IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI , JJ. A)

CIVIL APPEAL NO. 196 OF 2010

BETWEEN

KAYAM CHATUR.....APPELLANT

AND

BARCLAYS BANK OF KENYA LIMITED.....1st RESPONDENT

JOSEPH M. GIONYO t/a GARAM INVESTMENT AUCTIONEERS....2nd RESPONDENT

YOGESH DEWDA ….....3rd RESPONDENT

(Appeal from the Decision, Ruling and/or Judgment/Decree of the High Court of Kenya

at Kisumu (J. W. Mwera, J) dated 18th November, 2009

in

KSM HCC No. 148 OF 2009

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JUDGMENT OF THE COURT

By a plaint filed at the High Court of Kenya at Kisumu on 28th September, 2009 the two plaintiffs Kayam Chatur and Mahesh Patel sued the three defendants Barclays Bank of Kenya Limited, Joseph M. Gikonyo trading as Garam Investments Auctioneers and Yogesh Dewda in a suit whose cause of action was said to arise from the way a public auction over a property known as Kisumu Municipality /Block 3/123 was conducted. There were three main prayers sought – first, a declaration that the sale of the said property at a public auction conducted by the 2nd defendant on 25th September, 2009 to the third defendant was a nullity; second, an order of permanent injunction against the defendants to restrain them from dealing with the said property and particularly to stop transfer of the same to the 2nd defendant, and thirdly, a prayer for general damages. Kayam Chatur swore an affidavit to verify the contents of the Plaint and this was filed with the plaint. Contemporaneous with the plaint was an application by Chamber Summons under certificate of urgency where orders of temporary injunction were sought to restrain the defendants in prayers footed in the plaint. This application was supported by an affidavit of the same Kayam Chatur sworn on 28th September, 2009. The application was duly heard and ex-parte

orders were issued in favour of the plaintiffs which orders restrained transfer of the said property or dealing with the same pending an inter parte hearing.

The defendants duly appeared and filed replying affidavits to the application. On 5th October, 2009 the 3rd defendant filed a Notice of Preliminary Objection where this defendant gave notice of preliminary objections to the application stating that the 2nd plaintiff had not filed a verifying affidavit in accordance with the then Order VII Rule 1 (2) (this was erroneously stated to be Order VIII in the application; it is now Order 4 of the Civil Procedure Rules); that there was no authority by the 2nd plaintiff authorizing the 1st plaintiff to swear the affidavit in support of the application; that the jurat to the supporting affidavit offended the provisions of the Oaths and Statutory Declarations Act; that the same affidavit was defective for not stating the place where it was sworn and finally that the said affidavit was defective because it did not disclose the name of the advocate (presumably) who drew it.

It would appear that this Notice of Preliminary Objection forced the plaintiffs into very fast action. This is because the same day 5th October, 2005 the 2nd plaintiff Mahesh Patel filed a notice withdrawing the suit against the defendants. The defendants filed defence denying the claim. Further affidavits with the leave of the court followed and on 4th November, 2009 the application finally was before Mwera, J (as he then was) for hearing inter partes. It was agreed by the parties and confirmed by the learned judge that the 3rd defendant's preliminary objection be heard first. Detailed submissions were made and in a Ruling delivered on 18th November, 2009 the preliminary objection was upheld and the entire suit was struck out. Those are the orders that have provoked this appeal.

Being a first appeal we are duty bound to reconsider the whole matter and re-evaluate the same to reach our own conclusions – See our judgment in **Kenya Revenue Authority v Spectre International Limited (Kisumu) Civil Appeal No. 235 of 2010** (ur) and also the decision of Sir Kenneth O'Connor speaking for the predecessor of this Court in **Peters v Sunday Post Limited [1985] EA 424** where he sated:

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses ….. But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion...**"

The appellant who was the remaining plaintiff and whose suit was struck out has taken nine (9) grounds in the Memorandum of Appeal drawn by his lawyers M/s Otieno, Ragot & Company Advocates. These grounds are:

