REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 532 of 2004

AHMEDNASIR ABDIKADIR & CO. ADVOCATES….....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA……..…….....……DEFENDANT

DIRECTIONS

By an application dated 18th November 2004, the defendant sought to have struck out the plaint, on the grounds that it was an abuse of the process of the court.

After giving due consideration to the submissions made on that application, I delivered my ruling on 15th March 2006. By my said ruling, I dismissed the defendant's application.

Immediately thereafter, the plaintiff decided to withdraw their application for summary judgement, which was dated 18th November 2004. As the defendant did not have any objection to the withdrawal of that application, the court duly marked it as withdrawn, with costs to the defendant.

On the next day, 16th March 2006, the plaintiff filed a Notice of Motion dated 16th March 2006. By that new application, the plaintiff once again prayed for judgement as prayed in the plaint. The main distinction between the application dated 18th November 2004 and the new application, dated 16th March 2006, was that the former was brought pursuant to Order 35 Rules 1 and 8 of the Civil Procedure Rules, whilst the new application was brought pursuant to the provisions of Section 51 (2) of the Advocates Act.

The plaintiff's application dated 16th March 2006 was then set down for hearing on 4th April 2006. After getting the hearing date, the plaintiff served a Hearing Notice on the defendant's advocates. At that point, the defendant's advocates notified the plaintiffs that they would not be available on 4th April 2006. They said that the earliest date when they could be available for the hearing of the plaintiff's application dated 16th March 2006, would be 15th May 2006.

In the light of the request from the defendant's advocates, the plaintiffs agreed to take out their application dated 16th March 2006, from the hearing list of 4th April 2006. A consent letter, duly signed by both parties' advocates was then filed in court, whereupon the application was adjourned to 15th May 2006. The consent letter was dated 21st March 2006, and was filed in court on 29th March 2006.

The record shows that on 7th April 2006, the defendant filed a Notice of Motion, seeking the substitution of the orders made on 15th March 2006. By substitution of that order, the defendant hoped to have the dismissal of the application dated 18th November 2004, substituted with an order dismissing the plaintiff's

suit with costs.

The defendant's application dated 6th April 2006 (which was filed on 7th April 2006), was set down for hearing on 2nd May 2006. Therefore, when this matter was listed before me on that date, the application that was scheduled for hearing was the Notice of Motion dated 6th April 2006.

The plaintiff felt that the defendant had not been candid when they had told the plaintiff that the earliest date when they would be available in court would be 15th May 2006. The plaintiff therefore sought the adjournment of the defendant's application.

On its part, the defendant said that the plaintiff's counsel had said that he would be unavailable on 2nd May 2006. The plaintiff's said advocate had apparently been scheduled to deliver a paper at a workshop. For that reason, he believed that the earliest date when he would be available was 22nd May 2006.

Later the workshop was cancelled, and Mr. Ahmednasir was therefore able to attend court on 2nd May 2006.

On his part, Mr. Ohaga explained that he was only able to attend court on 2nd May 2006 (whereas he had earlier said that he would be unavailable until 15th May 2006), because he had managed to get his partner to handle his other case, which was said to have been listed for hearing on the 2nd of May 2006, before the Hon. Waweru J.

I have set out the foregoing matters in detail, not because of the reasons why the parties had stated them. I say so because the plaintiff wished to have the defendant's application adjourned, whilst the defendant wanted to proceed with the matter. The main reason for the defendant's said wish was that Mr. Ahmednasir had informed its advocates, only last Friday, 28th April 2006, that he would be available in court on 2nd May 2006. Indeed, the plaintiff is said to have issued a notice of their intention to cross-examine Mr. Ohaga.

For those reasons, the defendant said that the plaintiff was not being candid.

Finally, the defendant pointed out that all it wished for first was directions as to which of the two pending applications should be heard first. As far as the defendant was concerned, its application ought to be heard first. The said application was for review of the orders made on 15th March 2006. Therefore, the defendant felt that it should be heard before the plaintiff's application for summary judgement.

However, the plaintiff feels that as their application was filed first in time, it should be heard first.

Having heard all the submissions, I adjourned the matter to today, so that I could give directions as regards which of the two applications should be heard first. In effect, there is no need for the court to give any substantive reasons on whether or not an adjournment should be given on the defendant's application. That is so because I hold the view that the more crucial consideration was as regards which of the two applications should be heard first.

To my mind, from the conduct of both counsel each was trying to get their client's applications heard first. But I say no more about the manner in which each of the advocates tried to achieve that end. I do not think that the conduct of counsel, so far, should have any bearing on the directions which I am about to give.

First, it is common ground that the plaintiff's application for summary judgement was filed first in time. If that application was heard and determined, it would, if successful, determine the suit. On the other hand if the application was not successful, the defendant's application could proceed to hearing.

Meanwhile, if the defendant's application for review was heard first, if it were successful, it too would

determine the suit, for the Plaint would be struck out and the suit dismissed. If that happens, the plaintiff's application would never see the light of day. But, if the defendant's application failed, the plaintiff could prosecute their application.

Thus, if either application was heard and determined in favour of the applicant, it would determine the suit itself. I can therefore well understand why each of the parties would like the opportunity to be heard first. But, I also find no compelling logical or judicial reason to hear any one of the applications in priority over the other.

To my mind, the defendant could, by prosecuting their application, be deemed to be responding to the plaintiff's application. They would be saying that not only should the court not grant judgement in favour of the plaintiff, but that the court should actually dismiss the suit. As a first step to that end, the defendant would be saying that I should review the decision I made on 15th March 2006.

On the other hand, the plaintiff would be saying I should not review the said orders, dated 15th March 2006; but that I should now proceed to grant them judgement in terms of the certificate of taxation.

Therefore, I hold that the most reasonable and equitable manner of dealing with this matter is by hearing the two applications simultaneously. It is so directed.

Meanwhile, the costs of these directions shall be in the cause, and the applications shall proceed to hearing on 15th May 2006.

Dated and Delivered at Nairobi this 11th day of May 2006.

FRED A. OCHIENG

JUDGE