



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBIMILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 250 OF 1999

JOSHUA OKEYO NG'ANI PLAINTIFF

VERSUS

LION MOTOR DEALERS &

TECHNICAL INSTITUTE 1ST DEFENDANT

ZION CREDIT LIMITED 2ND DEFENDANT

RULING

This is an application by the 1st Defendant to have this suit struck out and/or dismissed as against it and the 1st Defendant's name be struck out from this suit or in the alternative the suit be stayed. The application is opposed.

The Plaintiff filed this suit way back in March 1999. After various applications were heard and disposed of the 1st defendant filed this application on 6th November, 2003. In the application the Applicant is purported to be one Jackson Mackenzie who according to the supporting affidavit sworn on 6th November, 2003 is an advocate instructed by the firm of M/s Wanjao & Wanjau Company Advocates for the defendants. No objection was raised against the description of the said advocate as the Applicant. I believe counsel for the Plaintiff did not raise objection as he believed the misdescription of the applicant is an inconsequential error.

The Plaintiff's counsel however raised objection against the affidavit sworn by the said advocate on the ground that as counsel he should not have sworn the said affidavit. He relied on the case of Nairobi HCCC No 1340 of 1999 to support his contention. He urged that the said affidavit be struck off.

I can dispose of the issue of the "defective" affidavit now. The offending affidavit in Nairobi HCCC No 1340 of 1999 contained facts in dispute between the parties. The offending paragraphs were accordingly struck out.

In the present case the applicant's counsel has deponed to matters of law and not contested matters of fact. In my view counsel is the best deponent regarding matters of law. Objection raised against Mr Jackson Mackenzie's affidavit is rejected.

I revert to the application for striking out the 1st defendant from the record on the ground that it is a firm and has no capacity to be sued. Both advocates rely on the provisions of Order 29. The 1st defendant's

advocate quotes Rules 1 and 2 (1) (2). The Plaintiff's advocate quotes Rules 2 and 4 of the said Order.

In my view, there is no provision under Order 29 1 or 2 which invalidates suits by or against a firm. Indeed it is clear from the reading of the said Order 29 Rule 9 and the quoted Rules that a firm is capable of being sued. Indeed the record is quote clear as to who the proprietor of the 1st defendant is.

If there is insufficient material regarding the proprietor or proprietors of the 1st defendant the same can be resolved by an appropriate application by the Plaintiff. The case of the KING VS HOLDEN 1 KCB 1911 page 483 stated the correct position in law but the facts are not relevant to the present case.

Before concluding this matter I should comment on the submission that as the applicant has not shown that the application is scandalous, frivolous or vexatious the application is in competent. The Applicant's counsel clearly abandoned reliance on these grounds. It is not therefore necessary to say anything further about this.

In the result the application is dismissed with costs.

Dated and delivered at Nairobi this 16th January, 2004.

F. AZANGALALA

JUDGE

16.1.2004