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Kapu (K) Limited v Mim Auto Spares

MILIMANI COMMERCIAL COURTS

OMBIA J

Date of Ruling: 24 October 2003 Case Number: 484/02

Sourced by: LawAfrica Citation: [2002] LLR 2711 (CCK)

Cases referred to in ruling:

Jambo Biscuits v Barclays Bank of Kenya Limited and two others Milimani High Court civil case number 1833 of 2001

Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited [1969] EA 696.

Ruling

OMBIA J: By a plaint dated 16 April 2002, Kapu (K) Limited (hereinafter referred to as the Plaintiff) sued Mim Auto Spares (hereinafter referred to as the Defendant).

The dispute, according to the plaint, is in respect of Automotive Spare Parts and accessories supplied to the Defendant (hereinafter referred to as goods) on diverse dates during the year 2000 and 2001.

The Plaintiff's case pleaded is that the goods were worth Shs 1 437 995-85 and the Defendant agreed to pay for the same within thirty (30) days. That despite several demands and notices of intention to pay the Defendant has failed, refused and/or neglected to make good the claim hence this suit.

From the records of pleadings the memorandum of appearance was filed on 15 May 2002 and subsequently defence was filed on 25 May 2002. Reply to defence was finally filed on 31 May 2002. The pleadings closed 14 days thereafter (14 June 2002) in terms of the provision of Order VI, rule 2 of the Civil Procedure Rules.

The Defendant's defence, as pleaded is:

- (1) That the Plaintiff's suit is an abuse of the process of the court and should be struck out.
- (2) That the verifying affidavit accompanying the plaint is incurably and fatally defective as the same contravenes the mandatory provisions of Order XVIII, rule 4 of the Civil Procedure Rules.
- (3) That the defect aforesaid renders the plaint and the entire suit a nullity and the Defendant shall raise this as a preliminary objection.
- (4) That the Defendant is a stranger to the contests of paragraph 3 of the Plaint which states that on diverse dates in the year 2000 and 2001 the Defendant was supplied with Automotive Spare Parts and Accessories worth Shs 1 437 995-85.
- (5) That Defendant denied the contents of paragraph 4 of the plant that it had agreed to pay for the goods within thirty (30) days after supply.

(6) That if there is any amount due and payable by the Defendant the Plaintiff has grossly exaggerated and reflected the sum by levying unauthorized debits and interest that were never contracted for by and between the parties.

(7) That by charging interest on its account the Defendant has acted illegally and without any colour of right and by virtue of the foregoing any contractual obligations by the Defendant on the Plaintiff is void and unenforceable.

(8) That on the premises the Plaintiff is guilty of unlawful extortion and gross business malpractice.

At the hearing of the suit the Defendants urged me, by way of preliminary objection, the notice of which is dated 3 September, to dismiss the suit based on four (4) grounds:

- (1) That this suit is incompetent as the Defendant has no legal entity and the plaint as it now stands is bad in law and a nullity and should be struck out with costs.
- (2) That the plaint does not comply with the provisions of Order VI, rule 14 of the Civil Procedure Rules and the same is fatally and incurably defective.
- (3) That the verifying affidavit sworn on 18 April 2002 in support of the plaint does not comply with the provisions of Order XVIII, rule 4 of the Civil Procedure Rules and section 34 and 35 of the Advocates' Act (Chapter (6) Laws of Kenya.
- (4) That the plaint does not comply with the mandatory provisions of Order VII, rule 191)(c) of the Civil Procedure Rules this rendering the plaint incurably defective and a nullity.

It is common ground that the pleadings in this case closed on 14 June 2002 upon the filing of the reply to defence.

On the basis of the pleadings I have been called upon to determine the preliminary objection as enumerated hereinabove.

A preliminary objection consists of points or a point of law which has been pleaded or which arises by clear implication out of pleadings, which if argued as a preliminary point may dispose of the suit. See the dicta of Law JA in *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* [1969] EA 696.

The first point which falls to be decided is whether the suit is incompetent since the Defendant has no legal entity that the plaint as it stands is bad in law and a nullity.

It was argued by the Defendant that the description of the Defendant as per plaint depicts it as a firm. That the only way suing a firm is by invoking the provisions of Order XXIX, rule 1. That immediately this aspect became an issue it was incumbent upon the Plaintiff to apply for and provide the names of the proprietors of the Defendant in terms of the provisions of Order XXIX, rule 1. More so in the light of the notification thereof at paragraph 3 of the defence and ground 1 of the notice of preliminary objection.

In response thereto the Plaintiff relied on the contents of Order XXIX, rule 9. The Defendant was sued as a firm, served with summons and all subsequent legal process as a business name. The said services were acted upon by the Defendant hence no prejudice has been occasioned thereby.

Order XXIX, rule 1, 2(1) and 2 provides:

- "1. Any two or more persons claiming or being liable as partners and carrying on business in Kenya may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in

such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the court may direct.

2. (1) Where a suit is instituted by partners in the name of their firm, the Plaintiffs or their advocate shall, on demand in writing by or on behalf of any Defendant, within seven days declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

(2) Where the Plaintiffs or their advocate fail to comply with any demand made under sub-rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the court may direct.

