note that the Hon. Njagi J. did not dismiss the previous application just because the 2nd defendant lacked the locus standi to sustain it. If anything, the honourable judge first addressed the merits of the application, before addressing the issue of locus.

In the process of addressing the substance of the application, the learned judge addressed his mind to most of the matters which the applicant has now placed before me.

After analysing the defence on record, the learned judge stated as follows:

"I find that the company did not file a defence, but the defence on record is that of Mr. Silcock personally."

He also addressed the question as to whether or not the default judgement against the 1st defendant was regular. This is what he said, in that respect;

"Whether the default judgement was regular or not depends on whether there was on record a defence by the first defendant. As observed earlier herein, the defence on record was that of Mr. Silcock, who made it very clear in paragraph 1 thereof that it was not filed on behalf of LAKE VICTORIA FISH LIMITED (in receivership). In light of that, there was no defence filed for and on behalf of the company, either then or after service of the further amended plaint. For that reason, the default judgement was regular."

With those remarks of my learned brother, I am fully in agreement, and find nothing useful to add.

Therefore, the only thing that now remains for me to consider is whether in the light of the draft defence which has been annexed to this application, the 1st defendant has demonstrated any reasonable cause to warrant the exercise of the court's discretion, to set aside the judgement.

It has been asserted, in the draft defence, that the 1st defendant had borrowed a sum of Kshs.30,000,000/=, between 1992 and 1993. The 1st defendant says that it repaid approximately Kshs.72,000,000/= between 1992 and February 1997. The said repayment is said to have cleared the loan which the plaintiff had advanced to the 1st defendant.

Furthermore, the plaintiff is said to have repossessed 8 vehicles from the 1st defendant. The said vehicles are said to have been valued at over Kshs.25 million.

Thirdly, the 1st defendant contends that if there were any monies still reflected as due to the plaintiff, the same would be wholly attributable to the falsified and fraudulent claims on interest, penalties and charges which were not contractual.

Having given due consideration to those averments in the draft defence, I hold the considered view that they give rise to triable issues. My said view on the matter is further fortified by the fact that as early as 3rd April 2002, the plaintiff and 2nd defendant filed a "statement of agreed issues" dated 11th October 2001, in which the following issues were enumerated;

"(1) Whether the Defendants are indebted to the plaintiff in the sum of Kshs.88,673,176/= as alleged in the further Amended Plaint.

(2) Whether the 1st Defendant has paid all monies lent to it by the plaintiff.

(3) Whether the plaintiff applied to the 1st Defendant's account, false and punitive interest claims above the limits set by the Central Bank of Kenya.

(4) Whether the 2nd Defendant, as Guarantor to the 1st Defendant is absolved from liability for

interest, penalty and other Bank Charges levied to the 1st Defendant's account.

(5) Whether the plaintiff is entitled to the prayers sought in the further Amended Pleint.

(6) Which party should bear costs of this suit."

Those issues, as drafted, appear to cover the very issue which the 1st defendant intends to raise in its defence, if this court would allot it leave to defend itself. As the issues appear to have anticipated the 1st defendant's defence, I find that the plaintiff and the 2nd defendant are not likely to be prejudiced, if the 1st defendant is given the opportunity of defending itself.

For those reasons, the default judgement entered on 17th October 2002 is hereby set aside. The 1st defendant is granted unconditional leave to defend itself; and it is now directed to file and serve its defence within the next FIFTEEN (15) DAYS from today.

Meanwhile, as the default judgement was otherwise regular, the 1st defendant will pay to the plaintiff, the costs of the application dated 29th June 2004.

Dated and Delivered at Nairobi, this 29th day of May 2006.

FRED A. OCHIENG

JUDGE