REPUBLIC OF KENYA

IN THE HIGH COURT OFKENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
Civil Case 329 of 2005

LUKAS NJUGUNA S. KAROBIA……PLAINTIFF

VERSUS

CONSOLIDATED BANK (K) LIMITED……DEFENDANT

R U L I N G

This is an application by the Defendant, pursuant to the provisions of Order 4 rule 3; Order 6 rule 13(1)(d); Order 39 rule 4; Order 50 rule 1, of the Civil Procedure Rules; as read together with Sections 9, 31 and 34 of the Advocates Act; and Section 3A of the Civil Procedure Act.

Essentially, the Applicant is asking for the discharge, setting aside or variation of the prohibitory injunction order which had been granted in favour of the Plaintiff, on 27th June 2005. The said orders had been made after the court had heard the Plaintiff's application dated 20th June 2005. Now, the Applicant is asking not only for the discharge of the orders previously made, but also for the striking out of the application dated 20th June 2005.

The application is premised on four distinct grounds, namely;

(i) Material non-disclosure,

(ii) Failure to serve the Plaint and Summons on the Defendant,

(iii) Advocates lack of a valid practising certificate, and

(iv) Absence of a prayer for a permanent injunction in the suit.

I believe that it will be convenient to delve into each of the grounds in turn. First, I will deal with the last ground, which asserts that the prayers in the application were at variance with those in the Plaint.

It was submitted, by the applicant, that whereas the Plaintiff's application had been for a temporary injunction, there was no prayers, in the plaint, for a permanent injunction. Instead, the only relevant prayer in the plaint was for a declaration. Therefore, as far as the defendant was concerned, that implied that the Plaintiff's application should have been dismissed, on account of the variance between the plaint and the application.

The defendant cited **DISMAS ODUOR OWUOR V. HOUSING FINANCE CO. (K) LTD ANOTHER, HCCC NO. 630 of 2001**, as authority for the proposition that an interlocutory

injunction ought not to be granted if the prayers were at variance with the injunctive prayers in the suit.

In that suit, Ringera J. (as he then was) held as follows, at page 8 of his Ruling:-

"**The defendant's interlocutory application of 7th June 2001 is inconsistent with the prayers sought in the suit. Whereas in the suit he is seeking an injunction to restrain the sale of the charged property, in the application he is seeking to restrain the transfer of the said property to the auction purchaser and other consequential or subsequent dealings with the property. The Plaintiff, in my opinion, cannot be granted interlocutory orders, which are at variance with the permanent orders sought. I think he goofed in not amending his plaint before amending the chamber summons. He could not be allowed to injunct a transfer by the chargee to the auction purchaser without amending his plaint to challenge the auction sale complained of. And although the court has power to nullify a sale if fraud is proved, I do not think it can do so in an interlocutory application wherein the purchaser is not even a party."**

There is no doubt in mind that the above-cited words correctly spell out the legal position. I say so because one can only seek to restrain a sale if the same had not yet taken place. However, if a property had already been sold, the applicant could then only seek to restrain the transfer thereof. Therefore, if the Plaint is seeking to stop the sale of a property after the event, there would be no probability of the said suit succeeding. It is for that reason that the court, in that suit, held that the application was inconsistent with the suit, as the application acknowledged that the property had been sold; yet at the same time, the suit was seeking to stop the sale. Obviously, those two prayers were not in sync.

Now, in this case, the substantive prayer in the Plaint is for a declaration, to the effect that the Defendant's intended action, for the sale of the suit property, would be illegal and wrongful. The basis of that prayer was said to be the fact that there was no nexus between the Plaintiff and the Defendant. It was the Plaintiff's case that the mortgagor was **HOME SAVINGS AND MORTGAGES LIMITED**, and not the defendant. Therefore, as far as the Plaintiff was concerned, the defendant had no legal power or authority to sell the charged property, as the said defendant was essentially a stranger to the plaintiff.

A perusal of the application reveals that the plaintiff took up the same theme. He believes that the defendant should be stopped from selling the charged property, because the defendant was not the chargee, and therefore did not have the legal capacity to exercise the statutory powers of sale under Section 74 of the Registered Land Act.

In my understanding, the averments in the plaint are wholly consistent with those in the application. Secondly, if the court were to ultimately grant a declaratory order, to the effect that the defendant had no power to sell the charged property, the said order would effectively act as a permanent injunction against the defendant.

