



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 261 OF 2014

REPUBLIC.....APPLICANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

REGISTRAR GENERAL OF COMPANIES.....2ND RESPONDENT

AND

REDSTONE HOLDINGS LIMITED.....INTERESTED PARTY

EX-PARTE

XPLICCO INSURANCE COMPANY LIMITED

RULING NO. 1

On 23rd July 2014 Mr. Ahmednasir made two applications. In the first application he applied for the striking out of a further affidavit sworn by Raj Sahi on 22nd July, 2014 on the ground that some of the documents exhibited through the said affidavit contained his private communication and thus breached his right to privacy which is protected by Article 31 of the Constitution.

In the second application, he applied that Raj Sahi be called for cross- examination in respect to an affidavit sworn on 16th July 2014.

Mr. Servia who appeared with Mr. Koech vehemently opposed the applications. On the first application, he contended that the messages exhibited by Raj Sahi were exchanged between him and Ahmednasir and touches on issues relating to these proceedings. He asserted that the messages exchanged did not indicate that they are private or confidential and cannot be shared. He asserted that Mr. Ahmednasir's right to privacy has not been breached.

Alternatively, Mr. Servia contends that even if the Court finds that the said communication breached Mr. Ahmednasir's privacy, then what the Court can do is to simply strike out the offending paragraph but not the entire affidavit.

On the application for cross-examination of Raj Sahi, Mr. Servia argued that the application is vague as the matters on which the deponent is to be cross-examined are not even contained in the affidavit. He submitted that rarely will a deponent be cross-examined on the contents of an affidavit where the affidavit is sworn in support of an interlocutory application. In support of this argument, he cited the decisions of this Court in **ANJANABEN ANIL SHAH v. AKIBA BANK LIMITED, Nairobi High Court (Milimani Commercial Division) Civil Suit No. 374 of 2005** and **KENBOX INDUSTRIES LIMITED & ANOTHER v. KIHUMBA TRADING LIMITED & 3 OTHERS, Nairobi High Court (Milimani Commercial and Tax Division), Civil Case No.424 of 2005.**

On the same point, Mr. Servia also cited the English case of **LEWISON & ANOTHER v. ODHAMS PRESS LTD. & OTHERS, All E.L.R. 717** in which Lord Greene, M.R. observed that:

“The question whether or not cross-examination ought to be allowed is a matter of discretion. I only express hope, if I may properly do so, that in interlocutory proceedings no such order will be made in the absence of special circumstances of some kind. I thought it desirable to say that, because I think it would be unfortunate if it was thought that orders for cross-examination on affidavits of this kind are to be given as a matter of course.”

Counsel consequently urged the Court not to allow cross-examination of Raj Sahi on the contents of his affidavits.

A brief background will suffice. On 3rd July, 2014 Xplico Insurance Company Limited filed a chamber summons application seeking leave to apply for the judicial review orders of certiorari, prohibition and mandamus. The application was as is required supported by a statement and a verifying affidavit. The verifying affidavit was sworn by Lee Waiwa Waruingi who introduced himself as a director of the Applicant Company. Considering that the application touched on the shareholding and directorship of the Applicant Company, I directed that the application be served on the Attorney General and the Registrar General of Companies who were named as the respondents. I also directed that all parties who were likely to be affected by the outcome of the proceedings be served. On 8th July, 2014 Ahmednasir, Abdikadir & Company Advocates filed a Notice of Change of Advocates. At the same time, the said firm also filed a Notice to Discontinue the Suit.

On 10th July, 2014 Mr. Ahmednasir and Mr. Servia appeared before me and agreed that the issue of representation of the Applicant Company be addressed first before any further step could be taken. The advocates agreed to file affidavits on this issue. The matter came up for hearing on 23rd July, 2014 and that is when Mr. Ahmednasir made the two applications which are the subject of this ruling.

The first issue is whether the further affidavit of Raj Sahi sworn on 22nd July, 2014 offends the right to privacy of Mr. Ahmednasir as protected by Article 31(4) of the Constitution. Article 31 of the Constitution provides:

- “31. Every person has the right to privacy, which includes the right not to have**
- (a) their person, home or property searched;**
 - (b) their possessions seized;**
 - (c) information relating to their family or private affairs unnecessarily required or revealed; or**
 - (d) the privacy of their communications infringed.”**

Sub-Article 4 therefore specifically protects the privacy of communications of every person. Mr. Ahmednasir contends that the communication between him and Mr. Raj Sahi was protected by Article 31 of the Constitution and Mr. Raj Sahi cannot be allowed to exhibit such information before this Court.

In Paragraph 7 of his affidavit sworn on 22nd July, 2014 and filed on 23rd July, 2014 Mr. Raj Sahi avers:

“Further to paragraph 11 of my said affidavit filed on 16th July 2014 , Mr. Ahmednasir had asked for Shs 5,000,000/- to give legal opinion on the issues raised by the Registrar of Companies in her said letter of 6th February 2014. The Applicant Company decided to seek alternative representation and did not issue any instructions whatsoever to Mr. Ahmednasir or his law firm with regard thereto. Annexed hereto and collectively marked as ‘RS 2’ are text messages exchanged between myself and Mr. Ahmednasir.”

The deponent then proceeds to annex copies of short text messages exchanged between 8th and 10th June.

In Paragraph 11 of his affidavit of 16th July, 2014 Mr. Raj Sahi had sworn that:

“The true position regarding the firm of Ahmednasir, Abdikadir and Company Advocates is that I had instructed them to act for me personally in a land transaction matter. In the course of my discussion regarding my said personal matter with Mr. Ahmednasir in February this year I handed over to him a copy of the Registrar of Companies’ letter dated 6th February 2014 and asked him to peruse the same and let him have his comments thereon. Instead, Mr. Ahmednasir proceeded (without having been instructed by the Applicant) to unilaterally respond to the said letter purporting to have taken over the conduct of this matter on behalf of the Applicant. Annexed and marked “RS6” is a copy of Ahmednasir, Abdikadir & Co. Advocates’ letter dated 26th February 2014.”

Looking at the exhibited text messages and the context in which they are exchanged, I am of the view that they are very relevant to the issues before the Court. The person who has exhibited the text messages is the originator as well as the recipient of those messages. The messages have not fallen into the hands of a third party and they clearly relate to the issue of representation of the Applicant Company. The messages will assist the Court in arriving at a just decision on the matters before it. It cannot therefore be said that Article 31 of the Constitution has been breached. The application to strike out the further Affidavit of Raj Sahi therefore fails.

In the second application Mr. Ahmednasir asked this Court to order the production of Raj Sahi for cross-examination on the contents of his affidavits. He submitted that there are many facts that the said Raj Sahi has failed to disclose and it is only through cross-examination that these matters can be disclosed.

I agree with Mr. Servia that cross-examination of deponents on the contents of affidavits during interlocutory applications should be discouraged. Allowing cross-examination will only convolute the matter at the preliminary stages. Mr. Ahmednasir claims that Raj Sahi has failed to disclose certain matters. Nothing stops his client from disclosing this hidden information. The Court can only act on the information placed before it by the parties. A party who conceals information only does so to his disadvantage. It is therefore not necessary to call Raj Sahi for cross-examination on the contents of his affidavits. Mr. Ahmednasir’s second application also fails.

The end result is that the two applications are dismissed. Costs will be in the cause.

Dated, signed and delivered in Nairobi this 30th of day July, 2014

W. KORIR,

JUDGE OF THE HIGH COURT