REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL CASE 1364 OF 2001

PETER G. N. NGA'NG'A.....…….....……PLAINTIFF

-V E R S U S-

STANDARD CHARTERED BANK (K) LTD

HARRISON MAINA KARIUKI…….....…..DEFENDANTS

R U L I N G

This application is brought by chamber summons dated 25th April, 2002 and filed in court on 26th April, 2002. It is brought under S.3A of the Civil Procedure Act, O.IXB Rule 8, and O.L.Rule 16(2) of the Civil Procedure Rules, and all the other enabling provisions of the Law. The applicant seeks the following orders from the court-

1. THAT this Honourable Court be pleased to set aside its ex parte orders given on 6th February, 2002, dismissing the plaintiff's application dated 3rd September, 2001.

2. THAT the application dated 3rd September, 2001 be marked withdrawn and be substituted with the plaintiff's application herein dated 25th February, 2002 with costs to the 1st and 2nd defendants.

3. THAT the applicants be granted leave to file a supplementary affidavit in support of their application herein dated 25th February, 2002.

4. THAT the costs of this application be provided for

5. THAT the Honourable Court be pleased to make further or other orders within its inherent jurisdiction.

The application is based on the following grounds-

(a) THAT the plaintiffs advocates on record after coming on record had no notice of the hearing of the application dated the 3rd day of September, 2001 for the 6th day of February 2002 when the same was dismissed for non attendance.

(b) THAT the plaintiff's application dated 3rd September, 2001, was previously before Mr. Justice Osiemo just before the Honourable Court's Christmas Vacation in 2001 when the said application was marked stood over generally to enable an application by the plaintiff for joinder of additional parties.

(c) THAT the plaintiff's advocates on record had a hint of the dismissal of the said application dated 3rd September, 2001, through the 1st defendant's Notice of preliminary objection dated the 5th day of March, 2002.

(d) THAT joinder of additional parties ordered by the Honourable Mr. Justice Onyango Otieno on 16th February, 2002 premised the filing of the application dated 25th February 2002 in substitution of the application dated 3rd September, 2001.

The application is further supported by the grounds set out in the annexed affidavit of FREDRICK N. WAMALWA, advocate for the applicant, sworn on 25th April, 2002.

The application is opposed. In his replying affidavit sworn and filed on 24th May, 2002, Mr. PAUL CHEGE, an advocate in the firm of Amolo & Gacoka, advocates who have the conduct of the defence for the first defendant, states that the application was presented with undue delay and lacks merit. Responding to paragraphs 9 and 10 of Mr. Wamalwa's supporting affidavit, Mr. Chege further states that the applicant's advocates upon coming on record seized the entire brief, adopted the pleadings, and cannot be heard to say that Mr. Gathemia was no longer on record. He also states that the application is an abuse of the court process in so far as it seeks to reinstate and withdraw the same application and under the same prayer the withdrawn application be substituted with another. In light of the above, the plaintiff cannot have his cake and eat it.

At the oral canvassing of this application, Mr. Ngoge appeared for the plaintiff/applicant while Mr. Chege appeared for the first and third defendants/respondents and also held brief for Mr. Munene and Mr. Ngatia for the second and fourth defendants/respondents respectively. Mr. Ngoge asked that the *ex parte* orders dated 6th February, 2002 dismissing the plaintiff's application dated 3rd September, 2001, be set aside *ex debito justitiae* , that the said application be marked as withdrawn with costs to the 1st and 2nd defendants.

Giving some historical background to this matter, counsel said that their firm of advocates came on record on 28th November, 2001, and notice of appointment was served on Amolo, Gachoka & Co., advocates for the 1st, 2nd and 3rd defendants, and Munene & Co., Advocates. During the christmas vacation of 2001, Mr. Wamalwa appeared before Osiemo J. for the hearing of the application dated 3rd September, 2001 when the same was stood over generally. Thereafter no dates were given for the hearing of that application and the plaintiff's advocates were never invited for the taking of a hearing date. The plaintiffs' advocates got to know of the dismissal of that application from the defendant's preliminary objection on 15th April, 2002, and Mr. Chege confirmed that they took the hearing date of 6th February, 2002 with the firm of Gatheru Gathemia & Co. By that time the firm of Wamalwa & Co. had already filed and served a notice of appointment. Mr. Ngoge then said that he relied on the affidavit of Mr. Wamalwa in support, and submitted that it is contrary to natural justice to condemn anyone unheard. He therefore urged the court to reinstate the application dated 3rd September, 2001 and then deem it as withdrawn.

