



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL CASE NO. 400 OF 2001

BAHRIYA PETROLEUM LTD.....PLAINTIFF

=V E R S U S=

1. GULF OIL COMPANY.....1ST DEFENDANT

2. GIRO BANK LTD.....2ND DEFENDANT

R U L I N G

The 2nd Defendant has applied for setting aside of judgment entered against him by the 1st Defendant. The grounds upon which the application is made are stated on the body of the application. There is also supporting affidavit of Mr. Otieno, counsel for the Applicant. The 2nd Defendant (co-Defendant) filed a Counter-Claim against the Applicant and obtained judgment ex-parte in default of the 2nd Defendant failure to file a Defence to the Countr-Claim. The 1st Defendant filed a Counter-Claim against the Plaintiff and the 2nd Defendant concerning a guarantee issued by 2nd Defendant at the request of the Plaintiff. The amount claimed is US.\$ 50,212.55 plus interest and costs.

It is not disputed that the 1st Defendant failed to follow the procedure set out under Order 1 rule 21 which permits a co-Defendant to pursue his claim for contribution or indemnity against his co-Defendant.

The 1st Defendant simply says that it has a claim for payment against both the Plaintiff and the 2nd Defendant and that is what he has counterclaimed for and there being no defence filed within 15 days he requested and obtained ex-parte judgment.

The court has perused the request for judgment. It is made only against the 2nd Defendant. I have also perused Civil Procedure Rules Order VIII rule 2 which states:-

“a defendant in a suit may set off or set up by way of counter-claim against the claims of the plaintiffand such set-off or counterclaim shall have the same effect as a cross suit.....”

A counter-claim is set up against the claims of a Plaintiff in the Plaintiff’s suit. It is not mandatory to make a counter-claim and the court may refuse permission for the counterclaim to be set up.

In case of the co-Defendant wishing to raise any claim against another party who is already a party to the suit provisions of Order 1 rule 21 apply:-

“21.(1) Where a defendant desires to claim against another person already to the suit:

a) that he is entitled to contribution or indemnity or

b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action which is substantially the same as some relief or remedy claimed by the plaintiff, or

c) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and defendant and should be properly determined not only as between the plaintiff or the defendant but as between the plaintiff and the defendant and such other person or between any or either of them the defendant may without leave issue and serve on such other person a notice making such claim, or specifying such question or issue.

The procedure to be adopted in determining such claim shall be same procedure as if such other person was a third party under this order.”

The Plaintiff is claiming under guarantee dated 23rd June, 2001. The 1st Defendant’s claim is also under the same guarantee which was given by the 2nd Defendant.

From the pleadings of the Plaintiff and the Defendants I am convinced that the suit involves the same questions, claims and issues and I find the procedure to be adopted by 1st Defendant can only be under Order 1 rule 21 and not by counter-claim.

In the circumstances, I find the ex-parte judgment entered herein was entered unprocedurally and therefore irregularly.

No defence or appearance is required under Order 1 rule 21. But directions must be obtained as provided.

For these reasons I allow application and grant orders sought.

Costs shall be in the cause.

Dated this 4th day of June, 2004.

JOYCE KHAMINWA

J U D G E

4/6/04

Khaminwa, J.

Chege – Court Clerk

Mr. Tindika

Ms Osire

Mr. Kaimbya

All present in court when the Ruling is read.

JOYCE KHAMINWA, J.