REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Case 79 of 2005

KENGA MWADUNA MWAMBIRE

DANIEL KATANA HANDE ……..……PLAINTIFFS

V E R S U S

NATIONAL BANK OF KENYA LTD ……DEFENDANT

R U L I N G

The plaintiffs herein applied, on 26th September, 2005, and obtained interlocutory judgment in default of appearance and defence against the defendant. Subsequently on 18th October 2005 the defendant filed both memorandum of appearance and a defence.

This was, of course, done irregularly, without leave and a preliminary objection was raised and the two documents struck out.

The defendant has now brought this application in which he is seeking two substantive orders, namely;

i) that the interlocutory judgment issued on 14th December, 2005 be varied, reviewed and set aside, and

ii) that the defendant's memorandum of appearance, defence, replying affidavit, counter claim and memorandum to enter appearance as against the defendant to the counter claim be deemed as being duly properly filed.

This application is based on the grounds that the service on the defendant was not proper; that the defendant has a good defence and a counter claim and the dispute ought to be resolved on merit; and finally that interlocutory judgment cannot be obtained in the circumstances of the plaintiff's claim herein.

Grounds of opposition was filed, raising broad issues. The grounds are that the application is bad in law, vexatious and is an abuse of the court process.

That orders sought do not lie and that the application is meant to circumvent the cause of justice. These opposing positions were canvassed before me on 22nd May, 2006, and authorities cited in support of the defendant's case.

Learned counsel for the defendant, first took issue with the interlocutory judgment and argued that the Deputy Registrar lacked jurisdiction to enter an interlocutory judgment where the plaintiff's suit was not

for liquidated claim.

The request for judgment dated and filed on 26th September, 2005 was based on the fact that the defendant had failed to enter appearance within the prescribed time, thereby bringing the application within the provisions of Order 9A of the Civil Procedure Rules. The relevant rules under this order empowers the court to enter judgment where the defendant has failed to appear in a suit of a liquidated claim, or a liquidated claim together with some other claim, or in a suit for detention of goods.

Rule 8 specifically provides that where the claim is not in any of above three categories, the plaintiff can only set down the case for hearing if pleadings have been closed and the defendant, who may have appeared, given notice of the hearing.

See **Andrew W. Njenga v Co-operative Merchant Bank Ltd,** HCCC No.1095 of 2002. In **Mint Holdings Ltd & Samson N. Keengu v Trust Bank**, Civil Appeal No.249 of 1999, the Court of Appeal stated the law as follows;

" **As pointed out, there was no liquidated demand. Judgment could only have been entered upon a formal proof. The entry of such interlocutory judgment was irregular as Order IXA of the Civil Procedure Rules does not cater for entering of an interlocutory judgment when the nature of reliefs sought requires formal proof".**

In the instant case the plaintiffs' claim against the defendant is specific, namely;

" **Declaratory order that the charges dated 9th March, 1998 made against the suit premises are null and void, the defendant's exercise of its statutory power of sale is illegal, the interest charged is unconsionable (sic) and illegal".**

This claim is clearly not a liquidated demand and plaintiff's recourse was in rule 8, to set the case down for hearing.

The other matter raised by the defendant is that service was improper. That affidavit of service filed on 15th August 2005 and sworn by Julius Otanga does not specify the person upon whom the summons to enter appearance and other documents were served.

It is mandatory by dint of Order 9A rule 2 of the Civil Procedure Rules to prove service upon the defendant before one can obtain judgment in default, unless, of course, service has been effected by court – appointed process server. Julius Otanga has deposed in his said affidavit that on 3rd August, 2005 he visited the offices of the defendant in Mombasa and –

" **served them by tendering them with copies of the above mentioned documents ……..**

That both Makuri Auctioneers and National Bank of Kenya Ltd, defendant, acknowledged service by signing and stamping at the reverse of the copies that I retained".

