



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1068 OF 2001

HOUSING FINANCE COMPANY OF KENYA LTD.....PLAINTIFF/APPLICANT

VERSUS

EMBAKASI YOUTH DEVELOPMENT PROJECT...DEFENDANT/RESPONDENT

JUDGEMENT

What is before the court is, an effect, in appeal, even though it comes as a reference, and in the form of a Chamber Summons, which is dated 16th August, 2004 and brought under rule 11 of the Advocates Remuneration Order, and Section 3A of the Civil Procedure Act (Cap. 21). It was filed on 17th August, 2004. Its substantive prayer was that the Court be pleased to vacate and set aside in its entirety the ruling and reasoning of the taxing master dated 4th August, 2004. The plaintiff also prayed that the defendant be made to pay the costs of the application.

The grounds on the face of the Chamber Summons are, firstly, that the taxing master misdirected herself in law, and reached decisions that were devoid of a legal basis. Secondly it was stated that it was trite law that, a non-legal person is not entitled to costs in any proceedings. Thirdly it was stated that the taxing master had misdirected herself on points of law, and so her ruling and reasoning must be set aside. It was, fourthly, asserted that the taxing master's ruling was contrary to rules of law. And lastly it was stated that the quantum as ordered by the taxing master was baseless in law.

Filed with the Chamber Summons was a "notice of objection of the Registrar's ruling delivered on 4th August, 2004". By this notice, the plaintiff objected to the Deputy Registrar's decision on the defendant's bill of costs dated 29th January, 2002. The plaintiff further requested the Deputy registrar's reasons, by virtue of the Advocates Remuneration Order, Rule 11(2).

The defendant's grounds of opposition, dated 9th September 2004 were filed on 10th September, 2004. The specific grounds set out are as follows:-

- (a) that, the plaintiff's reference is *res judicata* in so far as it challenges the taxing master's refusal to dismiss or strike out the bill of costs;
- (b) that, the costs awarded by the taxing master were minimal and the present application, in so far as it challenges the quantum awarded, has no merits;
- (c) that, the reference offends the provisions of rule 11 of the Advocates Remuneration Order under which it is purportedly brought;
- (d) that the reference is frivolous, vexatious and an abuse of Court process.

This matter was heard on 17th September, 2004 when Mr. Ahmednasir Abdullahi appeared for the plaintiff, while Mr. Amuga appeared for the defendant.

Mr. Ahmednassir first explained the lack of affidavits in this matter: the reference was concerned with a pure point of law, and no evidentiary material was required.

Counsel's first point was that the defendant, namely ***Embakasi Youth Development Project***, was not endowed with legal personality, and on this account would not be entitled to costs – and so the taxing master by awarding such costs fell into error as a matter of law. In support of this submission, counsel cited the case ***The Fort Hall Bakery Supply Co. v Fredrick Muigai Wangoe*** [1959] E.A 474. This was a decision of Her Majesty's Supreme Court of Kenya, given by Mr. Justice Templeton.

The facts of the ***Fort Hall Bakery Supply*** case, in summary, were as follows. The plaintiffs brought an action for the recovery of some money from the defendant. In the course of the hearing, it transpired from the evidence that the plaintiffs were an association consisting of 45 persons trading in partnership for gain and that the firm was not registered under the Registration of Business Names Ordinance. On this realization, counsel for the defendant submitted that the action was not properly before the Court, as the association would be illegal, since S.338 of the Companies Ordinance prohibited an association or partnership consisting of more than 20 persons formed for the purpose of business (other than banking) seeking to make gain, unless it was registered as a company under the Ordinance. The learned judge held that the plaintiff could not be "recognized as having legal existence." The learned judge adopted the words of Bankes, L.J. in ***Banque Internationale de Commerce de Petrograd v Goukassaow***(3) [1923] 2 K.B. 682, at p. 688:

"the party seeking to maintain the action is in the eye of our law not party at all but a mere name only, with no legal existence."

