



Urban Solutions Real Estate Limited & another v Halal Meat Products Limited & another (Civil Case 10 of 2019) [2021] KEHC 166 (KLR) (Commercial and Tax) (28 October 2021) (Ruling)

Neutral citation: [2021] KEHC 166 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 10 OF 2019
WA OKWANY, J
OCTOBER 28, 2021**

BETWEEN

URBAN SOLUTIONS REAL ESTATE LIMITED 1ST PLAINTIFF

CARLING WOOD INVESTMENTS COMPANY LIMITED 2ND PLAINTIFF

AND

HALAL MEAT PRODUCTS LIMITED 1ST DEFENDANT

ABIB & ASSOCIATES ADVOCATES 2ND DEFENDANT

RULING

1. This ruling is in respect to two applications; the 2nd defendant's application dated 24th April 2021 and the plaintiff's application dated 3rd May 2021. The applications were canvassed together by way of written submissions.

Application dated 26th April 2021

2. The applicant seeks orders that:-
 1. Spent
 2. THAT the ruling scheduled for 22nd July 2021 be arrested pending hearing and determination of this application.
 3. THAT this honourable court be pleased to strike out and expunge from the court record the plaintiffs'/applicants further affidavit sworn by Fathudin Ali Mohammed and filed in court on 20th April 2021.



4. THAT the honourable court be pleased to expunge from the court record any reference made to the plaintiffs'/applicants further affidavit sworn by Fathudin Ali Mohammed and filed in court on 20th April 2021 in the plaintiffs' submissions dated 20th April 2021.
 5. That the honourable court be pleased to disregard the plaintiff's/applicants further affidavit sworn by Fathudin Ali Mohammed and filed in court on 20th April 2021 when making its ruling scheduled for 22nd July 2021
 6. That costs of this application be provided for.
3. The application is supported by the affidavit of Mr. Paul Ogunde and premised on the following grounds: -
1. THAT this matter came up in court on 20th April 2021 to confirm whether parties had filed their submissions as previously directed by the court.
 2. THAT Mr. Osodo counsel holding brief for Mr. Owino for the plaintiff's apologized to court for not having complied with the courts directions and sought for three (3) days to file their submissions. He further requested for a ruling date.
 3. That the honourable court directed that the plaintiffs to file and serve their submissions, within three days, to both the application dated 12th March 2021 by the plaintiffs and the application dated 10th September 2020 by the 2nd defendant and scheduled the matter for ruling on 22nd July 2021.
 4. THAT the plaintiffs acted contrary to the courts directions by filing a further affidavit on 20th April 2021 at the submission stage and without leave of court.
 5. THAT the plaintiffs impugned further affidavit offends the mandatory provisions of Order 51 rule 14(3) of the *Civil Procedure Rules 2010*.
 6. THAT it will be prejudicial to the 2nd defendant's case if the plaintiffs said further affidavit is allowed the 2nd defendant has not been accorded with an opportunity to respond to the same which raises issues of fact and law.
 7. THAT the plaintiffs have further submitted on the issues raised by the impugned further affidavit improperly on record in their submissions dated 20th April 2021.
 8. THAT it will be prejudicial to the 2nd defendant's case if the plaintiffs said further affidavit is allowed as the 2nd defendant has not been accorded an opportunity to respond to the new issues of fact and law raised in their further affidavit and argued in their submissions.
 9. THAT the plaintiffs had all the opportunity to seek leave to file a further affidavit when this matter was last in court which leave they did not seek. They instead asked for more time to file submissions and a ruling date. Their move to file a further affidavit without the courts leave at the submission stage is therefore mischievous and an afterthought calculated to steal a march from the 2nd defendant which ought not to be allowed in the interest of justice.



10. THAT the plaintiffs by not seeking leave of court before filing its further affidavit at the submission stage is turning the proceedings into an unregulated game of ping pong and the court should not have regard to the same.
 11. THAT it would be fair, just, and reasonable that the orders sought herein above are granted.
4. The plaintiffs opposed the application through the replying affidavit of their advocate Mr. Stephen Owino who states that when the matter came up for hearing on 20th April 2021 he requested Mr. Osodo to hold his brief and request the court for time to finalize his submissions but that the said advocate failed to mention the issue of further affidavit. He states that he filed the further affidavit to guide the court and to prevent the defendants from misleading the court and to address new issues raised by the 2nd defendant's further affidavit. He states that justice would be best served by allowing the plaintiffs to place their entire evidence before the court given that the 2nd defendant's application sought to strike out a party. He further states that no prejudice will be suffered by the defendants if the affidavit sworn on 20th April 2021 remained on record.

