REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 2 of 2005

ABUBAKAR MADHUBUTI ..... PLAINTIFF

VERSUS

ANUPAM H. PAREKH ..... DEFENDANT

Coram: Before Hon. Justice Mwera

Maosa for the Applicant/Plaintiff

Magolo for Owino for the Respondent/Defendant

Court clerk – Kazungu

R U L I N G

The main prayer in the plaintiff's application dated 31-5-05 is that:

1) The defence filed herein on 20-4-05 (not 19-4-05) be struck out and judgement entered in favour of the plaintiff as against the defendant for Sh.11,193,104/-

The chamber summons was brought under O 6 r. 13 (1) (b) (c) (d), O 12 r. 6 Civil Procedure and S. 3A Civil Procedure Act. The Plaintiff swore a supporting affidavit detailing the long course of his claim. Mr. Maosa followed the same, highlighting points here and there.

As per ground 1 in the application, the court was told that the defence in question was incompetent, an abuse of the court process and not such as to resist the claim laid, because it was filed during the time when the defendant had, in anticipation of this suit filed on 13.1.05 rushed to court on his own petition, whereupon receiving order was issued in his favour on 7-2-05. That by force of that receiving order:

"1. That the suit herein be and is hereby marked stayed unless an order otherwise is made,"

That the defendant nonetheless without an order of the court went ahead to file the defence on 20-4-05. That the plaintiff successfully challenged the filing of the bankruptcy petition and on 1-4-05 Maraga J struck out the petition. Then the plaintiff approached the court which, on 4-5-05, set aside the orders staying the suit on 7-2-05.

The defendant who did not file a replying affidavit to challenge the depositions on facts as per the plaintiffs supporting affidavit nonetheless had Mr. Magolo put up a stiff opposition based on three (3) points initially filled as constituting a preliminary objection, but heard as grounds of opposition.

Mr. Magolo did not dispute the fact that between 7-2-05 and 4-5-05 proceedings in this suit had been stayed by force of the receiving order that the defendant had obtained against himself. But he argued that the stay order did not bar filing of pleadings and accordingly the defendant did not fall foul of the law or procedure by filing his defence on 20-4-05. To this court's mind, that stand is not without fault. If the defendant desired that anything proceedings, pleadings or whatever in the suit against him be stayed because he had obtained a bankruptcy receiving order, how would he then properly sneak his defence onto the file when his receiving order was still in force? The court cannot get the logic or the law and thus finds that filing of the defence on 20-4-05 when the receiving order was still in force is termed untenable. The defence is accordingly declared incompetent and of no effect. It should be struck out and it is. Mr. Magolo added that if the court found the defence to be incompetent then the plaintiff could only move to request for judgement and not in the manner he has moved here. Or that the suit could be stayed.

In the spirit of O 6 r. 13 (1) (b) (c) (d) Civil Procedure Rule this court may strike out or order to be amended a pleading, at any stage. In doing so the suit may be stayed, dismissed or judgement entered accordingly. In the present case the incompetent defence is considered an abuse of the court process. And having struck it out this court opts to give judgement for the plaintiff.

Mr. Magolo then faulted the manner in which the plaintiff, by chamber summons, sought to strike out the defence and also prayed to be given judgement on admission under O.12 r. 6 Civil procedure Rules. That an application under the latter provision of law should be by way of notice of motion and therefore judgement on admission should not be entertained here. This was in response to Mr. Maosa's position that the cause here arose from a decree following a judgement in HCCC 471/98. In that cause the plaintiff and the defendant had been jointly sued. The plaintiff paid the whole sum and now seeks contribution from the defendant for up to Sh.5,146,127/- to reimburse him. The plaintiff had claimed that contribution at 25% interest w.e.f. January 2005. Indeed the defendant sought to have the judgement in HCCC 471/98 set aside but he failed as per this court's ruling of 18-5-05. That followed the forceful argument that by agreement of 2000 between these 2 litigants, the defendant agreed to reimburse the plaintiff of Sh.5,146, 127/- (half of Sh.10,108,032/70 the two had jointly borrowed and were sued for in HCCC 471/98).

The court considered Mr. Magolo's point on the form of application, when one seeks judgement on admission. Agreed, the form is not set out under O.12 Civil Procedure Rules and so by virtue of O.50 r. 1 Civil Procedure Rules a notice of motion should be used. But here two prayers for judgement were sought – after striking out the defence (O. 6 r. 13 by chamber summons) and judgment on admission (O. 12 r. 6 Civil Procedure Rules, notice of motion). It can right away be seen that the two forms to apply to the court cannot be feasibly put in one application. Only one form of applying can do – either by notice of motion or chamber summons. In such a situation this court is inclined to accept any form by which it is approacheds (mixing the two sets of prayers) so long as no party is prejudiced. In the present proceeding prayers in an application that ought to have come by way of chamber summons and prayers that ought to have been laid by notice of motion ,came side by side in one application – by chamber summons. The defendant was heard and it is not shown that he is prejudiced. The court accepts that in the circumstances.

Now, had this court not found that the plaintiff was entitled to judgement on striking out the defence would he get judgement on admission? This court thinks so. The history of this cause is that the defendant agreed in 2000 to reimburse the plaintiff in the sum of Sh.5,146,127/- following the judgement in HCCC 471/98, at 25% p.a. w.e.f. January 2001. He did not honour it. He was sued here. After a week, on 20-1-05, to be exact, he affixed his own signature to:

> "ACKNOWLEDGEMENT
>
> I ANUPAM H. PAREKH, the defendant in HCCC No. 2 of 2005 (Commercial Division) do hereby admit owing KSh.11,194,104 all inclusive to the plaintiff ABUBAKAR MADHUBUTI.
>
> Dated at Mombasa this 20th day of January 2005.
>
> Signed (by defendant) ----------

Witnessed ----------.”

To this court such acknowledgement is clear an unequivocal. Granted, the claimed sum is Sh.5,146,127/- as per the plaint plus interest at 25% w.e.f. January 2001. But the defendant had bound himself to pay all that and all else agreed in a round figure of Sh.11,193,104/-. This court is not about to say more on this, save again to say that the plaintiff is entitled to this sum as per the admission. He gets it with costs.

It was not shown by the defendant whey this court lacked jurisdiction in this matter, and that ground is dismissed.

Orders accordingly.

Delivered on 22nd July, 2005.

J.W.MWERA

JUDGE