IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Omolo, Bosire & O'Kubasu JJ A)

CIVIL APPEALS NOS 13 & 19 OF 2001 (CONSOLIDATED)

VIPIN MAGANLAL SHAH

ATULKUMAR MAGANLAL SHAH ……APPLICANTS

VERSUS

INVESTMENT & MORTGAGES BANK

LIMITED & 2 OTHERS…… RESPONDENTS

(Appeal from the ruling & order of the High Court of Kenya at Nairobi

(Mbaluto J) dated 20th September, 2000 in HCCS No 782 of 2000)

JUDGMENT

By a plaint dated 26th April, 2001 and filed in the High Court of Kenya at Milimani Commercial Courts on 27th April, 2001 and registered in that court as Civil Case No 782 of 2000, Investments & Mortgages Bank Ltd,

"the Bank" hereinafter, claimed a total of Kshs 88,133,393.10 with interest thereon at the rate of 28% per annum from Nakumatt Investments Ltd,

"Nakumatt" hereinafter, Vipin Maganlal Shah, "Vipin" hereinafter and Atulkumar Maganlal Shah, "Atulkumar" hereinafter. For the purposes of this judgment, it is not necessary for us to go into the details of why the claim was made and such like matters. It is sufficient to say the claim was made and filed in the High Court as we have set out above.

To that claim, Atulkumar entered appearance on 29th May, 2000 and followed it with a defence, apparently on the same day. These things were done on behalf of Atulkumar by M/s Kariuki Muigua & Company Advocates of Nairobi. Ngatia & Associates Advocates entered appearance for Nakumatt on 31st May, 2000 and filed a defence for it on the same day. J W Ngetho & Company Advocates entered appearance and filed a defence on behalf of Vipin on 29th May, 2000. To complete the scene, we should state that the Bank's plaint had been filed on its behalf by M/s Salim Dhanji & Company Advocates, also

of Nairobi.

Then on 30th May, 2000, Atulkumar lodged a chamber summons under section 3A of the Civil Procedure Act, order VI rule 13 (d) and order VI rule 14 of the Civil Procedure Rules, and the prayers made in the summons were two, namely:

"1. That this Honourable Court be pleased to dismiss suit No 782/2000 with costs.

2.That the costs of this application be provided for." The grounds on which the dismissal of the suit was sought were that:

"(a)The plaint filed on 27th day of April, 2000 is unsigned, it is not a pleading as required by law.

(b)That the plaintiffs have not complied with the mandatory provisions of order VI rule 14.

(c)That the said unsigned plaint cannot form the basis of a suit.

(d)The plaint offends the mandatory provisions of the Civil Procedure Rules.

(e)That any suit founded on an unsigned pleading is incompetent and a nullity in law.

(f)That the suit is a total abuse of the process of court."

These grounds are merely repetitive of one fact, namely that as the plaint which had instituted the suit had not been signed on behalf of the Bank either by its advocates or by any of its authorised officers, there was no valid suit before the superior court. Whether there was or was not a signed plaint in the Court file at the time when Atulkumar took out his summons to dismiss the suit is a matter which we shall have to deal with later on. The summons was supported by a short affidavit containing in all nine paragraphs and sworn by Mr Kariuki Muigua. The relevant paragraphs were as follows:

"1.That I am an advocate of the High Court of Kenya who has the conduct of this matter on behalf of the 3rd defendant [Atulkumar].

2.That my client has been served with a plaint in respect of HCCC 782 of 2000.

3.That upon perusal of the Court file, I discovered that the plaint therein was filed contrary to the mandatory provisions of order VI rule 14 of the Civil Procedure Rules.

4.That on the 29th May, 2000, my law firm applied for certified copies of the pleadings in the court file by a letter dated 29/5/2000 [Annexed hereto and marked as ‘KM1’].

5.That on the same day I received a certified copy of the said plaint [Annexed hereto and marked as ‘KM2’].

6.That I verily believe that the purported suit filed herein is incompetent and a nullity in law and the unsigned plaint cannot form the basis of a suit.

7.That I verily believe that for the ends of justice this suit should be dismissed forthwith."

The basis of these assertions by Atulkumar and his counsel were based on the provisions of order VI

rule 14 of the Civil Procedure Rules. Order VI is headed "Pleadings Generally" and the various rules thereunder set out the formal and procedural requirements with regard to what a pleading should contain, how it should be drafted and so on. Then rule 14 provides:

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

The contention of Atulkumar and his counsel was that as the Bank's plaint in the Court record had not been signed either by its advocates or by an authorised officer of the Bank, it violated the provisions of rule 14 which according to Atulkumar and his counsel are mandatory and that being so the plaint ought to be dismissed. If this contention was true then the plaint would be struck out rather than be dismissed. Nakumatt joined in Atulkumar's contention though Nakumatt did not itself file an application to strike out. Instead Nakumatt's counsel, Mr Ngatia, merely himself by swearing an affidavit in support of the chamber summons filed by Atulkumar. Vipin, however, filed his own chamber summons supported by the affidavit of his counsel, also seeking the same orders as those sought by Atulkumar.

For its part, the Bank did not take these allegations lying down. Through Mr Dhanji, the Bank swore several affidavits explaining what had happened. The gist of the Bank's explanation was that Mr Dhanji's Court Clerk, one John Mbiti Mutunga, who also swore several affidavits, had been given six copies of the plaint and of those copies, five were signed and one was deliberately left unsigned. The unsigned copy was to be retained in the advocate's office file, presumably after stamping by the Court. A signed copy had to remain in the Court record while the other signed copies had to be served on the parties against whom the suit had been instituted. But according to Mr Dhanji and his clerk, there was a mistake and the Court was left with one signed copy and the unsigned copy. So that the Bank's position before the superior court and even before us was that there had always been one signed copy of the plaint in the Court file and one unsigned copy. The appellants' position, as we have seen was that when Mr Muigua checked the Court file before he filed his application for dismissal of the suit, there was only one unsigned and undated copy of the plaint in the Court record. Mr Muigua wrote to the Deputy Registrar asking to be given a certified copy of the plaint; the Deputy Registrar supplied an unsigned and undated copy. It was only after this that the application for dismissal was filed. Nakumatt and Vipin supported this position. The learned judge (Mbaluto, J) then felt compelled to ask the Deputy Registrar of the Court to swear an affidavit explaining the position. The Deputy Registrar, one Mr Charles Kanyangi, swore an affidavit which essentially supported the position taken by the appellants. The Deputy Registrar was promptly accused of bias and improper motives by the Bank's advisors.

The learned judge found for the Bank, principally on two grounds. These were first, that even if there was no signed plaint on record, that was not a ground for dismissing the suit as demanded by the appellants and secondly, that at any rate, by the time the matter came before him, there was in fact a signed copy of the plaint in the Court file. It is the presence of two plaints, one signed and the other one unsigned that led the learned judge to ask the Deputy Registrar to swear an affidavit explaining that position.

The two appellants, Atulkumar and Vipin, now come to this Court challenging the conclusions of the learned judge and his refusal to dismiss the suit. They filed separate appeals, Atulkumar's appeal being Civil Appeal No 13 of 2001 while that of Vipin is Civil Appeal No 19 of 2001. We consolidated the two when the hearing opened before us. Nakumatt did not appeal.

As far as we can see, there really are only two issues for the Court to determine in the consolidated appeals. The first issue is contained in Atulkumar's ground 7 of his memorandum of appeal, while in Vipin's memorandum of appeal it is contained in ground 5. In those grounds, it is alleged that:

"The learned judge erred in law and in fact in finding that there is no requirement in o VI rule 14 of the Civil Procedure Rules that a signed plaint be in the Court file."

The second issue which is not directly mentioned in any of the two appeals relates to the question of whether there was, in fact a signed copy of the plaint in the Court file when the application to dismiss the suit was lodged.

There were other issues such as what motive the appellants had in going to read the Court file to find out whether there was or there was not a signed plaint in the Court file and whether the appellants were guilty of failure to disclose relevant issues; but in our view these were really not issues of substance in the dispute though the learned judge seems to have taken a very dim view of the appellants over them. The truth of the matter is that parties to a litigation are entitled to go and peruse Court files; it was not suggested that it was illegal, or even immoral for the appellants to peruse Court documents in which they were directly interested. Court documents are public documents and of necessity the parties involved must have a right to peruse them. If the perusal is to be done on certain conditions, such as payment of some fee and a party complies with that condition, then such a party is entitled to peruse the document whatever may be his motive, unless of course there are reasonable grounds to show that he intends to steal or destroy the documents. But if the intention is merely to read the documents and leave them there, we do not see that such a party can be denied a remedy on the basis that he did not disclose his reason for going to read the Court file as a result of which he filed the application to dismiss the suit.

Again, on the issue of failure by the appellants to disclose in their respective affidavits that each of them had been served with a copy of the signed plaint, reprehensible as it was, we do not think the judge would have been entitled, in the circumstances of this case, to deny to the appellants a remedy on that basis. The two applications to dismiss the plaint were not made *ex parte* and the learned judge was not misled into making any order by the applicants' non-disclosure. The position would have been different if the applications had been made *ex parte* and because of the appellants' non-disclosure, the judge was misled into making an order which he would not have made had all the material facts been put before him by the party in whose favour the *ex parte* order was made. In that case a judge would be perfectly entitled to dismiss the whole application on the basis of failure to disclose material facts. That is what this Court said in the separate rulings in *Uhuru Highway Development Limited v Central Bank of Kenya & two others,* Civil Application No Nai 140 of 1995 (unreported). In this case, the appellants' failure to disclose that they had been served with signed copies of the plaint, reprehensible as it might have been, did not really deceive anyone. The respondents were able to put that fact before the judge long before he made any decision on the issue. But we suppose the learned judge was entitled to take into account in coming to his decision, though as we have said, it would not, by itself, have entitled the judge to dismiss the application. We shall now deal with the issue of what happens if a pleading is not signed as required by order VI rule 14 the contents of which we have set out elsewhere.

The contention of counsel for the appellants is that the provisions of rule 14 are mandatory and failure to comply with them renders the pleading liable to a dismissal. Mr Regeru for the Bank, contended that even if there was in fact no signed plaint on the Court record, that would not be a ground for dismissing or striking out a pleading. Mr Regeru in his usually learned way relied on certain English and Indian authorities and we think we must examine them first. We shall start with the English authorities upon which Mr Regeru relied.

First of course was *Halsbury's Laws of England* 4th Edition Volume 36 which deals with among other things, *"Pleadings"* and under the heading

"2 Contents of Pleadings" at page 7 and at paragraph 7 page 7, under the sub-heading *"Signature"* is to

be found this statement:

"Pleadings need not be settled by counsel, but where a pleading is settled by counsel, it must be signed by him. The only signature which is permitted to appear on pleadings is that of counsel or a solicitor or a litigant in person. If a pleading has been settled otherwise than by counsel, it must be signed by the solicitor of the party by whom it is served, or by the party himself if he sues or defends in person."

So that it is obvious from this passage that a pleading must be signed either by the advocate or the party himself where he sues or defends in person or by his recognised agent. The reason for this was stated in the ancient case of *Great Australian Gold Mining Co v Martin* (1877) 5 Ch D1 at pg 10 to be a *"voucher that the case is not a mere fiction"*. Several cases are quoted as illustrations of the passage in *Halsbury's Laws of England*.

In *France v Dutton* (1891) 2 QB 208, a clerk to a solicitor signed the solicitor's bill of costs on behalf of the solicitor. Objection was taken to the clerk's signature but the objection was over-ruled on the ground that the clerk's signature was sufficient. The issue here was not that there was absolutely no signature. The issue was whether the clerk's signature was sufficient and as the solicitor had authorised the clerk to sign on his behalf, the signature was really that of a recognised agent of the solicitor. But in the earlier case of *The Queen on The Prosecution of Harding Rees v Cowper* [1890] 24 QB D533, it was held that:

"In order to entitle the plaintiff in an action in a County Court to the costs of entering a plaint by a solicitor, the solicitor must sign the particulars, and a lithographed statement of the solicitor's name on the particulars is insufficient."