> **"1. The Learned Judge erred in law and in fact in reaching the finding that the failure by the 2nd Plaintiff to swear and file a separate affidavit verifying the correctness of the contents of the Plaint along with the already existing verifying affidavit of the 1st Plaintiff in accordance with the Provisions of Order VII rule 1 of the Civil Procedure Rules, was a fundamental and a fatal defect to the suit on the basis of which he had the Plaint struck out including the 1st Plaintiff suit.**
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> **2. The learned Judge erred in law and in fact in failing to appreciate from the Plaint, affidavits of the 1st Plaintiff on record and the submissions made before him that the 1st and 2nd Plaintiffs, though having filed a single Plaint based on the same set of facts and seeking the same reliefs, each of the Plaintiffs had expressed a separate and distinct cause of action against the Defendants, having each attended the Public auction that gave rise to the complaint in the suit and having separately and independently made bids on their own without having done so jointly, with the result that even if he found the failure to swear a verifying affidavit by the 2nd Plaintiff to have been fatal, it could not have given any justification for having the 1st Plaintiff's suit struck out yet the 1st Plaintiff had on record a valid and legitimate verifying affidavit in support of the Plaint.**

3. The Learned Judge erred in law in fact in failing to appreciate that the 2nd Plaintiff's failure to swear a separate verifying affidavit to accompany the Plaint along with that of the 1st Plaintiff, did not occasion any prejudice to the parties to the suit, since the said 2nd Plaintiff had filed a notice of withdrawal of his suit against the Defendants, and the whole complaint by the Defendants on that score, if at all. Had (sic) been overtaken by the event of the withdrawal of his claim against the Defendants.

4. The Learned Judge erred in law and in fact in holding that the 1st Plaintiff's affidavit sworn on 28.09.2009 in support of the Chamber Summons application for temporary injunction was fatally defective on the basis that it did not in its jurat disclose the place where it had been sworn in accordance with the Provisions of Section 5 of the Oaths and Statutory Declarations Act, Chapter 15 Laws of Kenya, and on that basis he arrived at the erroneous decision that the chamber summons application thereon be struck out and the interim orders in favour of the Plaintiff be vacated.

5. The Learned Judge erred in law and in fact, in failing to appreciate that the defect of failure to disclose the place of swearing in the jurat of the affidavit of the 1st Plaintiff sworn on 28.09.2009 was duly cured by the 1st Plaintiff in his supplementary affidavit sworn and filed in court on 23.10.2009 at paragraph 14 in which the 1st Plaintiff clarified that the previous affidavit sworn on the 28.09.2009 had been sworn by him at Kisumu and indeed he stated that all the contents of that previous affidavit were reiterated by him in the supplementary affidavit.

6. The Learned Judge erred in law and in fact by not only failing to appreciate that whatever defect on the previous affidavit had been cured by the contents of paragraph 14 of the supplementary affidavit, but he also erred by failing to consider this issue at all despite the express submissions on this point raised before him to that effect with the result that he reached an erroneous conclusion of having the application struck out.

7. The Learned Judge erred in law and in fact in failing to appreciate that even if he held that the previous affidavit sworn by the 1st Plaintiff was fatally defective, the Chamber Summons application before him still had a valid and legitimate supplementary affidavit sworn by the 1st Plaintiff in support thereof which had at paragraph 14 thereof reiterated all the contents of the previous affidavit complained of, and thus there was no justification at all for him to strike out the application and vacate the subsisting interim orders.

8. The Learned Judge erred in law and in fact by failing to appreciate the import of the judicial decisions and statutory provisions that were cited before him in opposition to the preliminary objection when he arrived at the erroneous decision that the defect in the affidavit was a defect of substance rather than form, yet the alleged defect did not prejudice any party to the suit, did not go to the substance of the issues in dispute before the court and would not have in any way affected the outcome of the material issues before the court, and in the process of that erroneous appreciation of the nature of that defect, if at all, the Learned Judge failed to correctly interpret the provisions of Section 5 of the Oaths and Statutory Declaration Act, Chapter 15, in accordance with the guidelines set out at Section 72 of the Interpretation and General Provisions Act, Chapter 2, the judicial interpretation thereto availed before him, together with the overriding objective of the Civil Procedure Act Chapter 21, Laws of Kenya as set out at Sections 1A and 1B thereof.

9. The learned Judge having at the ex-parte stage granted interim orders in favour of the Plaintiffs on 28.09.2009 as an indication that the Plaintiffs had a legitimate and valid legal right warranting protection, erred in law and in fact when in his ruling on that preliminary objection, he had the Plaintiff's suit struck out on the basis of alleged irregularities of form which did not touch on the substance of any of the parties disputed claims of right in the suit or the cause of action at all, with the result that he erroneously elevated such procedural

defects, if at all, to a fetish, despite the same having been cured, and in total disregard to the recently introduced overriding objective of the court as set out in the Provisions to Section 1A and 1B of the Civil Procedure Act, Chapter 21, laws of Kenya, which seeks to reduce unnecessary costs on litigation by avoiding engagement of the court's valuable time on procedural defects, if any, that have no significant relevance to the substantive issues and rights in dispute between the parties, whose determination has now culminated on appeal, more expenses and prejudice to the Plaintiff who in the process has lost the interim orders in his favour."

