



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL SUIT 1488 OF 2000

A.J. LIMITED.....1ST PLAINTIFF

RONALD SHOMPA.....2ND PLAINTIFF

VERSUS

CATERING LEVY TRUSTEES.....1ST DEFENDANT

BOARD OF TRUSTEES, NATIONAL

SOCIAL SECURITY FUND.....2ND DEFENDANT

DAVID KIBUI T/A KIBUI & CO.3RD DEFENDANT

NEWMAN INVESTMENTS LTD.4TH DEFENDANT

RULING

On 22nd April, 2005 I had made a ruling on a preliminary objection to the main suit herein. My last words in that ruling were as follows:

“...in the result I cannot but uphold the preliminary objection. Accordingly I hereby strike out the amended plaint of 15th September, 2000 as against the 1st and 2nd defendants, costs being borne by counsel for the plaintiffs who clearly have filed suit without valid authority.”

Now the plaintiff returns before the Court with two applications by Notice of Motion. The first application, dated 7th of June,2005 carries the following prayers:

(a) that the Court be pleased to review its orders issued on 22nd April, 2005 pursuant to the 1st and 2nd defendants’ preliminary objection; and

(b) that the Court be pleased, pursuant to the review sought, to set aside its orders striking out the 1st plaintiff’s “amended defence/suit” [sic] against the 1st and 2nd defendants and reinstate the 1st plaintiff’s suit against all the parties for hearing.

In the second application, dated 12th July, 2005 the 1st plaintiff seeks leave to file a further supplementary affidavit in support of the application of 7th June, 2005 in view of new issues raised in the defendants’ grounds and their replying affidavit. The application of 7th June, 2005 is thus, the main one, and the one of 12th July, 2005 is a subsidiary application. The grounds for the plaintiffs’ main application

are as follows:

- (i) that, the orders being contested were granted “on the basis of a legal position that was outside the ambit and provisions of the Companies Act (Cap.486)”;
- (ii) that, the orders were “granted against the weight of the current judicial holdings on the question of verifying “affidavits”;
- (iii) that, the Court’s order had the effect of “condemning an innocent litigant for counsel’s mistakes contrary to the established legal holdings in questions”;
- (iv) that, “there [was] sufficient material to dissuade the Court against granting the drastic orders which the 1st plaintiff never had a chance to bring before the Court since he was not advised to give instruction before the preliminary objection was taken and neither could he file the said material at the preliminary objection stage.”

The 2nd plaintiff swears a supporting affidavit (dated 7th June, 2005) in which he avers that he is the managing director of the 1st plaintiff company and is authorised to make depositions on behalf of the 2nd plaintiff. He depones that he had innocently signed the verifying affidavit under the direction of his advocates, and craves an opportunity to rectify the affidavit in question. He depones that he was the remaining director of the company, and on that basis he had resolved to commence suit to recover the company’s property, and had duly instructed his advocates, M/s. Muriithi & Co. to commence suit. The 2nd plaintiff depones that the subject-matter of the suit is a fraudulent transaction in which the company lost its two most valuable assets, namely L.R. Nos. 209/297 and 209/296/1 situate between Bishops Road and Valley Roads in Nairobi, worth more than Kshs.300,000,000/=. The said properties had belonged to A.J. Ltd. and one Emmanuel Kisinane Njau who had, alongside the deponent, bought shares in the company in the 1980s. It is averred that the said property was fraudulently transferred to the 1st and 2nd defendants, through the 3rd and 4th defendant. To the main application and the supporting affidavit, counsel for the 2nd defendant filed a replying affidavit dated 24th June, 2005. He avers that, following the ruling of 22nd April, 2005 the plaintiffs had lodged a Notice of Appeal, on 28th April, 2005. It is averred that the order sought to be reviewed has not been extracted and annexed to the application — and that this renders the application incompetent. The deponent avers that only a letter, but not a resolution by the 1st plaintiff, had been exhibited as authority for the commencement of the suit. It is deponed that although the 2nd plaintiff avers that he and Kisinane Njau (deceased) held shares in the 1st plaintiff company on a 50% - 50% basis, the 2nd plaintiff has taken no action to involve the estate of Kisinane Njau in the management of the company.

