



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

CIVIL CASE NOS. 1075 OF 1999 AND 1047 OF 2000

JOSEPH KAMAU KIMANI.....1ST PLAINTIFF

SAMUEL KAMAU KIMANI.....2ND PLAINTIFF

VERSUS

HARIT SHETH.....1ST DEFENDANT

ANTONY NAHASHON NGUNJIRI.....2ND DEFENDANT

THEURI WANJOHI.....3RD DEFENDANT

RULING

These two suits involve the same parties.

In HCCC No.1047 of 2000 the plaintiffs are Joseph Kamau Kimani and Samuel Kiburu Kimani and Antony Nahashon Ngunjiri is the defendant. Together with the defence to the suit the defendant filed a counter claim to the suit on 5.5.1999. However, on 8.12.1999 the plaintiffs filed a notice of withdrawal of the suit under Order XXIV Rule 1 of the Civil Procedure Rules in which the entire suit against the defendant was withdrawn. With that step, the plaintiffs claim against the defendants came to an end and what remained alive in the suit was the defendant's counter claim.

In suit No. 1075 of 1999 we have three plaintiffs, the two in 1047 of 2000 and a third, Kitek (7) Limited, a limited liability company. The defendant in HCCC NO.1047 of 2000 (an advocate of the High Court) now becomes the 2nd defendant while Harit Sheth (also an advocate of the High Court) is made the 1st defendant while yet another advocate of the High Court, Theuri Wanjohi is the 3rd defendant.

Though the two suits have not been formally consolidated, they have all along, with the acquiescence of the parties' advocates, been handled together. Thus when HCCC No.1075 of 1999 is listed for hearing the proceedings have at times been recorded in HCCC NO.1047 of 2000 and vice versa. An example of this development is the cause-list of 1.11.2001 when HCCC No. 1075 of 1999 was listed and the proceedings recorded in HCCC No. 1047 of 2000. The result is that the position in the two suits has not been without confusion. Indeed at one stage this court was called upon on 26.1.2001 to give directions as to the manner in which both suits should proceed there being three outstanding applications in both suit pending determination. In respect thereof, the court directed that the application dated 13.3.2000 be heard first on a date to be taken at the Registry.

Pursuant to those directions the plaintiffs' advocates in a letter dated 12.6.2001 wrote to the defendants' advocates as follows:-

“RE: HC CC NO. 1047 OF 2000

JOSEPH KAMAU KIMANI 1 ST PLAINTIFF

SAMUEL KIBURU KIMANI 2 ND PLAINTIFF

VERSUS

ANTONY NAHASHON NGUNJIRI DEFENDANT

Kindly instruct your representative to meet ours at the High Court Registry Milimani i on the 20th day of June, 2001 at 10.00 o'clock with a view to fixing a hearing date for the plaintiffs' application dated 13th March, 2000.

TAKE NOTICE that in default of your representative's appearance an ex-parte dated shall be taken.”

The record of HCCC No.1047 of 2000 shows that following the letter of 12.6.2001 the representatives of the advocates of both parties attended at the High Court Registry Milimani and set down for hearing on 23.7.2001 a Chamber Summons dated 13.3.2000. There is however no such application either by way of Chamber summons or Notice of Motion dated 13.3.2000 in HCCC No.1047 of 2000 and therefore what was fixed for hearing does not exist. Accordingly when learned counsel for the defendants Mr. Ochieng Oduol appeared before Hon. Justice Onyango Otieno on 23.7.01 in HCCC No.1047 of 2000 in the absence of learned counsel for the plaintiff and without reference to HCCC No.1075 of 1999 proceeded to apply for the dismissal of the application before the court which said application was granted, he was clearly asking for the dismissal of the application set down for hearing on 20.6.01 which according to the record is a Chamber Summons application dated 13.3.2000 in HCCC NO.1047 of 2000. As aforesaid no such application then or thereafter existed and consequently the dismissal order cannot be said to affect the plaintiffs application dated 13.3.2000 in HCCC No.1075 of 1999.

The upshot of the matter is that in my opinion the application by the plaintiffs dated 13.3.2000 in HCCC No.1075 of 1999 is still alive and consequently the plaintiffs are at liberty to proceed to prosecute it.

Dated at Nairobi this 30th day of November, 2001.

T. MBALUTO

JUDGE