In opposing the application, Mr. Chege relied on his own affidavit sworn on 24th May, 2002, and said that the application sought to be reinstated was filed by the former advocates for the plaintiff on 7th September, 2001 and the fixing of the application for hearing on 6th February, 2002 was also done by the same advocates when they were properly on record. Fixing of matters is documented on the court record, and when Wamalwa & Co., advocates came on record, the hearing date of 6th February, 2002 had already been taken. It is not the applicant's case that their predecessors, Gatheru Gathemia were not aware of the hearing date of 6th February, 2002, and therefore the defendants' advocates cannot be penalised for their non attendance. When a firm of advocates takes over a matter, there is no requirement that they should be briefed of hearing dates.

Secondly, Mr. Chege submitted, the prayer sought is an abuse of the process of the court, as it constitutes three prayers in one, and litigants should not play lottery with courts. He then cited **ASEA BROWN**

BOVERI LIMITED v. BAWAZIR GLASS WORKS LIMITED & ANOR, HCCC (Milimani) No.1619 of 2000, in support of that point. He further argued that it was a waste of court's time to reinstate and then withdraw. He then referred to **MICROSOFT CORPORATION v. MITSUBISHI COMPUTER GARAGE LTD. & ANOR.,** Milimani HCCC No. 810 of 2001 for a definition of abuse of process.

Thirdly, counsel for the defendants submitted that O.IXB rule 8 relates to the dismissal of suits and not applications, and what was dismissed here was not a suit but an application. Finally, he submitted that having abused the court process, the applicants cannot come to court under S.3A of the Civil Procedure Act. He therefore asked the court to dismiss the application with costs.

In his reply, Mr. Ngoge stated that there are differences between an application being dismissed or withdrawn. Where it is dismissed, the applicant cannot bring another one as that is res judicata, but where it is withdrawn, the applicant can substitute and pay costs. He then submitted that the definition of suit in Civil Procedure Rules includes application in which event it falls under O.IXB Rule 8. In any event, the inherent power of the court has been invoked, and counsel for the respondents did not tell the court under what rule the application should have been brought. He thereupon asked the court to grant the application.

This dispute is centred on the plaintiff's application dated 3rd September, 2001, which was dismissed on 6th February, 2002 for non-attendance. I agree with Mr. Chege for the respondent that fixing of matters is documented on the court record. Going by the record in this instance, the application dated 3rd September, 2001 as well as the plaint in this case bear the same date and were both filed in court on 7th September, 2001. A short history of the matter shows that the application came before Onyango Otieno J., as he then was, on 7th September, 2001 at 3.00pm when a Mr. Ongundi appeared for the applicant. The learned Judge certified the application urgent and ordered that the same be heard inter partes on 18th September, 2001. On 18th September, 2001, the matter came before Ringera J., as he then was, when Mr. Gatheru for the applicant said that he had not been able to serve the application. The same was accordingly stood over to 1st October, 2001. On that date, the matter was listed before Mwera J. Unfortunately it could not proceed. By consent of the parties, it was stood over generally and the plaintiff was ordered to pay the court adjournment fees.

A minute dated 9th November, 2001 on the court file reads-

"Francis for Gatheru Gathemia & Co, advocates, for the plaintiff.

Chamber summons dated 6th September, 2001 fixed for hearing ex parte 6th February, 2002. Notices to issue.

Snr. Executive Officer."

It is noteworthy that this minute refers to a chamber summons dated 6th September, 2001 being fixed for hearing on 6th February,2002. There does not seem to be on record a chamber summons application dated 6th September, 2001. The only application in September is the one dated 3rd September, 2001 and it is the one that came for hearing on 6th February, 2002. It is also the one which was the subject matter of the minute dated 9th November, 2001, fixing the same for hearing on 6th February, 2002. This view gains support from an application dated and filed in court under a certificate of urgency on 21st November, 2001. The certificate reads-

"I, PETER G.N. NG'ANG'A the plaintiff/applicant herein do hereby certify and confirm that the application dated 3rd September, 2001 and scheduled for hearing on 6th February, 2002 should be certified urgent and heard on a priority basis for reasons that the 2nd defendant/respondent has served me with a back-dated notice of eviction which has elapsed today the 21st day of November, 2001 and I may

be evicted any time from now before my said application is heard and determined."

