



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO. 127 OF 2003

NATIONAL BANK OF KENYA LTD. PLAINTIFF

VERSUS

BERNARD ONKOBA TINEGA

t/a BETICO AUCTIONEERS DEFENDANTS

CLEMENT MOYA

RULING:

The applicant's application is under Order 6 rule 13(1) (b)(c) and (d) order VII rule (1)(a) CPR and S.3A CPA.

It seeks court to strike out the plaintiff's/respondent's plaint dated 21st July 2003 filed on 13/8/03. It also seeks court to strike out the amended plaint filed on 28/8/03. Consequent to striking out the plaint it asks the suit be dismissed. He also prays for costs.

Mr. Oguttu for the respondent submitted several grounds in support of the application. First he submitted that the plaint filed on 21/7/03 was supported by a verifying affidavit not properly commissioned. The stamp shows it was commissioned by a firm of advocates and not a commissioner of oaths per se. The name of the commissioner should have been shown. The firm of Maari and Co. cannot commission the affidavit. He asked court to expunge the affidavit and then strike out the suit as per order 7 rule 1 (1).

Secondly it is submitted that in the initial plaint the plaintiff failed to disclose existence of another suit between the parties in accordance to provisions of order 7 rule 1(e).

The amended plaint did introduce a par.8, which stated there was another suit between the parties, but there was no affidavit verifying that. The amended plaint cannot have been verified by the affidavit filed with the initial plaint. Thus both plaints are incompetent and should be struck out.

Again it was submitted that the suit is based on a legal instrument, which granted facilities to the applicant. The legal instrument is not endorsed with the name of the person or firm who made them as per s.34 and 35 of the Advocates Act.

Another issue was that the replying affidavit does not comply with S.34 and 35 of Advocates Act. It does not show who drew and filed the same. It should be struck out.

Further it was submitted that there was a suit between the parties being Kisii HCC No. 99 of 1998. The plaintiff had sued the defendants. That suit was dismissed for nonprosecution, under Order 16 rule 5 CPR. That rule do not allow plaintiff to file another suit. The court therefore has no jurisdiction to entertain this

suit.

The application was opposed and Mr. Masese submitted that it has not been shown that the suit will not succeed. It was also stated that court has discretion where a defective verifying affidavit is filed.

I will first deal with the issue raised that the suit No. Kisii HCC No.99 of 1998 having been struck out under Order 16 rule 5 CPR the plaintiff cannot bring a fresh suit. Court was drawn to order 16 rule 6 CPR which clearly states that if a suit is dismissed by the court for failure to take action within 3 years then subject to rules of limitation a fresh suit can be filed. True there is no such provision in rule 5. The rule only says a party can apply for dismissal.

However the rule does not either says a party cannot bring a fresh suit. I think the correct position is that a party can bring a fresh suit subject to rules of limitation just like it is provided for in rule 6. In rule 6 it provides for a dismissal where a party has not taken any steps within 3 years. Rule 5 provides for dismissal if no steps are taken within 3 months. It would not be just to give a leeway to file a fresh suit to a party who has been asleep for 3 years and deny the same opportunity to one who has not taken steps for three months. The argument that the plaintiff could not bring a fresh suit was therefore based on the wrong premises and I disallow the same.

The applicant had in ground d on the face of the application stated that suit was time barred. However this position was not argued during submission and I assume the same was abandoned.

Order 7 rule 1(2) CPR clearly provides that a plaint must be accompanied by a verifying affidavit. The initial plaint was accompanied by a verifying affidavit. The only quarrel was that the name of the commissioner of oaths who commissioned it is not specifically endorsed and only a stamp of law firm is there. Indeed the oaths and statutory Declarations Act provide that the person commissioning the affidavit be shown. This may not have been done in this instant case but I think that is not fatal. The stamp is shown to be that of Maari & Co. Advocates and Commissioner of Oaths. Though as I have said it is desirable to specify the actual person I think such omission does not make the affidavit fatal. The stamp shows that the firm of Maari has a commissioner of oaths and I should believe he is the one who commissioned the affidavit. I will therefore decline to strike out that verifying affidavit.

Indeed the initial plaint had no averment to show that there was another suit between the parties. Order 7 rule 1(e) clearly makes this mandatory. However this omission, which would otherwise be fatal, was cured when the amended plaint was filed. In par.8 the plaint has an averment that there was a previous suit. Thus even if we strike out the original plaint the amended plaint still stands.

It was submitted that since the amended plaint was not accompanied by a verifying affidavit then it did not comply with provision of order 7 rule 2 CPR and should be struck out. However the law now is very clear.

An amended plaint need not be accompanied by a further verifying affidavit if there was one filed with the original plaint. I have already stated that the verifying affidavit accompanying the original plaint was proper. The respondent therefore had no obligation to file another affidavit with the amended plaint.

The applicant stated that the legal instrument that were made which enabled the applicant to get loan facilities from the respondent did not comply with s.34 and 35 of the Advocates Act in that the name of the drawer was not endorsed. Indeed these instruments are annexed. With respect I think these are issues to be canvassed at the full hearing of the case. Looking at the plaint and the defence it does not indicate whether the plaintiff is basing his claim on the legal instruments alone. Par. 5 of the plaint states that the facilities were granted through a letter dated 23/10/95. Later there were legal charges created. The legality or otherwise of all these documents can only be decided after full hearing. The applicant has not in his defence denied some of the issues raised in the plaint. This is therefore not a properly case to be dismissed summarily. Plaintiff should be given his day in court.

From the above therefore I find application has no merit and dismiss it.

Dated the 26th October 2004.

KABURU BAUNI

JUDGE

26/10/04

Mr. Ondika H/B for Mr. Oguttu for applicant/defendants.

KABURU BAUNI

JUDGE