



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 61 of 1998

SAVINGS & LOAN (K) LTD PLAINTIFF

VERSUS

FRANCIS N.M. GITHIARI DEFENDANT

RULING

By their Notice of Motion dated 26.9.2005 and filed on 27.9.2005, the Defendants sought three primary orders. These are:-

1. **That the firm of Murage and Mwangi Advocates be granted leave to act for the Defendants.**
2. **That the exparte Judgment entered herein on 2.11.2001 and all consequential orders be set aside reviewed and or varied.**
3. **That the Court be pleased to order a stay of execution of the decree herein pending the hearing and determination of this application.**

The Notice of Motion was expressed to be brought under Section 3A of the Civil Procedure Act, Order 1 Rule 10 (1), Order XX1 Rule 22, Order XLIV Rules 1 and 2 and Order 1XA Rule 10 of the Civil Procedure Rules. The application was made on the principal grounds that:-

- a) **The entire proceedings are null and void *ab initio***
- b) **The Defendants have a good defence to the Plaintiff's claim.**
- c) **The Order for arrest and committal was issued in contravention of Order XX1 Rule 18 of the Civil Procedure Rules.**
- d) **It is in the interest of justice that the ex parte judgment be set aside to accord the Defendants a chance to be heard on the matter.**
- e) **The Court had no jurisdiction to enter the ex parte judgment.**
- f) **The Applicants are likely to suffer irreparably if a stay is not granted.**

On 27th September, 2005, the application came up before Ransley J. who granted an interim stay of execution pending the hearing of the application inter partes.

On 2.11.2005 the Plaintiff's advocates filed a Notice of Preliminary Objection to the application based on the grounds that the application is void *ab initio* incompetent and an abuse of the process of the Court since it has been filed by a firm of Advocates who are not on record and that the firm of Murage and Mwangi Advocates currently do not have any right of audience in these proceedings.

When the Notice of Motion came up before me for hearing inter partes on 3rd November 2005 I allowed the Preliminary Objection to be argued first. Counsel for the Plaintiff was brief and to the point. He argued that M/S Murage and Mwangi Advocates were seeking to come on record and yet they had not invoked Order 3 Rule 9A of the Civil Procedure Rules under which the Court's jurisdiction had to be invoked and further that leave to come on record was to be obtained first by a separate application before seeking other orders. In the premises, it was argued for the Plaintiff that the Notice of Motion is void *ab initio* and should be struck out with costs.

The Objection was opposed. It was argued that the intension of Order 3 Rule 9A of the Civil Procedure Rules is to regularize representation and was primarily intended to prevent a successful litigant from depriving the benefits of a decree from his advocate. Counsel for the Defendants submitted further that the Court retains jurisdiction to do justice to the parties and has power to entertain an application pending compliance with Order 3 Rule 9A. In Counsel's view, the Preliminary Objection had no merit and should be dismissed. He further urged that prayer 2 of the Notice of Motion be allowed to pave way for canvassing of the other prayers.

The above are the rival submissions on the Plaintiff's Preliminary Objection. I have carefully considered the submissions. I have also considered the application. In my view the Objection is basically a technical objection. It is clear that the requirement to seek leave to come on record where judgment has been passed was introduced in our Civil Procedure Rules by Rule 9A of Order 3 of the Civil Procedure Rules by Legal Notice No.128 of 2001. This rule has not been invoked. Does this omission invalidate the Notice of Motion. I think not. Indeed in my view Order L. Rule 12 of the Civil Procedure Rules prohibits objection being raised against such lapses.

The prayer to come on record has been clearly spelt out in the Notice of Motion. The Plaintiff has not demonstrated how it has been prejudiced by the failure to invoke Order 3 Rule 9A of the Civil Procedure Rules.

With respect to the argument that the prayer to come on record should have been made in a separate application, I am afraid I see no merit in the submission. Rule 9A of Order 3 reads:-

“Where there is a change of Advocate, or where a party decides to act in person having previously engaged an advocate after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record.”

This rule has been phrased deliberately in my view to acknowledge that before the court gives effect a change has in fact been made. I agree with the present Counsel for the Defendants that the Court has inherent jurisdiction to do justice to the parties and can entertain an application partly pending compliance with Order 3 Rule 9A of the Civil Procedure Rules. It is this jurisdiction which Ransley J. invoked when he ordered an interim stay of execution on 27.9.2005 before the Court entertained prayer 3 of the Notice of Motion.

I see no prejudice that has been occasioned to the Plaintiff by the failure of the Applicants to separate the prayer for leave to come on record from the rest of the prayers.

The upshot of these considerations is that the Preliminary Objection fails and is dismissed with costs.

Counsel for the Defendants urged me to allow prayer 2 of the Notice of Motion to avoid further delay. The former Advocates of the Defendants have been served with the Notice of Motion. They did not file any response by way of Grounds of Opposition or Replying Affidavit. They also did not attend the Court

on 3.11.2005 when the Notice of Motion came up before me for hearing. I see no impediment to the firm of Murage and Mwangi Advocates coming on record in place of the said former Advocates of the Defendants. To pave way for the hearing of this Notice of Motion, I grant prayer 2 of the same.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-