



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL CASE 73 OF 2007

JETLINK EXPRESS LIMITEDPLAINTIFF

VERSUS

EAST AFRICAN SAFARI AIR EXPRESS LIMITEDDEFENDANT

RULING

A preliminary issue has been raised seeking the court's direction regarding the grounds of opposition dated 12th March 2007, filed by the Respondent in response to the Chamber Summons dated 15th February 2007, and four affidavits sworn in response to the same application. It is maintained that this is a violation of Order 50 Rule 16(1) of the Civil Procedure Rules which provides for the filing of either grounds of opposition or replying affidavit. It is further contended that the law does not allow a Respondent to file more than one affidavit without leave of the court.

Mr. Lubullela who is seeking these directions has referred the court to the following cases.

- *National Industrial Credit Bank Limited vs Gathuku [2002]2 KLR 295.*
- *Mahandra Vitalbhat Patel vs Violet W. Gatei & Another Hccc 685 of 2003.*

Mr. Kiragu who appears for the Respondent maintains that the court must give the rule an interpretation that does not make the rule an absolute nonsense. He explained that whereas grounds of opposition simply articulate the grounds intended to be relied upon, an affidavit contains evidence and that there is no reason why a party cannot file both documents as the applicant is not likely to suffer any prejudice. He urged the court to look at the intention of the rule which is to give parties a choice. As regards the multiple affidavits Mr. Kiragu referred the court to the interpretation and General Provisions Act Cap 2 Section 3(4) which provides that singular includes plural, and plural includes singular, and therefore Order L rule 16(2) must be read as permitting more than one affidavit. In this case the various affidavits were necessary to rebut the various allegations made by the applicant which could only be attested to by different persons.

To this Mr. Lubullela responded that order L rule 16(1) is very clear and the same being worded in mandatory terms, the intention to exclude the filing of both documents must be given effect. He dismissed the reference to Section 3(4) of the interpretation and General Provisions Act, maintaining that the same only applies to statutes and not rules, and that to adopt the interpretation proposed in Section 3(4) would make an absurdity of the rules. He conceded that the court has the power to regulate the number of affidavits to be filed but maintained that leave has to be obtained for the filing of additional affidavits.

The provisions of Order L Rule 16(1) have been discussed by my brother Judges in the two cases which were cited to me by Mr. Lubulela. I do not therefore find it necessary to go into a discourse of the rule save to concur with my brother Judges that order 50 rule 16(1) is mandatory and that it requires the filing of a replying affidavit or a statement of grounds of opposition. Although I agree with Mr. Kiragu that no prejudice is likely to be suffered by the filling of both documents, the intention of the rule is clear that a party should elect which document to file and cannot file both documents. In this case Mr. Kiragu has given an indication that if put to an election they will opt for a replying affidavit. That takes us to the next issue and that is whether the Respondent can rely on the multiple affidavits filed in response to the application.

In my understanding Order L Rule 16(1) only provides for the filing of one replying affidavit. Although there is no mention of additional affidavits, where there is need for more affidavits to be filed, the Respondent must seek leave of the Court and justify the need for such additional affidavits. In this case the applicant did not seek leave of the court and therefore the three additional affidavits have been irregularly filed. Be that as it may, Mr. Kiragu has clearly demonstrated the need for such additional affidavits as each is responding to specific issues raised in the applicant's supporting affidavit. In my view, given that the application before the court is one under certificate of urgency, it is in the interest of justice and expediency that the court do grant leave for the additional affidavits to be filed and deem the affidavits already filed as properly filed.

The upshot of the above is that I give the following directions and orders.

- (1) The grounds of opposition dated 12th March 2007, filed by the Respondent is struck out.
- (2) The three additional affidavits filed by the Respondent are deemed as properly filed.
- (3) The applicant is at liberty to file a response to the additional affidavits within 7 days from the date hereof.

Orders accordingly.

Dated Signed and delivered this 30th Day of March, 2007.

H. M. OKWENGU

JUDGE