



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 1219 of 1992

BENJOH AMALGAMATED LTD & ANO..... PLAINTIFFS

VERSUS

KENYA COMMERCIAL BANK..... DEFENDANT

RULING

On the 15th of June, 1992 delivered my ruling on a Preliminary Objection that was upheld on the grounds that "a consent judgement order dated the 4th of May 1992 duly recorded by the Hon. Justice Githinji stands. That the Court of Appeal decision 276/97 applies."

The effect of my ruling was that any proceedings and or action filed in this file after the 4th of May 1992 was null and void.

The plaintiff/applicant now filed this present application by way of a Notice of Motion under Order 44 CPR and Section 3A CPR praying for orders that-

"The ruling/orders of 15th of June 1999 be reviewed and or set aside2) that plaintiffs/application dated 23rd December 1997 be listed down for hearing or the suit be set down for full hearing or the suit be set down for Full hearing"

The reasons being that when the application of the 23.12.99 came for hearing it was in effect "sort for striking of the defence and not the amendment of the Plaintiff" as stated by this court. When Hon. Justice Githinji had set aside the consent, no stay was prayed for. As a result various pleadings were filed both side thereafter.

Further this court erred in stating that Justice Githinji did not make orders to investigate or reconstitute the file but instead referred to Justice Mbogholi Msagha as having done so.

The advocate for the respondent/ original defendant stated that even if a wrong application was relied on the gist of the ruling is that any orders that was filed after the 4.5.92 be null and void, should stand. I have gone through this file again. I noted that on an unknown date the court file was recorded by the registry the following words.

"Mr. Kinuthia for E.K. Mutua Advocate for the applicant C/S dated 24. 12.97 fixed for hearing on 10th June, 1999 at 9.00 a.m. [Notice to issue."

The application tagged for hearing dated the 23.12.97 and filed on the 24 .12. 97 was the one that dealt with the plaintiff to be allowed to further amend their plaint on 14.12.97.

Immediately proceeding this application that was in the same file was one filed also on the 24.12.97 and dated the 23.12.97 the very-same dates, seeking for the Defence by the defendant on the 2nd day of December, 1997 to be struck out. These two applications had been filed by the original plaintiff.

When the parties came before me for hearing none had the opportunity to address me on either of the applications as the Preliminary Objection was taken up immediately.

From the note by the registry fixing the application for hearing it did not specify which of the two applications filed simultaneously on the same day was for hearing.

I would therefore review my ruling to state that the application for hearing by way of Chamber Summons dated 23.12.97 and filed on the 24.12.97 for "amendment of the Plaintiff" and the application for "the Defence be struck out" are the two for hearing.

I further review my orders to include the words that both be and are hereby struck out in light of my ruling of 15th of June, 1999.

I would further agree with the advocate for the defendant that my ruling has not effected the issue as to what was coming up for hearing but that any matters filed after the 4th of May 1992 is null and void.

As to the issue as to whether the Hon. Justice Mbogholi-Msaghah or Githinji made orders in the file - it must be noted that there are two files that orders had been made in. Nonetheless the end result was that the Deputy Registrar refused to reconstitute another file on the grounds of forgery and or fake documents. I would still hold that anything that transpired after the 4th of May, 1992 be and is hereby null and void.

My ruling of 15th of June, 1999 stands subject to the minor reference to the application for hearing. The application for review be and is hereby dismissed with costs to the respondent.

Dated this 28th Day of July 1999 at Nairobi.

M.A. ANG'AWA

JUDGE