



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO.1584 OF 2000

GIRO COMMERCIAL BANK LTD.PLAINTIFF

VERSUS

SUPERFOSS LIMITED

PANKAJ MOHANLAL LAKHANI

DILIP MOHANLAL LAKHANIDEFENDANT

R U L I N G

This Notice of Motion under Order 44 rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act is dated 10/11/03. It seeks review and setting aside of an order of this court dated 5/11/03.

The application is supported by an Affidavit by Kiragu Kimani, an advocate of this court, dated 24/11/04, and on the ground that the Plaintiff has sufficient cause as to why the suit should not have been dismissed for want of prosecution.

In their opposition to the application the Respondents aver that:-

- 1. The application is totally misconceived, bad in law and an abuse of the court process.**
- 2. The application lacks merit.**
- 3. The entire application is frivolous, vexatious and scandalous.**
- 4. The application is incurably defective and, or, untenable in law.**

When the hearing came up on 26/2/04, Mr. Murugu, for the Defendant/Respondents, raised the following Preliminary Objections:

- 1. Section 6 of the Oaths and Statutory Declarations, cap.15, requires that all Exhibits shall be sealed with the seal of the Commissioner and marked with serial numbers for identification.**

The Affidavits herein and the annexures to the Affidavit, do not Comply with the above Rule 9, in that there is no seal of the Commissioner. It is only a piece of paper, and hence the annexures are invalid, submitted the learned counsel for the Defendant/Respondent.

As a consequence, the affidavit etc, should be struck out.

2. The Supporting Affidavit has been deponed by an Advocate – Mr. Kiragu Kimani which offends Order 18 rule 3 of the Civil Procedure Rules: which requires such affidavits to be deponed by the applicant as this deals with matters of fact.

Accordingly, the Affidavit should be struck out for noncompliance with the law.

3. On the application fore Review, it was averred that the court is being requested to sit on its own decision as an appellate court.

4. The matter, submitted the learned counsel, is RES JUDICATA, as the same issues which were raised and ruled upon by the court, are the same issues raised in the current application for Review.

Accordingly, the application is incompetent and defective and ought to be dismissed.

In his reply, learned counsel for the Applicant, Mr. Kwacha, submitted that the annexures comply with the expanded Rule 9 made under Section 6 of Cap.15, as per the Chief Justice's Practice Directions of 1984. He submitted that H.C.C.C. No.907 of 1999 is distinguishable because there it was a blank piece of paper whereas here, there is an index ad the Bundle conforms to the Index.

I have carefully perused the authorities and considered the submissions by the learned counsel for both sides in relation to each of the grounds of Preliminary Objection, and my conclusions are as follows:-

On non-compliance with Section 6 of the Oaths and Statutory Declarations Act, my examination on this ground shows that the annexures to the Supporting Affidavit squarely comply with Section 6 as amplified by the Chief Justice's Practice Direction 4 (ii) of 9th January 1984. That Practice Direction provides as follows:-

“Where a number of documents is contained in one exhibit, a front page must be attached, setting out a list of the documents with dates, which the exhibit contains and the bundle must be securely fastened.”

A cursory look at the Supporting Affidavit and the annexures thereto clearly show the same to comply with the above Chief Justice's Practice Direction, which clarifies how Section 6 of Cap.15 should, in practice, operate. Accordingly, that ground of the Preliminary Objection lacks merit and I dismiss the same as baseless.

Turning to the alleged non-compliance with Order 18 rule 3 of the Civil Procedure Rules, this is with respect to the Affidavit by Mr. Kiragu Kimani, advocate.

Mr. Murugu's submission that the Affidavit is incompetent because it is by the Advocate, rather than by the applicant, on matters of fact, shows a deliberate misreading of the provisions of Order 18 rule 3(1) which provides as follows:-

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove”.

Here, it is Mr. Kiragu, the deponent, not the applicant, who had the command of the knowledge, and of the facts, of what happened in the court on the material day that the suit was dismissed, on 15/11/03. The applicant was not in court that day.

Accordingly, that objection, and the decision in **KISYA INVESTMENTS LTD. VS. KENYA FINANCE CORPORATION LTD., Civil suit No.3504 of 1993**, heavily relied upon by Mr. Murugu,

are dismissed as clearly distinguishable and inapplicable in this particular incidence.

The learned counsel for the Defendant/Respondents, Mr. Murugu, submitted, as his last point of Preliminary Objection that through Review – this application – the court is being requested to sit on an appeal of its own judgment, since the issues here are the same issues as raised and ruled upon by this court. With due respect to the learned counsel, that submission does not, in my view, have a basis. To invoke **RES JUDICATA** where the case was disposed off on technicalities, rather than on merit, is not particularly helpful to the Defendant/Respondent's case in this application. The application for review herein is based on the all encompassing provision of Order 44 rule 1, any other sufficient reason.

The case of **NATIONAL BANK OF KENYA LTD. VS. NDUNGU NJAU, Civil appeal No.211 of 1996** is not applicable here, because there the jurisdiction of the court was under Challenge, and that could only be dealt with at the appellate court. Here, the application is for review for any other sufficient reason, which is within this court's jurisdiction and review does not constitute sitting on appeal of one's own decision.

For all the above reasons, the Preliminary Objection herein is rejected; and the application should proceed for hearing on merit.

DATED and delivered in Nairobi, this 13th day of May 2005.

O.K. MUTUNGI

JUDGE