



REPUBLIC OF KENYA



Carvahlo & another v Dry Associates Limited & another (Commercial Case E493 of 2020) [2023] KEHC 1221 (KLR) (Civ) (17 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1221 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
COMMERCIAL CASE E493 OF 2020
DO CHEPKWONY, J
FEBRUARY 17, 2023

BETWEEN

JOE CARVAHLO 1ST PLAINTIFF
SUSAN SCULL-CARVAHLO 2ND PLAINTIFF

AND

DRY ASSOCIATES LIMITED 1ST DEFENDANT
BAHATI MWAMUYE 2ND DEFENDANT

RULING

1. Before this court for determination is a Chamber Summons Application dated March 25, 2022 and in which the Applicants are seeking for orders that;
 - a) Spent;
 - b) Spent;
 - c) Spent;
 - d) Leave be granted to the Plaintiffs/Applicants to file a Further Affidavit in response to the 2nd Defendant's application dated July 29, 2021;
 - e) The Further Affidavit sworn on the March 25, 2022 by the Plaintiffs Advocate and filed herein be deemed as properly on record;
 - f) The costs of this application be provided for.



2. The Application is premised on the grounds on its face and in the Supporting Affidavit of Joe Carvahlo sworn on March 25, 2022. It is stated that the 2nd Defendant filed a Notice of Motion application dated July 29, 2021 seeking the following orders:-
 - a) That the Plaintiffs do within seven (7) days, give security for the 2nd Defendant's costs for an amount of Kshs 3,998,299/- being the legal fees charged to defend this matter to be deposited in a joint interest earning bank account opened and operated jointly by the Advocates of the 2nd Defendant and the Advocates of the Plaintiffs;
 - b) That the suit against the 2nd Defendant be struck out with costs in default of the provision of the said security within the prescribed period;
 - c) That the costs of this Application be provided for
3. It is further stated that the application was based on grounds that the Plaintiffs would allegedly be unable to pay the 2nd Defendant's costs as they are not Kenyan citizens, and because they allegedly have no registered or known assets within the jurisdiction capable of satisfying an order for costs.
4. That the Plaintiffs responded to the said application through a Replying Affidavit dated September 22, 2021 and thereafter, the 2nd Defendant filed a Supplementary Affidavit dated January 17, 2022, alongside its submissions dated February 10, 2022.
5. That on March 3, 2022, the matter was mentioned in Court and the Plaintiffs were directed to file their submissions on or before the March 14, 2022. That in the course of preparing the Plaintiffs submissions its Advocate realized that the evidence with respect to the Plaintiffs response was not annexed to its Replying Affidavit of September 22, 2021, which evidence included;
 - i) A Certificate of Permanent Residence of the 1st Plaintiff;
 - ii) A Work/Resident Permit of the 2nd Plaintiff;
 - iii) A Certificate of Incorporation of Josujani Company Ltd in Kenya;
 - iv) CR12 of Josujani Co Ltd showing both the Plaintiffs as Directors and Shareholders of the Josujani Ltd;
 - v) A Certificate of Lease certifying that Josujani Co Ltd is the registered proprietor of 4.69 acres of property Title No Kwale/Diani Beach Block/105 in Kwale County.
6. It is contended that the Plaintiffs further brought to their Advocates attention that they had obtained the following additional documents:
 - i. Kenya Power Electricity Bill issued on February 17, 2022 to Josujani Ltd;
 - ii. A registered transfer of Sub-lease of Plot No F7 on Land Ref No 24880 of Section I Mainland North, Kilifi worth Kshs 80,000,000/-, to the 1st Plaintiff;
 - iii. A Certificate of Search indicating the 1st Plaintiff as the registered owner Plot No F7 on Land Ref No 24880 of Section I Mainland North, Kilifi.
7. It is further contended that the above documents are crucial to the Plaintiffs reply to the 2nd Defendants application of July 29, 2021 as they demonstrate that the Plaintiffs are indeed resident in Kenya, and



further that they jointly and severally own various properties in Kenya worth over Kshs 100,000,000/- which would be more than sufficient to meet the 2nd Defendants costs of Kshs 3,998,299/- or any eventual order as to costs. That the documents will not in any way prejudice the 2nd Defendant as the same disclose material facts relevant for this Honourable Court to make a just and fair determination on the application.

8. That given that the Court had earlier directed the Plaintiffs to file their submissions before the March 14, 2022, and given that the Plaintiffs submissions relied on the above documents, the Plaintiffs filed a further affidavit sworn by their Advocate explaining the inadvertent error and omission of the documents, wherein it annexed the said omitted documents.
9. When the matter came up in Court on the March 14, 2022, the Plaintiffs Advocate informed the Court and its counterparts of the said further affidavit, and sought the Court's indulgence for leave to have the said affidavit deemed as being properly on record but the Honourable Deputy Registrar E. Tanui declined to grant the said leave, and expunged the said affidavit from the record while stating that the Plaintiffs were at liberty to file a formal application requesting for leave to file the same.
10. Accordingly, the Plaintiffs have brought the instant Application seeking this Honourable Court's leave to file a further affidavit and deem the further affidavit filed herewith and sworn on the March 25, 2022, as being properly on record. It is averred that the omission was an inadvertent error with no fraudulent intention or any intention to overreach and which omission ought not to be punished by exclusion of the affidavit from the record, but admitted by this Honourable Court as evidence after consideration of the above issues.
11. By virtue of Article 159(2)(b) of the Constitution of Kenya, this Honourable Court is enjoined to mete out substantive justice to parties without undue regard to technicalities and as such, nothing limits or affects the inherent power of this Court to make such orders as may be necessary for the ends of justice to be met.
12. It is the Applicant's prayer that it is in the interest of justice that this Honourable Court does exercise its discretion to grant leave to the Plaintiffs to file a further affidavit and further deem the affidavit filed herewith and sworn on the March 25, 2022, as being properly on record.

