



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**Civil Appeal 294 of 2002**

**PETER G. N. NGANGA ..... APPELLANT**

**AND**

**HARRISON MAINA KARIUKI ..... RESPONDENT**

**STANDARD CHARTERED BANK OF KENYA LIMITED..... INTERESTED PARTY**

*(An appeal from the Ruling and Order of the High Court of Kenya at Milimani*

*Commercial Law Courts, Nairobi (Mwera, J) dated 5<sup>th</sup> July, 2002*

**In**

**H. C. C. Suit No. 1037 of 2000)**

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**JUDGMENT OF THE COURT**

The orders of Mwera, J. dated 5<sup>th</sup> July, 2002 and against which Peter G.N. Nganga, the Appellant hereinafter, has brought this appeal were made upon a purported notice of motion brought by Harrison Maina Kariuki, the Respondent herein, pursuant to the provisions of *Order 24 Rule 4* of the Civil Procedure Rules, *section 3A* of the Civil Procedure Act and “All other enabling provisions of the Law.” As far as we are concerned, only the provisions of *Order 24 Rule 4* were relevant to the matter under consideration. That Rule provides that:-

*“If any subsequent suit shall be brought before payment of the costs of the discontinued suit upon the same, or substantially the same, cause of action, the court may order a stay of such subsequent suit until such costs have been paid.”*

It appears that the Appellant had previously filed H.C.C.C. No. 1037 of 2000 and that the Appellant had given a notice for the discontinuation of the said suit and the same had in fact been discontinued on 7<sup>th</sup> September, 2001. Then the Appellant filed H.C.C.C. No. 1364 of 2001 and it was the latter case that the Respondent sought to be stayed by his purported notice of motion of 8<sup>th</sup> October, 2001. The stay was sought on the basis that the costs in H.C.C.C. No. 1037 of 2000 ought to be paid first. The Appellant in turn, took a preliminary objection to the notice of motion seeking the stay of H.C.C.C. No. 1364 of 2001 and the main basis of the preliminary objection was contained in ground one of “NOTICE OF PRELIMINARY OBJECTION” and that ground was to the effect that:-

**“..... the 2<sup>nd</sup> defendant’s Notice of Motion dated the 8<sup>th</sup> day of October, 2001 is incompetent and does not lie by a back-door to seek substantive relief not raised by the 2<sup>nd</sup> Defendant’s pleading never tried or found by evidence.”**

That ground was unhappily worded but at the hearing of the preliminary objection before Mwera, J., it emerged from the submissions of Mr. Ngoge who represented the Appellant before the learned Judge that the true complaint forming the gravamen of the objection was that the Respondent’s notice of motion was not supported by any affidavit contrary to the provisions of **Order 50 Rule 3. Order 50 Rule 3**, in our view, envisages the filing of a motion without a supporting affidavit, but where the motion is grounded on evidence by affidavit, a copy of such affidavit must be served.

Before us, it transpired that the notice of motion itself was dated 8<sup>th</sup> October, 2001 and was in fact lodged in the superior court on 29<sup>th</sup> October, 2001. The affidavit in support of the motion was also dated 8<sup>th</sup> October, 2001 but was lodged in the superior court on 12<sup>th</sup> October, 2001, some seventeen (17) days before the motion itself was filed. Mr. Munene, learned counsel for the Respondent, readily conceded before us that the affidavit lodged on 12<sup>th</sup> October, 2001 could not have been in support of the motion lodged on 29<sup>th</sup> October, 2001. Mr. Munene readily agreed that the motion was not supported by any affidavit and therefore, that there was no valid notice of motion before Mwera, J. upon which the learned Judge could make the orders he purported to make. The consequence of that concession must be, and shall be, that the notice of motion ought to have been struck out as being incompetent.

Mr. Wamalwa, learned counsel for the Appellant, filed a notice of appeal in which the Appellant stated that he intended to appeal:-

**“ ..... against the whole of the said decision”**

Some parts of Mwera, J’s orders were in favour of the Appellant and that being so, the Appellant could not have appealed against them. But that really does not matter now. The whole notice of motion upon which the orders were purportedly made was defective and the whole of it ought to have been struck out. No orders could have been made on it either for or against the Appellant or the Respondent except an order striking it out. In those circumstances, we allow this appeal, set aside all the orders made by Mwera, J., and substitute them with orders that the Appellant’s notice of preliminary objection dated 28<sup>th</sup> May, 2002 be and is hereby allowed, and that the Respondent’s purported notice of motion dated 8<sup>th</sup> October, 2001 and lodged in the superior court on 29<sup>th</sup> October, 2001 be and is hereby struck out.

On the issue of costs looking at the history of this litigation and taking into account the conduct of the parties, we think the appropriate order to make is that each party shall bear their own costs of this appeal and those in the High Court. Those shall be our orders in the appeal.

Dated and delivered at Nairobi this 7<sup>th</sup> day of June, 2007.

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**