Mr. Geoffrey Yogo, the learned counsel for the appellant, urged grounds 1, 2, 3, and 7 as one cluster of the grounds of appeal and grounds 4, 5, 6, 8, and 9 as the second cluster of grounds of appeal. In urging the appeal learned counsel submitted that the learned Judge erred in striking out the entire suit when there was a valid claim by the appellant against the respondents. Counsel relied on the case of **Josephat Sigilai v Gotab Sanik Enterprises Ltd & 4 others (Eldoret) Civil Appal No. 98 of 2003 (ur)** where this court allowed a verifying affidavit to be filed to replace a defective affidavit. Reliance was also placed on the case of **Ponangipalli v R. Rao (In his Capacity as Receiver/ Manager of Unibilt Kenya Limited (in Receivership) v Giro Commercial Bank Limited HC MISC. APPL NO. 704 of 2000 (ur)** where the High Court declined to uphold a preliminary objection taken by the defendant on the basis that the jurat of an affidavit was on a page different from the rest of the text.

Mr. Mitchell Menezes, the learned counsel for the 3rd respondent although opposing the appeal conceded the fact that the suit by the remaining plaintiff remained valid and should not have been struck out.

As we have stated the Plaint was accompanied by verifying affidavit of Kayam Chatur who stated inter alia that he was the plaintiff; that he was conversant with facts giving rise to the suit and that the contents of the plaint were correct. This affidavit was sworn at Kisumu on 28th September, 2009 before a Commissioner for Oaths.

Order 7 Rules 1 (2) and (3) Civil Procedure Rules (now Order 4) required that:

"(2) the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.

3. The court may of its own motion or on application of the defendant order to be struck out any plaint which does not comply with sub-rule (2) of this rule."

The suit was brought by two plaintiffs who prayed for the orders we have set out in this judgment but there was no verifying affidavit by the 2nd plaintiff. When, however, a notice of preliminary objection was filed on 5th October, 2009 which attacked the suit inter alia for absence of a verifying affidavit by the 2nd plaintiff this plaintiff immediately withdrew his suit against the defendants. This was way before the inter parte hearing of the application which did not take place until 4th November, 2009.

In the course of the Ruling the learned Judge stated:

"Here the suit was brought by 2 plaintiffs . Only one swore the verifying affidavit as to the truthfulness of every averment in the plaint. The 2nd plaintiff did not vouch for the same as per Order 7 rule 1 (2) Civil Procedure Rules whether by a separate verifying affidavit or a joint one. In this court's view that was a fundamental omission in the case. The defendants were misled to think that two plaintiffs were ranged against them even alleging fraud. And the two plaintiffs had even obtained an interim injunction order, to boot. If it was disobeyed, a civil jail term was hanging over the plaintiffs head (sic). This cannot have been a mere irregularity. The law required in mandatory terms that every plaint shall be accompanied by an affidavit sworn by the plaintiff, if one or as many as they are, verifying the correctness of the averments contained in the plaint....."

When the application came for inter parte hearing before the learned judge on the said 4th November, 2009 there was no suit at all by the 2nd plaintiff who had by formal notice filed in court on 5th October, 2009 withdrawn his suit against the defendants which he was entitled to do the only requirement being that such withdrawal be by notice. The Notice of withdrawal of suit which we have perused from the record fully complied with the formal requirements on withdrawal of a suit as it was filed in court with copies to the defendants.

The learned judge also held that the affidavit in support of the application did not comply with the provisions of the Oaths and Statutory Declarations Act because the place where the affidavit was sworn was not stated. He proceeded to strike out the entire suit. We are of the respectful view that if, indeed, that affidavit was incurably defective this could only have led to dismissal of the application which would not have affected the suit itself. The action of the learned judge who struck out the suit which was properly before him and unaffected by the actions of the 2nd plaintiff who had in any event withdrawn his suit was clearly in error. There was a competent suit by the appellant who was entitled to maintain the same. The effect of our findings is that the Ruling of the learned judge cannot stand and we hereby set it aside. The suit by the appellant against the respondents is hereby reinstated and shall be heard in the normal way. The appeal succeeds with costs to the appellant.

Dated and Delivered at Kisumu this 6th day of June, 2014.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR