REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 150 of 2001

NATIONAL BANK OF KENYA LTD……PLAINTIFF

VERSUS

PUNTLAND AGENCIES LIMITED……..……1ST DEFENDANT

AHMED MOHAMED HAJI ……..……2ND DEFENDANT

YUSSUF MOHAMED HAJI ……..……3RD DEFENDANT

RULING

The application for my determination is the Chamber summons dated 28th February, 2007 brought under Order VI Rule 13(a) (b) (c) and (d) and Order VII Rules 1(2) and (3) of the Civil Procedure Rules. The application has 3 prayers namely;

(1) That the Plaintiff's suit be struck out.

(2) That the verifying affidavit of Joseph M. Mutava dated 1/02/2001 be struck out for contravening the mandatory provisions of the Civil Procedure Act Cap 21 Laws of Kenya and the Advocates Act Cap 16 Laws of Kenya which are couched in mandatory terms.

(3) That the costs of this application and suit be paid by the plaintiff.

The application is based on the following grounds:-

(1) That the plaintiff's suit is res judicata the same having been determined against the defendant in Nairobi HCCC No.1114/99.

(2) That the verifying affidavit of Joseph M. Mutava dated 1st February 2001 be struck out for its contrary to the mandatory provisions of the Civil Procedure Act Cap 21 Laws of Kenya and Advocates Cap 16 Laws of Kenya which are couched in mandatory terms.

(3) That the plaintiff's suit discloses no reasonable cause against the defendant.

(4) That the plaintiff's suit is scandalous, frivolous and vexatious.

(5) That the plaintiff's suit is otherwise an abuse of the process of the court.

The application is supported by the affidavit of one Ahmed Mohamed Haji the 2nd defendant herein and who alleges to be a director of the 1st defendant company. He states that the present suit was instituted against the defendants on 5th February, 2001. And prior to the institution of this suit, a similar suit against the 1st defendant and the plaintiff had been instituted in Nairobi HCCC No.1114/99 wherein the National Oil corporation, the plaintiff had claimed against the 1st defendant and the plaintiff a sum of Kshs. Dollars 75,000/= plus costs and interest.

The said suit was compromised on 9th October, 2000 through a consent between the plaintiff and the 1st defendant, wherein the 1st defendant agreed to settle the claim but the suit against the 2nd defendant, who did not enter appearance was withdrawn. According to **Mr. Ahmed Mohamed Haji** the issues in the present suit was determined in the earlier suit, therefore the present suit is *res judicata*, the same having been determined on HCCC No.1114/99.

The application was argued before me by **Mr. Ojienda** Advocate on behalf of the applicants/defendants. He submitted that the current suit is *res judicata* as a similar suit involving the same parties, had been filed and determined by this court. He asserted that the pleadings in both suits involve the same parties, so that the current suit brought by the plaintiff who was then the 1st defendant in the earlier suit is res judicata, therefore contravenes the mandatory provisions of section 7 of the Civil Procedure Act.

Mr. Ojienda Advocate submitted that the plaintiff ought to have exercised its right under Order 1 Rule 21 of the Civil Procedure Rules for either indemnity or contribution against the current defendants, hence the current suit is not sustainable against the defendants.

As regards the verifying affidavit of **Joseph M. Mutava**, **Mr. Ojienda** submitted that it contravenes the provisions of Section 35 of the Advocates Act Cap 16 Laws of Kenya, hence the affidavit is void and incurably defective. The effect of the failure to endorse the name of the drawer Advocate on the affidavit is that the affidavit is rendered void and not merely irregular.

The application was opposed by **Mr. Kenyariri** Advocate who submitted that the present suit was instituted in the year 2001. The defendants refused to enter appearance and judgement was entered against the defendants, but sometimes last year, the court allowed the defendants to file their defence.

According to **Mr. Kenyariri**, there was no determination between the present plaintiff and defendants, in that the court in the earlier suit did not determine any issue between the plaintiff and the present defendants. The earlier suit had been determined against the present plaintiff who was the defendant in the previous suit.

The issues for my determination are fairly simple and straight forward. The first issue which I endeavour to answer is whether the verifying affidavit of **Joseph M. Mutava** contravenes the mandatory provisions of Section 35 of Cap 16 Laws of Kenya. It is also important to address whether failure by an Advocate to endorse his name on the affidavit renders it void and incurable. It is clear that the verifying affidavit by **Mr. Joseph M. Mutava** does not indicate the drawer of the said affidavit.