In the latter case, it was held, in effect, that the solicitor had not signed the plaint and the plaintiff was denied his costs, even though Lord Esher, MR dissented from the decision. Mr Regeru next relied on the case of *Fick and Fick Limited v Assimakis* [1958] 3 All ER 182 where it was held that:

"as the writ which was issued was properly endorsed with a signed statement of claim, the absence of a signature to the statement of claim on the copy served on the defendant was cured by the appearance which the defendant must be taken to have entered."

Mr Regeru contended that as the appellants entered unconditional appearance to the Bank's suit, even if there had been no signature on the plaint in the file, their unconditional appearance cured that defect. We do not think Mr Regeru is right on this aspect of the matter. In *Fick's* case, the writ which was issued was properly endorsed with a SIGNED statement of claim. What was not signed was the copy of the statement of claim served upon the defendant and as the defendant had entered an unconditional appearance to the claim the defect in the unsigned copy served on him was cured. We doubt very much if the position would have been the same if the original writ issued was not endorsed with a signed statement of claim. The position in England, at least according to these authorities appears to be that a pleading must be signed either by counsel or the party in person or the party's recognized agent. Whether a pleading which has not been so signed can be struck out or dismissed is not clear from these authorities.

Here in Kenya this Court dealt with the case of *Samaki Industries (Nairobi) Ltd v Samaki Industries (K) Ltd,* Civil Appeal No 203 of 1995 (Unreported). There a suspended advocate filed an appeal on behalf of a party signing the memorandum of appeal and the other relevant documents. This Court had no difficulty in holding, indeed it was conceded, that the appeal having been filed by an unqualified advocate on behalf of an appellant was incurably defective and was struck out. The Court did not call upon the appellant to come and sign the memorandum of appeal and thus validate it.

What is the position in India" Mr Regeru relied on a passage from *Mulla on the Code of Civil Procedure*, 12th Edition page 502, where it is recorded:

"[O VI rule 14 Every pleading shall be signed by the party and his pleader (if any) provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person, duly authorised by him to sign the same or to sue or defend on his behalf."

Then there follows this statement:

"Omission to sign plaint:- The signing of plaint is merely a matter of procedure. If a plaint is not signed by the plaintiff or by a person duly authorised by him in that behalf, and the defect is discovered at any time before judgment, the Court may allow the plaintiff to amend the plaint by signing the same. If the defect is not discovered until the case comes on for hearing before an appellate court, the appellate court may order the amendment to be made in that Court. The appellate court ought not to dismiss the suit or interfere with the decree of the lower Court merely because the plaint has not been signed. The omission to sign or verify a plaint is not such a defect as could affect the merits of a case or the jurisdiction of the Court. It can be set right even after the expiration of the period of limitation for filing the suit."

We have no reason to doubt that that passage may well set out the correct position in India but it does not appear to set out the correct position in England. In Kenya, we have already cited the *Samaki* case, *supra*. There is of course the object the legislator had in mind in requiring that a plaint be signed either by counsel or the party suing. The object must clearly be to make the party suing or filing any other pleading take ownership and responsibility for the contents of the plaint or pleading or as was said in the *Great Australian Gold Mining Co* case, *supra*, to be:

"a voucher that the case is not a mere fiction."

Again, in Kenya, order VII rule 1(e) now requires that a plaint shall contain:

"an averment that there is no other suit pending, and that there have been no previous proceedings in any court between the plaintiff and the defendant on the same subject matter", and rule (2) of that order stipulates that:

"The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint."

