



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO.442 OF 1998

ABDULHAMID ESMAIL PLAINTIFF

V E R S U S

MOHAMMED KASSAM.....1ST DEFENDANT

HUSSEIN DAIRY LIMITED.....2ND DEFENDANT

R U L I N G

The Notice of Motion dated 23.11.1998 is totally misconceived and must fail. It is an application for summary judgment under O.35 r.1 & 2 of the Civil Procedure Rules where the Plaintiff seeks the following order:-

“1. That Judgment may be entered against the Defendants jointly and severally as prayed in the Plaintiff.

a) Kshs.8,729,400/- liquidated damages.

b) Kshs.1.5 million being value of the motor vehicle.

c) Kshs.47,005,627.90 under paragraph 9.

d) Kshs.319,173/- for tyres and repairs”.

The total of those figures is Kshs.57,554,200. The sum is said to “prayed in the Plaintiff” and one would therefore expect the final prayers made in the Plaintiff to state that figure and for filing fees in respect thereof to have been paid. Turning to the Plaintiff however, the main prayer made therein is:-

“Specific performance of the said Agreement”

. And in the alternative ***“the value thereof ”.***

The other main prayer is for ***“financial loss and damages ”.*** The fees paid for filing that Plaintiff was Kshs.3,175/= since no specific amount was prayed for. That would mean one of two things:- either that the Plaintiff did not wish to claim any specific sum leaving it to the court to determine the quantum after hearing the suit; or that the Plaintiff intended to claim specific amounts which he deliberately avoided to pray for with the intention of avoiding payment of high Court-filing fees. Neither of them attracts favourable consequences.

In the latter proposition the Plaintiff must be prepared to have the filing fees reassessed and paid before the claim can be considered; while in the former proposition the whole matter is removed from the

ambit of O.35 r.1 Civil Procedure Rules. I would indeed add that it would be fraudulent and an abuse of the court process to deliberately omit prayers for special damages which are apparent on the pleading, with the sole purpose of avoiding payment of prescribed Court Fees. A party so inclined will not be treated with favour by the Court.

At all events it is clear to me that the application is made under a misapprehension that it falls within the ambit of Order 35 r.1. Rule 1(1)(a) provides:-

“1(1) In all suits where a Plaintiff seeks judgment for

(a) a liquidated demand with or without interest”.

Learned counsel Ms Echesa for the Applicant submits that although the figures stated in the application are not prayed for in the Plaint they form liquidated damages which are pleaded in the Plaint. With respect, “liquidated damages” are not synonymous with “liquidated demand”. I had occasion to consider similar submissions in the past and I clarified the position on authority. In two cases HCCC.31/95 **ESSAK -v- MWANYOTA & 2 OTHERS (UR) and HCCC.12/97 PAMBO LA NYUMBA LTD. -vs- ROBERTO CELLINI (UR)** I stated:

