



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CIVIL SUIT NO. 2 OF 2018

SAHAM ASSURANCE CO. LTD.....PLAINTIFF/APPLICANT

VERSUS

PAUL MUSEE SHIMOLI.....DEFENDANT/RESPONDENT

RULING

1. Pursuant to the provisions of article 159 of the 2010 Constitution of Kenya, Order 51 rule 1 of the 2010 Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act [Cap 21] Laws of Kenya, the applicant seeks the following orders from this court.

- 1) *spent*
- 2) an order to stay the proceedings herein pending the hearing and determination of the instant application.
- 3) an order to re-open the plaintiff's case so as to enable them file a complaint (*sic*) verifying affidavit.
- 4) an order to grant leave to the applicant to substitute the defective verifying affidavit on record with one that is compliant with the Civil Procedure Rules for the just and fair determination of the suit.
- 5) an order to make provision for costs.

2. The application is supported by eleven (11) grounds that are set out on the face of the notice of motion and a seventeen (17) supporting sworn affidavit by Chelule C. Abigail.

3. The major grounds in support of the notice of motion are as follows. The claim herein was filed on 4/10/2018 seeking a declaration that the plaintiff is not bound to pay/or satisfy the judgement in Kabarnet PMCC No. 61 of 2018. The suit proceeded to hearing and during the defence hearing, it came to light that the verifying affidavit in support of the plaint on record and one that was served upon the defendant was not commissioned by an advocate before filing and service. This error did not come to the attention of the advocate as the verifying affidavit in her file was both signed and commissioned by an advocate. The advocate now seeks to replace the defective affidavit with a compliant one for the effective and fair determination of the suit.

4. Furthermore, the applicant stands to suffer prejudice if the proceedings are not stayed and a compliant verifying affidavit is filed in place of the defective one. No prejudice will be suffered by the defendant in the event that this application is allowed. The applicant has also stated that the error was due to an honest and excusable mistake and should not visit injustice to the applicant.

5. The deponent has replicated the same matters that are set out as grounds in support of the notice of motion in her seventeen (17) paragraphs supporting affidavit.

The submissions of the plaintiff/applicant

6. Counsel for the plaintiff has submitted that the verifying affidavit accompanying the plaint was not commissioned as required by Order 4 Rule 1 (6) of the Civil Procedure Rules. Counsel has submitted that this due to a mistake that is excusable. Counsel cited a number of authorities including article 159 of the 2010 Constitution, which empowers the court to administer substantive justice without undue regard to technicalities. Counsel also cited sections 1A and 3A of the Civil Procedure Act that mandates the court to ensure that justice is served by facilitating a just, expeditious, proportionate and affordable resolution of civil disputes.

7. Furthermore, counsel cited the case of *D.T. Dobie & Company (Kenya) Ltd v Joseph Mbaria Muchina & Another [1980] e-KLR*, in which

the Court of Appeal stated that a court ought to sustain a suit rather than terminate it summarily where errors are explainable.

8. Counsel also cited among other authorities the case of *Phillip Chemwolo & Another v Augustine Kubende [1982-1988] KLR 103 at 1040* in which Apaloo, JA, pronounced himself as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.”

9. The applicant has also filed a further affidavit in which it has substantially raised the same averments that have already been raised in its supporting affidavit. I have therefore declined to consider them. Based on the applicant's affidavit and the authorities cited, counsel for the plaintiff urged the court to allow the plaintiff's application.

Grounds of opposition to the notice to cross examination.

10. The plaintiff/applicant has filed seven grounds in opposition to the notice to cross examine it. In those grounds the plaintiff/applicant has set out the following major grounds.

11. First, the said notice is bad in law and frivolous. Second, the defendant/respondent has not placed any material before the court to warrant the cross examination of the plaintiff/applicant's advocate. Thirdly, the intended cross examination will embarrass the court. Fourthly, the deponent who is sought to be cross examined is not a party to the case.

The case for the defendant/respondent

12. The respondent has filed a 26 paragraphs replying affidavit together with a further 13 paragraphs replying affidavit in opposition to the application; whose major averments are as follows.

13. The application to re-open the case and substitute the defective verifying affidavit is scandalous, vexatious, frivolous, a waste of judicial time and a ploy to frustrate the respondent's case. Furthermore, the applicant's application is an afterthought since the applicant did not cross examine on the issue of unsworn verifying affidavit when the same matter was raised during cross examination. The applicant commissioned its copy of its verifying affidavit after the defence closed its case. The leave sought to file a proper verifying affidavit is a clear indication that the applicant's advocate is on a fishing expedition and now wants to turn right, the weaknesses of its case; which was exposed during the defence hearing.

14. Furthermore, the applicant realized during the defence hearing that its case had gaps it needed to be filled up and if the case for defence is re-opened it will prejudice the respondent's case. Following advice from its advocate respondent, the respondent believes that counsel for the applicant is professionally negligence, casual and/or sloppy; which cannot be equated to an excusable genuine mistake or error. The applicant delayed in filing the instant application and its whole case is weak and should be dismissed with costs.

