

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

Civil Suit 65 of 1999

PENINAH OMUONY MANGALA.....PLAINTIFF

V E R S U S

TRUST BANK (K) LTD.....DEFENDANT

R U L I N G

On 12th July, 2001, the Taxing Master of this court taxed the Defendant's Bill of costs in the sum of Shs.217,584/20 and thereafter execution proceedings were put in hand against the Plaintiff/Judgment/debtor. Subsequently an application was made by the judgment debtor dated 8.11.2004 seeking, inter alia, stay of execution. It was withdrawn later and the Notice of Motion made on 16.5.2005. It was dated 12.5.2005. The plaintiff judgment-debtor sought in it a multiplicity of orders the main ones being stay of execution of the orders made on 24.2.99 and review of such orders.

On 10.6.2005, the plaintiff judgment-debtor filed a chamber summons dated 9.6.2005 seeking orders to amend the said Notice of Motion by deleting some words erroneously written and inserting the correct words and by introduction of a prayer numbered 7A seeking orders that one Rajin K. Somaia, an advocate, be compelled to pay the sum of Shs.198,551/= being overpayment or money received by him from the judgment debtor.

The court has unfettered discretion to order amendment of pleadings with the object of ensuring that all the relevant matters are brought before it to facilitate fair determination of the dispute between the parties. However, where an amendment sought is prejudicial to the other party or is likely to undermine fair play or the ends of justice, the court will be disinclined to grant it.

Mr. Adala, advocate, who appeared for the judgment debtor passionately urged me to grant the orders for the amendment of the Notice of Motion dated 12.5.2005 in the manner reflected in the amended Notice of Motion annexed to the chamber summons application. Mr. Onger, Advocate, on behalf of the judgment creditor robustly opposed the application for amendment.

I have perused the chamber summons application and the replying affidavit thereto. I have also given due consideration to the submissions of both counsel. The proposed amendments to the Notice of Motion are a veiled attempt to seek rebate of the decretal dues on the ground that the decree holder's advocate, one Rajin Somaia, has been paid Shs.198,551/= by the judgment debtor. This, to my mind, is a matter that could and should have been raised during the taxation of the Defendant's Bill of costs. The Taxing Master has jurisdiction to entertain an application for review of his decision if it is desired to show that the taxed amount did not take into account amounts paid to the judgment creditor through its advocate. In effect, the judgment debtor seeks amendment quite patently to enable him to argue that he is entitled to credit for the money he alleges to have paid to the judgment creditor's advocate in other cases in which the judgment creditor was not a party. A judgment creditor ought not to be dragged into such matter and I consider the proposed amendments prejudicial to the judgment-creditor and undesirable. The judgment debtor cannot at this stage found a new claim in this action without causing the judgment creditor considerable prejudice. These are not amendments designed to bring before the court facts that will assist the court in fair determination of the dispute. Rather, the proposed amendments, if allowed, will not only unfairly prejudice the judgment creditor, but will also not serve the ends of justice. Instead, they will introduce extraneous matters which, in any case, ought to have been canvassed a lot earlier. There is no reason or rhythm why I should grant orders that do not serve the interest of justice. I find no sufficient

cause for exercising my discretion in favour of the applicant. I have no hesitation in dismissing with costs, which I hereby do, the chamber summons dated 9.6.2005.

Dated and delivered at Kakamega this 22nd day of September, 2005.

G. B. M. KARIUKI

J U D G E