If a plaint is not signed either by the plaintiff in person or his recognized agent or his advocate, what is the use of requiring that it contains an averment by the plaintiff that there is no other suit pending and so on" If the plaint is not signed as required by order VI rule 14, these other requirements clearly become meaningless. Whatever may be the position in India or even in England, the position in Kenya seems to us to be that a party who files an unsigned plaint runs a very grave risk of having that plaint struck out as not complying with the law. In this appeal, we shall go no further than that because as we said earlier, we must deal with the issue of whether or not there was on record a copy of the signed plaint when the summons to strike out was lodged in the superior court. It is to that question that we must turn.

There can be no doubt on the material before us that right from the time Mbaluto, J started handling the matter, there was a signed copy of the plaint in the Court record. The learned judge then ordered his Deputy Registrar to swear an affidavit explaining how *"two plaints"* had come to be in the Court file. On this aspect of the matter, we are in entire agreement with the learned judge that the Deputy Registrar's affidavit was wholly unhelpful. He swore that when he handled the file on 29th May, 2000, there was only

one copy of the plaint in the file and that the copy was unsigned and undated. He also swore that:

"... there is no room for the Court file to contain two original plaints as the cashier's duty is to collect the appropriate fee and to retain the original plaint and copy the duplicate receipt leaving no room for an advocate's clerk to file two plaints inadvertently as alleged."

Mr Dhanji and his clerk had specifically deponed in their respective affidavits that a mistake had in fact occurred. The Deputy Registrar was not the cashier who had dealt with Mr Dhanji's clerk and the Deputy

Registrar did not specifically, indeed he could not have specifically sworn, that no mistake in fact occurred. The Deputy Registrar's affidavit was sworn on 27th June, 2000 and by then there was the signed copy of the plaint in the Court file which at all times must have been in the custody, actual or constructive, of the Deputy Registrar. He did not attempt to explain how and when the signed copy of the plaint came to be in the Court file. He did not swear that he even made any efforts to find out from his clerks how the signed plaint had come to be in the Court file. It appears it was being suggested that the Bank and its advisors had corruptly *"sneaked"* the signed plaint in the Court record in order to defeat the appellants' summons to dismiss the suit. That was a very serious allegation and there was no acceptable evidence which could have justified that conclusion. In our view the learned judge was perfectly within his right to reject the summons on the ground that a signed and dated copy of the plaint had always been in the Court file and had not been surreptitiously *"sneaked in"* as was being suggested by the appellants. On this ground alone, we are satisfied this appeal must fail.

Before we leave the matter, there is one other issue which we must deal with. It was being contended by the appellants before Mbaluto, J that the summonses which had been issued in the case and served on all the appellants and Nakumatt had all been invalid because they had provided for entry of appearance within ten days instead of giving them at least ten days to enter appearance. The learned judge found that the summonses had been defective in that respect and ordered fresh summonses to issue.

Apparently the learned judge was being urged to hold that since the summonses were defective, it followed that the suit itself was defective and for that proposition the case of *Ceneast Airlines Ltd v Kenya Shell Ltd* Civil Appeal No 174 of 1999 (unreported) relied on. Nothing could have been further from the truth. That case did not and could not have decided that when summons to enter appearance and file a defence is defective, the suit itself is defective. What the case decided was that if the summons is defective the service of the same upon the other party must itself be defective. The defect in the service, however, has got nothing to do with the validity of the suit in which the summons is issued. It is to be noted that in the *Ceneast Airlines* case, the service was held to be invalid and the defendant was granted unconditional leave to defend. If the suit had itself been invalid, there would be no occasion for granting leave to defend as there would be nothing to defend. The learned judge, rightly in our view, set aside the defective service and ordered fresh summonses to issue. He was entitled to do so.

Should we order the appellants to pay the costs of the appeals" In normal circumstances, costs ought to follow the events. But taking into account the conduct of both sides in the superior court, we are not prepared to award costs to any of them. We order that the two consolidated appeals be dismissed but with no orders as to costs. Those shall be the orders of the Court.

Dated and Delivered at Nairobi this 14th day of December, 2001

R.S.C OMOLO

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JUDGE OF APPEAL

S.E.O BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

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