15. In addition to the foregoing, the respondent has deposed that the person who filed the verifying is Karen Njagi, whereas the person who wrote the plaintiff's witness statement is Sarah Weru. The said Sarah Weru is different from the person who gave evidence in court, who was Rachel Omollo.

16. The others averments of the respondent relate to the evidence of the applicant, which evidence is not relevant to the instant application. I have therefore ignored those averments.

Notice of intended cross examination.

17. The respondent has filed a notice to cross examine the plaintiff/applicant's deponent (Chelule c. Abigail) pursuant to Order 19 Rule 2 of the Civil Procedure Rules.

18. The respondent has also filed a further replying affidavit in which he has substantially raised the same averments that have already been raised in his replying affidavit. I have therefore declined to consider them.

The submissions of the defendant/respondent

19. Messrs Otwere & Advocates for the respondent has filed written submissions in support of dismissal of the application.

20. Based on the averments of the respondent, counsel has submitted that the conduct of the applicant's in remaining silent in respect of the un-commissioned verifying affidavit and its counsel's failure to cross examine concerning the un-commissioned verifying affidavit is an indication that the plaintiff/applicant's advocate only intends to fill the gaps in its case and is also an afterthought. Counsel cited *Osodo v Rael Obara Ojuok & 4 Others [2017] e-KLR*, in which that court observed that it is prejudicial to the respondent's case for a court to order for the re-opening of the applicant's case after its closure. That court further observed that if such an application were to be allowed it would allow the applicant to fill gaps in its case.

21. Furthermore, the defendant/respondent also cited *Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & Another [2015] e-KLR*, in which that court observed that unexplained delay defeats an application to re-open its case. Based on this authority counsel has submitted that there is unexplained delay in filing this application.

Issues for determination

22. I have considered the affidavits and the submissions of both parties including the authorities they cited. As a result, I find the following issues to be issues for determination.

1 Whether the applicant has made out a case for the grant of an order to re-open its case and to file a commissioned verifying affidavit.

2 Who bears the costs of this application?

Issue 1

23. I find that the plaintiff/applicant had closed its case. I further find that the case was pending the filing of submissions. It is at that stage that the plaintiff/applicant applied to re-open its case for the purposes of filing a commissioned verifying affidavit. Although, counsel for the plaintiff/applicant was aware that the said verifying affidavit was not commissioned, she did not appreciate the consequences of failing to have in place a compliant verifying affidavit. In the premises, I find that it is not proper to punish a party for the mistakes of its counsel. Furthermore, a party should be allowed to have all its evidence placed before the court in order to enable the court to make an informed and sound decision. A mistake is a mistake whether it is one of law or fact. Counsel on both sides are not angels and have not been exempted from making mistakes just because they are advocates.

24. Furthermore, I find that the case of *Odoyo Osodo v Rael Obara Ojuok & 4 Others*, supra, is distinguishable from the instant application. In the instant application what is sought to be rectified is a defective affidavit which was not commissioned, whereas in *Odoyo Osodo v Rael Obara Ojuok & 4 Others*, the applicant sought to be allowed to re-open the case to produce evidence in support of its counter –claim; which would have necessitated calling the district land adjudication officer and the district land registrar.

25. In addition to the foregoing, I find as persuasive the case of *Phillip Chemwolo & Another v Augustine Kubende [1982-1988] KLR 103 at 1040* in which Apaloo, JA, pronounced himself as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.”

I equally find as persuasive the case of D.T. Dobie & Company (Kenya) Ltd v Joseph Mbaria Muchina & Another [1980] e-KLR, in which the Court of Appeal stated that a court ought to sustain a suit rather terminate a suit summarily where errors are explainable.

26. In the premises, I find that the mistake committed by counsel for the applicant is excusable.

27. There is no doubt that the defendant/respondent will be prejudiced at least in terms of monetary expenses that he has incurred in opposing this application. I find that an order of costs in favour of the defendant/respondent will compensate him and I therefore order that the costs of this application be awarded to the defendant/respondent in any event.

28. In the premises, I allow the plaintiff/applicant’s application with the result that the plaintiff/applicant’s case is hereby ordered re-opened and is to file a commissioned verifying affidavit within fourteen days (14) failing which this order shall lapse.

29. The plaintiff/applicant’s deponent cannot shield herself from being cross examined on the basis that she is not a party to the proceedings.

30. She is the deponent of the affidavit upon which she is sought to be cross examined. The right of the defendant/respondent to cross examine the deponent is allowed by law. Cross examination is geared to bring out the truth in any contested matter. I find that the reasons advanced in opposition to the notice to cross examine the plaintiff/applicant are not merited.

31. In the premises, I hereby grant the defendant/respondent the right to cross examine the deponent in terms of his notice.

Issue 2

32. I have already made an order of costs in favour of the defendant/respondent. I will therefore say no more on this point.

Ruling signed, dated and delivered in open court at Kabarnet this 26th day of May 2021 in the presence of

J M BWONWONG’A

JUDGE

In the presence of:

Mr. Kemboi, Court Assistant.

Mr. Kipkulei holding brief for Mr. Munyiri for the Plaintiff/Applicant and in the absence of Messrs Otwere for the Respondent.