It is the argument of **Mr. Ojienda** Advocate that the effect of the failure to endorse the name of the drawer Advocate on the affidavit renders the affidavit void.

Section 35(1) of Cap 16 states:

"Every person who draws or prepares or causes to be drawn or prepared, any document or instrument referred to in Section 34(1) shall be 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 so to do shall be guilty of an offence and liable to a fine not exceeding five thousand shillings in the case of an unqualified person or a fine not exceeding five hundred shillings in the case of an Advocate".

Order VII Rule 2(2) "The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint".

Order 18 Rule 7 states:

"The court may receive any affidavit sworn for the purposes 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".

There is no suggestion that the affidavit in support of the plaint is scandalous, irrelevant or oppressive but the issue on contention is that the affidavit was not endorsed by an Advocate as drawn by and filed. There is no dispute that the Advocate who filed the suit did not state that they have drawn and filed the affidavit in question.

In my view there is nothing in Section 35 of Advocates Act which empowers the court to strike out an affidavit simply because it was not endorsed by the Advocate who drew and filed it. The failure to endorse an affidavit is not fatal to require the court to strike it out, I will however deem that to be a minor transgression, which does not go to the root of the mischief to be cured under Section 35 of the Advocates Act. More so no prejudice is caused to the applicant by the said default. It is my position that the failure to endorse the name of the drawer Advocate on the verifying affidavit is not fatal and does not render the affidavit void. That is a mere irregularity which can be readily excused by the court. The omission of the plaintiff's Advocate to endorse their names on the affidavit is not a violation of Section 35(1) of the Advocates Act. In any case Section 35(1) says that every person who draws or prepares any document or instrument referred to Section 34(1) shall at the same time endorse or cause to be endorsed thereon his name and address: It means Section 35(1) is subject to the provisions contained under Section 34(1) of the Advocates Act. Perhaps it is essential to note that Section 34(1) does not specifically mention an affidavit as a document or instrument which requires an endorsement of the drawer.

Let me state that a verifying affidavit is a document secondary and/or supplemental to a plaint. It is not an independent document which can be lodged on its own and it attracts no payment of fees either to court or to the Advocate. In any case the issue of verifying affidavit was brought by a recent amendment by legal Notice No.36/2000, while the Advocates Act came into operation in December, 1989. It therefore means that Section 35(1) of the Advocates Act has no application or effect upon the requirement under Order 7 Rule 2(2) of the Civil Procedure Rules. My firm position is that a verifying affidavit is not a document or instrument as envisaged under Section 34(1) of the Advocates Act, therefore it goes without saying that Section 35(1)of the Advocates Act has no relevance as to whether a verifying affidavit is endorsed or not.

It is my position that since a verifying affidavit is not independent from the plaint, then it suffices to say the parent is the plaint. If the parent is properly before court nobody has the right to question the child. It is my view that a verifying affidavit is not a document capable of being endorsed by the drawer of the plaint is properly endorsed by the drawer. It means therefore, the objection as to the regularity or

otherwise of the verifying affidavit is baseless.

Even if I am wrong in that line of argument, let say that a party who filed his plaint to seek justice in the year 2001 cannot loose his right simply because the verifying affidavit has not been endorsed by the agent. The case belongs to the principal and if the agent committed some procedural lapses, then it would be unfair to punish or penalize the principal for the inadvertent acts or omission of the Advocate. I think it is unfair to strike out the plaint of the plaintiff who was in court since the year 2001 hoping to get justice from the court. The plaintiff wonder at the sense of justice of the court and definitely that would forment mistrust and public ridicule towards the justice system.

For the reasons stated I think the objection on the verifying affidavit is misplaced and unfounded. I therefore, refuse to strike out the plaint on that ground.

The second point for my determination is whether the present suit is *res judicata*. As I understand *res judicata*, a party will not be allowed to canvass fresh matters which could have been canvassed in an earlier application. A party can only successfully file, a second suit if it is based on facts not known to him at the time he made the first suit. For a party to succeed in a plea of *res judicata*, it must show the court has previously exercised its judicial mind and has after argument and consideration, come to a conclusion on the contested issues.