This was in reference to the plaintiff in the present case. He then went on to say, quite significantly for the matter in hand (p.475):

"A non-existent person cannot sue, and once the Court is made aware that the plaintiff is non-existent, and therefore incapable of maintaining the action, it cannot allow the action to proceed."

"The order of the Court is that the action be struck out, as the alleged plaintiff has no existence. Since a non-existent plaintiff can neither pay nor receive costs there can be no order as to costs".

Counsel submitted that the ***Fort Hall Bakery Supply Co.*** case was indeed brought to the attention of the taxing master, but notwithstanding its clear relevance, it was neither followed, nor analysed, nor distinguished. He submitted that the defendant in this case was in precisely the same position as the ***Fort Hall Bakery Supply Co.***, and therefore the taxing master had no basis for taxing costs in favour of the defendant.

Mr. Amuga for the defendant opposed the plaintiff's application, contending that any grievance with respect to the bill of costs had to be referred to the taxing master, and the specific items which were the basis of complaint ought to have been stated on that occasion. Counsel stated that when the bill of costs had come before the taxing master, all the items had been agreed between the parties, except for item 2 which was contested. Counsel contended that it was only during the stalemate over item 3, that the issue of legal personality arose, and when it did, it now embraced the entire bill of costs. Counsel contended that the reference had been brought on a matter which was *res judicata*, as the taxing master had already taken her decision within the powers entrusted exclusively to her.

Mr. Amuga stated that the plaintiff's objections founded on legal personality had been brought up in a preliminary objection dated 11th March 2002, but had been dismissed by the Deputy Registrar on 11th November, 2003. Counsel cited in support of his contention section 7 of the Civil Procedure Act (Cap.

21) which states:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been substantially raised, and has been heard and finally decided by such court”.

The essence of this contention is that the issue in dispute had already been determined by the Deputy Registrar in her capacity as taxing master, and it must now be allowed to remain at rest.

Mr. Amuga cited in support of his submission the case, *Ganijee Glass Mart Ltd (in receivership) v First American Bank of Kenya Ltd*, Civil Case No. 752 of 2003, which is a brief ruling dealing with the *res judicata* concept. Counsel submitted that there had been a Court decision which directed that the bill of costs be forwarded for taxation, and *at that stage it had already been determined that the defendant was entitled to costs*. He contended that the plaintiff did participate in the assessment of costs; and so the plaintiff could no longer raise issues about liability, or about the entitlement of the defendant.

Mr. Amuga submitted that the claim made by the plaintiff was also barred by the operation of *issue estoppel*, and in this regard he sought to rely on the case, *Hunter v Chief Constable of West Midlands & Another* [1981] 3 ALL E.R. 727. The relevant passage in that case is in the judgment of Lord Diplock (p.733):

“the abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision against the plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the plaintiff had a full opportunity of contesting the decision in the court by which it was made”.

Counsel submitted that even where the same issues have been raised in a court of criminal jurisdiction, they can no longer be raised before the court when it is exercising a civil jurisdiction; and that only an appeal would be allowed, everything else being barred by issue estoppel. Counsel contended that the effect of the plaintiff’s reference was to attempt to obtain a different order from that of the Deputy Registrar, *without filing an appeal*.

Counsel stated that he had cited a case before the taxing master which qualified the weight of the *Fort Hall Bakery Co.* case. That case was *Francis Karani Elijah & 2 others v Chairman (KANU) and 2 others*, Misc. Civil Case No. 238 of 2002, in which a two-judge High Court Bench (Oguk and Rimita, JJ.) had thus held (p.6):

“It is common ground that the party known as KENYA AFRICAN NATIONAL UNION (KANU) is a society. It is registered under the Societies Act. It is therefore not a legal person with [a] capacity to sue or be sued. It can therefore only be sued through its officials. It was therefore necessary for the respondents to name the officials by their names. The offices named are not proper parties.

“Consequently, we agree with the advocates for the respondents that there are no proper respondents in the application”.

