



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI MILIMANI COMMERCIAL COURTS
CIVIL CASE 1470 OF 2000

NATIONAL INDUSTRIAL CREDIT BANK LTD.....PLAINTIFF

NIAZSONS KENYA LIMITED

VERSUS

MOHAMED ZAFAR NIAZ

MOHAMED SAJAD NIAZ.....DEFENDANTS

RULING

On 25/8/04, the applicant, Naheed Niaz brought this Notice of Motion under Section 3A and 80 of the Civil Procedure Act; Order 1 rules 3 and Order 44 rule 1(1) of the Civil Procedure Rules seeking the following orders:-

- 1. That the applicant – Naheed Niaz be joined as a defendant to this suit.**
- 2. Review of this court’s order of 18/4/01 and remove the restraining order against dealing in all that property Title No.156/1/MN.**
- 3. Upon granting of prayer No.2 above, the applicant be removed from these proceedings.**
- 4. Costs of this application be by the Plaintiff.**

The application is supported by the Affidavit of Mohamed Zafar Niaz who holds a General Power of Attorney from Naheed Niaz; of even date, and on the grounds that: the property Plot No.156/1/MN does not belong to either the 1st and 2nd Defendants, but belongs to the applicant exclusively.

When the matter came up for hearing on 28/9/04, Mr. Laibuta, learned counsel for the Plaintiff/Respondent, raised the following Preliminary Objections:-

- 1. Prayer Nos. 1 and 3 in the application are obtainable by way of Chamber Summons, whereas here, the application is by way of Notice of Motion.**
- 2. Prayer No.2 is obtainable by way of a Notice of Motion.**

The learned counsel then submitted that the applicant was invoking dual procedures and that renders the application defective, and should be struck out. Further, Mr. Laibuta submitted that prayer No.2 seeks

Review of an Order given on application under Order 38 rules 1 and 5 which relate to attachment before judgment. The applicant herein ought to have moved by way of Objection Proceedings, not under Review as provided for under Order 44 and Section 80 of the Act. Counsel went on and submitted that under Order 44 of the Civil Procedure Rules, the applicant is presumed to be a party to the substantive suit. Here, the applicant is not a party to the suit. He is a non-party – a third party, whose property had been wrongfully attached. The applicant should have come under Objection Proceedings. A Review can't be a substitute to Objection Proceedings.

Further, Mr. Laibuta submitted that the Supporting Affidavit by Mohamed Sajad Niaz was bad in law, as it violated Order 18 rule 3 of the Civil Procedure Rules where the source of information must be disclosed if affidavit is made by someone other than the applicant. Here, the deponent is a holder of a power of attorney and what he deponed, at paragraphs 3 to 8, 10 to 12, are all hearsay.

Order 1 rule 3 is not available as it deals with substitution of parties because it only applies where the persons sought to be joined include persons against whom relief is alleged to exist. Under that Order and Rule, there is no room for an Objector, who is a stranger to the suit.

In opposition, Mr. Mungu submitted that an applicant can go through any – either a Chamber Summons or a Notice of Motion, and on the Affidavit he submitted that he had obtained the information from the records in the Lands Office and that source is disclosed in the Supporting Affidavit, at paragraph 2.

I have considered the submissions by the counsel for both sides with respect to the Preliminary Objections, and I have reached the conclusions that:-

(a) The application is brought under the wrong provisions of the law. For example, only a party to proceedings or suit can apply for a Review of orders or decree arising from such judgment or proceedings. Review presumes that the applicant is a party to the order or decree, and that such party has been aggrieved by such order or decree. A non-party to proceedings cannot be aggrieved because in the first place no order or decree can be made, legally, against a nonparty to the proceedings.

(b) The court has no jurisdiction to hear any matter unless it is properly moved. One cannot claim to have moved the court by a Notice of Motion when the matter should be brought under a Chamber Summons. If there was no difference between the two processes, assuming such an absurd state of ignorance, the Civil Procedure Rules would clearly have said so.

(c) Interests of non-parties to any proceedings are catered for through Objection Proceedings, which is well provided for under the Civil Procedure Rules.

(d) Prayer No.3 is very strange and unusual, and shows total misconception of law. How can an applicant pray that this court reviews its order or orders, and upon application of that, the applicant be removed from the proceedings!! Which proceedings? The application or the entire suit? How can a party sapply to be removed or cease to be a party after a Review? To whom would the orders made in the Review be directed then? This goes to show that the applicant is clearly a non-party to the proceedings and her interests lapse upon the Objection Proceedings being determined in her favour.

I have looked at the Supporting Affidavit, and I agree with the counsel for the Respondent that what is deponed herein is by and large, hearsay and the sources of the information therein are not disclosed. Being a holder of a general power of attorney does not give the deponent the knowledge which Order 18 rule 3 of the Civil Procedure Rules was directed at. Accordingly, paragraphs 3-8; 10-12 of the Affidavit of Mohamed Zafar Niaz are struck out. Having done that, it follows that the application is naked, and it too must be struck out as defective.

All in all therefore, I uphold the Preliminary Objections, and hold that the application is defective both in

terms of the prayers sought therein and the provisions under which the application is canvassed, and on the basis that the Supporting Affidavit is incompetent.

The Preliminary Objection is upheld, and the application dismissed with costs to the Respondent, and against the applicant.

DATED and delivered in Nairobi, this 17th day of June, 2005.

O.K. MUTUNGI

JUDGE