



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 1083 OF 1997 (O.S.)

TYSONS LIMITED PLAINTIFF

VERSUS

OTIENO-OYOO & CO. ADVOCATES DEFENDANT

JUDGMENT

This suit was commenced by Originating Summons dated 25th November, 1997 brought under Order LII rule 4(1) and (2) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap. 21). This was later replaced by the amended Originating Summons dated 25th November, 1998. There was one substantive prayer made:

“THAT, the cash [element] of the judgment amount, interest and costs in HCCC No. 1441 of 1996 held by Messrs PATRICK LUMUMBA OTIENO-OYOO t/a OTIENO-OYOO & COMPANY ADVOCATES be and is hereby ordered to be paid to the applicant”.

The evidence in support of the Originating Summons is set out in the depositions of **Stephen Kariuki Muchiri**. The deponent in his affidavit of 25th November, 1997 thus avers:

- (i) he is the chief accountant of the plaintiff;
- (ii) in HCCC No. 1441 of 1996 the plaintiff had sued the Kenya Co-operative Creameries Ltd;
- (iii) the firm of Otieno-Oyoo & Co. Advocates had, in that earlier suit, represented the plaintiff;
- (iv) the plaintiff's claim in that case was for Kshs.783,210/=, and judgment was given in favour of the plaintiff;
- (v) the defendant did not inform the plaintiff of the interests and costs awarded in the suit, and so the plaintiff made an inquiry on this question;
- (vi) although the defendant was paid the full judgment amount, interest and costs in HCCC No. 1441 of 1996, the defendant has failed and/or neglected to pass on the same to the plaintiff as required by law and equity;

(vii) the plaintiff needs the monies in question as part of its income generation, to cover its investment costs and to generate profit for its shareholders.

The defendant, on 22nd October, 1998 filed grounds of opposition which read as follows:

- (a) that, the issues raised in the Originating Summons are too broad, prolix and contentious to be determined by way of Originating Summons;
- (b) that the defendant lacks legal capacity to sue or be sued in its own name;
- (c) that, directions not having been taken, the Originating Summons cannot proceed to hearing.

On file is an affidavit of service sworn by *Amos Ogutu Wandago*, counsel for the plaintiff. He avers that on 2nd July, 2004 he received a hearing notice in triplicate from M/s Eboso & Wandago Advocates, with instructions to serve the same upon M/s Otieno Oyoo & Co. Advocates and M/s Abuodha & Omino Advocates. On that same day he effected service upon Mr. Otieno, Advocate which service he acknowledged by stamping and signing on the principal copy. On 13th July, 2004 the deponent effected service upon Mr. Okello, a clerk to M/s Abuodha & Omino Advocates; he duly acknowledged by stamping and signing on the principal copy.

On the date of hearing, 29th September, 2004 the plaintiff was represented by Mr. Wandago, while the defendant was absent and had no representation.

Being satisfied with the state of service, I allowed Mr. Wandago to present his client's case. He presented the plaintiff's application, that the defendant be ordered to pay the sum of Kshs.783,210/= to the plaintiff, for whom they had acted in HCCC No. 1441 of 1996. Counsel presented the affidavit sworn by Stephen Kariuki Muchiri, and showed how the evidence supported the claim in the Originating Summons. One of the annexures to the affidavit is a letter dated 5th February, 1997, Ref No. PLO/CIV/TLO/022/96 from M/s Otieno-Oyoo & Company Advocates to M/s Tysons Ltd (the plaintiff). This letter thus reads:

“As stated in our letter dated 17th January, 1997 the principal amount herein is Kshs.783,210/= which we expect to be fully paid by July, 1997. We are addressing the judgment-debtor's advocates on the issue of costs and interest and we shall inform you as soon as we reach a consent. In the event that we do not agree on the costs and interest, the matter will have to be placed before the Deputy Registrar for taxation of our bill of costs”.

By this letter, counsel submitted, Mr. Otieno Oyoo had clearly admitted receipt of the monies in question. He noted that the defendants did enter appearance, but failed to file a replying affidavit. Entry of appearance came along with an application to strike out the Originating Summons as first filed on 25th November, 1997. The Originating Summons was, as a result, amended; but there was no response from the defendant thereafter.

Counsel prayed that the Court do make an order binding the defendant to pay up the monies specified in the Originating Summons. Quite obviously the defendant has chosen not to benefit from the opportunity of a hearing to contest the claims made by the plaintiff. The defendant will not, as a matter of fairness and due administration of justice, be allowed to controvert the claims made, or indeed to challenge any aspect of the process which now leads me to the judgment herein.

I find the defendant liable in accordance with the claim set out in the Originating Summons. Accordingly I will make orders as follows:

1. Immediately, and in any case within 30 days of the date hereof, the defendant shall pay to the plaintiff the cash element of the judgment amount in HCCC No. 1441 of 1996.

2. The total sum payable in accordance with the first Order herein, shall accrue interest at Court rates with effect from the date this Originating Summons suit was filed.

3. The defendant shall pay the costs of this suit, which costs shall carry interest at Court rates from the date hereof until payment in full.

DATED and DELIVERED at NAIROBI this 21st day of January, 2005

J.B. OJWANG

JUDGE

Coram : Ojwang, J

Court Clerk – Mwangi

For the plaintiff: Mr. Wandago, instructed by M/s Eboso & Wandago

Advocates

Defendant absent and unrepresented