Mr. Ahmednassir submitted that counsel for the defendant has misunderstood his earlier motions. The plaintiff’s notice of objection dated 13th August, 2004 had been filed on 17th August, 2004 – and this had been an objection to all aspects of the bill of costs. On the basis of the reasons given by the Deputy Registrar, the plaintiff had then come before the Court by making a reference. Counsel submitted that the doctrine of *res judicata* was inapplicable, since this was the same suit, and all the plaintiff had done was to make a reference; and the plaintiff had taken the conscious decision not to *appeal*.

Counsel submitted that the **Fort Hall Bakery** case was perfectly consistent with the KANU case, in so far as both were quite clear on one point: *a non-legal person cannot sue*.

It is necessary to set out a series of *factual points*, as a basis for determining the present matter.

1. On 28th June, 2001 the plaintiff filed suit against the defendant.
2. On 12th July, 2001 the defendant filed a memorandum of appearance.
3. On 12th October, 2001 the plaintiff gave a formal notice of discontinuance of the suit, by virtue of Order XXIV rule 1 of the Civil Procedure Rules.
4. On 6th December, 2001 the defendant filed a request for judgment on costs, by virtue of Order XXIV rule 3.
5. On 5th February, 2002 the defendant filed their bill of costs.
6. On 11th March, 2002 the plaintiff filed a notice of preliminary objection on a point of law. Its essence was that –
 - (i) the purported defendant was not a legal entity capable of filing a bill of costs;
 - (ii) the advocate purportedly on record for the defendant had no legal instructions from a juridic entity to prosecute a taxation cause.
7. On 26th March, 2002 the defendant initiated action to fix a date for a hearing on their bill of costs. This was repeated on 16th January, 2003 and 18th June, 2003.
8. On 7th August, 2004 the Deputy Registrar, Mrs. T. Matheka, exercised her jurisdiction as the taxing officer and gave her decision.
9. On 17th August, 2004 the plaintiff filed an objection to the taxation of costs done by the Deputy Registrar – the main ground being that the defendant was a non-juridic entity and was not entitled to costs.
10. The following passages from the Deputy Registrar’s ruling will provide a basis for resolving the present application:
 - (a) “Mr. Ahmednasir for the respondent..... says that no instruction fees are payable because the applicant is a non-legal person and hence cannot be paid legal fees”.
 - (b) “On the issue..... whether instruction fees can be awarded or not, the same was dealt with by a preliminary objection raised by [the] respondents on 7th November, 2003. I made my ruling on 11th November, 2003 and I wish to reiterate the same. The said ruling was not appealed against and has not been set aside or reviewed”.
 - (c) “I rely on schedule VI 1(L) of the 1994 Remuneration Order. From the nature of the case, work done, complexity of the matter and bearing in mind that the suit was discontinued and never proceeded for hearing, I find an award of 300,000/= is reasonable as instruction fee for item 2”.
11. On the occasion of the Deputy Registrar’s ruling, on 7th August, 2004 counsel for the plaintiff sought stay of execution of the taxed bill of costs, to enable him to file a reference. Although the specific question to be the subject of reference was not identified, the Deputy Registrar granted 45 days of stay to the execution process.

12. The reference took the form of the Chamber Summons of 16th August, 2004 and as already noted, it carried the prayer that *the Court be pleased to vacate and set aside in its entirety the ruling and reasoning of the taxing master dated 4th August, 2004.*

There are also matters of law that I should set out here, as a basis for the resolution of the question raised in the Chamber Summons of 16th August, 2004. These are as follows:

1. The two cases sought to be relied on by the parties, albeit for different purposes, namely ***Fort Hall Bakery Supply Co. v Fredrick Muigai Wangoe*** [1959] E.A. 474 and ***Francis Karani Elijah & 2 others v. Chairman (KANU) & 2 others***, Misc. Civil Case No. 238 of 2002, for the purpose of the instant matter, speak authoritatively in the same terms : only a juristic person, that is an entity endowed with legal personality, can have *locus standi* before the Court, and can be the subject of rights and liabilities as may be declared by the Court. Court orders are not made in vain and are intended to be executed. Such execution is only possible in relation to entities endowed with legal personality. It follows that the notion that an entity lacking legal personality can seek orders of the Court or become the bearer of rights or liabilities declared by the Court, is totally inconsistent with the character and *modus operandi* of the Courts in the common law system. In this system, judicial orders may only be made where they are assured of enforcement and this assurance is secured by the effectiveness of the law relating to contempt of Court.