In the circumstances, I hold that there is no merit in the submission to the effect that the interlocutory application should have been dismissed on the grounds that it was at variance with the prayers in the plaint.

The second issue which was urged by the defendant was that the application, as well as the suit be struck out, following the Plaintiff's failure to serve the defendant with the Plaint and Summons.

Mr. Otieno, advocate for the defendant pointed out that the provisions of Order 4 rule 3 of the Civil Procedure Rules were mandatory. He submitted that a plaintiff must serve the defendant with a Plaint and Summons. In this case, the defendant had not yet been served with the Plaint and Summons, even as late as 15th August 2005, when the defendant filed the

present application.

When it is borne in mind that the Plaint was filed on 20th June 2005, simultaneously with the injunction application, the defendant contends that the failure to serve the plaint and Summons amount to a failure by the Plaintiff to prosecute the suit. It is for that reason that the defendant feels that the suit should therefore be dismissed, for want of prosecution.

When I asked the defendant's advocate for any authority to back his submissions, he said that he had none. And, I must say that I was not surprised, because there are very specific rules for the dismissal of suits, for want of prosecution. But, the defendant has not satisfied me that this case falls within the circumstances contemplated by Order 16 of the Civil Procedure Rules. Furthermore, the defendant has not demonstrated that the suit has actually not been prosecuted, as alleged. If anything, this suit has been very active indeed. It was instituted on 20th June 2005. On that same date, the Plaintiff filed an application for interlocutory reliefs. The said application was first dealt with, exparte, on 21st June 2005. Then, the application was again back in court on 27th June 2005, on 29th September 2005, and on 24th October 2005. Therefore, if there is something which the plaintiff or the defendant cannot be guilty of, it is the failure to prosecute the suit.

But, at the same time, it has not been denied by the plaintiff that he had not served the defendant with the plaint and summons. A perusal of the court file has yielded a copy of summons dated 28th June 2005. The date of the summons leads me to presume that the plaintiff did comply with the provisions of Order 4 rule 3(5), which stipulates as follows:-

"**Every Summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub-rule (2) of this rule."**

Pursuant to the provisions of Order 4 rule 3(1), the summons ought to have issued to the defendant, ordering him to appear within the time specified on the face thereof. And, the summons should have been accompanied with a copy of the Plaint.

Notwithstanding those very clear rules, the plaintiff has not yet served the defendant with the Plaint and Summons. The failure so to do, has nothing to do with difficulties experienced by the plaintiff, in tracing the defendant, as the plaintiff was able to serve the application dated 20th June 2005, as early as 23rd June 2005. The plaintiff has no justifiable reason for the delay in serving the plaint and summons. He must be told, in no uncertain terms, that that is wrong. And, for that, he is hereby censured, and so also his advocate. Their said conduct may well weigh against them, when the court is called upon to exercise its discretion in the light of the equitable remedies sought herein. However, I do not think that the failure to serve the Plaint and Summons, would, by itself, be sufficient ground to strike out or dismiss the application or plaint.

Material Non-Disclosure

The defendant contends that the interlocutory orders which were granted on 27th June 2005 should be discharged, on the grounds that the plaintiff was guilty of material non-disclosure.

It was the defendant's case that the plaintiff had told the court that there was no relationship between him and the defendant, as the said defendant had no nexus with the chargee, **HOME SAVINGS & MORTGAGES LIMITED**. That information was a blatant lie, said the defendant.

In order to illustrate the point, the defendant drew the court's attention to correspondence exchanged between its advocates and the advocates for the plaintiff.

On 4th February 2005, the plaintiff's advocates wrote to Lumumba Mumma & Kalume, advocates for the defendant. By that letter, the plaintiff sought a copy of the debt assignment between the defendant and Home Savings & Mortgages Limited. He also sought a copy of the new charge, by the defendant. And, finally, he asked for a document by which he made a commitment to the defendant.

