



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 418 OF 1998

KAMLESH MANSUKHLAL DAMJI PATTNI.....PLAINTIFF
VERSUS
NASIR IBRAHIM ALI.....1ST DEFENDANT
DINKY INTERNATIONAL S.A.....2ND DEFENDANT
WORLD DUTY FREE COMPANY LTD.
T/A KENYA DUTY FREE COMPLEX.....3RD DEFENDANT

RULING

I am asked to give directions as to which of the applications following should be heard first:-

(1) Chamber Summons dated and filed on 28.11.2003, under Order XXXIX rule 1, Section 3A of the Civil Procedure Act, and Section 18 of the Foreign Judgements (Reciprocal Enforcement) Act Cap. 43, Laws of Kenya, and the inherent powers of the Court.

(the Review application)

(2) A Notice of Motion dated 24.01.2005 under Order 1 rule 10 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of the law.(the Joinder of Parties Application)

(3) Chamber Summons under Order XXV rules 1, 4 and 6 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya), and all enabling provisions of the law.

(Security for Costs application) dated 2.02.2005.

When the question of the application of Joinder of Parties) i.e came up for hearing before me on 8.02.2005, Mr. Macharia informed the Court that his lead Counsel, Mr. Ngatia had been served with a Replying Affidavit sworn by Paul Kibugi Muite on 7.02.2005 on behalf of the First Defendant raising issues upon which Mr. Ngatia needed to seek further instructions from the First Defendant a resident of the United Arab Emirates. He requested for two weeks adjournment to enable Mr. Ngatia obtain

instructions from his client to reply. Macharia then urged the Court to fix the application for hearing in priority to the **Application for Review**, and be heard either on 23rd, 24th or 25th February 2005. Mr Adala, who held brief for Mr. Mr. Imanyara said to have been engaged in the Court of Appeal in Civil Appeal No. NAI 3540 of 2004 associated himself with Mr. Macharia's submissions.

Mr. Nyatoti who held brief for Mr. Muite did not object to the adjournment as he did not know of the nature of the application for security for costs which was scheduled for hearing on 9.02.2005.

The application which was due for hearing on 9.02.2005 was the Chamber Summons dated 2.02.2005 (the Application for Security for Costs for the Counter-Claim).

All the parties were represented in Court. Mr. Muite took the podium first.

After reiterating that apart from the Defendant's application of 28.11.2003, (the Review application), there were two other applications, the Joinder of Parties Applications and the Security for Costs Application. He urged that his application be heard first, as it was filed first, and should have priority. He gave a long chronology of the sins of commission and omission by the Plaintiff herein to frustrate, obstruct, and delay the hearing of his client's application. These tactics included:-

(1) The applicant has known of the 1st Defendant's application since November 28th 2003. He should not wait until the eve of the hearing of the Defendant's said application to file another application for security for costs on 2.02.2005.

The sole intention is to obstruct delay and prevent the hearing of the Defendant's application.

(2) When the application of 28.11.2003 came up for hearing before Ibrahim J., the Plaintiff again succeeded in filing a Constitutional Reference which had the immediate effect of staying the application under rule 10 of the Constitution of Kenya (Protection of Constitutional Rights and Freedoms of the Individual Practice and Procedure Rules (Legal Notice No. 133 of 2001). Because the matter was stayed, the file was referred to the Chief Justice for directions (although there is no legal requirement to do so).

(3) Even before the matter was referred to the Chief Justice, the Plaintiff filed an application to the Court of Appeal which was subsequently withdrawn.

(4) There was yet another application to review the decision refusing to refer the matter to the Chief Justice, and so the application of 28.11.2003 could not proceed to hearing.

(5) There was an application for stay of the hearing of the application for review (of 28.11.2003).

(6) The decision on the Constitutional Reference was heard and determined in October 2004 and the application was dismissed.

(7) Thereafter, there was filed in the Court of Appeal an application for stay.

(8) On 8.02.2005 the issue was raised as a preliminary point. The Court of Appeal declined to grant a stay of proceedings herein.