Response

13. The Application is opposed by the 2nd Respondent vide the Grounds of Opposition and a Notice of Preliminary Objection, both dated May 4, 2022. It is stated therein that by seeking to admit an affidavit already expunged, the Application seeks to Appeal the decision of the Hon. Deputy Registrar, without following due process, hence the Application offends Section 6 of the Civil Procedure Act.
14. That by seeking to file evidence after filing of submissions by the parties, the Application abuses the court process and is undeserving of the enjoyment of the inherent powers of the court. That the Application as filed is a textbook definition of a frivolous and vexatious Application only calculated to waste the limited time of the Honorable Court and delay the determination of the matter at hand.
15. That the Application purports to rely on unknown rules of the court, namely Order 9 Rule 19 and claims to further rely on Order 51 Rule 14, a complete craftsmanship of the Applicants and which the Honorable Court must resist.
16. That prayer No (4) of the Application seeks to file further evidence after both parties have filed their submissions and a ruling is due contrary to the rules and tradition of the Honorable Court. Further, that if prayer No.(5) is allowed this shall offend the holding in the case of Nicholas Kiptoo Arap Korir Salat



vs Independent Electoral and Boundaries Commission & 7 Others 120141 eKLR, where the Honorable court succinctly held that

“... Such a filing renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court.”

17. That the Application seeks to portray that the Applicants own properties yet it does not attach any single document showing that the Applicants own any property in their name but instead rely on properties allegedly owned by a separate legal entity known as Josujani Co Ltd contrary to the rule in *Salomon v Salomon* as affirmed by this Honorable court in its numerous judicial pronouncements. That the Application tries to prematurely argue both the Application dated March 25, 2022 and the suit.
18. On June 13, 2022, this court directed that the instant Application be disposed by way of written submissions.

Analysis and Determination

19. I have read through the application dated March 25, 2022, the respective affidavits, responses and submissions, I find that what was in contention before the Deputy Registrar is the 2nd Respondent's Application dated July 29, 2021 seeking an order that the Plaintiff deposits security for costs in court on grounds that the Applicants herein will be unable to pay costs if the Respondent's Application succeeds since the Plaintiffs are not Kenyan Citizens and neither do they have any registered or known assets within the jurisdiction of this court capable of satisfying an order for costs.
20. When the parties appeared before the Hon Deputy Registrar on March 14, 2022, she expunged the Applicant's further affidavit dated March 10, 2022 for being filed out of time and without leave of the court but allowed the Applicants to file a formal Application hence the instant Application.
21. The Supreme Court of Kenya in the case of *Raila Odinga & Others vs IEBC & 3 Others*, Supreme Court of Kenya Presidential Petitions Nos 3, 4, 5/2013 [2013]eKLR, considered whether or not to allow additional evidence filed outside the contemplation of the rules in a Presidential Election Petition and set the principles applicable as follows:

“The parties have a duty to ensure they comply with their respective time – lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.

The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.”



22. I have perused the further affidavit sworn by Mary Otieno dated March 10, 2022 and the annexures therein which include;
- i) A Certificate of Permanent Residence of the 1st Plaintiff;
 - ii) A Work/Resident Permit of the 2nd Plaintiff;
 - iii) A Certificate of Incorporation of Josujani Company Ltd in Kenya;
 - iv) CR12 of Josujani Co Ltd showing both the Plaintiffs as Directors and Shareholders of the Josujani Ltd;
 - v) A Certificate of Lease of Josujani Co Ltd being the registered proprietor of Title No Kwale/Diani Beach Block/105 in Kwale County;
 - vi) Kenya Power Electricity Bill issued on February 17, 2022 to Josujani Ltd;
 - vii) Sale Agreement Kshs 80,000,000.00
23. Further, at Paragraph 9 of the Supporting Affidavit, the Applicant indicates that there exist other documents including;
- i) A registered transfer of Sub-lease of Plot No F7 on Land Ref No 24880 of Section I Mainland North, Kilifi worth Kshs 80,000,000/-, to the 1st Plaintiff;
 - ii) A Certificate of Search indicating the 1st Plaintiff as the registered owner Plot No F7 on Land Ref No 24880 of Section I Mainland North, Kilifi.
24. I have perused these documents and in my view, find they are very necessary in assisting the court determine the question of whether the Applicant will be able to satisfy an order for costs in the event the Applicant's Application dated July 29, 2021 succeeds. Having considered each party's submission, I find there is no prejudice that the Respondents will suffer if the Applicant is allowed to bring in a further affidavit. In fact, they stand at an advantage since proof of the existence of the said properties and ownership by the Plaintiffs is security enough for them since they can execute against these properties.
25. The upshot, therefore, is that this Application dated March 25, 2022 is meritable and succeeds in the following terms:-
- a) The Applicant be and is hereby granted leave to file and serve a Further Affidavit with all the relevant annexures and the further affidavit sworn on March 25, 2022 by Plaintiff's advocate and filed herein is hereby deemed as duly filed and to be served upon the Respondents within seven (7) days from the date hereof.
 - b) The Respondent is granted leave of fourteen (14) days upon service to file and serve their response to the Further Affidavit if any.
 - c) Costs of the Application to be borne by the Applicant.
 - d) Mention on March 20, 2023 before the Deputy Registrar to confirm compliance and take directions.

It is hereby ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.



D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Otieno holding brief for Mr. Wandabwa counsel for Plaintiff

Mr. Kimosop holding brief for Mr. Mola counsel for 2nd Defendant/Respondent

Court Assistant - Sakina