In paragraphs 2 and 3 of his affidavit, the said Mr. Peter G.N. Ng'ang'a avers as follows-

"2. THAT this suit was filed on my behalf by Messrs Gatheru Gathemia & Co., Advocates.

3. THAT the said advocates also filed a chamber summons dated 3rd September, 2001 which has been scheduled for hearing on 6th February, 2002."

From the certificate of urgency and paragraph 3 of the applicant's affidavit, there is no gainsaying that as of 21st November, 2001, the plaintiff/applicant knew, actually and not constructively, that his application dated 3rd September, 2001 was slated for hearing on 6th February, 2002.

The matter of the above certificate came before Mwera J. on 21st November, 2001, the same date on which it was filed. Mr. Ng'ang'a, the plaintiff/applicant, appeared in person. There was no attendance by the respondent. Mr. Ng'ang'a told the court that he was acting in person, and the court ordered the matter to be stood over generally until the court adjournment fees ordered on 1st October, 2001 was paid.

The following day, i.e. on 22nd November, 2001 the plaintiff/applicant appointed M/s Ochieng Ogutu & Co., as his advocates. They filed on the same day a Notice of Appointment of advocates, and Mr. Ogutu signed a certificate of urgency in exactly the same terms as that signed by Mr. Ng'ang'a the previous day. The matter then came before Osiemo J.. Mr. Ogutu appeared for the applicant but there was no attendance by the respondent. The court made the following order-

"Application dated 3-9-2001 certified urgent. To be heard on 29.11.2001. Mr. Ogutu to serve the respondents. Status quo to be maintained."

The application dated 3rd September, 2001 had seemingly been certified urgent by Onyango Otieno J. on 7th September, 2001. How the same application fell to be re-certified urgent is not readily comprehensible. If the true facts had been brought to the court's attention, the court would, in all probability have acted differently. What the plaintiff/applicant should have sought, I think, was for the matter to be heard earlier than 6th February, 2002. By asking and suffering the court to certify urgent a matter which had already been so certified more than two months previously, the plaintiff engaged in a singular act of abuse of court process. Even worse, there was no disclosure that the same application had, only the previous day, been stood over generally pending the payment of court adjournment fees.

But be that as it may. On 28th November, 2001 the day before the inter partes hearing, the plaintiff/applicant appointed F.N. Wamalwa & Co., to act for him. On 29th November, 2001, the matter came before Osiemo J. Mr. Ngoge appeared for the applicant, Mr. Chege for the first respondent, and Mr. Munene for the second respondent. By consent, the application dated 3rd September, 2001 was taken out and stood over to 6th December, 2001 for hearing inter partes. On 6th December, 2001, the matter came again before Osiemo J. Mr. Wamalwa appeared for the plaintiff/applicant, Mr. Chege for the first defendant/respondent, and Mr. Munene for the second defendant/respondent. By consent, the application dated 3rd September, 2001, was taken our and stood over generally. During all these appearances, no one ever mentioned the 6th February, 2002, on which date the application was listed for hearing. The date remained in the court diary, and come that day, the matter came for hearing before the Hon. Justice Mwera. Mr. Chege appeared for the first defendant and held brief for Mr. Munene for the second defendant. When the judge asked whether the court adjournment fees had been paid, Mr.Chege responded that it was the plaintiff/applicant who was supposed to pay, and that he was not in court to argue his application. He requested the court to dismiss the application with costs. In a short terse ruling, the court said-

"The plaintiff has neglected/ignored to pay court adjournment fees ordered on 1st October, 2001. He is

not present to argue his application dated 3rd September, 2001. It is dismissed with costs."

If I understand the plaintiff's case, it is that his advocates came on record on 28th November, 2001 and were not aware that there was a hearing date fixed for 6th February, 2002. Paragraphs 7 and 8 of the supporting affidavit of F.N. Wamalwa, advocate, are quite telling. Paragraph 7 states-

"7. THAT neither my firm nor the plaintiff were aware of the hearing dates set mysteriously for 6th February, 2002 and it would appear when the 1st plaintiff sacked the firm of Gatheru Gathemia & Co., advocates in October, 2001 the Honourable Court's diary for the year 2002 may not then have been opened."