It is the claim of the applicants that the issues in the present matter were directly and substantially in issue in the earlier suit which has been compromised. In my view in order to determine whether a matter is res judicata or not, the court is empowered to address its mind to the cause of action and the relief claimed in both suits. In short a party is barred from litigating in piecemeal or installments to enable court to determine the issues once and for all. For a party to succeed in a plea of res judicata he must establish;

(1) There was a previous suit in which the matter in dispute was in issue.

(2) The parties were the same or litigating under the same title

(3) That a competent court heard and determined the matter or dispute in issue.

(4) That the issue in question had been raised once again in a fresh suit.

It is for those reasons that parties are required to bring forward their whole case and the court will not permit the same parties to open the same subject matter which might have been brought forward as part of the subject in dispute but was not brought forward only because they have from negligence, inadvertence or even accident omitted part of their case. In essence every point which properly belonged to the subject litigation must be brought forward in the first instance.

In understanding the genesis of this matter, it is important to note that;

(1) In HCCC No.1114/99 the plaintiff is National Oil Corporation of Kenya.

(2) The defendants in that suit were;

(i) National Bank of Kenya and

(ii) Putland Agencies Ltd.

The Plaintiff in that suit sued the two defendants in respect of a bank guarantee for a sum of US Dollars 75,000/=. It is alleged the 2nd defendant obtained a bank guarantee from the 1st defendant. And as a result of that guarantee, the plaintiff agreed to supply to the 2nd defendant with fuel and other related products on credit to be covered by the bank guarantee. The 2nd defendant obtained goods worth US Dollars 75,000/= from the plaintiff but refused and/or was unable to pay for the said goods.

In consideration of the bank guarantee from the 1st defendant, the plaintiff supplied goods to the 2nd defendant, which no payment was made. The amount of the 1st defendant's liability under the bank guarantee was limited to the sum of US Dollars 75,000/=. And upon the default of the 2nd defendant, the plaintiff sued the bank and 2nd defendant. It appears the plaintiff was unable to serve the 2nd defendant and through a consent dated 11th October, 2000, the plaintiff and the 1st defendant compromised the suit, wherein the 1st defendant agreed to pay the sum of US Dollars 75,000/=.

Now the present suit is between the bank which provided the guarantee and the parties extended to the facility. The 2nd and 3rd defendants are the directors of the 1st defendant who obtained a bank guarantee from the plaintiff sometimes in February, 1998 to the tune of US Dollars 75,000/=. And the bank having paid **National Oil Corporation of Kenya** for the value of the guarantee is now in the process of recovering what it paid on behalf of the 1st defendant.

It is my decision that the parties in the earlier suit and the present suit are different. It is also clear that the contest is between different parties. There is no evidence to show that the 1st defendant paid for the sum of US Dollars 75,000/= paid on its behalf by the plaintiff. In any case the present plaintiff and the 1st defendant were sued jointly in the earlier suit but the 2nd defendant in the earlier suit failed to participate in that suit. I fail to understand how the earlier suit relates to the present suit. In any case the present plaintiff is empowered to pursue the monies it paid through the guarantee document. The bank had no option but to pay upon demand by the beneficiary of the guarantee.

Mr. Ojienda Advocate says that the bank ought to have exercised its rights for either indemnity or contribution. I think such argument is contrary to the law governing guarantee, since the bank is required to pay upon demand. Nevertheless it was not the bank who instituted the earlier suit and to avoid embarrassment the bank was obliged to respect the terms of the letter of guarantee. I think the bank is perfectly within its boundaries to bring the present suit. There was no issue in contest between the bank and the present defendants in the earlier suit. The issues are radically and substantially different on both suits, therefore the plea for res judicata is a misguided contention. I refuse to entertain it.

I think I have expressed myself well enough to turn away the misconceived position of the defendants. I have tried to tell them that they cannot drive away the plaintiff easily without a real contest. The contest is determined on merit upon full hearing all the parties or otherwise.

For now the attempt to dislodge the plaintiff is thwarted by the able mind of this court.

In the premises the application dated 28th February, 2007 is dismissed with costs.

Dated and delivered at Nairobi this 10th day of May, 2007.

M. A. WARSAME

JUDGE