



**REPUBLIC OF KENYA**

**THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 300 of 2007**

**GERISHON GITHUGO HITHA.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LTD.....DEFENDANT**

**RULING**

The Plaintiff, by a chamber summons application dated 14<sup>th</sup> June, 2007, and filed on the same day sought an order of injunction against the Defendant, restraining it from disposing off, transferring or selling Land reference No. LOC.10/WANJENGI/T174 pending the hearing and determination of the suit. The application was expressed to have been brought under Order XXXIX rule 1 and 2 of Civil Procedure Rules section 3A of Civil Procedure Act, Section 39 of Central Bank of Kenya

ment Act and all enabling provisions of the law.

The Respondent filed a replying affidavit on 24<sup>th</sup> July, 2007 and a Notice of Preliminary Objection on 25<sup>th</sup> October, 2007.

The application was set to be heard on 27<sup>th</sup> July, 2007 but was adjourned by consent of parties and an order made by the Judge that the parties fix a new date in the registry. The Respondents fixed the application for hearing on 5<sup>th</sup> November, 2007 and they duly served a hearing notice on the Applicant.

On 5<sup>th</sup> November, 2007, the Applicant did not show up, whether in person or through Counsel. The matter therefore proceeded ex-parte. Mr. Ojiambo for the Respondent argued the Preliminary Objection filed by the Respondent on 25<sup>th</sup> October, 2007. The Preliminary Objection raises three grounds as follows:

1. **The Amended plaint is a nullity in law as it flies in the face of Order VIA RULE 7 of the Civil Procedure Rules.**
2. **That the introduced amendments amount to an admission that the Applicant did not disclose material facts at the time of getting the ex-parte injunction.**
3. **That the defendant shall apply for:-**
  - a) **The amended plaint should be struck out with costs to the Defendant.**

b) The application dated 16<sup>th</sup> August, 2007 should be struck out with costs to the defendant as there is no valid plaint on record.

c) The ex-parte injunction is discharged until the non-disclosure is disclosed.

Mr. Ojiambo submitted that after the Plaintiff/Applicant obtained injunction orders ex-parte, when he argued the application under certificate of urgency, he amended the plaint without leave. Mr. Ojiambo raised issue with the amended plaint on grounds it did not have any date endorsed on it whether of the amendment or of date leave to amend was granted. Mr. Ojiambo submitted that the omission contravened Order VIA rule 7(1) of Civil Procedure Rules. Counsel relied on two authorities. **STOCKMAN ROZEN KENYA LTD. VS DA GAMA ROSE GROUP OF COMPANIES LIMITED [2002]1 KLR 573** in which Mwera, J held:

***“3. The Plaintiff was enjoined to endorse on the amended plaint the number of the rule in pursuance of which the amendment was made and failure to comply was fatal and the amended plaint would be struck out.”***

Counsel also relies on **WILFRED DICKSON KATIBI vs BARCLAYS BANK OF KENYA LIMITED & OTHERS MILIMANI HCCC NO. 259 OF 2005** where Ochieng, J held:

***“But, even if there had been no order, so that the amendments were effected pursuant to the provisions of Order 6A rule 1(1), the 2<sup>nd</sup> Defendant was still obliged to endorse the pleading with the number of the rule pursuant to which the amendment was made. As it is, there is neither an endorsement of the order which allowed the amendment or an endorsement of the rule pursuant to which the amendment was made. Therefore, the 2<sup>nd</sup> defendant has definitely flouted the provisions of Order 6A rule 7(1) of the Civil Procedure Rules.***

***When faced with those formidable authorities, the 2<sup>nd</sup> Defendant asked the Court to apply substantive justice, instead of going along with technicalities. I am afraid that the rules of procedure cannot be looked at simply as technicalities. They provide a set up within which the judicial system can systematically dispense justice. If rules were disregarded, as being mere technicalities, our judicial systems would soon be clogged shut by disorderly and radar-less actions.”***

Counsel relied on **MUTUKU & 3 OTHERS VS UNITED INSURANCE CO. LIMITED [2002]1 KLR 250** where Ringera, J as he then was held:

***“Where a pleading has been amended and the same has been struck out, the party affected has simply no valid pleading left on record.”***

The amended plaint was not on the file at the time the application was argued. The parties were both called on phone and requested to supply a copy of the same. The Plaintiff’s Advocate finally supplied a copy of the amended plaint just this week. The supplied copy has a date showing the date the plaint was amended. The amendment was made under Order VIA rule 1(1) of the Civil Procedure Rules which provides:

***“Order VIA rule 1.(1) A party may, without the leave of the Court, amend any pleading of his once at any time before the pleadings are closed.”***

The amendment was therefore carried out before pleadings closed, in fact before the plaint was served on the Respondent/Defendant, and therefore without the leave of the court. That being the case, the plaintiff complied with Order VIA rule 7(1) by indicating the date the amendment was made, assuming the amended plaint supplied was the correct one. Failure to indicate on the face of the amended plaint that the amendment was pursuant to Order VIA rule 1(1) of Civil Procedure Rules is irregular but in my view not fatal. Ochieng J’s ruling in Wilfred Katibi case, Supra cited by the Respondent dealt with a Preliminary Objection raised on a defence amended with the leave of the Court. In the instant case, the

amendment was made without leave and before the pleadings were closed. The best order to make is not to strike out the amended plaint but to order the Plaintiff to file a compliant one.

That rests the first ground of opposition. The second ground raised is quite serious. Mr. Ojiambo contends that the Plaintiff did not disclose all the facts of the case in the initial plaint filed. According to Mr. Ojiambo, the plaint dated 14.6.2007 at paragraph 3 to 5 only spoke of the initial loan taken by the Plaintiff from the Defendant of Kshs.200,000/= and which he secured with his property LOC 10/WANJENGI/T.174 valued at Kshs.600,000/=. In paragraph 6 the Plaintiff avers that he cleared the entire outstanding loan plus the interest. Paragraph 3 and 6 of Plaintiff provides:

**3) In or about 1991 the Defendant Bank advanced a loan of Kshs.200,000/= to the Plaintiff.**

**6) The Plaintiff avers that he duly repaid the loan (principal) plus interest at the said rates but on or about 19<sup>th</sup> April 2007 Gillette Traders (Auctioneers) with instructions from the Defendant herein issued a 45 redemption notice purporting to sell Land Parcel No. Loc 10/Wanengi/T 174 by public auction. This was on alleged exercise of statutory power of sale by the Defendant.**

Mr. Ojiambo drew the Court's attention to paragraph 3A of the amended plaint. In that paragraph the Plaintiff avers as follows:

***"3A) Further in or about 1997, before the Plaintiff cleared the 1<sup>st</sup> loan for Kshs.200,000/= the Defendant Bank advanced a further loan of Kshs.400,000/= to the Plaintiff."***

Mr. Ojiambo submitted that the Plaintiff obtained the injunction order on the basis of the initial plaint in which he indicated that he had cleared the loan. Counsel submitted that by virtue of the amended plaint, the Applicant is guilty of non-disclosure of material facts and that the plaint and the application should be struck out.

Counsel relies on the case of **NGENGI MUIGAI & ANOTHER VS EAST AFRICAN BUILDING SOCIETY & ANOTHER MOMBASA HCCC NO. 11 OF 2004** in which Maraga, J quotes from other cases as follows:

***"In JOHN MURILU KIGWE & ANOTHER VS AGIP (KENYA) LIMITED NAIROBI (MILIMANI COMMERCIAL COURTS) HCCC NO. 2382 OF 1999 it was held that on an ex-parte application uberrima fides is required.***

***Person making an ex-parte application is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge and if he does not he will be deprived of any advantage he will have already obtained by an ex-parte order. If there is any deception practiced on the Court, then the Court should not go into the merits of the case and instead it should dismiss the application.***