First the stamp copy was not annexed to the affidavit. Secondly, from the plaintiff's own plaint, the defendant is described as a limited liability company having its registered office at Nairobi. That being the case, the requirements for service of a company must apply. Section 391 of the Companies Act provides that;

" **391,(1) A document may be served on a company by personally serving it on an officer of the company, by sending it by registered post to the registered postal address of the company in Kenya, or by leaving it at the registered office of the company".**

Order 5 rule 2 of the Civil Procedure Rules similarly provides that the first option in serving summons on

a corporation is to serve the secretary, director or other principal officer of the corporation.

As a second option service can be effected by leaving the summons at the corporations registered office or sending it by prepaid registered post to the corporations registered office or to the last known address.

The process server in this case did not comply with any of the above requirements. His averment that he tendered the documents with the defendant without stating who is particular he left them with is insufficient.

Having acknowledged in the plaint that the defendant's registered office is in Nairobi, it was illogical for the process server to purport to have effected service in some Mombasa office. The service was therefore irregular and improper.

Before I conclude, learned counsel for the plaintiff raised only one point in his reply. He submitted that the application combined several prayers. In particular that the application ought to have been brought under Order 9A rules 10 and 11 of the Civil Procedure Rules, by way of Chamber Summons. Learned counsel for the defendant defended the approach arguing that want of procedure cannot be used to stifle substantive justice.

The application is expressed to be brought under Sections 63(e) and 80 of the Civil Procedure Act, Order 9A rules 8, 10, 11 and Order 50 rule 1 of the Civil Procedure Rules.

I wish to concentrate on the cited provisions under the rules as the contention is with regard to procedure. The gist of the defendant's application is the setting aside of the interlocutory judgment. The other prayer of reinstating the documents struck out are consequential upon the first prayer being granted.

The procedure provided for bringing an application for setting aside interlocutory judgment under Order 9A is by summons. Yet the plaintiff's application is brought by way of Notice on Motion.

Adherence to the rules of procedure is paramount. Rules of procedure are not made in vain. They are intended to regulate the practice of the court. Legal practitioners must, like their medical counterparts, scrupulously follow the procedure in their diagnosis to avoid fatality.

It is now established beyond peradventure that irregularities as to form which do not go to the jurisdiction of the court and which do not cause prejudice or failure of justice to the other party are not sufficient to invalidate the entire proceedings before the court. A court of law must always strive to do substantive justice.

This point was succinctly stated by Sir Charles Newbold, P, in **Boyes v Gathure**, (1969) E.A 385 as follows;

" **As regards the first point, the chamber summons initiated proceedings in court between the parties. The form was that of an interlocutory summons, which is not a sustainable form to bring the parties initially before a court and not of an originating summons. This was clearly wrong, the error being emphasized by the fact that the summons purports to be in a miscellaneous civil suit, which did not, infact, exist. Did this erroneous procedure result in the whole proceedings being a nullity as is argued by Mr. Da Gama Ross?. In my view, the concept of treating something which has been done and acted upon as a nullity is a concept which should be used with the greatest caution. May I use some words I used in Navijibhai Prabhudas & Co. Ltd v the Standard Bank Ltd (1968)EA 670. I said in that case (at P.683B):**

' The courts should not treat any incorrect act as nullity, with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature'

Using an incorrect form of procedure which has, in fact, brought the parties before the court and

has infact, enabled the parties to present their respective cases to the court is not an incorrect act of such a fundamental nature that it should be treated as if it, and everything consequent upon it, did not exist and never existed".

The primary consideration, as I have said is whether the procedure complained of was of a fundamental nature and whether there has been failure of justice.

I find, in the instant application the departure of procedure is not of a fundamental nature and no failure of justice has been occasioned the plaintiff. As a matter of fact the application was heard in chambers.

In the result I find that the interlocutory judgment entered by the Deputy Registrar was irregular and further that there was no service of summons upon the defendant.

For the reasons stated the interlocutory judgment entered on 26th September, 2005 and all the subsequent orders are hereby set aside. It is further ordered that the memorandum of appearance, defence, counter-claim, verifying affidavit and summons to enter appearance as against the defendants to the counter-claim as well as replying affidavit filed herein be deemed as being duly and properly filed.

The plaintiff shall pay costs of this application.

Dated and delivered at Malindi this 14th day of July 2006

W. OUKO

J U D G E