



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 131 of 2003

MEIR MIZRAHI.....PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL & OTHERS.....DEFENDANT

RULING

The proceedings in this matter have been protracted and acrimonious, with many interlocutory applications filed. On 22nd September, 2004, in an effort to instill some order in the proceedings so as to move forward the court framed, with the consent of the parties, the following preliminary issue, the same to be determined before any other proceedings are taken in the matter-

“Whether or not there is in existence a Plaintiff or Plaintiffs recognizable in law, and if not, what should be the consequences in respect to the suit?”

When this issue came up for arguments on 13th October, 2004 learned counsel for the Plaintiffs raised the further preliminary objection whether or not the firm of M/s Ochieng, Onyango, Kibet and Ohaga, Advocates were properly on record for the 2nd Defendant. This new preliminary point was argued on 3rd November, 2004. There was considerable heat on both sides. Learned counsels submitted at length. Many decided cases and other authorities were quoted. In my view it was not necessary to take up so much judicial time in arguments over this fairly straight-forward issue. On my part, I have no inclination to unduly exercise myself to decide this preliminary issue.

Mr. Mungai, learned counsel for the Plaintiffs, argued as follows. Interlocutory judgment was entered in favour of the Plaintiffs on 6th September, 2003. That judgment remains in place. It has not been set aside nor appealed against. The firm of Ocheing, Onyango, Kibet and Ohaga applied by notice of motion dated 15th September, 2004 under Order III, Rule 9A of the Civil Procedure Rules (the Rules) to come onto the record for the 2nd Defendant in place of the advocates then on record. The application was listed for hearing on 22nd September, 2004. There was no appearance for any party that day and the application was adjourned generally. Subsequently M/s Ocheing, Onyango, Kibet & Ohaga filed a notice of change of advocates dated 22nd September, 2004. Attached to it was a consent for change of advocates signed by them as well as the advocates on record for the 2nd defendant, M/s S. Musalia Mwenesi. This consent further argued Mr. Mungai, did not amount to an order of court as provided for in Rule 9A of Order III. In any case, it was not a consent signed by all the parties, the Plaintiffs not having signed it. It could thus not be acted upon by the court. M/s Ochieng, Onyango, Kibet and Ohaga are therefore not properly on record and they should not be heard. All the pleadings filed by them should be struck out.

Mr. Ohaga, learned counsel for the 2nd Defendant replied as follows. The question is whether there is

a proper judgment on record in favour of the Plaintiffs. There is no such proper judgment. The judgment purportedly entered on 4.9.2003 is a nullity. That judgment was entered by the Deputy Registrar pursuant to powers delegated under Order 48, Rule 2 of the Rules. The judgment was ostensibly entered under Order IXA of the Rules. However, in view of the reliefs sought in the plaint, no interlocutory judgment under that Order could be validly entered. The judgment thus entered is a nullity in law and must be set aside as a matter of right, argued Mr. Ohaga. The Deputy Registrar simply did not have jurisdiction to enter the judgment he ostensibly entered, because no such judgment was available in law. There is thus no proper and lawful judgment on record. That being the position, further argued Mr. Ohaga, there was no necessity to comply with Rule 9A of Order III, and the application filed in that regard was a mere superfluity. And even if it were necessary to comply with that rule, the Plaintiff has no locus to question the legal representation of the 2nd Defendant in these circumstances. An application under that rule requires notice only to the outgoing advocate, not to the opposite party. It is a matter between the Defendant and its two sets of advocates. It does not concern the Plaintiff. So the consent for change of advocate signed by the incoming and outgoing advocates for 2nd Defendant was proper and adequate, and the Deputy Registrar, in execution of his ministerial duties, should have entered an appropriate order upon that consent.

In Mr. Mungai's view, unless and until the interlocutory judgment is set aside, it is a valid judgment of the court. The present proceedings are not the proper forum to challenge the judgment. A proper application to set aside must be filed. The Plaintiffs are of necessity interested in the legal representation of the 2nd Defendant as they must know who to serve process. There must be orderly conduct of court proceedings, and in that regard it is necessary to know which advocate is properly on record for which party.

I have considered these rival submissions of the learned counsels. In my view, even at this stage the court cannot ignore the issue of whether or not there is a proper and lawful interlocutory judgment validly entered. This interlocutory judgment, as is now obvious, has been the cause of a number of interlocutory applications herein and consumption of a lot of judicial time. I must look at this judgment, notwithstanding that there is no application before court to set it aside.

What are the reliefs sought in the plaint? They are two declarations {prayers (i) and (ii)}, an order to annul some agreements {prayer (iii)}, permanent injunctions {prayers (iv), (v) and (vi)} and general damages {prayer (vii)}. Interlocutory judgments are available under Order IXA only as follows-

(a) Under Rule 3 thereof, where the plaint makes a liquidated demand only or together with some other claim, and the defendant or all the defendants fail to appear or file defence.

(b) Under Rule 4, where the plaint makes a liquidated demand with or without some other claim and there are several defendants of whom one or more appear or file defence and any other fails to appear or file defence.

(c) Under rule 5, where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear or file defence.

(d) Under Rule 6 where the plaint is drawn as mentioned in Rule 5 and there are several defendants of whom one or more appear and any other fails to appear or file defence.

The plaint in the present suit does not make a liquidated demand only. It does not make a liquidated demand together with some other claim. It does not make a liquidated demand with or without some other claim. The plaint is not drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages.

It is thus plain as daylight that interlocutory judgment was not available, and none should have been entered by the Deputy Registrar. The judgment entered on 4th September, 2003 is illegal and a nullity in law and cannot be permitted to stand. Now that it has been brought to the attention of the court, the court

need not wait for a formal application to set it aside. To permit it to remain on record is to encourage the parties to try all manner of mischief against each other upon strength of the illegal judgment. I will therefore set it aside. It is so ordered.

Having held that the judgment of 4th September, 2003 was a nullity in law, it was not necessary for Rule 9A of Order III to be complied with. I so hold. M/s Ochieng, Onyango, Kibet and Ohaga were therefore entitled to come on record after being instructed by the 2nd Defendant, and they have been properly on record, especially as there was no objection from the outgoing advocates. The Plaintiffs cannot possibly choose advocates for the 2nd Defendant. It is not their business who represents the 2nd Defendant, as long as that agent is properly on record.

For all the above reasons I will overrule the Plaintiffs' preliminary objection. It is hereby dismissed with costs.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JANUARY, 2005.

H. P. G. WAWERU

JUDGE