



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI(MILIMANI COMMERCIAL COURTS)

CIVIL CASE 91 OF 1998

FIDELITY COMMERCIAL BANK.....PLAINTIFF

VERSUS

WORLDIN TOURS & TRAVEL LIMITED.....1ST

DEFENDANT

AZMINA HERNANDEZ JUMA.....2ND DEFENDANT

RULING

This is an application by Way of Chamber Summons by the Defendants under the provisions of Order VI Rule 13 (a) (d), and Rule 14 and Order VIA Rule 7(1) of the Procedure Rules.

The Plaintiff filed this suit on 14th April 1998 in which inter alia it prayed for judgment against the Defendants jointly and severally in the sum of Kshs.1,125,372.80 with interest thereon at the rate of 48% per annum and costs on account of banking accommodation and facilities granted to the First Defendant by the Plaintiff at the Defendant's request and instance. Upon service of Summons, each of the Defendants filed their respective

Defences in which they denied liability or owing the monies claimed by the plaintiff.

Upon Application by the Plaintiff this court on 4.11.03 granted leave to it to file an Amended Plaintiff while the Defendants were granted leave to file any Amended Defences if necessary. On 14th January, 2004 the Plaintiff filed its Amended Plaintiff in which it pleaded that the amount claimed arose out of a Hire Purchase Agreement dated 22nd December, 1994 involving the purchase of a motor vehicle by the First Defendant and a Guarantee given by the Second Defendant securing the said hire purchase agreement. It is this Amended Plaintiff that the Defendants have applied to be struck out with costs. The Defendants' grounds for the said application to strike out and also for dismissal of the suit reads as follows:-

- (i) That the Plaintiff's purported Amended Plaintiff filed on the 14th day of January, 2004 is unsigned and in therefore not a pleading at all.
- (ii) That the purported Amended Plaintiff has not been dated as provided by law.
- (iii) That the Plaintiff's Amended Plaintiff is an abuse of the court process.
- (iv) That the purported Amended Plaintiff is incurably defective and consequently the suit should be

dismissed. The Plaintiff at the outset conceded the fact that the Amended Plaintiff was not signed by its Advocates and the same is invalid. It follows that the Defendants' contention that the Amended Plaintiff is a nullity and of no legal effect. This means that strictly the only question fact after leave to amend the Plaintiff was granted?

(i) Does this mean that the Plaintiff no longer has any Plaintiff on record and therefore no cause of action?
or

(ii) Does it mean that the record reverts to the original position and the Original Plaintiff filed on 14th April 1998 remains in existence and capable of prosecution?

The Defendants take the position in (i) above while the Plaintiff takes the position in (ii).

The court was referred to the decision of this court in H.C.C.C. No. 1994 of 2000 (Milimani) – REGINA KAVENYA MUTUKU & OTHERS - V- UNITED INSURANCE COMPANY LIMITED decided by Justice Ringera (as he then was). I agree with his decision that an unsigned pleading cannot in law be valid in law. This position in law is accepted by both the Plaintiff and the Defendants in this case.

The Plaintiff was granted leave to file an Amended Plaintiff within a specified period. It did not comply with the court order but instead filed a defective document which is not in law a pleading, in this case an "Amended Plaintiff". This means in practical terms that no Amended Plaintiff was ever filed. The filing of the Amended Plaintiff mean nothing in law. Nothing took place. As a result, the Defendants to first prayer is successful and I do hereby strike out the so - called "Amended Plaintiff with costs to the Defendants. It was an abuse of the court process.

Should the court now dismiss the Plaintiff's suit or can the Plaintiff rely on the Original Plaintiff as a valid Pleading? I have considered the submissions of Counsel and the ratio decidendi in the cited case of Regina Kavenya Mutuku I think that strictly the facts of the said case are distinguishable from those in this case. The significant difference appears to be that the Plaintiff/Applicant in the said case did not stop at challenging the unsigned pleading but went on to attack the surviving or original pleading which was a Defence. The said case considered which I also do, the provisions of Order VIA, Rule 6 of the Civil Procedure Rules which reads as follows:- "Where the court has made an Order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within 14 days, the order shall cease to have effect, without prejudice to the power of the court to extend the period "

This provision strengthens the striking out of the so-called "Amended" albeit on a different ground. The Plaintiff herein having filed an unsigned pleading never amended the Plaintiff and/or complied with the Order for leave. In law it did nothing and the said order ceased to have any effect.

To this court, the pleadings and record then reverted to the original position, the status quo ante. The original Plaintiff is still on record, and was never set aside or struck out by the filing of the so called Amended Plaintiff as submitted by the Plaintiff's Counsel. The Plaintiff is entitled to rely on the said original Plaintiff whatever it is worth, considering the attempted departure and attempted raising of new grounds of claim which appear inconsistent with the said original and now only Plaintiff by the Plaintiff in the same suit. The Plaintiff cannot rely on Order VI Rule 6 as there was no "actual departure" from the original Plaintiff or pleading as the "Amended Plaintiff" was invalid. Accordingly, this court cannot dismiss the Plaintiff's suit in this application and based on the facts relied upon. The said Plaintiff can only be attacked at the trial or other application. As a result prayer 2 of the Application is disallowed. Since the Defendants have been successful in respect of Prayer 1, Costs of the application is hereby awarded to them. Orders accordingly.

Dated and delivered at Nairobi this 22nd day of October, 2004.

MOHAMMED K IBRAHIM

JUDGE

