



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 359 of 2006**

**THE SEVENTHDAY ADVENTIST CHURCH (E.A.) LTD....APPLICANT**

**VERSUS**

**SOLOMON MUIGA.....RESPONDENT**

**RULING**

The Plaintiffs herein by their plaint dated 8<sup>th</sup> August, 2006 and filed the same date sought certain reliefs against the Defendant/Respondent. It was accompanied by a chamber summons dated the same date and also filed the same date as the plaint. In prayer 3 thereof the application sought an injunction against the Defendant/Respondent including his servants and/or agents, employees or any authorized party whatsoever restraining them from alienating, encroaching into, erecting a fence, constructing, disposing or interfering with the plaintiffs peaceful occupation and possession of LR.No.12/44/128, 12/44/127 and 12/44/126 herein and particularly the nine (9) meter wide round which is approximately 144.55 meters long or any part thereof until the hearing and final determination of this suit or in the alternative until further orders from this Honourable Court. Prayer 4 thereof asked the Court to issue a mandatory injunction compelling the Defendant/Respondent to demolish, remove or clear any fence sitting a cross or blocking the said access road measuring approximately 9 meters wide and 144.55 meters long or there about or any part thereof to demolish, remove or otherwise clear any building, structure, foundation slab, extension or other fixture on the said access road and completely open up the portion of the road currently blocked or encroached upon by the said Defendant/Respondent. Interim orders were granted on 9.8.2006 and subsequent to the present day. This ruling is in respect of the inter parties hearing.

The main grounds in support of the application is that the Plaintiffs portions and that of the Defendant was initially one plot but was subdivided into 4 portions upon sale and transfer to each of the plaintiffs and the Defendant; there are two access roads to the plots the main one being on the Langata road on the lower part of the plots and an access road on the upper part of the plots. The affected road is the upper road. The plaintiffs moved to court because they defendant started putting up a building and a wall across the said access road and blockaded it completely between him and the 3<sup>rd</sup> Plaintiff. It is this action which prompted the Plaintiffs to move to Court.

The Court was however informed that as at the time of inter parties hearing the Defendant had demolished the blockage, cleared the offending portion and the road was now clear and accessible. The inter parties argument are for purposes of jurisprudence or principle and it is also hoped that these will boost the issue of admission in the substantive suit. They maintain they are entitled to the orders because they had a valid claim and have established a *prima facie* case and they should be allowed to have a

confirmation of the orders complained of.

In response Counsel for the Respondent has submitted that the orders cannot be confirmed because they are not based on a proper suit as the verifying affidavit is defective. That being the case there is no proper suit on the basis of which the orders can be granted. The second objection is that the Applicants exhibits are not properly commissioned and the offending paragraphs which purport to exhibit the offending exhibits should be struck out. Once that is done there will be no material evidence on the basis of which the orders sought can be granted. 3rdly that the application has been overtaken by events as the offending structures have since been removed. The argument is therefore an academic exercise and this court is urged not to issue orders in vain.

In reply Counsel for the Applicant submitted that order 18 rule 7 Civil Procedure Rules can be invoked to cure any defects in the verifying affidavit although they still maintain that the same is proper.

As regards exhibits he maintains that the Respondent cannot move to fault them as they themselves have relied on them. As for status quo he concedes the offending walls have been removed but this came after the Plaintiff had already moved to Court. Their complaint is still valid and the Defendant should not be allowed to benefit from their wrong.

The Respondent has raised two crucial legal issues which have to be disposed off first before the matter can proceed to be considered on its merits. If the legal issues raised are upheld there will be no need for the court to go into the merits of the matter save for jurisprudential purposes. The first one to be considered is the issue concerning commissioning of exhibits relied upon. It is correctly submitted that if faulted then the exhibits as well as the paragraphs in respect of which they were annexed have to be struck out. It matters not that they have been referred to in the submissions by both Counsel.