***Materiality is to be decided by the Court and not by the assessment of the Applicant and his legal advisers. See REX VS KENSINGTON INCOME TAX COMMISSIONERS [1917] 1K.B. 486 AT 504. The material facts are those which are necessary for the court to know when dealing with an application. They include not only the material facts within the knowledge of the applicant but also any additional facts which he would have known if he had made proper and reasonable enquiries.***

Counsel also relied on the case of **JANE WANJIKU CHEGE VS HOUSING FINANCE COMPANY OF KENYA MILIMANI HCCC 635 OF 2005** where by learned sister, Kasango J, makes similar observations as Maraga, J on the issue of material non disclosure of facts.

As stated earlier, the Applicant did not show up to argue this application despite proper service and in spite of the fact the Applicant was enjoying injunction orders granted ex-parte.

On the issue of the Preliminary Objection raised I find merit in the third ground on the point that the

Plaintiff/Applicant was guilty of material non-disclosure. The nature of the non-disclosure is glaringly clear. The Plaintiff filed simultaneously with the application disclosed only one loan of Kshs.200,000/= was taken by the Plaintiff from the Defendant in 1991, and which the Plaintiff duly paid. The application was challenging the sale of the Applicant's property used to secure the said loan and which the Defendant Bank was proposing to sell on the 18<sup>th</sup> June, 2007. The Applicant came to court on the 15<sup>th</sup> June 2007, three days before the sale.

After an injunction was issued to the Plaintiff, on a temporary basis, he went and amended his plaint and filed it on 3<sup>rd</sup> October, 2007. In that amended plaint, as already indicated, the Plaintiff not only made a new disclosure, that indeed he took a second loan of Kshs.400,000/= secured by the same suit property, but also changed the cause of action. In the amended plaint the Plaintiff challenges the legality of the charge instrument dated 24<sup>th</sup> April, 1991, challenges the legality of the interest charged on the loan and alleges misrepresentation and impropriety against the Defendant Bank. These were missing from the original plaint filed.

I do not think that at this stage the amended plaint should be struck out merely on the basis that there are new facts and a different cause of action disclosed. That would be tantamount to gag the Plaintiff and to prevent him from being heard on the merit. However, on the grounds that the Applicant obtained an injunction ex-parte on basis of non-disclosure of material facts, I believe the Respondent has a point. The Applicant is guilty of material non-disclosure, because he failed to disclose that he had taken an additional loan for which he was in arrears of payment. Had the Plaintiff disclosed the additional loan, I doubt that any temporary injunction would have been granted to him stopping the sale of the charged property. The Applicant was under an obligation to make the fullest disclosure of all material facts within his knowledge especially given the fact that he approached the Court ex-parte and under a certificate of urgency. The facts he failed to disclose were material facts which were necessary for the Court to know when dealing with the application for injunction.

The averments in the amended plaint are clear proof that the material facts initially excluded from the first plaint but which he included meticulously in the amended plaint were within his knowledge. This is more so if one considers that the disclosures were made three and half months after the injunction was obtained.

I do find that the Applicant failed to disclose material facts and further that the injunctive relief sought were based on deception practiced on the court. The proper thing for the Court to do is not to look into the merits of the application. Even if the Applicant argued it, the Court is not obliged to consider its merits if in fact an ex-parte order was made based non-disclosure of material facts and therefore on deception practiced on the Court by the Applicant.

The upshot of this application is that the ex-parte order of injunction issued by this court on the 15<sup>th</sup> June, 2007 is hereby set aside and the application dated 14<sup>th</sup> June, 2007 dismissed with costs to the Respondent. The Applicant should file a compliant amended plaint within 14 days from date of service of this order.

**Dated at Nairobi this 30<sup>th</sup> day of November, 2007.**

**LESIIT, J.**

**JUDGE**

Read, signed and delivered in the presence of:

Non attendance

**LESIIT, J.**

**JUDGE**