To my mind when any two (2) persons claiming or being liable as partners are sued in the name of the firm, it is incumbent upon any party to such suit to apply to court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firms to be furnished and verified in such manner as the court may direct. The penal consequences of failing to do so is that proceedings in the suit may be stayed.

There is no evidence that application was made for a statement of the names of the partners.

Equally on the record service of summons was, effected at the principal place at which the partnership business is carried on within Kenya-Kisumu Industrial Area-upon a Mr Yusuf described as a proprietor (See Order XXIX, rule 3(1) of the Civil Procedure Rules. In the premises the first limb of the preliminary objection fails.

The second point which fails to be described is whether the plaint complies with the provision of Order VI, rule 14 of the Civil Procedure Rules.

Order VI, rule 14 provides:

"Every pleadings shall be signed by an advocate, or recognized agent (as defined by Order III, rule 2), or by the party if he sues or defends in person."

While the Defendant contends that the plaint was signed by unqualified person Mr Karanja advocate avers and submits that he personally signed the plaint. I have not been shown any evidence that he is unqualified person. In the premises the second limb of the preliminary objection equally fails.

The third point which falls to be decided is whether the verifying affidavit sworn on 16 April 2002 in support of the plaint complies with the provision of Order XVIII, rule 4 of the Civil Procedure Rules and section 34 and 35 of the Advocates Act (Chapter 16) Laws of Kenya.

Order XVIII, rule 4 provides:

"Every affidavit shall state the description, true place of abode and postal address of the deponent, and if the deponent is a minor shall state his age."

The Defendant contends that the defect is that the affidavit does not state the place of abode and postal address of the deponent.

The Plaintiff on the other hand contends that the affidavit is proper. By way of alternative argument the Plaintiff contends that even if the same is improper nevertheless the defect is curable by dint of the provisions of Order XVIII, rule 7.

Order XVIII, rule 7 provides:

*7. The court may receive any affidavit sworn of the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof.

True there are defects in the affidavit, nevertheless in the circumstances of this case I am constrained to exercise my discretion under Order XVIII, rule 4 and save this affidavit notwithstanding the defects therein.

The fourth point which falls to be decided is whether the plaint complies with the mandatory provisions of Order VII, rule 1(1)(a)(c) which provides:

*1.(1)The plaint shall contain the following particulars.

(a) The name of the court in which the suit is brought;

(c) the name, description and place of residence of the Defendant, so far as they can be ascertained;

The Defendant contends that the verifying affidavits does not comply with the provisions of Order VIII, rule 1. Moreover, the verifying affidavit aforesaid does not show which firm of advocate drew and filed the same contrary to the provisions of section 34 and 35 of the Advocates Act. In this regard counsel referred me to Jambo Biscuits v Barclays Bank of Kenya Limited and two others Milimani High Court civil case number 1833 of 2001.

The Plaintiff, on the other hand, maintained that said affidavit is proper and in any case does not contravene the provisions of section 34 and 35 of the Advocates Act. That the verifying affidavit was filed together with the plaint which clearly indicates who the advocates for the Plaintiffs are.

That in any event sections 34 and 35 of the Advocates Act contemplate documents which are filed on their own. That a verifying affidavit is such document that cannot stand on its own.

I have agonized over the matter and taken the view that a verifying affidavit is merely an accompanying document. The main document is the plaint. It is the plaint which must be drawn or prepared by a qualified person (see section 34(1)(e) of the Advocates Act as read together with the third scale of the first schedule of the Advocates Remuneration Order). There is not evidence before me to show that the plaint was drawn by unqualified person and hence the affidavit accompanying it must be taken to have been drawn by a qualified person too.

Section 35 of the Advocates Act requires that the name and address of the firm which drew or prepares a document (read plaint) should be endorsed thereon. A look at the plaint shows the name and address of the firm that drew or prepared the same is endorsed.

In the premises I take the view that where a plaint is properly drawn and endorsed with the name of the firm that prepared it the omission to endorse the name of the firm in the accompanying verifying does not render the plaint incurably defective and a nullity.

For those reasons grounds four(4) of the preliminary objection equally fails.

The up shot is that the preliminary objection raised herein fails on all limbs and is hereby dismissed. Costs shall be in the cause. It is so ordered.

For the Plaintiff:
Karanja

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Barclays Bank of Kenya Limited v Otero

MILIMANI COMMERCIAL COURTS
NJAGI J

Date of Ruling: 23 April 2004 Case Number: 1736/01

Sourced by: LawAfrica Citation: [2001] LLR 2706 (CCK)

Cases referred to in ruling:

Jovenna East Africa Limited v Sylvester Onyango and others, Milimani civil case number 1086 of 2002

Miben (K) Limited v Mark Wangai Muchemi t/A Border Services Station and others, Kisumu High Court civil case number 234 of 2001

Ruling

NJAGI J: Before the court is the Defendant's application dated 30 October 2003. It seeks orders that the Plaintiff's suit be dismissed with costs to the Defendant for want of prosecution. At the hearing of that application on 25 March 2003, Mr Njagi for the Respondent raised a preliminary objection touching upon Mr Kajwang's supporting affidavit dated 4 November 2003.

