IN THE COURT OF APPEAL
AT KISUMU

(CORAM: O'KUBASU, GITHINJI & NYAMU, JJ.A.)

CIVIL APPEAL NO.21 OF 2004

BETWEEN

ERNARD ONKOBA TINEGA T/A BETICO AUCTIONEERS
CLEMENT MOYA..... APPELLANTS

AND

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

(An appeal from the ruling and order of the Court of Kenya at Kisii (Kaburu Bauni, J.) dated 26th October, 2004

in

KISII H.C.C.C.NO.127 OF 2003
****
DRAFT JUDGMENT OF THE COURT

This is an appeal from the ruling of Bauni J. delivered at Kisii on 26th October, 2004.

The background to this appeal is that the respondent herein ***NATIONAL BANK OF KENYA LIITED*** filed a civil suit against both appellants (who were the defendants in the superior court seeking judgment in the sum of Kshs.3,172,410 together with interest at 26% p.a. from 19th March, 2003 until payment in full. The salient paragraphs of this Amended Plaint filed in the superior court on 28th August, 2003 were as follows:-

"3A(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just expeditious, proportionate and affordable resolution of the appeals governed by the Act.

3B(1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims -

(a) the just determination of the proceedings;

(b) the efficient use of he available judicial and administrative resources;

(c) the timely disposal of the proceedings; and all other proceedings in the Court, at a cost affordable by the respective parties; and

(d) the use of suitable technology

In reaction to the foregoing the appellants herein filed a chamber summons application under order ***VI Rule 13(1)(b),(c) & (d), Rule 1(1)(e)*** of the Civil Procedure Rules and ***section 3A*** of the Civil Procedure Act seeking the following orders from the superior court in:-

"1. The Honourable Court be pleased to order struck out the plaintiff's/Respondent's plaint dated 21st day of July, 2003 and filed in court on the 13th day of August, 2003.

2. That the Honourable court be further pleased, to order struck out the Amended Plaint dated 25th August, 2003 and filed in court on 28th August, 2003.

3. Consequent to striking out the plaintiff's/respondent's original plaint and the Amended Plaint herein, the court be pleased to dismiss the suit herein.

4. Costs of this application and of the main suit be borne by the plaintiff/respondent.

5. Such further and/or other orders be made as the court may deem fit and expedient."

It is that chamber summons application that was placed before the late Hon. Justice Bauni or consideration.

The learned Judge considered all that was urged before him and in is ruling delivered on 26th October, 2004 dismissing the application stated inter alia:-

"Looking at the plaint and the defence it does not indicate whether the plaintiff is basing his claim on the legal instruments alone. Par. 5 of the plaint states that the facilities were granted through a letter dated 23/10/95. Later there were legal charges created. The legality or otherwise of all these documents can only be decided after full hearing. The applicant has not in his defence denied some of the issues raised in the plaint. This is therefore not a properly case to be dismissed summarily. Plaintiff should be given his day in court."

Aggrieved by the foregoing the appellants, through heir advocates filed this appeal setting out the following 9 grounds of appeal:-

"1. The learned Judge of the superior court grossly misdirected himself in law when he held that a verifying affidavit which does not show the name(s) and/or true identity of the Commissioner of Oaths before whom such affidavit was taken is valid and lawful, contrary to the express provisions of Section 5 of the Oaths & Statutory Declaration Act.

2. The learned Judge of the superior court further misdirected himself in law when he held that a stamp of a firm of Advocates, who are also Commissioner for Oaths, suffices for purposes of Section 5 of the Oaths & Statutory Declaration Act.

3. The learned Judge of the superior court erred in law in failing to strike out the verifying affidavit attached to respondent's plaint dated 21st July, 2003, together with the plaint and thus arrived at an erroneous conclusion.

4. The learned Judge of the superior court erred in law in not finding that the respondent's suit in the superior court was ex-facie incompetent, deficient and thus fatally defective on account of an incompetent verifying affidavit, thus occasioning a miscarriage of justice.