For the 1st defendant, grounds of opposition were filed on 30th June, 2005 and carry the following points:

- (a) the application seeks the review of an order of the Court which has not been annexed;
- (b) the application seeks the review of an order of the Court from which an appeal has been preferred;
- (c) the application discloses no ground on the basis of which the Court can review the order of 22nd April, 2005;
- (d) the application does not set out a sufficient ground for a review to be considered;
- (e) the application seeks to set aside an order made pursuant to an inter partes hearing, while there are no provisions for setting aside orders made in those circumstances.

The advocates for the 1st defendant also filed grounds of opposition to the plaintiffs’ Notice of Motion of 12th July, 2005. The main objections are:

- (i) that, the application is bad in law, incompetent, misconceived, and an abuse of the process of the Court;

(ii) that, the application is only a reaction, in the light of substantive objections which the defendants have raised, in relation to the Notice of Motion of 7th June, 2005;

(iii) that, the facts which the applicant seeks to introduce by affidavit, were within his knowledge at the time of filing the application of 7th June, 2005;

(iv) that, the application is contrary to law. For the 2nd defendant, the objections to the plaintiff's subsidiary application are as follows:

(a) that, the application lacks merit, as it is made through the firm of M/s. Muriithi & Co. Advocates whose authority to act for the plaintiffs is negated by the Court's order of 22nd April, 2005 which order has not been set aside;

(b) that, the replying affidavit sworn by Anthony Milimu Lubulellah on 24th June, 2005 only touches on matters of record, but raises no new matter of fact which was not in the applicants' knowledge prior to the filing of the Notice of Motion of 7th June, 2005;

(c) that, the application is an abuse of the process of the Court since it seeks to covertly correct or amend a legal defect in the Notice of Motion of 7th June, 2005 and thereby defeat the ground of opposition to the effect that the main application is incurably defective, for failure to annex the Court order sought to be reviewed; and the application is in that manner, "meant to steal a match on the respondents, without formally amending the Notice of Motion";

(d) that, the applicants cannot rely upon the default or omission by their advocates as a legal basis and justification for filing a supplementary affidavit;

(e) that, the application is prejudicial to the respondents, since it is designed to deny the respondents a genuine and legitimate ground of challenge to the Notice of Motion of 7th June, 2005;

(f) that, the applicants are undeserving of a discretionary order such as they seek.

At the hearing of the plaintiffs' applications, learned counsel, **Mr. Namada** (holding brief for **Mr. Muriithi**), **Ms. Kemonto** (holding brief for **Mr. Ochieng**) and **Mr. Ashimosi** represented, respectively, the plaintiffs, the 1st defendant and the 2nd defendant.

Mr. Namada in presenting his clients' applications, submitted that the nature of the issues in dispute is such that it was necessary for the plaintiffs to invoke the unlimited jurisdiction of the Court to do justice. He contended that it was necessary for the applicant to file a further affidavit to answer new issues raised in the replying affidavit filed for the 2nd defendant on 24th June, 2005. He invoked O.L, rule 16(2) which provides that any applicant upon whom a replying affidavit is served under rule 16(1), may with the leave of the Court, file a replying affidavit. He contended that it was not necessary to identify the nature of the new matter claimed to be in the replying affidavit, as the law was silent on that issue. But counsel went further to submit that the depositions made for the 2nd defendant had touched on resolutions of the 1st plaintiff company, and so the plaintiffs would want to take up that point in a supplementary affidavit. This contention is, in my view, somewhat strange, since the issue of the plaintiff company being able to make resolutions had featured prominently in the ruling of 2nd April, 2005, and this gave it a level of importance that should not have escaped the 2nd plaintiff when he swore the supporting affidavit on 7th June, 2005.

Learned counsel, **Mr. Ashimosi**, submitted that the replying affidavit sworn by **Anthony Milimu Lubulellah** on 24th June, 2005 had not raised any matter other than what was already on record, for the reason that an advocate is not in a position to depone on contentious issues of fact in respect of which he has no personal knowledge. He noted, in this regard, that paragraphs 2, 3 and 4 of the replying affidavit were limited to the records of the Court; while paragraphs 5, 6, 7, 8, 9, 10 and 13 were concerned with

questions of law; and only in paragraphs 11, 12 and 16 had the deponent given an opinion, based on the documents on file. There was, therefore, no new issue in respect of which the plaintiffs should want to make new depositions.