For an affidavit, the sentiments in this paragraph are not factual. They are speculative. As indicated earlier on, the hearing date of 6th February, 2002 was taken on 9th November, 2001 by none other than the firm of Gatheru Gathemia & Co., the then plaintiff's advocates on record. This shows that the diary was then open. Secondly, the plaintiff was personally aware of this date. His certificate of urgency and paragraph 3 of his affidavit dated 21st November, 2001 quote specifically that the matter was scheduled for hearing on 6th February, 2002 and this was only 7 days before the appointment of the advocates. To state on oath that neither the advocates' firm nor the plaintiff were aware of the hearing dates set mysteriously for 6th February, 2002 is a travesty of what actually happened. If the plaintiff decided to keep away from his advocates some such details for his own underhand purposes, then he is bound to reap the fruits of telling half truths which sometimes are more costly than downright falsehoods.

Paragraph 8 of the same affidavit states in part-

"THAT…Mr. Chege advocate for the 1st, 3rd and 4th defendants confirmed to the court that the hearing date for 6th February, 2002 was taken by his firm with the consent of the firm of Gatheru Gathemia & Co., advocates…"

With respect, and with hindsight of what is on record as having transpired on 9th November, 2001, this statement is not and cannot be true. It was Gatheru Gathemia who took the date and issued the relevant notices. Mr. Ng'ang'a, the plaintiff himself, was aware that the matter was coming for hearing on 6th February, 2002. He so advised Messrs. Ochieng Ogutu & Co., advocates, on 21st November, 2001. I don't see that seven days later, he was not aware of that fact. I find that the plaintiff actually knew, and ought to have advised his new advocates accordingly.

This application is made under O.IXB rule 8 of the Civil Procedure Rules. The remedy sought is equitable and discretionary. He that comes to equity must do equity and must also come with clean hands. For the plaintiff to say that he was not aware that the hearing date was set for 6th February, 2002, and yet he was actually aware, is tainting his hands. His hands are unclean. He cannot access an equitable relief.

Coming back to O.IXB rule 8, the same prescribes a procedure for setting aside judgment or dismissal where judgment has been entered or the suit has been dismissed. Mr. Chege argued that this provision applies to the dismissal of suits, but since we are here dealing with the dismissal of an application and not a suit, the provision does not lie. With respect, the position is not as learned counsel for the first defendant put it. Although no authority was cited by either counsel on that point, we derive some adequate guidance from the case of MANSION HOUSE LTD. v. JOHN STANBURY WILKINSON, (1954) 21 EACA 98. In that case, Briggs J.A. said at page 101-

"In s.2 of the Ordinance 'suit' is defined to mean 'all civil proceedings commenced in any manner prescribed.' One might imagine that this would mean 'prescribed by any written law'; but it does not, for 'prescribed' is again defined by the same section to mean 'prescribed by rules' and 'rules' are defined to mean 'rules and forms made by the Rules Committee to regulate the procedure of courts'. The Rules Committee is clearly that created by section 81 of the Ordinance. Accordingly a ' suit' is any civil

proceeding commenced in any manner prescribed by rules and forms made by the Rules Committee to regulate the procedure of courts under s.81 of the Ordinance."

This definition of the word "suit" was quoted with approval and applied in the subsequent case of MANDAVIA v. RATTAN SINGH [1968] E.A. 146. I don't think that there is any need to belabour the point. An application such as this one is as good as any suit for purposes of O.IXB of the Civil Procedure Rules. Being of that persuasion, I see no need to consider whether S.3A of the Civil Procedure Act is properly invoked or not.

If the plaintiff's concern is that he will have to contend with *res judicata* unless the dismissal of the application dated 3rd September, 2001 is set aside, then his fears are misdirected. He should focus these towards HCCC No.1037 of 2000, in which the germ of *res judicata* herein was laid. It is not premised on the application dated 3rd September, 2001.

For the aforegoing reasons, I find no merit in this application. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 10th day of December 2004

L. NJAGI

JUDGE