



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 30 OF 2014

DICKSON NGIGE NGUGI.....PLAINTIFF

-VERSUS-

RIVA PETROLEUM DEALERS LIMITED.....1ST DEFENDANT

DUNCAN GITHAIGA MUCHIRI.....2ND DEFENDANT

RULING

1. The Plaintiff has filed the Notice of Motion dated 19th November 2014 seeking leave to amend his Plaintiff and that upon leave being granted, the draft amended Plaintiff annexed to the application be deemed as duly filed upon payment of the requisite court fees.

2. This application based upon the grounds in the Supporting Affidavit of the Plaintiff's Counsel, Gladys Achieng Ndeda, sworn on 19th November 2014 and on the further grounds that:

- (a) there is a material fact which was not pleaded in the Plaintiff;**
- (b) the contract which is the subject matter of the suit was supposed to be for ten years but it was terminated by the Respondents after two years;**
- (c) as a result, the Plaintiff incurred loss in his business;**
- (d) it is in the interest of justice that the Plaintiff is allowed to amend his Plaintiff in order to enable the court determine the real controversy between the parties;**
- (e) the defendant will not be prejudiced if the amendments are allowed.**

3. In response, the 1st Defendant filed the Grounds of Opposition dated 26th November 2011. He objected to the application on two grounds, firstly that the affidavit in support of the application was sworn by an advocate whereas the application contains controverted and disputed matters of fact and that the Plaintiff is trying to introduce issues of an oral agreement through an amendment to the detriment of the 1st Defendant.

SUBMISSION

4. Counsel argued the application on 23rd February 2015. Counsel for the Plaintiff submitted that it is necessary to amend the Plaintiff to include the fact that there was an oral agreement between the Plaintiff and the 1st Defendant which was to run for ten years but it was terminated by the 1st Defendant contract after two years. As a result, the Plaintiff suffered the loss as stated at paragraph 16 (a) and (b) and paragraph 18 (iii) of the Plaintiff for which he seeks compensation. These material facts were inadvertently omitted in the Plaintiff hence the need for its amendment.

5. Referring to the 1st Defendant's objection that the affidavit sworn in support of the application was defective because it was not sworn by the Plaintiff, Counsel submitted that the affidavit was sworn by the advocate acting on behalf of the Plaintiff and was duly authorised.

6. It was contended that the application is properly before court because the amendments sought introduce a new cause of action from the facts that are already pleaded in the Plaintiff.

7. Counsel cited the provisions of **Order 8 Rules (3) and (5)** which grant the court unfettered discretion to allow an amendment of pleadings when necessary so as to determine the real controversy between the parties, at any stage of the proceedings.

8. In addition, the 1st Defendant will not suffer any prejudice if the orders sought are granted.

9. For the 1st Defendant, Counsel submitted that the intended amendments introduce highly contentious matters of an oral agreement of 10 years between the Plaintiff and the 1st Defendant. They also introduce a claim of Kshs. 18,746,000/= which had not been pleaded previously.

10. Counsel argued that these are facts that should have been deposed by the Plaintiff and not his advocate. The supporting affidavit is therefore defective particularly, because no explanation has been offered as to why Counsel swore the affidavit.¹⁰

11. It follows that the Defendants cannot respond to a defective affidavit. Order 19 Rule (3) provides that an affidavit should be confined to matters that the deponent can prove. The facts of the existence of the oral agreement and the loss that resulted can only be proved by the parties to the agreement. The affidavit should be struck out. The instructions of Counsel do not extend to authority to swear an affidavit on such contentious matters. That the application be dismissed.

12. In rebuttal, Counsel for the Plaintiff argued that the amended Plaintiff is neither dated nor signed for. It is only an annexure indicating the facts on which the amendment is sought. That being in conduct of the matter means that counsel has full powers to amend the pleadings. That the court should look at the prejudice that will be suffered.

DETERMINATION

13. The primary issue for consideration is whether the supporting affidavit is defective because it has been sworn by an advocate acting on behalf of one of the parties herein.