In response to that letter, the defendant's advocates wrote back on 11th March 2005, stating inter alia that;

"**The Consolidated Bank Act provided for assets and liabilities assignment from the previous institution to Consolidated Bank of Kenya Limited. You may refer to the Act for guidance."**

It is apparent that the defendant had notified the plaintiff about the manner in which it took over the assets and liabilities of Home Savings and Mortgages Limited. Furthermore, by Legal Notice No. 136, which was made on 25th July 2002, the then Minister for Finance, Mr. C.M. Obure had notified the public as follows:-

"**Subject to Section 3 of the Act, all the undertakings of the institutions specified in the Schedule shall, by virtue of the Act and without further assurance, rest in the Consolidated Bank of Kenya Limited."**

The Home Savings and Mortgages Limited was one of the nine institutions listed in the schedule.

I hold the considered view that whether or not the plaintiff accepted the accuracy of the information contained in the letter from the defendant's advocates, he was obliged to draw the courts attention to the same. Thereafter, if he was convinced that the said advocates had got it wrong, the plaintiff would have made appropriate submissions to the court, to prove that the defendant had no nexus with the chargee.

But, as it is, the plaintiff only told the court that he had never charged his property to the defendant. The plaintiff also asserted, in the plaint, that the defendant had no power of sale under Section 74 of the Registered Land Act. It is that averment which persuaded the court to grant the interlocutory injunction, as the court believed that:-

"**the Defendant, CONSOLIDATED BANK (K) LIMITED, has no nexus with either the plaintiff or the charged property."**

It is my considered view that had the plaintiff brought to court's attention the correspondence which his lawyers exchanged with the defendant's advocates, and also the Legal Notice No.136 of 2002, the court would most probably have not made the decision in the manner it did. In other words, the court was led to the conclusion it made then, due to material non-disclosure. Indeed, I would go further to say that the plaintiff herein was guilty not only of material non-disclosure, but also of concealment.

On that basis alone, the plaintiff became disentitled to the grant of the equitable relief of an interlocutory injunction. Accordingly, the interlocutory orders are hereby discharged, as the plaintiff has proved himself unworthy of the said relief.

In arriving at this conclusion, I have not merely presumed that for any non-disclosure, an order that was given earlier should be discharged. In my considered view, the clincher is the fact that the plaintiff's advocate had given due consideration to the issue of nexus (between the defendant and the charges) prior to the institution of the suit. He therefore considered it to be very material to the plaintiff's case. Yet, even though he got a very definite answer to the issue, he failed to reveal it to the court; choosing instead to harp on something which had already

been answered. It is for that reason, that I hold the considered view that the plaintiff should be deprived of the advantage he may have derived by the defendant's allegedly unlawfully actions.

Practicing Certificate

The plaint herein, as well as the application dated 20th June 2005 were drawn and signed by **M/s SAM KARUGA WANDAI & CO. ADVOCATES.**

The Law Society of Kenya has provided information to the effect that Mr. Sam Karuga Wandai did not hold a current practising certificate, as at 1st August 2005.

Mr. Wandai does not deny the fact that by 1st August 2005, he did not have a practicing certificate for the year 2005. The question that then arises is whether or not the Plaint and the application are rendered incompetent, by virtue of the fact that the person who drew and signed the same did not have a practising certificate at the material time.

As far as the defendant is concerned, Mr. Karuga Wandai was not only incompetent to draw or sign the Plaint and Application; he was also in contempt of court by instituting the proceedings and prosecuting the application.

But, the defendant's advocate holds the view that he was legitimately on the roll of advocates, and was thus entitled to draw up pleadings, as he had done. Furthermore, having renewed his Practising Certificate for the year 2005, Mr. Karuga Wandai, contends that the said certificate legitimised his actions for the whole year. He believes that it was only those persons who had not ever qualified as advocates, who were not authorised to draw up pleadings. In his view, there was a distinction between advocates who had delayed in renewing their practising certificates, and persons who had never qualified as advocates.

Section 9 of the Advocates Act provides as follows:-

"**Subject to this Act, no person shall be qualified to act as an advocate unless –**

(a) he has been admitted as an advocate; and

(b) **his name is for the time being on the Roll; and**

(c) **he has in force a practising certificate; and**

for the purpose of this Act a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of Section 27 or by an order under Section 60 (4)."

The ordinary meaning of the said section makes the point that for a person to be qualified to act as an advocate he would need to have been admitted as an advocate, and be on the Roll. But that was not sufficient, as suggested by the plaintiff's advocate, as there was also the requirement for the person to have in force, a practising certificate. Therefore, in my considered view, the plaintiff's advocate cannot be right, to contend that all he needed was to have been admitted as an advocate, and to be on the Roll. He also had to have a current practising certificate.