The 2nd application

5. The plaintiffs seek the following orders in the application dated 3rd May 2021: -
- i. THAT this Honourable Court be pleased to grant leave to the plaintiffs to file a further affidavit.
 - ii. THAT this Honourable Court be pleased to deem the Further Affidavit filed on 20th April 2021 as properly on record.
 - iii. THAT the costs of this application be in the cause.
6. The application is supported by the affidavit of Stephen Owino and is based on the following grounds; -
1. THAT the 2nd defendant herein filed an application dated 10th September 2020 seeking to have her name and the pleadings as regards to the claim against her struck out from the suit herein.
 2. THAT the Honourable Court gave directions that the 2nd defendant's application be canvassed by way of written submissions.
 3. THAT the plaintiffs responded to the 2nd defendant's application by filing a Notice of Preliminary Objection together with a Replying affidavit both dated 5th October 2020.
 4. THAT the 1st defendant filed their reply to the 2nd defendant's application long after the plaintiffs had filed their replying affidavit.
 5. THAT the 1st defendant, in a deliberate move, failed to serve their replying affidavit upon the plaintiffs.
 6. THAT when the plaintiffs accessed the said replying affidavit through the e-filing portal, it was discovered that it was in support of the 2nd defendant's application and raised issues that the plaintiffs had not addressed in their replying affidavit.



7. THAT since the Honourable Court had directed that the plaintiffs file their submissions, a further affidavit was equally filed to respond to new issues that were deponed to by the defendants.
 8. THAT leave to file the said further affidavit was never sought on 20th April 2021 when this matter was mentioned since Mr. Owino who had the personal conduct of the matter was bereaved.
 9. THAT though Mr. Owino had requested Mr. Osodo to hold his brief and to request the court for extension of time, he did not through oversight, mention the issue of the further affidavit.
 10. THAT the filing of the said affidavit was informed by the need to guide the court and prevent the defendants from filing documents intended to mislead the court and to respond to new issues raised by the 1st defendant's replying affidavit sworn on 8th December 2020 as a matter of right.
 11. THAT in the premises the plaintiffs took the opportunity to also respond to the new matters raised in the further affidavit of the 24 defendant.
 12. THAT the court should seek to render substantive justice and not be bound by procedural technicalities as provided under Article 159 of the Constitution.
 13. THAT the defendants can address any issues of law or fact that arise in supplementary submissions they may wish to file.
 14. THAT no prejudice will be suffered by the defendants if the plaintiffs' further affidavit sworn on 20 April 2021 remains on record.
 15. THAT it would be in the best interest of justice that the orders sought herein be granted.
7. The defendants opposed the application through the replying affidavit of their advocate Mr. Edward Wangila who states that the plaintiffs' allegation that the replying affidavit dated 8th December 2020 was not served upon them is false. He contends that the plaintiffs have not given any reason why they failed to seek court's leave to file their further affidavit.
 8. I have considered the two applications, the parties' respective responses together with their written submissions. The main issue for determination is whether the plaintiffs' affidavit should be admitted so as to form part of the court record. The plaintiff submitted that the further affidavit is aimed at addressing the new issues raised by the defendant in its replying affidavit dated 8th December 2020. According to the plaintiff, justice will be served if the plaintiffs are allowed to place their entire case before the court.
 9. On its part, the 1st defendant submitted that the plaintiffs' affidavit raises new issues that the defendants have not been accorded the opportunity to respond. The defendant argued that there is no justification for striking out the affidavit should not be struck out. It was submitted that that the plaintiffs were undeserving of the courts discretion as they only sought leave after the court had given a hearing date.
 10. From the facts of this case, it is not disputed that the plaintiffs filed a further affidavit without leave of court. The bone of contention is whether this court should admit the further affidavit to form part of the plaintiff's document. Courts have taken the position that admission of affidavits is subject to the courts discretion which ought to be exercised judiciously.



11. In *Chris Munga N. Bichange vs Richard Nyagaka Tongi and 2 others [2015] eKLR* reference was made to the decision in *Raila Odinga vs IEBC* the court pronounced itself as follows: -

“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 introduced and relied upon. If it is small and 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 evidence is such 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 the further affidavit and or admission of additional evidence.”

12. A perusal of the court record reveals that the plaintiffs were duly served with the replying affidavit, in which case, they had the opportunity to seek leave from the court to file further affidavit. It turns out that the plaintiffs did not file the further affidavit in good time and opted to file it after the defendant had filed its submissions. I am not persuaded that the reason advanced by the plaintiffs for the late filing of the further affidavit is plausible.

13. Be that as it may and my above findings notwithstanding, I find that it will be in the interest of justice to allow the parties to present their cases. I have also perused the affidavit in question and it is evident that the defendants will not suffer any prejudice if it is admitted as part of the evidence. In the same vein, I find that it will be just to grant the defendants the opportunity to respond to the issues raised in the further affidavit.

14. Consequently, I allow the application dated 3rd may 2021 in the following terms: -

- i. The Further Affidavit filed on 20th April 2021 be deemed as properly on record.
- ii. The defendants be at liberty to file responses to the further affidavit within 14 days from the date of this application.
- iii. The defendants are granted the costs of the application.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 28TH DAY OF OCTOBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Osodo for the Plaintiffs

Mr. Wangila for 1st Defendant.

Mr. Wangila for Ogunde for 2nd Defendant

Court Assistant: Margaret