14. The law is settled that an advocate should refrain in as far as possible from swearing contentious matters on behalf of his client. **Rule 9 of the Advocates Practice Rules** provides for this as follows:

No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non- contentious matter of fact in any matter in

which he acts or appears.

15. The above order is very clear and does not need to be expounded further. The rationale according to Odunga, J in **Frank Choge & 2c Others V. Board Of Trustees Telposta Pension Scheme**, [2012]eKLR is

“It is meant to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate exposes himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided by counsel at all costs. In my view, however innocent an averment may be, counsel should desist from the temptation to be the mouthpiece through which such an averment is transmitted.”

16. In addition, **Order 19** which contains regulations on affidavits provides at **rule 3 (1)** that:

3 (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

17. The prayers for amendment in the application are sought on the basis that there are material facts that were omitted in the Plaintiff. These facts include that there was an oral agreement for ten years between the Plaintiff and the 1st Defendant and that this agreement was terminated prematurely by the 1st Defendant.

18. Counsel for the Plaintiff alleged that these facts were already pleaded in the Plaintiff. I do not agree with this submission. The amendment is intended to introduce a new cause of action, for refund of Kshs. 116,504 and a further Kshs. 95,000/= overcharge and not merely to correct an error or mistake in the pleading. It is also apparent that the facts upon which this amendment is sought are contentious matters whose deposition is outside the realm of Counsel's powers by virtue of **Order 9 Rule 3** of the **Advocates Practice Rules**.

19. Counsel also pleaded from the bar, that her client was not available. She also intimated that it is within the scope of her powers to file an application for amendment of the pleadings. In this regard, I refer to the holding in In the matter of the Estate of M'Magiri M'Mugira (Deceased), [2005] eKLR where it was held:

“It is now trite law that an advocate acting on instructions of his client, should avoid swearing any affidavit in the matter in which he is acting unless the circumstances are such that it is necessary, nay, imperative, to require him to swear such an affidavit.... In my view an advocate does not become authorized to swear an affidavit merely because, by virtue of his representation, he becomes knowledgeable of the relevant facts. He still needs to decide whether or not swearing such an affidavit will not bring him in professional conflict with his position as such advocate. He needs to decide whether if he swears such an affidavit he will place himself in a position where he becomes a potential witness by the sheer nature of the contents of the affidavit. And in my view, even where he finally finds that he indeed has to swear such affidavit because he is the only one who should do so by the nature of things, he nevertheless, must at the head of the affidavit clearly reveal that he has been authorized by his client to do so, preferably through a short affidavit by his client to that effect.”

20. Further, although **Order 19 Rule 3 (1)** allows a person to swear an affidavit on information relayed to him in interlocutory applications or with leave of court. However, such person must disclose the source of the information and belief showing sources and grounds thereof.

21. In the instant case, the deponent of the Supporting Affidavit has failed to indicate the source of her information regarding the terms of the verbal contract that the loss for which the Plaintiff seeks

compensation and the grounds on which she believes the information to be sound. See the holding of Waki, J in **Volcano Engineering Ltd & Another V. Owners and Captain of M/V 'Globe Tours'**, Mombasa High Court, Admiralty Cause NO.19 OF 1993. The learned Judge held that although an advocate may swear a Supporting Affidavit, he must state the sources of his information and the grounds for believing this information with precision and particularity.

22. Accordingly, the Supporting Affidavit sworn by Counsel is clearly defective and cannot be allowed to stand.

23. Although **Order 18 Rules (3) and (5)** grant the court wide powers to grant amendments, this discretion must be exercised judicially. The applicant is not granted the prayers as a matter of course and he must show that the amendment is necessary for purposes of determining the controversy between the parties.

24. In the instant case, the Plaintiff has failed to satisfy the court as above. Without a supporting affidavit setting out the facts which necessitate the amendment, there are no grounds put forth for consideration by the court.

25. For the above reasons, I find that the application is fatally defective and it is hereby dismissed

26. The 1st Respondent shall have costs of the application.

Orders accordingly.

Dated, Signed and Delivered at Nakuru 19th March, 2015

A. MSHILA

JUDGE