REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1520 OF 1999

DR. PAUL SHIUNDU…………………………………..…PLAINTIFF/APPLICANT

VERSUS

SAVANNAH DEVELOPMENT CO. LTD……………………….….1ST DEFENDANT

KARUSO INVESTMENT LTD. ………………..…2ND DEFENDANT/RESPONDENT

RULING

The plaintiff's application by Chamber Summons dated *17th March, 2000* and filed on 26th April, 2000 was brought under Order IXA, rules 10, 11 of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap.21).

The plaintiff's prayers were, firstly, that the interlocutory judgment entered against him, on the 2nd defendant's counterclaim, o*n 22nd September, 1999* be set aside. The second substantive prayer was that the plaintiff's reply to the 2nd defendant's defence and defence to counterclaim filed in Court on *1st September, 1999* be deemed as duly filed and served.

The application rested on the following grounds:

(i) that, the plaintiff has a good defence to the counterclaim;

(ii) that, the plaintiff's claim and the defendant's counterclaim are so intertwined they cannot be severed;

(iii) that the plaintiff has not yet served summons upon the defendant;

(iv) that the honest mistake of the plaintiff's advocate in not filing a defence to the 2nd defendant's counterclaim, should not be visited upon the plaintiff.

In support of the application is the affidavit of the plaintiff's advocate in this matter, *Ms. Nancy Ikinu* of M/s. Kangethe & Mola, Advocates. She deposes that she had, on *29th July, 1999* filed an application for an injunction to restrain the 2nd defendant from evicting the plaintiff; and the matter was set for inter partes hearing on *9th August, 1999*. On 30th July, 1999 the deponent was heard ex parte by *Mr. Justice Mitey*, and an order of injunction was given. On 13th August, 1999 the defendant filed and served a statement of defence and counterclaim. On 9th August, 1999 the deponent, together wit*h Mr. S.K. Ritho*, counsel for the 2nd defendant, appeared before *Mr. Justice Kuloba* and the learned Judge set the matter down for hearing on 4th October, 1999. On *6th August, 1999* the deponent received a memorandum of appearance as well as grounds of opposition from S.K. Ritho & Co. Advocates acting for the 2nd defendant. On 16th August, 1999 the deponent received a *plaint* by the 1st defendant who had obtained an

injunction against the 2nd defendant herein; and the 1st defendant was desirous of consolidating several suits relating to the same parties on the same issues.

It is deponed that the plaintiff filed and served defence to counterclaim on 1st September, 1999. The application of 29th July, 1999 should have been heard before *Kuloba, J* on *4th October, 1999* but it was not listed, and the Court file was not available. It turned out, it is averred, that the 2nd defendant had requested interlocutory judgment on their counterclaim of 13th August, 1999 and had filed an application for striking out the plaint and this *made the file unavailable* on *4th October, 1999* as it was with the Deputy Registrar for entry of default judgment. It is deposed that the defendant had obtained interlocutory judgment on the counterclaim even though summons had not been served, and notwithstanding the issues raised in the application of 29th July, 1999 which had not been heard and was pending for hearing on 4th October, 1999. The deponent avers that he had filed defence to counterclaim on 1st September, 1999 and served the same on S.K. Ritho & Co. Advocates on 2nd September, 1999. The deponent avers that the defence herein was filed two days after the due date; and he prays that it be deemed to be duly filed.

The deponent avers that the claim in the suit relates to ownership of property known as Nairobi/Block 82/1006 which the plaintiff and the 2nd defendant claim both to have purchased; and so that the plaint, defence, counterclaim and defence to counterclaim cannot be severed as the issues raised in the pleadings are substantially similar. The deponent avers that the prayers sought in the counterclaim require the hearing of evidence of the 2nd defendant by way of *proof* – but the matter has not been set down for proof. It is deponed that the 2nd defendant will suffer no prejudice if the interlocutory judgment is set aside. Counsel for the 2nd defendant, Mr. S.K. Ritho, swore and filed a replying affidavit on 19th June, 2000. The depositions may be restated in summary as follows:

> (i) that, the 2nd defendant had been *served* with Chamber Summons dated 29th July, 1999; a plaint dated 29th July, 1999; an affidavit and annexures, and temporary injunction orders dated 30th July, 1999;
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> (ii) that, the 2nd defendant entered appearance on 6th August, 1999; filed defence and counterclaim on 13th August, 1999 and the same were served on the plaintiff and the 1st defendant on 13th August, 1999 and this has been acknowledged by the plaintiff's advocates at para. 7 of their supporting affidavit;
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> (iii) that, as at 31st August, 1999 the plaintiff and the 1st defendant had not filed their reply to the statement of defence; that, interlocutory judgment was entered on *31st August, 1999* before the plaintiff had filed the defence to counterclaim; and therefore the said interlocutory judgment was properly and lawfully entered;
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> (iv) that, under Order IV, rule 3 suits are to be filed with summons to enter appearance; and this is what every plaintiff is deemed to have done;
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> (v) that, as the 2nd defendant had been served with the plaint, Chamber Summons and affidavit dated 29th July, 1999 the 2nd defendant had no choice but to enter appearance, and file defence and counterclaim and serve the parties as required by law;
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> (vi) that as at 30th August, 1999 when the 2nd defendant applied for interlocutory judgment, the plaintiff had not filed the defence to counterclaim and thus the entry of judgment was proper, in accordance with order VIII, rule 10.

With leave of the Court, *Stephen Reuben Karunditu*, the Managing Director of the 2nd defendant, swore a further affidavit on 14th June, 2004. Firstly he expressed agreement with the replying affidavit sworn by his advocate on 19th June, 2000. Secondly he averred that the 2nd defendant who is the first purchaser of the suit land, L.R. Nairobi/Block 82/1006 from the 1st defendant, has obtained two *interlocutory judgments*, one in HCCC No. 1580 of 1999 and the other herein, in HCCC No. 1520 of 1999, and the 1st defendant has not applied to set aside the interlocutory judgment given in HCCC No. 1520 of 1999 on 31st August, 1999 and *signed* on 29th September, 1999; and in the meantime, the 1st defendant's

application dated 30th November, 1999 to set aside the interlocutory judgment in HCCC No.1580 of 1999 was *dismissed* on 16th July, 2003. It is deponed that, as at now, the 2nd defendant has judgment against the 1st defendant in the suit HCCC No. 1520 of 1999 and also in HCCC No. 1580 of 1999; and the deponent believes to be true the advice of his advocates, that the purchasers of L.R. No. Nairobi block 82/1006 as privies of the 1st defendant are bound by the judgment entered against the 1st defendant in the instant case and against the plaintiff in HCCC No. 1580 of 1999 who is the same as the 1st defendant herein. The deponent avers that documentation on file is clear on certain facts: the 1st defendant had sold the suit land to the 2nd defendant before 1991 and all documents were executed in 1992, so that in 1992 the 1st defendant had no premises to sell to the plaintiff in the instant suit; L.R. No. Nairobi/Block 82/1006 had already been sold to the 2nd defendant. It is deponed that the plaintiff herein is claiming through the 1st defendant who had no rights to sell to the plaintiff in 1996, and consequently nothing had then been sold to the plaintiff.

At the hearing of the plaintiff's application, on 18th July, 2005 learned counsel, *Ms. Macharia* appeared for the plaintiff/applicant while learned counsel, *Mr. Ritho* appeared for the 2nd defendant. Mr. Ritho noted that he had filed a *notice of preliminary* objection on 19th June, 2000 even though he would propose that the same do **proceed** *as an integral part of the application* herein. Sometimes, in the course of hearing interlocutory applications for injunctions, counsel will concede that their preliminary objections filed in parallel with replying affidavits, may proceed as part of the hearing process on the application itself. Whenever that happens, the hearing plan on the interlocutory application must be regarded as *having been modified.* For a preliminary objection, in its essence, is a radical legal point which would necessitate the determination of the proceedings in *limine,* for the reason that unbeknown to the applicant, the Court has been moved on the basis of a misunderstanding of the law. So, if a notice of preliminary objection is merged into the normal hearing of the application, this must mean that the objector has withdrawn his claim that a radical legal point was being raised; he must have agreed to transform a threshold legal point into a *normal legal argument* to be considered as part of the merits of the submissions placed before the Court.

I will, therefore, treat the 2nd defendant/respondent's notice of preliminary objection of 19th June, 2000 as normal grounds of opposition, to be articulated *arguendo* and to be responded to by counsel for the applicant, especially in the final part of her submissions.

Learned counsel, *Ms. Macharia* indicated the main purpose of her client's application as, to have the interlocutory judgment (against the plaintiff) of "22nd September, 1999" set aside. As noted by counsel for the 2nd defendant, there is some confusion, especially on the part of the plaintiff, about the particulars of the interlocutory judgment in question. From the records, the position is that M/s. S.K. Ritho & Co. Advocates requested for interlocutory judgment on *30th August, 1999* and their letter was filed at the High Court Registry on *31st August, 1999.* However, the date of entry of interlocutory judgment by the Principal Deputy Registrar is shown as *29th September, 1999.*

Learned counsel submitted that the plaintiff had a good defence, filed on *1st September, 1999* to the 2nd defendant's counterclaim. She urged that the said defence, which was closely intertwined with the 2nd defendant's claim in the counterclaim, was a good defence which should be given a fair day in Court. Counsel submitted that pleadings had not closed, nor had service been effected, when the 2nd defendant had obtained interlocutory judgment. She admitted that the plaintiff's papers could have been filed earlier, but the Court file had gone missing. The counterclaim had been served on the plaintiff on *13th August, 1999;* and the defence to counterclaim had been filed on 1st September, 1999 – *two days late*. Counsel pleaded that the plaintiff's delayed response to the counterclaim was inadvertent.

There is a disputed point, as to whether summons had been served by the plaintiff, along with the pleadings. In line with the content of the supporting affidavit, *Ms. Macharia* stated that the plaintiff had *not yet served summons to enter appearance* upon the defendants, and so the plaintiff would have been under no obligation to file a reply to defence and defence to counterclaim. This would raise a puzzle of law which, perhaps, is not necessary in attempts to solve the issues in dispute herein. The 2nd defendant's position, which in general is entirely logical, is that pleadings are *not expected to be filed and served without the attendant summons;* and so the plaintiff should not be heard to say he filed and served his

plaint but was yet to serve summons entitling the 2nd defendant to reply as necessary. I would not, on this point, agree with the plaintiff that his obligation to file a reply to defence and defence to counterclaim had not yet accrued.

Learned counsel had a more serious point, with respect, when she submitted that her client's delayed filing of responding pleadings was inadvertent; that the Court file was before the Deputy Registrar and was unavailable; that it would be unjust to lock out the plaintiff in prosecuting his suit and defending against the counterclaim, especially when the issues in the suit and in the counterclaim are so intertwined that they can only be properly disentangled through full trial. *Ms. Macharia* urged that the annexures included with the supporting affidavit, just as much as the new issues raised by the 2nd defendant, notably the reference to a *different cause,* HCCC No. 1580 of 1999, indicated that *contentious issues* existed which cannot be justly resolved through interlocutory applications or determinations on the basis of interlocutory judgment.

Learned counsel urged that the plaintiff had committed a delay of no more than two days before answering to the 2nd defendant's counterclaim, and that this delay was to be blamed on the *advocate,* rather than on the plaintiff personally. She urged that the plaintiff be not penalized for such a mistake of counsel; and she expressed remorse for the mistake.

*Ms. Macharia s*aid that from her reading of the replying affidavit, she did not form the impression that the respondent stood to suffer prejudice if the interlocutory judgment was set aside. In her words: "The respondent should also concede that a full trial would also be of benefit to him." She expressed a willingness to take an early hearing date if the plaintiff's prayers were accepted.

In the main thrust of his submission, learned counsel*, Mr. Ritho*, devoted himself to *questions of substance*, rather than of *form* – which by contrast, had been the preoccupation of learned counsel for the plaintiff. Counsel for the 2nd defendant remarked that the plaintiff had been sued by the 1st defendant some two to three years after the 1st defendant had sold the suit land to the 2nd defendant, and consequently Court restrictions were imposed, preventing registration of the transfer. But then, in 1994 the 1st defendant sold the property again, as 2nd defendant had not yet taken possession. The defendant had to file a defence to the suit, on *13th August, 1999* because he had an injunction application which could only have credibility before the Court if there were defence pleadings lying behind it. Hence the statement of defence and counterclaim, served on both the plaintiff and the 1st defendant on 13th August, 1999. Mr. Ritho noted that neither the plaintiff, nor the 1st defendant filed a defence nor defence to counterclaim; and this is how the 2nd defendant came to apply promptly for interlocutory judgment. He observed that the interlocutory judgment was *signed on 29th September, 1999.*

It is quite clear from the pleadings, and from the applications and the depositions and submissions, that the main dispute in the instant matter is a complex one. It involves claims of *fraud,* in relation to the purchase of property, as well as the conflicting claims of several parties. Much pecuniary value is at stake, and there are possibilities of further suits being spawned out of the claims herein.

