



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
MISC. APPLICATION NO. 15 OF 2013

IN THE MATTER OF: HCCC NO. 1232 OF 2001, NAIROBI

AND

IN THE MATTER OF: DELIVERY OF MONEY HELD BY AN ADVOCATE TO THE CLIENT

BETWEEN

BROLLO KENYA

**LIMITED:.....
 APPLICANT**

-VERSUS-

**DAVID OYATTA T/A OYATTA & ASSOCIATES :.....
 RESPONDENT**

R U L I N G

1. The **Notice of Motion** before the court is dated **19th March 2015** filed by the Applicant under Order 45 and Order 37 Rule 19 of the Civil Procedural Rules and Section 1A, 1B and 3A of the Civil Procedural Act. The application seeks to secure the following orders:-
 1. *The honorable court be pleased to review the Ruling delivered on 30th January 2015 to order that the proceedings herein continue as if the cause had been begun by filing a **Plaint**.*
 2. *The originating Summons and the Affidavits filed herein be deemed as the pleadings for the purpose of the suit.*
 3. *The cost of the application be provided for.*

2. The application is supported by affidavit of **Ketan Doshi** sworn on **19th March 2015**. In the supporting affidavit Mr. Doshi states that he is a director of the Applicant herein and is well versed with the matters under controversy. He deponed that the Originating Summons herein was filed for the orders that:-
 - a. The Respondent render a cash account of money paid to him by the Applicant and money held on behalf of the Applicant.

- b. The Respondent delivered a list of the money in his possession or control on behalf of the Respondent.
 - c. The Respondent pay the Applicant any and all money by the Respondent on behalf o the Applicant.
 - d. The costs of the application be borne by the Respondent.
3. Vide a ruling delivered on 30th January 2015, the court granted prayer (a) and (b) and ordered the same be complied with within 14 days of the Ruling. The court declined to grant prayer (c) stating that:-

“The contention on fees as raised by the Applicant can only be conclusively determined after full hearing. The purpose of an originating summon is to determined simple matters. Therefore the option available to the Applicant is to adequately address its grievances is to file a suit.”

The judge then reserved costs under prayer (d) pending the determination of the cause. From the foregoing, the Applicant submitted, it is in the best interest of justice that the proceedings continue as if they had been begun by filing a Plaint. By doing so the dispute between the parties can be conclusively adjudicated.

4. The application is opposed. The Respondent filed Grounds of Opposition on 16th April 2015, stating that this court is *functus officio* and cannot re-open this case again otherwise than as by law provided. The court by its Ruling made on 30th January 2015 clearly and unequivocally set out the option available to the Applicant in respect of the contention of fees and stated that the **“option available to the Applicant to adequately address its grievances is to file a normal suit.”** The Respondent stated that the decretal sum paid to the Respondent in respect of HCCC no. 1232 of 2001 was Kshs.5,920,772/=. Which sum the Respondent claims as a set off. The Respondent also submitted that the matter is within the pecuniary jurisdiction of the Chief Magistrate’s court and the Applicant has the option to file its suit there. The Respondent stated that the application is not only belated but also heavily prejudicial to the Respondent, and is an abuse of the court process, and should be dismissed.
5. I have considered the application. The issue is whether this court can allow the proceedings herein by way of originating Summons to proceed as though the same were originated by a Plaint. Order 37 Rule 19 states:-

“where, on an originating summons under this order, it appears to the curt at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a Plaint, it may order the proceedings to continue as if the cause had so begun and may, in particular, order that any affidavits file shall stand as pleadings, with or without liberty of the parties to add to, or to apply for particulars of those affidavits.”

6. Order 45 Rule 1 (b) states in part that any person can apply for a review:-

“. . . on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review or the decree or order . . . can apply for a review. . .”

Clearly, both Order 45 and Order 37 Rule (19) allow this court to grant the prayers that are sought in this matter.

7. However, the Respondent contends that this court is *functus officio* and cannot re-open this case, and that the court had in fact stated in its Ruling that the

“Option available to the Applicant to adequately address its grievance is to file a normal suit.”

8. That position is also correct, expect that it is the reason why the Applicant is now seeking its review. In my view, the court is not *functus officio*, and indeed that is why prayer on costs was reserved. It is also true that if the court's attention was specifically drawn to the provisions of order 37 Rule 19 at the time of submission, the court would not have hesitated to turn the Originating Summons into a Plaintiff.
9. The overriding objectives of Section 1A, 1B and 3A of the Civil Procedure Act demands of this court of the necessity to do justice to parties at minimum costs and minimum delay. The court is already seized of this matter. It is easier to turn the Originating Summons into a Plaintiff, and to direct the parties to file further or supplementary affidavits or documents, for the matter to proceed rather than have the Plaintiff spend more time and money filing a fresh suit. To do that would be contrary to the overriding objectives in the Civil Procedure Act.
10. The contention by the Respondent that the Originating Summons was dismissed in respect of prayer 3 thereof in this court's Ruling of 30th January 2015 is not correct. The correct position is that prayer 3 was the issue to be determined in the said Plaintiff which was ordered to be filed. Again, the court ordered and directed that the Respondent renders accounts. It is alleged that those accounts have been rendered. It is after the rendering of those accounts that the Plaintiff may comment on the same. As per the order of 30th January 2015, the accounts would be the subject matter of the suit to be filed by the Plaintiff. However, if this application is allowed, these accounts will be commented on in this suit.
11. I am satisfied that the application is merited and I allow it in the following terms:-
 1. ***The Originating Summons herein dated 21st January 2013 and the affidavits filed herein be and are hereby deemed as the pleadings for the purpose of the suit.***
 2. ***There shall be liberty for parties to file further or supplementary affidavits, and such other documents as may be necessary.***
 3. ***The accounts which have been rendered by the Respondent shall form part of the pleadings.***
 4. ***Costs of this application shall be in the cause.***

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 12TH DAY OF MAY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Muriithi holding brief for Wandabwa for the Applicant

Mr. Washike holding brief for Nyawara for the Respondent

Teresia – Court Clerk