5. The learned Judge of the superior court erred in law when he held that the provisions of order XVI Rule 5 of the Civil Procedure Rules, allows a litigant whose suit has been dismissed for want of prosecution to file a fresh suit, contrary to the express provisions of the legislature.

6. The learned Judge of the superior court misapprehended and/or misunderstood the gist and tenor of the provisions of Sections 34 and 35 of the Advocates Act, as relates to the legality of documents which do not correspond with the mandatory requirements of the said Sections and hence reached an erroneous conclusions.

7. The learned Judge of the superior court also erred in law in holding that documents which do

not correspond with Sections 34 and 35 of the Advocates Act, can still form the basis of a plenary trial, contrary to the established principles that issues of law be disposed of summarily.

8. That the learned Judge of the superior court erred in law in disregarding a binding decision of this Honourable court thus violating the hackneyed doctrine of stare decisis.

9. The decision and/or order of the learned Judge of the superior court appealed against is contrary to the weight of submissions on record."

That is the appeal that came up for hearing before us on 1st December, 210. Mr P. Ochwangi appeared for the appellants but there was no appearance for the respondent. Since here was evidence of service on the firm of M/s Khan & Katiku Advocates which was on record as appearing for the respondent we allowed Mr Ochwangi to proceed with his appeal.

In his submissions Mr Ochangi took up the issue of the verifying affidavit which, in his view, had not been properly commissioned and hence fatal to the respondent's suit in the superior court. Mr Ochwangi also referred to the fact that there had been an earlier suit by the same parties which suit had been dismissed. It was therefore his contention that the learned Judge erred in allowing the respondent herein to bring a fresh suit.

From the submissions of Mr Ochwangi it would appear that the appellants' application in the superior court was based on two main grounds viz that the verifying affidavit be expunged because the name of the commissioner was not shown and secondly there was failure on the part of he plaintiff (the respondent in this appeal) to disclose existence of a previous suit between the parties. These are the main issues that were taken up by Mr Ochwangi in his submissions before us.

We have carefully considered these matters and it is our view that the learned judge cannot be faulted in the manner he dealt with the issues before him. On this issue of verifying affidavit the learned Judge in his ruling stated:-

"Order 7 rule 1(2) CPR clearly provides that a plaint must be accompanied by a verifying affidavit. The initial plaint was accompanied by a verifying affidavit. The only quarrel was that the name of the commissioner of oaths who commissioned it is not specifically endorsed and only a stamp of law firm is there. Indeed the oaths and statutory Declaration Act provide that the person commissioning the affidavit be shown. This may not have been done in this instant case but I think that is not fatal. The stamp is shown to be that of Maari & Co. Advocates and Commissioner of Oaths. Though as I have said it is desirous to specify the actual person I think such omission does not make the affidavit fatal. The stamp shows that the firm of Maari has a commissioner of oaths and I should believe e is the one who commissioned the affidavit. I will therefore decline to strike out that verifying affidavit."

Considering the foregoing and the submissions by Mr Ochwangi we are satisfied that this is one of those technicalities that should not be entertained as they add no value to expeditious determination of disputes in our courts.

As we conclude this judgment, we would draw the attention of the parties herein and other litigants to ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act which provide:-

"3A(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just expeditious, proportionate and affordable resolution of the appeals governed by the Act.

3B(1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims -

(e) the just determination of the proceedings;

(f) the efficient use of he available judicial and administrative resources;

(g) the timely disposal of the proceedings; and all other proceedings in the Court, at a cost affordable by the respective parties; and

(h) the use of suitable technology

In view of the foregoing we are satisfied that this appeal lacks merit and we order that it he and is hereby dismissed will costs to the respondent.

Dated and delivered at Kisumu this 2nd day of December, 2010.

E.O. O'KUBASU
.....
JUDGE OF APPEAL

E.M. GITHINJI
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JUDGE OF APPEAL

J.G. NYAMU
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JUDGE OF APPEAL