Rule 9 of the Oaths and Statutory Declaration Rules made under the Oaths and Statutory Declarations Act Cap.15 Laws of Kenya

des:-

*“All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with a serial letter of identification”*

None compliance with this requirement makes the exhibits to be mere pieces of paper as per the reasoning in Nairobi HCC No. 1251/2002 COWEST TRADING GMBH VERSUS SPECIALIZED LIGHTING SYSTEMS LTD. The exhibits are meant to confirm allegations in the paragraphs for which they are annexed. Paragraph 2,3,4,5,10 and 18 to which the exhibit were annexed form the backbone of the applications. Once the exhibits are faulted and expunged the allegations in the said paragraphs remain mere allegations and mere allegations with no material to support them cannot form the basis of confirmation of the orders granted earlier on. The said paragraphs having been sworn in the form they were, they cannot be severed. They stand or fall together. Expunging of the exhibits automatically leads to the expunging of the affected paragraphs. Annexure, 2,4 and 5 are signed by the Commissioner for Oaths though the seal of the commissioner is not appended. Annexure 3 is not signed by the Commissioner of Oaths. It is this Court's view that a signature alone does not satisfy the requirement in rule 9 of Cap.10 *“shall be surely turn to under the seal of the Commissioner”*. This means that the seal of the Commissioner of Oaths Commissioning the exhibits has to be affixed on his signature. On that basis both the signed and unsigned exhibits are mere pieces of paper. They are to be expunged along side the paragraphs in which they were annexed.

The verifying affidavit has also been faulted. Paragraph 1 of the said verifying affidavit states *“that I am the executive secretary of the 1<sup>st</sup> Plaintiff with the capacity and authority of the 1<sup>st</sup> plaintiff to swear this affidavit. I also have the permission and authorities of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs to swear this affidavit on their behalf”*

It is not indicated when or how that authority was given. The authority has not been annexed. In the

absence of annexing the authority paragraph 1 of the verifying affidavit cannot stand. An affidavit has to be sworn as one unit. It cannot be severed. Once paragraph 1 is struck out the basis for bringing the suit crumbles and once that crumbles the suit cannot stand.

The Applicants Counsel has asked the Court to look to order 18 Civil Procedure Rules for a cure. Order 18 rule 7 reads. *"The Court may receive any affidavit sworn for the purposes of being used in any suit not withstanding any defect by misdescription of the parties or otherwise in the title or other irregularities in the form thereof."*

As reasoned in Nairobi HCCC NO. 907 OF 1999 WEST KENYA SUGAR COMPANY LTD VERSUS PANACHAN JIURAS SHAH AND 2 OTHERS, Order 18 rule 7 deals with an irregularity in the title or in the form of the affidavit. Failure to attach authority has nothing to do with the title or form. Once paragraph 1 of the verifying affidavit is faulted the entire verifying affidavit has to be struck out. Once the verifying affidavit is struck out the suit filed becomes defective as it will not meet the requirements in order 7 rule 2 of the Civil Procedure Rules which states *"The Plaintiff shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the plaint."*

In the absence of a verifying affidavit the Plaintiff cannot stand and likewise without the plaintiff the interim application cannot stand.

Indeed as submitted by the applicants counsel the Respondent has ambushed the applicant with these two points. However, being issues of law they can be raised at any stage of the proceedings and were rightly raised at that point in time.

Turning to the merits of the application for jurisprudential purposes only, it is clear that the sum total of the status quo meant to be preserved pending the hearing of the application inter parties and thereafter pending the hearing and determination of the main suit was to have the access road in question restored to its former position as per the plans exhibited. This was to be achieved by requiring the Defendants to remove any encroachment he had erected therein once that was achieved prayer 4 became spent. There was no need to confirm those orders.

As for prayer 3 confirmation for the same would have been necessary if the status quo as at the time the Plaintiff applicant came to Court had continued up to time of hearing inter parties. The confirmation would then ensure that status quo continues in place as the Court proceeds to determine the genuineness of the applicants complaints during the main trial. In a situation where the alleged wrong doer has remedied the wrong and is not threatening to continue the wrong doing confirmation would not be necessary. Herein had the time legal objection not been upheld this court would not have confirmed the orders as they would have been issued in vain because the status quo prevailing as at the time the applicant moved to court had changed.

Turning to the legal objections raised herein for the reasons given this court upholds the faulting of the verifying affidavit which the court has no alternative but to strike out the said verifying affidavit. Once the verifying affidavit is struck out the plaintiff which was being supported by it becomes incompetent for none compliance with order 7 rule 2 and it also has to be struck out. Likewise once the plaintiff and verifying affidavit are struck out. Interim application cemented on it has no base on which to stand and so it also has to be struck out which, I hereby do due to firstly lack of abase on which to stand and secondly due to lack of substance by virtue of having the very paragraph in its supporting affidavit struck out.

The net result is that the entire suit as well as the interim application are struck out with costs to the Defendant.

DATED READ DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF MARCH 2007.

**R. NAMBUYE**

**JUDGE**