This would explain the counterclaim earlier referred to, with counsel for the plaintiff impeaching the interlocutory judgment as irregular since the plaint had been served without summons, and consequently the plaintiff still had no obligations to reply to any defence or counterclaim; and counsel for the 2nd defendant maintaining that the plaintiff's suit ought to have been accompanied by summons to enter appearance, and that the same was to be deemed to have been served upon the 2nd defendant. So, as can be seen, the 2nd defendant *deemed* summons to have been served upon him; counted days; and moved speedily to make a request for interlocutory judgment. Learned counsel for the 2nd defendant has also admitted that an undelayed filing of defence and counterclaim was in the best interests of the 2nd defendant who had to make a case for grant of injunction, and such responding pleading was the umbrella for the prayer for injunction.

I think it should be a principle informing judicial dispute resolution, that in a factscenario as complex as the one herein, there should be a slowness to enter interlocutory judgment. A detailed inquiry on *effectiveness of service* by parties, and on the *background to request for judgment*, should be conducted

before interlocutory judgment is entered. This is because, as soon as it is plain that the facts are so complex, the claims of justice will dictate that, prima facie, there should be a *normal trial.*

On that principle alone I would have been inclined to open up the instant proceedings to full trial. I am, besides, fortified in that inclination by certain specific considerations, taken in the context of one single question: Is it in accordance with the law, and with the best exercise of judicial discretion, that the impugned interlocutory judgment should be retained?

I do not think so. Firstly, the fact that the 2nd defendant's position, as expressed in affidavits and in the submissions of counsel, has been focused on fundamental claims and *issues of merit,* indicates that the proceedings must go to the merits – and that can only be in *full trial*. The relevant issues of merit are the ones which, when resolved, become an expression of justice and fairness. They cannot be determined by interlocutory proceedings.

Secondly, there is a misunderstanding of the date of the *interlocutory judgment;* and this, in my opinion, has led the 2nd defendant to wrong calculations of dates, and given the impression that the interlocutory judgment was regular. On this point even the plaintiff has not, with respect, got the correct picture and so he has proceeded on the basis that he had not filed responding pleadings as required.

Learned counsel, *Mr. Ritho*, acknowledged that the interlocutory judgment was signed on *29th September, 1999.* He did not, however, elaborate on the implications of that fact. As I have already noted, M/s. S.K. Ritho & Co. Advocates *requeste*d for interlocutory judgment on 30th August, 1999. The letter of request was filed at the Registry on *31st August, 1999*. How was that letter acted upon? It would, of course, be acted upon by the Deputy Registrar. When was action taken? The binding time-lines in such matters are those shown on the *Court record*. And the critical date is *29th September, 1999*. On that date the Principal Deputy Registrar entered and signed the interlocutory judgment, in the standard wrapping-up language of the Court, "Dated this 29th day of September, 1999". I believe the correct interpretation to be that the interlocutory judgment was delivered on *29th September, 1999.*

The implication is that even if the plaintiff had been dilatory in filing his defence to counterclaim on *1st September,1999* the interlocutory judgment when delivered on *29th September*, *199*9 found the reply to defence and defence to counterclaim *already on file*. The law, in these circumstances, stands in *favour of the plaintiff* rather than of the 2nd defendant; and the correct position is that the interlocutory judgment was irregularly obtained and must be set aside.

I will make the following orders:

1. The interlocutory judgment delivered on 29th September, 1999 against the plaintiff, on the 2nd defendant's counterclaim, is hereby set aside.

2. The plaintiff's reply to the 2nd defendant's defence and defence to counterclaim filed in Court on 1st September, 1999 shall be deemed duly filed and served.

3. Costs shall be in the cause.

4. The plaintiff shall take a date for the hearing (before any Judge in the Civil Division) of the main suit, and the same shall be given on priority.

DATED and DELIVERED at Nairobi this 30th day of September, 2005.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk : Mwangi

For the Plaintiff/Applicant: Ms. Macharia, instructed by M/S.

Kangethe & Mola, Advocates

For the 2nd Defendant/Respondent: Mr. Ritho, instructed by M/S. Ritho & Co.

Advocates