After setting out this chronology and choreography of events since the filing of the Application on 28.11.2003, Mr. Muite invited the Court to see the current application for Security for Costs as another and continuing attempts to prevent the Defendants/Applicants application of 28.11.2003 from being heard.

Mr. Muite invited the Court to look at Order XXV (Security for Costs) under which the application for security for costs is brought. Rule 1 of the said orders specifies that the Court may order security for the

whole of the costs of any defendant or third party or subsequent party, not a Plaintiff, to be given security by any other party. It is not to be asked by the Plaintiff. In this instance, there was a Counter-Claim, and it was dismissed. In any event in this particular instance the Chamber Summons cannot form the basis for security for costs. He therefore invited the Court to exercise its discretion under Section 3A of the Civil Procedure Act and make necessary orders for ends of justice to prevent the abuse of the process as it is being abused by the plethora of applications.

Regarding the application for joinder of the interested party, Mr. Muite observed that the applicant therein, **World Duty Free Company Limited** was a company incorporated in the British Virgin Islands (BVI Company) on 16th October 2001 whereas at the time of setting up the Duty Free Shops in Nairobi and Mombasa the holding Company was **World Duty Free Company Ltd** incorporated in the Isle of Man (IM Company). Again Counsel concluded that there were no bona fides in filing this application, now at the eleventh hour.

Commenting upon the provisions of Order I rule 10, Mr. Muite submitted that the order of joinder is made **before** and not after judgement and concluded that the object of this application (the Joinder Application) was again to obstruct, delay and prevent the hearing of the Defendant's Review Application. He would not have opposed the application for joinder of the proposed 4th Defendant but only after the Review application was heard and orders (if any) of setting aside the judgement currently on record.

In response to Mr. Muite's submissions Mr. Wambua Kilonzo filled the Court with more information which Mr. Muite had, he said, omitted in his submissions. These facts were:-

(1) Judgement herein was given by Mr. Justice Mbaluto on 21.09.2001 and that there had been no appeal filed in the Kenya Court of Appeal regarding the validity of that judgment.

(2) The Defendants filed the Review application on 28.11.2003 attaching thereto a copy of a judgement from the High Court of the Isle of Man and sought on the basis of that judgement to review and set aside Mr. Justice Mbaluto's judgement on the basis that this Court had no jurisdiction to determine the matter. (3) The application of 28.11.2003 was filed on the same day and date when the Plaintiff herein was arraigned before the Criminal Court for murder allegedly by a former employee of the Respondent. The Plaintiff had therefore not been a free man.

(4) The 1st Defendant in particular is a Canadian citizen permanently resident in Dubai.

(5) It is the Defendants, (in particular the 1st Defendant) who have opened this litigation, after judgement, after costs were taxed at shs. 200,000/= and which are still unpaid and with the opening of this litigation further costs will be incurred. It is therefore a matter of order that these applications be heard sequentially in the order of priority of their filing.

(6) The Plaintiff has not been a free man. There is an application for security for costs. It is his constitutional right to bring the application.

(7) The hearing fixed for 10.12.2004 was taken ex parte with an order of Court to have a Hearing Notice served upon the Plaintiff's Counsel. Such a Hearing Notice was not served, and by virtue of this omission alone, the Applicant's application is disentitled from taking priority.

(8) Mr. Mugambi Imanyara Counsel for the Plaintiff is currently engaged in H. C. Criminal Case No. 229 of 2003, Republic vs. Kamlesh Mansukhlal Damji Patni, and without service of the Hearing Notice upon him. By this failure to comply with the Court's Order, Mr. Imanyara has been put into an embarrassing situation where it is impossible for him to attend both to the criminal case, and also prosecute this suit.

(9) They (Mr Imanyara) been served with grounds of opposition to which is attached an

Affidavit sworn by Mr. Muite Counsel for the Defendants, and in which he raises contentious issues which as Counsel he is not entitled to raise. This issue was taken up as a preliminary point in the Court of Appeal which reserved its Ruling to 4th March 2005. The same Affidavit is annexed to the Replying Affidavit to the Notice of Motion of 27th January 2005 (the Joinder of Parties Application). This affidavit is the subject of the Ruling by the Court of Appeal. It would therefore be prudent to delay the hearing of the Review Application for another month to await the decision of the Court of Appeal.

