

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (COMMERCIAL DIVISION, MILIMANI)

CIVIL CASE NO. 18 OF 2004

DONHOLM RAHISI STORES.....PLAINTIFF

VERSUS

EAST AFRICA PORTLAND CEMENT LIMITED.....DEFENDANT

R U L I N G

The Plaintiff herein, DONHOLM RAHISI STORES (suing as a firm) filed suit by plaint dated 12th January, 2004 against the Defendant, EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED, claiming various reliefs. The Defendant entered appearance on 2.2.2004. On the following day it filed a defence and counterclaim dated 3rd February, 2004. In the counterclaim it named as defendant one MOHAMED MAHAT KUNO “(carrying on business under the name and style of **DONHOLM RAHISI STORES**)” . On 10th February, 2004, Mohamed Mahat Kuno (hereinafter called Mr. Kuno) entered appearance to the counterclaim. He also on the same day filed a defence to the counterclaim.

In the meantime, on 9th February, 2004 the Defendant had filed an Amended Defence and Counterclaim of the same date. In the counterclaim section of it Mr. Kuno was still named as defendant, again “carrying on business under the name and style of **DONHOLM RAHISI STORES**”. On 3rd June, 2004 the Defendant filed a Re-amended Defence and Counterclaim dated 2nd June, 2004. In the counterclaim section thereof Mr. Kuno was deleted as defendant and DONHOLM RAHISI STORES (sued as a firm) substituted as first defendant. A second defendant, one EMANUEL KYALO BIRYA, was added as second defendant in the counter claim.

Mr. Kuno has argued, through his learned counsel, that deletion of his name as defendant in the counterclaim was simply a backdoor withdrawal of the counterclaim against him, and the action was intended to deny him costs due to him for defending the counterclaim. That is why he has filed the application by notice of motion dated 28th September, 2004 seeking the main order that the Defendant, EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED, do pay his costs for defending the counterclaim which has now, in effect, been withdrawn as against him. The main grounds for the application are that he, Mr. Kuno, has never been a sole trader under the name and style of DONHOLM RAHISI STORES; that he was sued in the counterclaim in his personal capacity, allegedly trading as DONHOLM RAHISI STORES, and not as a partner in the Plaintiff firm, DONHOLM RAHISI STORES which, as a firm, brought the suit against the Defendant; and that therefore it is only fair, just and equitable that he be paid his costs. The application is said to be brought under Order 50, Rule 1 of the Civil Procedure Rules, under sections 3A and 63(e) of the Civil Procedure Act, Cap. 21, and also under “all other (unnamed) provisions of the law.” I would imagine that one such enabling provision is section 27 of Cap. 21 aforesaid which gives the court discretion with regard to costs. The supporting affidavit sworn by Mr. Kuno essentially states the factual position with regard to the pleadings filed, as I have already set out, in addition to his arguments in support of his claim for costs.

The Defendant, not unexpectedly, given that the counterclaim is for the very substantial sum of Kshs.442,025,000/90, opposes the application upon the grounds set out in the replying affidavit sworn by one OLE MAPELU ZAKAYO, the Managing Director of the Defendant. Those grounds are that it is not true that the Defendant has withdrawn the counterclaim against Mr. Kuno; that it is not true that a different party has been substituted as defendant in the counterclaim; that the counterclaim was lodged against Mr. Kuno as a partner in the Plaintiff firm; that as the Plaintiff is not a corporate entity but a firm,

all its partners are liable fully and personally for all its liabilities; that because of incomplete instructions given to counsel by the Defendant, the original counterclaim was lodged against Mr. Kuno under the belief that he was the sole proprietor of the Plaintiff firm; that upon receipt of proper instructions that the Plaintiff firm had another partner, the counterclaim was appropriately amended; and that Mr. Kuno is still a defendant in the counterclaim as under the law (Rule 5 of Order 29 of the Rules), the partners of the Plaintiff firm must individually appear in their own names in the counterclaim.

I have considered the submissions of the respective learned counsels in furtherance of their client's positions. It seems to me that parties must be bound by their pleadings. Mr. Kuno was sued in the counterclaim as an individual who was said to be carrying on business as DONHOLM RAHISI STORES. The relevant pleadings say so. It matters not that he was so sued by mistake due to incomplete or incorrect instructions given to counsel by the Defendant. A litigant must bear the consequences of any mistakes in his pleadings. Mr. Kuno entered appearance and filed defence to the counterclaim in his individual capacity because he had been so sued. He was entitled to so protect his interest in the counterclaim; otherwise default judgment could have been entered against him in his individual capacity. When the counterclaim was re-amended, his name deleted and the name of the Plaintiff firm substituted as the first defendant, this had the same effect as if the counterclaim had been withdrawn as against him.

In all fairness I find no reason at all to deny Mr. Kuno his costs for defending the counterclaim until it was in effect withdrawn as against him. The quantum of such costs will of course be a matter for the discretion of the taxing officer of the court who will no doubt consider all the circumstances peculiar to this case.

I will in the event allow the application with costs. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 11TH DAY OF FEBRUARY, 2005.