

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 156 of 2002

PATRICK KINYUA MUNYITO

T/A PAK MOTORS SERVICES.....1ST PLAINTIFF/APPLICANT

VERSUS

THE CO-OPERATIVE BANK OF KENYA.....DEFENDANT/RESPONDENT

SIMON MURIITHI WACHIRA

T/A JOSY AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

R U L I N G

By a notice of motion brought under Order XLIV Rule 1 and 3 and Order L Rule 1 of the Civil Procedure Rules, the Applicant seeks to have the orders made on the 12th November 2004, reviewed and set aside. The Applicant also seeks to have the application filed by the Respondent on 27th September, 2004 which was subject of the order of 12th November 2004 struck off.

The grounds upon which the application is based are as follows: -

- That the application dated 27th September, 2004 is irregular as the same was not served on the Applicant.
- The procedure brought by the Respondent offends the fundamental rule of natural justice.
- That the application is incurably defective.
- The amended defence and counter-claim filed herein is null and void.

The application is further supported by an affidavit sworn by the Applicant on the 30th December 2004 in which He indicates that Charles Kariuki Advocate of Meru who is indicated in the Chamber Summons dated 27th September 2004 was not his advocate and that his advocate A. J. Kariuki was never served with the application.

In response to the application John Mugambi Njagi, who has deponed that He is an advocate having the conduct of this matter on behalf of the Respondent has sworn a replying affidavit in which He depones that the notice of motion is devoid of merit, incompetent and an abuse of the process of the court. He maintains that no good grounds have been advanced to have the application dated 27th September 2004 struck out and that the Respondent stands to suffer a substantial loss of Kshs.70,000/= which was amount paid to file his defence and counter-claim.

Mr. Liko who appeared before this court on behalf of the Respondent has conceded that the application was wrongly served on Mr. Charles Kariuki Advocate, who was not the advocate on record. He maintains that this was an honest mistake. He conceded to the setting aside of the orders of 12th November 2004, but urged the court not to strike out the application dated 27th September 2004 as the applicant has not come under the appropriate orders. He urged the court to order that the application be heard on merit and the amount paid in respect of the defence and counter-claim be deemed properly paid.

It is clear that the application dated 27th September 2004 was not served on the applicant's advocate. The order made on 12th November 2004 cannot stand as the same was made ex-parte in error – it being evident that the failure to serve the applicant's advocate was due to an honest mistake.

Apart from the fact that the applicant has not moved the court under the proper order for striking out pleadings, the applicant has not provided any good reason as to why the said application should be struck off. It is only fair that the same be properly served so that both parties can be heard. With regard to the payments made in respect of the defence and counter-claim the court cannot at this stage deem the same to have been properly paid since the defence and counter-claim are not properly on record.

In the circumstances I grant the application to the extent of reviewing the order of 12th November 2004 by setting aside the said order and substituting it thereof an order adjourning the application dated 27th September 2004.

The Respondent shall pay the costs of this application.

Orders accordingly.

Dated, signed and delivered this 28th November 2006.

H. M. OKWENGU

JUDGE