Section 34 of the Advocates Act stipulates that no unqualified person shall either directly or indirectly take instructions or draw or prepare any document or instrument, including such documents as relate to any legal proceedings.

Therefore, if the plaintiff's advocate was not qualified to act as an advocate, he was not

competent to draw the Plaint or the application dated 20th June 2005.

In this case, the plaintiff's advocate did endorse or cause to be endorsed on the plaint and the application, his name and address. By so doing, the advocate complied with the provisions of Section 35 of the Advocates Act.

However, even though Mr. Karuga Wandai did comply with Section 35 of the Advocates Act, he was not, at the time when he drew the plaint and the application, qualified to act as an advocate, as he did not have, in force, a practising certificate.

In **KAJWANG V. LAW SOCIETY OF KENYA [2002] 1 KLR 846,** Amin and Mulwa JJ declined to declare invalid the documents which were signed by an advocate who did not possess a valid practising certificate. In arriving at that decision, the court expressed itself as follows, at page 855:-

"**It would be a great disservice to litigants if they were constrained to inquire from the society or courts of the qualifications of every advocate they do want to engage. It would be an affront to logic that, where juxtaposed, actions of doctors, engineers, pharmacies, accountants or any other professional requiring an annual practising certificate, be deemed illegal, invalid and void *ab initio* merely because the person conducting such actions did not have in force the required certificate."**

The court went on to state that the relevant disciplinary mechanism as administered under the Advocates Act were an appropriate remedial measure, so that the litigant would not bear the sweeping brunt of the illegality and striking out of pleadings.

To my mind, the decision in that case needs to be appreciated within the special circumstances of that matter.

First, the issue was raised as a matter of a Preliminary Objection. The said objection was raised in the course of the appeal hearing, when the appellant's advocate had closed its submissions.

Secondly, the respondent was the Law Society of Kenya, which was the body charged with issuing practising certificates, as well as keeping records in that record.

The court held that the Society was guilty of "**selective**

concealment and utilisation of information," a practice which was not favoured by the court. It was the court's view that if the Law Society wished to raise the said issue, it should have done so at the earliest opportunity. Therefore, the court expressed the view that the Society could not be allowed to benefit from its own shortcomings.

I therefore do not think that the decision has universal application to cases in which an advocate did not have a current practising certificate, as at the time when he drew up pleadings, or signed the same.

In **OBURA V. KOOME [2001] 1 EA 175 at 177,** the Court of Appeal held as follows:-

"**In these circumstances, the memorandum of appeal is incompetent having been signed by an advocate who is not entitled to appear and conduct any matter in this Court or in any other court. Accordingly, we strike out the appeal with costs thereof to the Applicant including the costs of the notice of motion dated 26th February 2001.**

That decision is binding on the High Court. The Hon. Ondeyo J. applied it in **DELPHIS BANK LTD V. BEHAL & OTHERS [2003] EA 412 at 414,** where she said:-

"**Similarly, in this case the plaint was signed by an advocate working with Lumumba & Mumma Advocates, but the said advocate had no practising certificate at the time. He was therefore unqualified and not entitled to appear and conduct any proceedings in this or any other court. The plaint filed herein on 1 March 2002 is therefore incompetent. I allow the application dated 30 April 2003 and order that the said plaint filed herein on 1 March 2002 and signed by Mr. Oyiembo advocate be and is hereby struck out with costs to the second defendant/applicant."**

I believe that that is the correct legal position. The fact that an advocate obtains a practising certificate after drawing up a plaint and an application, cannot cure that which was done at a time when he did not hold a current practising certificate.

In conclusion, I do hold that the plaint and the application dated 20th June 2005 were both incompetent, on the grounds that they were drawn and signed by an unqualified person. Even though Mr. Karuga Wandai was an admitted advocate, and one who was on the Roll at the time, that was not sufficient. He should have had a current practising certificate as at 20th June 2005, to be deemed as a qualified person.

Accordingly, the plaint dated 20th June 2005, as well as the plaintiff's application of like date are hereby struck out. The costs of the said suit and of the application are awarded to the defendant.

Dated and Delivered at Nairobi this 15th day of November 2005.

FRED A OCHIENG

JUDGE