



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1632 OF 1997

SIMON ISAAC NGUI.....PLAINTIFF

VERSUS

OVERSEAS COURIER SERVICES

(K) LIMITED.....DEFENDANT

R U L I N G

By a notice dated 30th October, 1997 and filed in court on 3rd November, 1997, the defendant sought the striking out of the affidavits of Simon Isaac Ngui and Godfrey Suromcan Ukwonga as they are allegedly defective in form and substance and are scandalous irrelevant, oppressive and thus incompetent. Several grounds have been set out thereunder the relevance of which I shall mention hereunder.

For the avoidance of doubt, Simon Isaac Ngui is the plaintiff who obtained the judgment in the High Court of Tanzania vide C.C. NO. 25 of 1995 against the defendants herein. Mr Godfrey Suromcan Ukwonga is an advocate of the High Court of Tanzania who appeared for the plaintiff in the said suit. The judgment in the said suit has been registered in this his court under the provisions of Foreign Judgments (Reciprocal Enforcement) Act cap. 43 Laws of Kenya. The said registration is the basis of the proceedings before this ;court.

There is a pending application filed on behalf of the defendant for orders inter alia, that the judgment entered and/or registered herein on 11th July, 1997 be Reviewed, Discharged and/or vacated. That in the alternative and without prejudice to the first prayer, the judgment entered and or registered on 11th July, 1997 be reviewed and vacated the same being null, void and of no legal effect.

There is also an order sought for the hearing de novo by this Honourable Court of the plaintiff's entire suit and/or proceedings after due service of summons and plaint in accordance with the mandatory provisions of Order 5 of the Civil procedure Rules. Pending the ;hearing of the application a stay of execution was also sought. There is an interim order in place staying execution until this application is finalised. Both learned counsel for the parties have addressed the court on the notice to strike out the two affidavits.

The thrust for the defendant's case at this stage is that the two affidavits offend the provisions of order 18 of the Civil procedure Rules and The Oaths and Statutory Declarations Act Cap. 15 Laws of Kenya. Order 18 Rule 3(10) provides as follows:

“3(1) Affidavits shall be confined to such facts as the deponent is able of his own

knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

The learned counsel for the defendant has taken the court through the two contentions affidavits showing lack of compliance with the above provision. In the end he submitted that the two should be struck out.

In H.C.C.C. NO. 1625 of 1996 Kentainers Limited -v- V.M. Assani & Others Ringera J. dealt with a similar submission. In his ruling the learned Judge quoted HALSBURY’S LAWS OF ENGLAND, 3rd EDITION, PARAGRAPH 845 which says:

“ Affidavits filed in the High Court must deal only with facts which the witness can prove of his own knowledge, except that, in interlocutory proceedings or with leave, statements as to a deponent’s information or belief are admitted, provided the sources and grounds thereof are stated.....For the purpose of this rule, those applications only are considered interlocutory which do not decide the rights of the parties but are made for the purpose of keeping things in status quo till the right can be decided, or for purpose of obtaining some direction of the court as to the conduct of the cause.”

In the same ruling the learned Judge quoted SARKAR ON EVIDENCE, 12TH EDITION PG. 1404 wherein the learned author states:

“An affidavit which contains neither a specification as to which part is based on information and which on belief nor the grounds of belief offends against order 19 rule 13 (The said provision is identical in material respects to our own order 18 Rule 3(1). An affidavit continuing a verification that “paragraphs 1-3 above are true according to my own knowledge and according to my information received and believed to be true” is meaningless and infructuous as the identical facts cannot be verified both on knowledge and information.”

The foregoing is as far as the court can go in addressing the provision of Order 18 Rule 3(1).

In relation to the Oaths and Statutory Declarations Act Cap. 15 Laws of Kenya aforesaid, Rule 9 of the Oaths and Statutory Declarations Rules provides that:

“the seal of the Commissioner, and shall be marked with serial 9. All exhibits to affidavits shall be securely sealed thereto under letters of identification.”

The observations made by the learned counsel for the defendants is that the annexures mentioned in the affidavit of Mr Simon Isaac Ngui paragraphs 4 and 5 are not part of that affidavit. This has been conceded by the learned counsel for the plaintiff who however submits that the said exhibits are in the court record the same having been used in the application for the registration of the judgment. They are also annexed to the affidavit of Mr Seki filed by the defendants and so no prejudice has been caused to the defendants by their inadvertent exclusion.

The affidavit of Mr Godfrey Suromcan ukwonga has mentioned some exhibits in paragraphs 3, 4, 5 and 6. These have been annexed. However, considering that the affidavit is for use in this jurisdiction compliance with the provisions of Cap. 15 aforesaid is a must. The language of Rule 9 aforesaid is mandatory and I do not believe I have a discretion to find otherwise.

The learned counsel for the defendant has also criticised Mr Ukwonga for descending onto the arena of conflict. He cited H.C.C.C. NO 3504 of 1993 Kisy Investment Limited & Others -v- Kenya Finance Corporation Ltd. Where the court said:

“.....The applicants’s counsel has deponed to contested matters of fact and said that the same are true and within his own knowledge information and belief. It is not competent for a party’s advocate to depon to evidentiary facts at any stage of the suit.”

With respect, I agree and go further to quote the same ruling by the learned judge (Ringera J) where he said.

“By deponing to such matters the advocate courts an adversarial invitation to step from his privileged position at the bar into the witness box. He is liable to be cross examined on his deposition. It is impossible and unseemly for an advocate to discharge his duty to the court and to his client if he is going to enter into the controversy as a witness. he cannot be both counsel and witness in the same case.”

The proceedings before me which started in the High Court of Tanzania are not over yet. It matters not that Mr Ukwonga is an advocate based in Tanzania. The principles are the same. His affidavit therefore offends the said principles which, with respect, I subscribe to.

And so in the end, when the offending paragraphs in both affidavits of Mr Ngui and Mr Ukwonga are struck out, what remains are shells that cannot be of any assistance to the court. I know that the striking out of any document in a matter before the court is a drastic measure but in the instant case I see no other way save to do so.

Accordingly the two contentions affidavits by Mr Simon Isaac Ngui and Godfrey Suromcan ukwonga respectively are hereby struck out with costs.

Orders accordingly. **Dated and delivered at Nairobi this 26th day of February, 1998.**

A. MBOGHOLI MSAGHA

JUDGE