



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 1209 of 2003

KANG SUK LEEPLAINTIFF

VERSUS

DEVSONS INVESTMENTS LIMITEDDEFENDANT

R U L I N G

(1) The Plaintiff has taken out this Chamber Summons dated the 23rd September 2005 and seeks an order setting aside the decree entered and recorded in this case by consent on the 6th August 2004. The letter setting out the terms of the consent was dated the 25th May 2004 and filed on the 27th May 2004 and was addressed to the Deputy Registrar High Court, Nairobi and the Business Premises Rent Tribunal, Nairobi. It was written on the letter-head of the firm of Aloo, Advocates. It was signed by Aloo & Company, Advocates for the Plaintiff and P.C. Onduso & Company, Advocates for the Defendant.

(2) Under the terms of the consent, rent arrears were to be paid by five instalments, the first of which, in the sum of K.Shs.785,000/=, was to be paid on or before the date of the consent.

(3) This application was filed on the 23rd September 2005 — some sixteen months after the consent was filed in court. Among the grounds on which the application is based are:

“(d) THAT the Plaintiff has never engaged any other Advocate to act in this matter other than the firm on record.”

“(e) THAT its is (*sic*) curious that a different firm of Advocate (*sic*) purported to have compromised the suit without even coming formally on record.”

The firm of Advocates on record for the Plaintiff is Odera Obar & Company, the Advocates who have filed this application on behalf of the Plaintiff.

(4) The supporting affidavit is sworn by Kang Suk Lee, the Plaintiff. It is dated the 23rd September 2005 and he has deponed, *inter alia* —

“5. THAT I have never engaged in (*sic*) another Advocates (*sic*) in the matter other than the firm of ODERA OBAR & COMPANY ADVOCATES.”

“(6). THAT I am surprised to note that sometimes in May, 2004, a firm of Advocates known as ALOO & COMPANY purportedly recorded consent in settling this case. Annexed hereto and marked “KS1” is a true copy of the said consent.”

“7. THAT I am informed by my Advocates on record, which information I verily that (sic) in any event, the said advocates never came formally on record in any event (sic).”

(5) The replying affidavit was sworn by Ramji Patel, the Managing Director of Devsons Investments Ltd. the Defendant. In paragraph 8 of the affidavit dated the 7th October 2005, he stated —

“8. THAT pursuant to the said Consent Order, the Applicant in part compliance paid the Respondent the sum of K.Shs.785,000/= on the 18th May 2004 via a Bankers Cheque. Annexed and marked RP3 is a copy of the said Bankers Cheque.”

(6) The Plaintiff was given leave to file a further affidavit which he filed on the 31st May 2006. He dealt with the issue of the Banker’s cheque mentioned in paragraph 8 of Ramji Patel’s affidavit as follows —

“7. THAT with reference to the purported Bankers Cheque referred to in Paragraph 8 of the Replying Affidavit I aver as follows:

a) The alleged Bankers Cheque has no relevance to me, on its face.

b) In any event, the alleged Bankers Cheque was made without prejudice.

c) If, which is denied, the purported cheque was drawn by me, I aver that the payment was made with reference to a totally different matter and was not in paid (sic) in satisfaction of the alleged consent order as alleged in the Supporting Affidavit.”

(7) The cheque being a Banker’s cheque could not obviously have been drawn by the Plaintiff. That is why it is called a Banker’s cheque. It is not a cheque drawn by a customer although it is issued on the instructions of a customer. So it is not particularly clever for the Plaintiff to say that the cheque does not refer to him on the face of it. He would have done his case a great deal of good if he had admitted that the cheque had been issued at his request and then explained the reason for the payment if it was not for the payment of the first instalment under the consent order. If, as the Plaintiff claims, the payment was made in a different matter and not in part satisfaction of the decree, he should have given details of the matter in respect of which the payment was made.

(8) Then in paragraph 9 of his further affidavit the Plaintiff still insists that he did not instruct the firm of Aloo & Company, Advocates, to file HCCC No.286 of 2004. What I find very strange, and for this the Plaintiff’s Advocates are also to blame, is that they have allowed the Plaintiff to make what would appear to be reckless allegations against a firm of Advocates without the slightest attempt to bring them into the proceedings either to defend themselves or simply say their bit. Why was this application not served on the firm of Aloo & Company, Advocates? It would also have been most helpful if in addition to the replying affidavit of Ramji Patel, an affidavit had been sworn by an Advocate from the firm of P.C. Onduso & Company, Advocates to explain the circumstances in which the consent letter to the Deputy Registrar dated the 25th May 2004 was written and filed in court.

(9) For this application to succeed, I have to be satisfied that the firm of Aloo & Company, Advocates had no instructions to represent the Plaintiff, and secondly, that the sum of K.Shs.785,000/= was not paid by the Plaintiff pursuant to the consent order. The burden of proving these matters, on a balance of probabilities, lies squarely on the Plaintiff. He had not discharged that burden.

(10) For these reasons, the application fails and it is ordered that the Chamber Summons dated and filed on the 23rd September 2005 be and is hereby dismissed with costs to the Defendant.

Dated and delivered at Nairobi this Thirtieth day of June 2006.

P. Kihara Kariuki

Judge.