



Republic of Kenya
In the High Court of Kenya
at Nairobi (Milimani Commercial Courts)
Civil Suit No 782 of 2000
Investment and Mortgages Bank Ltd
v
Nakumatt Investments Limited & 2 others
T Mbaluto, Judge

September 20, 2000 T Mbaluto, Judge delivered the following ruling. There are two applications before me in this matter for consideration and determination. The first one is dated May 30, 2000 and has been brought by Atulkumar Maganlal Shah who is the 3rd defendant in the suit. It seeks the dismissal of the suit with costs allegedly because the plaint was unsigned and was therefore incompetent and could not for that reason form the basis of a suit. The second application is dated June 6, 2000 and has been brought by Nipin Maganlal Shah, the 2nd defendant. It also seeks to have the suit dismissed and struck out for reasons similar to those on which the first application is based.

The third defendant Nakumatt Investments Limited has not brought any application of its own but has chosen to join the fray through its advocate Mr Frederick Ngatia who swore and filed an affidavit in which he depones that the plaint in question is neither signed nor dated.

The plaintiff opposes the applications on the grounds that the suit and the summons are valid and fully in compliance with the provisions of the Civil Procedure Act as well as the rules made thereunder. In the premises, it is further averred, on behalf of the plaintiff that the application to strike out the plaint and to dismiss the suit should not be granted. Although the disputed facts appear to be very simple, the only question in my view being whether or not there is or rather was a signed and dated plaint when the two applications were lodged on May 30, 2000 and June 8, 2000 respectively, the matter has attracted no less than 12 separate affidavits being sworn and filed in this matter in support of the conflicting positions urged by the two sides.

Ranged on one side are the three defendants who have put in 6 affidavits in all, 3 from the same advocate. In addition, the Deputy Registrar of this Court has, following a court order, filed his own affidavit which supports the position taken by the defendants. The plaintiff has, on its part, put in five affidavits, two of which have been sworn by its advocate Mr S Dhanji with the other three having been sworn by Mr Dhanji's clerk John Mbiti Mutunga.

I consider it necessary at this stage to observe that generally speaking, most of the material in those affidavits is not only hearsay, argumentative and totally unnecessary but it also offends the provisions of Order XVIII of the Civil Procedure Rules. However as no objection was taken by any party on the point, I do not think it is appropriate to dwell on the issue any further save to so observe that the court's or the

Rules Committee should sooner rather than later stiffen the sanction imposed for breaching the provisions of the rules as so much time and money is being wasted nowadays in having to deal with the unnecessary material that is introduced into court records by way of unnecessary affidavits.

To revert to the issue at hand, although the defendants claim that there is no signed and dated plaint, the fact of the matter is that in the court file there is a signed and dated plaint. That plaint is dated April 26, 2000 and is shown to have been signed by somebody for Salim Dhanji and Company Advocates. The court stamp thereon indicates that it was filed on April 27, 2000. There is however another plaint filed on the same date which is unsigned and undated. That is the plaint that has given rise to the problem which this court is called to resolve.

The defendants claim that as at the time of lodging their applications there was only one plaint in the court file, namely the unsigned and undated one. They contend that the second plaint ie the signed and dated one must have been sneaked into the court file probably with the connivance of court official subsequent to the filing of the two application. The allegation is clearly grave and implies some criminal act on the part of the culprits. All that is strongly denied by the plaintiff. And in an attempt to explain what exactly happened, the plaintiff in the five affidavits filed herein avers that no plaint was sneaked in as alleged by the defendants or at all and that there was, right from the date the suit was filed, two plaints in the file, one unsigned and undated and another one which was signed and dated. The obvious question that springs to mind, given that contention, is how that came to be.

Both Mr Salim Dhanji and his clerk Mr John Mutunga, in their various affidavits, swear that, in all six copies of the plaint were prepared for the purposes of instituting the suit, five of which were signed while the sixth one was deliberately left unsigned. It was intended that the five signed copies were to be presented to the High Court Registry for purposes of filing the suit while the sixth unsigned one was to be retained as the file copy. However when the court clerk presented the documents for filing in the court at the Registry, he inadvertently presented all the six copies which included the unsigned one. Both Mr Dhanji and his clerk further depones that after filing the plaint, two copies thereof, one of which was the unsigned copy, were retained in the court file while the other four were returned to the court clerk. That according to Mr Dhanji and his clerk explains the presence of the two plaints in the court file. As aforesaid, the defendants reject that explanation and bluntly say it is not true.

It hardly needs to be observed that both versions of the story cannot possibly be true. Regretfully the obvious implication of the matter is that one or several of the advocates is/are not being forthright. Who it is, I do not and cannot tell on the basis of the affidavit evidence available. All I can observe is that the advocates involved in this matter are senior members of the profession and it is a matter of great regret that they should have contributed to a situation of such extreme gravity.

Be that what it may, the position in law is I think clear. Firstly when the plaintiff brought the matter to court, at the very list, 3 signed and dated plaints were placed before the Registry clerk. Those were the 3 plaints which were served upon the 3 defendants. Although the defendants were evidently reluctant to concede that fact, and in this respect they can justifiably be accused of failure to disclose material facts in their applications, it is as plain as daylight that each one of them was served with a signed and dated plaint. It is also a fact that each of them entered an unconditional appearance in response thereto.