(10) The Plaintiff would need to respond to the allegations that the Defendants are owners of the subject shops, and any decision by the Court that the Review Application be heard first would hurt and offend the Court's sense of justice. For the same reason the hearing date of 25.02.2005 be also deferred until the Ruling by the Court of Appeal on the Affidavit of Paul Kibugi Muite the Defendant's lead Counsel. It would be safer to do things right.

I was initially reluctant to hear Mr. Macharia, Counsel holding brief for Mr. Ngatia Counsel for the intended 4th Defendant. I reversed my earlier decision and decided to hear him, as any decision reached would or may affect the rights (if any) of the intended 4th Defendant, and I made this decision despite strong objection from Paul K. Muite that the intended 4th Defendant not yet being a party to the suit, had no locus standi. According to Mr. Macharia, the whole dispute about hearing either the Review Application, or the Security for Costs application was a great conspiracy to shut out his client from being heard. In his view the applications pending should be heard on the basis of achieving justice, and not priority of the dates on which those applications were filed. Consideration of priority of applications is a matter of discretion by the Court.

I have in the foregoing passages of this Ruling faithfully reproduced the respective Counsel's submissions as to why each of the three pending applications should have priority over the other in being heard and determined. Mr. Muite was of the view that hearing of his application (the Review Application) had been obstructed, delayed and prevented because of the plethora of the applications made by the Plaintiff to this Court and the Court of Appeal. As there was no order of stay of proceedings, the Review application of 28.11.2003 be heard first. The Plaintiff/Respondent was at liberty to raise any points against the application during hearing thereof.

Wambua Kilonzo for the Plaintiff/Respondent was of the contrary view. I have set out at length his reasons why the Review Application should await the outcome of his preliminary objection to the Affidavit by Mr. Muite on behalf of the 1st Defendant, Mr. Nasir Ibrahim Ali.

Mr. Wambua Kilonzo likened the hearing the Review Application to an application to strike out a suit, and the Plaintiff saying, oh no, hear my suit first, and strike it out later, or that if there is an application for an amendment and the other party says no, hear me first and you may amend thereafter. In either case, there would be no purpose of the applications either to amend or to strike out. For these reasons he submitted that his application for an order security for costs should be heard first.

Mr. Wambua's argument is of course right in its context and although I am not called upon to determine the application for security for costs, I am unable to pronounce its relevance in the context of the Defendant's application for review of the judgment for if the Defendant's application is dismissed, costs would follow the event, unless the Court shall for good reason order otherwise. I would not find the hearing of the application for security for costs as taking precedence either over the application for joinder of the proposed 4th Defendant, or indeed the Review Application.

As I see it, the joinder application has a direct bearing upon the interests of the Plaintiff, in that the applicant seeks to be enjoined as a necessary party to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit. The fundamental question as I see it in the suit is who is the owner of the suit properties, the World Duty Free Shops in Nairobi and Mombasa Airports. The intended 4th party (Defendant) would shed some light on that question. The Plaintiff is not prejudiced in any way, he has an additional party to go against for the damages (if any) and costs.

I do not believe in any conspiracy between the Plaintiff and the Defendants to keep the intended 4th Defendant out of this suit. There is also no order staying these proceedings.

The Plaintiff/Respondent has a judgement against the Defendants. That judgement has neither been appealed against, reviewed or set aside. Neither the application for review nor joinder of the intended 4th Defendant would adversely affect the Plaintiff at this stage.. For these reasons, I would give the following directions for the order or sequence of hearing of those applications:-

(A) Firstly, the application for joinder of the intended 4th Defendant as a necessary party dated 24.01.2005 be heard on 25.02.2005.

(B) Secondly the application for Review of the judgement of Mbaluto J. made on 25.05.2001 be heard next.

(C) Thirdly the Plaintiff's application be heard if deemed necessary, in terms of Order XXV rule 2 of the Civil Procedure Rules.

There shall be orders accordingly.

Dated and Delivered at Nairobi this 17th day of January 2005.

ANYARA EMUKULE

JUDGE