Mr. Ashimosi submitted that the failure by the plaintiffs to extract the Court's orders of 22nd April, 2005 rendered the application defective.

Learned counsel for the 1st defendant, **Ms. Kemonto** adopted the submissions made for the 2nd defendant.

It is the case that after this Court's ruling was given on 22nd April, 2005 the plaintiffs, on 27th April, 2005 filed a Notice of Appeal. The Notice of Appeal reads:

“TAKE NOTICE that the plaintiffs herein, being dissatisfied with the whole of the ruling/order of the Honourable Mr. Justice Ojwang delivered on 22nd April, 2005 intend to appeal to the Court of Appeal for Kenya against the whole decision.”

The design and effect of the decision of 22nd April, 2005 was to terminate the plaintiffs' case in limine. During the proceedings, which were conducted on 24th January, 2005 and 8th March, 2005 the plaintiffs were represented by **Mr. Muriithi** of M/s. Muriithi & Co. Advocates; the 1st defendant by **Ms. Onyango** of M/s. Oraro & Co. Advocates, and the 2nd defendant by **Mr. Lubulellah** of M/s. Lubulellah & Associates Advocates, while the 3rd and 4th defendants chose not to be represented. An effective hearing did take place, in the course of which counsel present had all the opportunity to advance their clients' cases. A detailed record was kept of these proceedings; and it is on that basis that the ruling of 22nd April, 2005 was given. It is a 19-page ruling which gave comprehensive consideration to the main areas of argument advanced by learned counsel —

- (i) preliminary objection to the verifying affidavit and the suit;
- (ii) the swearing of an affidavit on behalf of a co-plaintiff;
- (iii) statutory requirements for indorsement on documents relating to legal proceedings;
- (iv) resolution of company to authorise commencement of suit;
- (v) filing suit without cause of action;
- (vi) preliminary objections, and the question of evidence;
- (vii) statutes and affidavits, and subsidiary rules and affidavits; and
- (viii) preliminary objections, and statements in pleadings.

In my analysis of those various points I remarked:

“While it is for certain that the Court will always be anxious to hear litigants on the merits of their suit, this does not excuse them from complying with the procedural law which regulates the conduct of hearings. If parties ignore the laws that accord them locus standi, or that regulate the process of hearing, they cannot expect the doors of the Court to be still open to them, and in this regard it will not matter the magnitude of the claims they are making.”

I carefully considered the case law which was brought to my attention and in the circumstances I upheld the preliminary objection.

So this is a most typical example of a case properly heard on the merits, in the presence of counsel who made their submissions both ingeniously and industriously. From that fact alone, this, as a matter of law,

is not a case for review by the Judge who gave the ruling. It was not at all alleged by counsel for the plaintiffs, that there was some error on the face of the record, or some oversight calling for rectification through review. What counsel for the plaintiffs was seeking was, in effect, a re-hearing on merits and then a setting aside of the decision of 22nd April, 2005. He was contesting a decision said to have been made “on the basis of a legal position that was outside the ambit of the provisions of the Companies Act...”; he claimed that the Court’s orders were “granted against the weight of the current judicial holdings...”, etc. These claims clearly amount to a contention that the Judge reached a decision not supported by law. To come back to the same Judge with such contentions, I now hold, amounts to turning the Judge into an appellate Court over his own decisions. It cannot be done.

To attempt such a course of action is, in plain terms, to abuse the process of the Court. In agreement with counsel for the defendants, I hold that the plaintiffs by their applications of 7th June, 2005 and 12th July, 2005 have abused the process of the Court. When they chose to file their Notice of Appeal on 28th April, 2005 they did the right and professional thing. But their applications in the High Court must be, and are hereby, dismissed with costs to the 1st and 2nd defendants.

Orders accordingly.

DATED and DELIVERED at Nairobi this 28th day of October, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiffs/Applicants: Mr. Namada, instructed by M/s. Muriithi & Co. Advocates

For the 1st Defendant/Respondent: Ms. Kemonto, instructed by M/s. Oraro & Co. Advocates.

For the 2nd Defendant/Respondent: Mr. Ashimosi, instructed by M/s. Lubulellah & Associates Advocates