



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC CIVIL SUIT NO 1 OF 2019

ASSETS RECOVERY AGENCY.....APPLICANT

VS

PHYLIS NJERI NGIRITA.....1ST RESPONDENT

LUCY WAMBUI NGIRITA.....2ND RESPONDENT

JEREMIAH GICHINA NGIRITA.....3RD RESPONDENT

AND

PLATNUM CREDIT LIMITED.....1ST INTERESTED PARTY

OPPORTUNITY INTERNATIONAL

WEDCO LTD.....2ND INTERESTED PARTY

RULING

1. This ruling relates to an oral application made by Mr. Ngumi, Learned Counsel for the applicant, to strike out the respondents' Supplementary Affidavit dated 18th November 2019. The basis of the application is that the affidavit goes beyond the scope of the leave that was granted to the respondents when they sought and were granted leave to file a supplementary affidavit.

2. The application was made on 28th January 2020 when the matter came up before the court for directions with regard to the manner of hearing. Mr. Ngumi submitted that the respondents filed an affidavit sworn on 30th July 2019 in response to the application, and the applicant filed a Further Supplementary affidavit sworn on 15th of October 2019. He further submitted that when the matter came up in court on 16th October 2019 the respondents sought leave to file a further affidavit in order to include certain invoices which they stated had been left out of their earlier affidavit. The court granted them leave to file a further affidavit, and they filed the affidavit dated 18th November 2019.

3. Mr. Ngumi submitted that when the parties went before Onyiego J on 9th December 2019, the applicant raised the issue that the respondents had gone beyond the leave that they had been granted by the court. He observed that a casual glance at the affidavit would show that the affidavit was, in some paragraphs, responding to the applicant's affidavit sworn on 23rd March 2019 to which they had been given leave to respond and had done so in the affidavit of 30th July 2019. His submission was that what the respondents have done is to respond again to the applicant's affidavit of 23rd March 2019 after the applicant had filed its affidavit of 15th October 2019. The applicant argues that the respondents did not have leave to do this; that the parties are now on their 5th and 6th affidavits, and the court should not allow this. Mr. Ngumi therefore asked the court to expunge the affidavit sworn on 18th November 2019 from the record as it is an abuse of the court process, seeking, as it does, to expand the leave granted to the respondents by the court.

4. In his submissions in reply, Mr. Waudo for the respondents submitted that the respondents had not been served with any application seeking to expunge their affidavit sworn on 18th November 2019 from the record. His submission was that after he came on record for the respondents, he sought leave to file a supplementary affidavit. That the leave that they were given was not specific to the filing of specific documents but extended to filing of additional responses. In his view, the respondents' affidavit was properly on record, and should the applicant have an issue with it, the applicant should file an application for it to be expunged, to which the respondent would be able to

respond. Mr. Waudu observed that the affidavit at issue was filed more than two months before the date of the oral application; that the applicant had sought leave to file an affidavit in response, and had not filed an application for it to be struck out.

5. In submissions in response, Mr. Ngumi observed that the court had granted the respondents leave to file responses, which they did by way of their affidavit sworn on 30th July 2019. The applicant then filed its affidavit sworn on 15th October 2019. The applicant had then filed submissions on 20th June 2019 before the respondents sought leave to file a replying affidavit. The respondents had also filed submissions dated 30th July 2019. According to Mr. Ngumi, what the applicant was contesting was the affidavit dated 18th November 2019 as the respondents had limited leave to file documents left out of their earlier affidavit such as invoices and delivery notes.

6. He observed that on 9th December 2019, Mr. Ondieki, not Mr. Waudu, had appeared for the respondents and was present when the applicant made the application before Onyiego J for the striking out of the affidavit. Mr. Ngumi noted that Onyiego J had observed that as his was not the trial court, the application for striking out should be made before this court. He had initially sought leave to respond to the affidavits as he was served in court with the affidavits. He urged the court to look at the affidavits filed by the respondents and find that they went outside the scope of the leave granted to the respondents and should be expunged from the record. He reiterated that by 20th June 2019, the applicant had filed all its documents. However, the respondents have continually sought leave in one way or another to file new documents, which has delayed the hearing of the matter. Counsel for the applicant termed the actions of the respondents abuse of the court process which ought to be stopped.

7. I have considered the oral application by the applicant and the respective submissions of the parties. I have also considered the record of the court, from which I note the following:

i. The applicant filed the Originating Motion dated 12th March 2019 under sections 80, 81 and 90 of the Proceeds of Crime and Anti-money Laundering Act seeking orders from the court declaring the properties listed therein as proceeds of crime and a further order for their forfeiture to the applicant on behalf of the State;

ii. The matter came up before Onyiego J on 13th March 2019 and the court directed that the application be served on the respondents, who were directed to file their responses thereto within 14 days of that date, and the matter to be mentioned on 15th April 2019 to confirm that the directions had been complied with;

iii. On 15th April 2019, the matter came up before Ogembo J in the presence of Mr. Mburu for the respondents and Mr. Ngumi for the applicant. Counsel for the parties indicated that they had agreed that the applicant would file submissions and a response to the respondents' grounds of opposition within 21 days. The respondents would file their submissions within 21 days of service, and the matter would be mentioned on 3rd June 2019;

iv. The matter was next before Onyiego J on 2nd July 2019 when interim orders were given in an application by the 2nd interested party. The matter was then fixed for hearing before me on 15th July 2019;

v. On this day, Counsel for the respondents did not appear. The court gave directions for hearing of the applications by the interested parties and set them for hearing on 23rd July 2019. All the parties were represented on that date, with the respondents represented by Mr. Waudu. Mr. Waudu indicated that the respondents had filed a replying affidavit on 12th April 2019, but that he was seeking leave to file a further affidavit. Mr. Ngumi opposed the application but sought leave, should the court grant the respondents' leave to file a further affidavit, corresponding leave to file a further affidavit;

vi. The court then directed that the applications by the interested parties would be heard simultaneously with the applicant's application. The court also granted leave to the respondents to file a further affidavit in response to the Originating Motion within 7 days of that day, while the applicant was granted leave to file a reply if need as well as supplementary submission within 7 days of service. The court fixed the matter for hearing on 18th September 2019;

vii. When the matter came up before Onyiego J, Mr. Waudu was not present but there was a Mr. Nyaanga holding brief for Mr. Ondieki, who is on record with Mr. Waudu for the respondents. It appears that there was no appearance for the applicant. Mr. Nyaanga informed the court that he had instructions to seek leave of the court for the respondents to file a supplementary replying affidavit. The court granted the respondents leave to file a supplementary affidavit within 14 days, and the matter was scheduled for highlighting of submissions on 16th October 2019;

viii. On that date, the parties again appeared before Onyiego J. Mr. Ondieki appeared for the respondents while Mr. Ngumi appeared for the applicant. Mr. Ondieki informed the court that the respondents were served with a further affidavit by Mr. Ngumi in which new evidence had been introduced, and the respondents needed more time to file a supplementary affidavit, noting that they had sought leave and had been granted such leave but were yet to file their affidavit. In his reply, Mr. Ngumi stated that leave to file a supplementary affidavit could be granted, and he also indicated that the applicant had no objection to cross-examination of the deponent of their affidavit, Snr. Sgt. Musyoka, whom Mr. Ondieki had indicated they would wish to cross-examine. Mr. Ngumi also sought more time to file supplementary submissions.

ix. The court extended the leave granted to the respondents on 23rd July 2019 to file a further supplementary affidavit for a further 7 days, and also granted the respondents leave to cross-examine Snr. Sgt. Musyoka on the contents of the affidavits sworn on 12th March 2019 and 15th October 2019. The court also granted the applicant leave to file supplementary submissions within 7 days of that date. The matter was then fixed for hearing on 18th November 2019;

x. The matter once again came up before Onyiego J in the presence of Mr. Ondieki and Mr. Waudu for the respondents and Mr. Ngumi for the applicant. Mr. Ondieki indicated to the court that he was not ready to proceed as he was not able to file the supplementary affidavit as they had somehow mixed up the exhibits. He informed the court that they had now reorganized the exhibits and 'they' were being filed. Mr. Ngumi indicated that he had no objection to the affidavit being filed but prayed for leave to file a response. He had seen a 60,000 page affidavit and was seeking 21 days to file a response;

xi. The court granted the leave sought, the affidavit to be filed by the end of the day. The applicant was granted leave to file a response within 21 days from the date of service. The matter was then fixed for mention on 9th December 2019;

xii. As scheduled, the matter came up on 9th December 2019, again before Onyiego J. Representation for the respondent and the applicant was as it was on 18th November 2019. The matter was scheduled for hearing on 28th January 2020, when Counsel for the applicant made the application the subject of this ruling.

8. Having perused the court record and set out above the salient facts thereof, I take the view that the submissions of Mr. Ngumi with respect to the scope of the supplementary affidavit to be filed by the respondents are not borne out by the record. The respondents sought and were granted leave to file a supplementary affidavit. There is, however, nowhere in the record where it is indicated that such affidavit would be confined to only placing invoices on record.

9. I note that the respondents have the following affidavits on record:

- a. An affidavit sworn by Phyllis Njeri Ngirita on 11th April 2019 and filed in court on 12th April 2019;
- b. An affidavit also sworn by Phyllis Njeri Ngirita on 19th July 2019 and filed in court on the same date;
- c. An affidavit sworn on 29th July 2019 by Lucy Wambui Ngirita and filed in court on 30th July 2019;
- d. Three affidavits sworn on 4th November 2019 and filed in court on 18th November 2019 respectively by Phyllis Njeri Ngirita, Lucy Wambui Ngirita and Jeremiah Gichini Ngirita.

10. It is not clear from the record whether the respondents were granted leave to file one affidavit or three. What is clear, however, is that the record does not indicate that they were to file an affidavit or affidavits confined to attaching such documents as had been omitted.

11. Accordingly, I decline to expunge the affidavit or affidavits as prayed by Mr. Ngumi. This, in my view, accords with the interests of justice that the parties are able to present their entire case before the court. That, however, should not be deemed as a licence for a party to file endless pleadings before the court. In the present case, the only documents that may be filed prior to the hearing shall be the applicant's response to the three affidavits as well as its supplementary submissions, leave with respect to which has already been granted. The affidavit and submissions shall be filed and served within 21 days of today after which the matter shall proceed to hearing.

Dated Delivered and Signed at Nairobi this 25th day of February 2020

MUMBI NGUGI

JUDGE

Mr Limo Court Assistant

Mr Ngumi for Applicant

Mr Waudu for Respondents

Mr. Rono for 2nd Interested Party

NA for 1st Interested Party