Mr Njagi submitted that the affidavit was incurably defective on the ground that it did not comply with the mandatory provisions of section 35(1) read together with section 34 of the Advocates Act (Chapter 16) of the laws of Kenya. He argued that the affidavit did not bear the endorsement of the person who drew, prepared and filed it, or the name of the firm of advocates from which either a partner therein or an advocate employed by the firm drew or prepared the affidavit. He referred the court to Miben (K) Limited v Mark Wangai Muchemi t/A Border Services Station and others, High Court at Kisumu civil case number 234 of 2001, and Jovenna East Africa Limited v Sylvester Onyango and others, Milimani civil case number 1086 of 2002 and urged the court to strike out the notice of motion dated 30 October 2003 with costs to the Plaintiff.

In his response, Mr Kajwang submitted that the issue raised by the Plaintiff was not a point of law, and even if the affidavit is struck out as being defective, the notice of motion would still stand without the affidavit since there is nothing in the affidavit which is not on record. Counsel, however, agreed with the positions of law taken in the two authorities cited by Mr Njagi only because Section 35 of the Advocates Act read with section 34 thereof says so. But what exactly was missing from the affidavits in those authorities has not been demonstrated. Mr Kajwang also submitted that it is the commissioner for oaths who draws and prepares an affidavit, and in the instant case the commissioner has endorsed his name and address. He urged the court to dismiss the objection and hear the substantive application.

Section 35 of the Advocates Act states:

"(1) Every person who draws or prepares or causes to be drawn or prepared any document or instrument referred to in section 34(1) shall at the same time endorse or cause to be endorsed thereon his name and address, or the name and address of the firm of which he is a partner and any person omitting to do so shall be guilty of an offence and liable to a fine

not exceeding five hundred shillings in the case of an advocate.

(2) The registrar ... shall refuse to accept or recognise any document or instrument referred to in section 34(1) unless such document or instrument is endorsed in accordance with this section."

Section 34(1) itself prohibits any unqualified person from drawing or preparing any document or instrument ... "relating to any other legal proceedings". An affidavit is a document relating to legal proceedings. It should therefore comply with the requirements of section 35(1) as to endorsement with the name and address of the drawer.

That was not done in this case and, to that extent, the affidavit falls foul of section 35(1). Both sub-sections (1) and (2) of section 35 are couched in mandatory terms. Subsection (1) takes such serious cognizance of any omission to obey the dictates of the subsection that it criminalizes any such omission. In its turn, subsection (2) takes the issue so equally seriously that it enjoins the registrar not to accept or recognize any document or instrument referred to in section 34(1) unless such document or instrument is endorsed in accordance with this section. Parliament has led the way by demonstrating the gravity with which it views matters under sections 34 and 35 of the Act. The least we can do is to emulate Parliament by treating these sections with the seriousness they deserve and obey them in observance.

The court was referred to *Miben (K) Limited v Mark Wangai Muchemi t/A Border Services Station and others*, Kisumu High Court civil case number 234 of 2001 in which a breach of section 35(1) was invoked, as in this case. Upholding a preliminary objection similar to the one before this Court, Justice Tanui said:

"While the endorsement of the names and addresses on the documents by the person who drew them would appear to be a technicality, under section 35(2) of the said act the registrars are forbidden to accept such documents for all purposes. It is clear therefore that a failure to endorse ... renders the application fatally defective."

These observations are on all fours with the circumstances of the application before this Court. In *Jovenna East Africa Limited v Sylvester Onyango and others*, Milimani civil case number 1086 of 2002, Justice Nyamu had occasion to address **Section 35 of the Advocates Act**.

He said:

"As regards the requirement of advocates Act section 35 these are statutory requirements and they cannot be said to be irregularities in form only. A violation of a statute cannot be an irregularity in form. The violation of section 35 does attract a fine. To the extent that his Lordship, Justice Tanui in *Miben (K) Limited v mar* and another High Court civil case number 34 of 2001 says that non compliance is a major defect, I do concur with him."

Mr Kajwang submitted that these authorities are only persuasive and urged the court to follow in the footsteps of Justice Ringera who has said elsewhere that the omission to endorse a document in terms of section 35(1) is a mere irregularity. My worry with that view is - when does an irregularity graduate from an irregularity? Where would one draw the dividing line between an irregularity as envisaged in Order XVII, rule 7 of the Civil Procedure Rules and a blatant breach a statutory provision? In an appropriate case, one would not hesitate to invoke the soothing effects of the petroleum jelly offered by Order XVIII, rule 7. But when an "irregularity" touches upon the breach of express statutory provisions one has to be careful. If the treatment of such breaches as mere irregularities becomes common practice, then it will be difficult to state the law with certainty and finality.

For the above reasons, I am constrained to uphold the preliminary objection and strike out the Defendant's application dated 30 October 2003, with costs to the Plaintiff.

For the Respondent:
Njagi

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The advocate must also familiarize himself with court fees and charges levied for filing documents in court.