2. Thus in the ***Fort Hall Bakery Case***, the purported plaintiff was declared to be a non-existent person in law; and in the same way, in the ***Francis Karani Elijah*** case, KANU by itself was declared to be a non-existent person before the Courts of law.

3. It follows, therefore, that in the instant matter, the purported defendant, Embakasi Youth Development Project was a non-existent person for the purposes of the law.

4. Yet the plaintiff, without due regard to the point stated at paragraph 3 above, did file suit against a non-existent person. It must be right to say, such was the plaintiff's error and not the purported defendant's error.

5. It must be assumed that the plaintiff later realized it was in error, when on 12th October, 2001 it gave formal notice of discontinuance of its suit. Of course, no reason was given, but I can see no possible reason than the fact that there was no defendant in law to be sued and the plaintiff was destined to lose in its suit.

6. The mere fact of filing suit sets in motion a certain train of events that occasions cost, on the part of the plaintiff and of the defendant or purported defendant. This obviously is the reason for the decision of the taxing master which is being challenged by the plaintiff.

7. For the reasons emerging clearly in this ruling, it would not be right or proper for the *plaintiff* to question the exercise of jurisdiction by the taxing master, on the ground that the defendant was a non-existent person in law; or at the very least, the plaintiff cannot dispute the right of *counsel* who appeared in the name of the purported defendant, to their own costs. Even if the defendants did not have legal personality, all of them or some of them would have asked counsel to enter appearance and to begin to act. Therefore such counsel would be regarded as having performed *legal work in respect of which in law and in equity, they should be remunerated.*

8. It follows that the taxing master had a proper matter before her, and she could not decline her responsibility to tax the bill of costs submitted by counsel for the "defendant".

9. It is recognized that the taxation of costs is the responsibility of the taxing master and not of the judge. There will, however, be those instances in which the taxing master is seen to have departed from governing principles of law, in the course of taxation. In such a case an appeal lies to a judge who will consider the relevant issues of law and make appropriate orders.

10. Counsel for the plaintiff stated that the plaintiff had elected not to lodge such an appeal. What is the implication of this? I believe the implication is that it had not been the perception of the plaintiff that the taxing master had erred in law.

11. But that is inconsistent with the claim in the reference which the plaintiff filed by Chamber Summons of 16th August, 2004. In the reference, it is asserted that:

- **“the taxing master misdirected herself in law in that she reached decisions that are untenable in law”;**
- **“a non-legal person is not entitled to any cost in any proceedings”;**
- **“the taxing master misdirected herself on points of law”;**
- **“her ruling was contrary to the rules of law”.**

12. The effect of such prayers is to ask the court to sit on appeal over the decision of the taxing master.

13. It is not possible in law for a judge to consider granting such prayers unless they come in the form of an *appeal*.

My consideration of the reference of 16th August, 2004 and of the grounds stated; of the submissions of counsel; of the authorities tendered by counsel; of the pertinent facts and legal considerations, leads me to the following orders which I hereby make:

1. The prayer that the ruling and the reasoning of the taxing master be vacated, is refused.
2. The plaintiff shall bear the costs of this application.

DATED and DELIVERED at NAIROBI this 12th day of November 2004.

J.B. OJWANG

AG. JUDGE

Coram : Ojwang, Ag. J

Court Clerk : Mwangi

For the plaintiff/applicant : Mr. Ahmednassir Abdullahi,

instructed by M/s Ahmednasir, Abdikadir & Co. Advocates

For the defendant/respondant : Mr. Amuga, instructed by M/s Amuga & Co. Advocates.