It is indeed surprising that having been served with a signed and dated plaint, the defendants were somehow able to detect that there was something amiss with the plaint or plaints left with the court. The question which up to now remains unanswered is what prompted the defendants to come to the Court Registry to check whether the original plaint was signed and dated? Was the information provided by a court clerk. Only the defendants can answer those questions but as of now they are not talking. The silence has given rise to a conspiracy theory allegedly between the Court Registry and the defendants.

We must now however go back to the filing of the plaints. If the story as given by the defendants is true, then it means having received at least 4 plaints, 3 of which were duly signed and stamped, for some very curious reason, the court clerk at the Registry decided to hand over to Mr Dhanji's court clerk for service upon the defendants advocates, the only three signed and dated plaints and chose to retain for the court

record, the unsigned and undated plaint. That, I must repeat, if true, was a very unusual act on the part of the Registry clerk, the normal practice being retention of at least one signed copy and release of the other copies inclusive of the unsigned one to the person presenting the documents. So who is the villain in this matter; the Registry clerk or Mr Dhanji's clerk or someone else.

This brings in play the role of the Deputy Registrar. It must be recalled that the defendants are in effect accusing the court of having allowed the plaintiff to sneak in a signed and dated plaint after the two applications to strike out the plaint had been brought. If that is true, how were the plaints sneaked in? When the parties appeared before me on June 15, 2000, an order was made for the Deputy Registrar of this court to swear and file an affidavit regarding the circumstances under which two plaints, one unsigned and undated, the other signed and dated, came to be filed in the same suit. The intention which apparently did not come out clearly was that the Deputy Registrar as an administrator of this court, should investigate the matter and bring in information concerning the filing of the two plaints in view of the very grave allegation of irregular and possibly criminal act of sneaking into a court file a plaint through the back door.

In the event the Deputy Registrar did not conduct any investigations into the allegations at all. He confined himself to repeating what the defendants had said in their affidavits and for his intervention, he was accused by the plaintiffs of bias.

I think it is now not necessary to determine at this stage who the offender in this matter is. As aforesaid, there is no sufficient evidence upon which that can be done. Order VI rule 14 of the Civil Procedure Rules provides that "every pleading shall be signed by an advocate or recognised agent or by the party if he sues or defendants in persons." In my view, there is no requirement in O. VI rule 14 of the Civil Procedure Rules that the signed plaint be in the court file.

The plaintiff presented at least 3 signed and dated plaints. These were served upon each of the defendants and they all entered unconditional appearances thereto. Indeed one cannot really begin to understand why in the first place a defendant who has been served with a plaint duly signed and dated would wish to complain in respect thereof particularly in a case where he has made an unconditional appearance. In Mulla on the Code of Civil Procedure, 12th Edition, page 502 it is stated:

"The signing of plaints is merely a matter of procedure. If a plaint is not signed by the plaintiff or by a person duly authorised by him in that behalf, and the defect is discovered at any time before judgment, the Court may allow the plaintiff to amend the plaint by signing the same. If the defect is not discovered until the case comes on for hearing before an appellate Court, the appellate Court may order the amendment to be made in that Court. The appellate Court ought not to dismiss the suit or interfere with the decree of the lower Court merely because the plaint has not been signed. The omission to sign or verify a plaint is not such a defect as could affect the merits of a case or the jurisdiction of the Court."

And in the case of *Fick and Fick Ltd. V. Assimakis* (1958) 3 All ER 182 it was held:-

"as the writ which was issued was properly indorsed with a signed statement of claim, the absence of a signature to the statement of claim on the copy served on the defendant was cured by the appearance which defendant must be taken to have entered."

No authority was cited by the defendants suggesting that Kenyan Law is different from what is stated above.

The defendants in attempting to have the plaint struck off and the suit dismissed also have another problem to surmount. In their two applications they do not say what is to become of the signed and dated plaint. The suit cannot obviously be dismissed if there is a signed and dated plaint. For that to happen the signed and dated plaint must be expunged from the record. That can only be done if it is established that the plaint was introduced into the court file fraudulently. Fraud is a grave allegation which require proof on a standard above the balance of probabilities. As observed above, the affidavit evidence available does

not satisfy that standard.

The defendants cited several authorities in support of their applications. In the cases of Jane W. Kamau V. Kenya Ports Authority (HCCC 1575 of 1999); National Industrial Credit Bank Limited V. Albert Gacheru Kiarie (HCCC No. 1863 of 1999) and Fresho International Ltd. V. Pioneer Overseas Corporation, Onyango Otieno, J. in the first two cases and Mitey, J. in the third held that proceedings based on unsigned pleadings were invalid. In my view however, all the three authorities were clearly distinguishable from the facts of the instant case in that in the current case, the pleadings, at any rate those served, were duly signed

Finally it was claimed on behalf of the defendants that the summons served upon them were invalid in that they provided for appearance within 10 days from the date of service in contravention of O. 4 rule 3(1) of the Civil Procedure Rules which requires that not less than 10 days be allowed. The position about the matter was determined by the Court of Appeal in Ceneast Airlines Limited V. Kenya Shell Limited (Court of Appeal, Civil Appeal No. 174 of 1999) where it was held that any summons which provides for appearance within a period of less than 10 clean days is invalid and of no effect. On the basis of that decision, I am bound to find that the summons served upon the defendants having required the defendants to make an appearance within a period less than that imposed by law were invalid and of no effect.

For the above reasons, the two applications filed by the 2nd and 3rd defendants are dismissed. As for the summons served upon the defendants, they are declared invalid and of no effect and fresh ones will have to be issued. In view of the conclusions I have arrived at, each party will have to bear his/its own costs of these proceedings. www.kenyalawreports.or.ke