



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 105 of 2007

SURGIPHARM LTD.....PLAINTIFF

-VERSUS-

KENYA INVALID & PHARMACY SUPPLIES LTD1ST DEFENDANT

KANTILAL NATHOO NARSHI SHAH2ND DEFENDANT

MINAXIBEN KANTILAL NATHOO SHAH.....3RD DEFENDANT

AND

NAWAZ SADRUDDIN GULAM.....1ST THIRD PARTY

SADRUDDIN GULAM.....2ND THIRD PARTY

RULING

1. There are two applications before the court: the first is the defendants' notice of motion dated 30th January 2013 seeking to enlarge time within which to file and serve the defendants' supplementary witness statement; the second is the third parties' oral application made on 28th January 2013 to strike out the defendants' claim against the third parties.
2. I will deal first with the notice of motion by the defendants dated 30th January 2013. The principal grounds are set out in a deposition dated 30th January 2013 by Jack Kamande, an advocate for the defendants. At paragraphs 4 to 9 he explains the reasons for failure to file and serve the supplementary witness statement within the time prescribed by the court. On 28th January 2013, the court had directed that the statement be filed and served by the close of business on 28th January 2013. The defendants now state that the court file was not available at the registry and "*could not be traced for a long time*". However, the statement was filed at about 4:30 p.m. He says that it was not possible to serve the third parties' counsel the same day. The applicant contends that the delay is not inordinate. It was also submitted that in the interests of justice and the overriding objective of the court, the application should be allowed.
3. The third parties oppose the application. There are grounds of opposition dated 5th February 2013. In a synopsis, they state that the application is an abuse of court process; that the supporting affidavit is defective; and that the motion seeks to extend time to file a statement which the court has already struck out. The intended statement is said to be identical to the one that was struck out.

4. I have heard the rival submissions. On 28th January 2013 both parties appeared for hearing of the suit. The defendants' counsel was granted leave to file and serve a supplementary witness statement by close of business on 28th January 2013. The suit was adjourned for hearing to the 30th January 2013. On that date, the statement had not been served. Upon application by the third party and for reasons in a considered ruling on the same day, the supplementary witness statement dated 28th January 2013 was struck out and expunged from the record with costs to the third parties.

5. The notice of motion dated 30th January 2013 now seeks to enlarge time to file and serve a fresh supplementary witness statement. This court has wide and unfettered discretion to do so. This court is also enjoined by article 159 of the constitution and section 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. Justice is however a two way street and the court must exercise its discretion in a judicious manner. The defendants' motion is on a legal quicksand for four key reasons: First, in view of the order striking out the original statements, the defendants should have either pleaded with this court for review or to set aside that order. The defendants had the added option of appealing the decision. None of those three steps have been taken. Instead, the defendants have decided to ignore completely, the order of 28th January 2013 and to file a fresh motion seeking to reintroduce the impugned supplementary statement.

6. Secondly, the annexed 2nd defendant's supplementary witness statement which is sought to be introduced is dated 28th January 2013. It is exactly, word for word, with the statement that was struck out by court on 28th January 2013. Its reintroduction would thus be an abuse of court process.

7. Thirdly, the motion has been supported by a deposition of Jack Kamande, an advocate for the defendants. In my view advocates should desist from deponing to contested matters that are best left to the parties. I am alive that such depositions are acceptable in interlocutory proceedings under order 19 of the Civil Procedure Rules. But that should be the exception rather than the norm. see *M'Kiara M'Mbijiwe vs Frankline Mugambi and others* (2007) eKLR, *Small Enterprises Finance Company Limited vs George Gikubu Mbuthia* Nairobi, High Court case 3088 of 1994 (unreported), *Salim Alhamed Ali and Another vs Emag Ag* Nairobi, High Court case 1806 of 2006 (2012) eKLR. *Trust Bank Limited vs Ajay shah and 9 others* High Court case No. 185 of 2001. (unreported).

8. Fourthly and lastly, if the court enlarges the time for filing and service of the supplementary statement, it will prejudice the expeditious determination of the suit. This is particularly relevant because the plaintiff has been caught up in the turf wars between the defendants and third parties. This trial is fixed for hearing on 21st February 2013. It was held up by the contest between the protagonists on 28th January 2013 and again on 30th January 2013. I am thus not persuaded to exercise my discretion in favour of the defendants. I take a little comfort in the fact that the defendants have not been left empty handed: they can still rely on the original witness statement filed on 18th July 2012. I dismiss the defendants' motion dated 30th January 2013 with costs to the third parties.

9. I now turn to the oral application made on 28th January 2013 to dismiss the claim against the third parties. The primary ground put forth is that upon the striking out of the supplementary witness statement, there is no evidence left to sustain a claim against the third parties. Accordingly, I was urged to strike out the third party notice and the claim. The defendants contest that prayer. I have studied the written submissions filed by both parties on that point. I am of the following considered opinion. First, the defendants have taken up cudgels on the manner of bringing up the oral motion. I do not subscribe to the argument that all applications to court must be in writing. The Civil Procedure Rules contain many examples when motions can be made orally: For example under Order 1 Rule 10, 19 and 25 on joinder or under Order 42 Rule 6(3) for stay of execution of a decree. While it is always preferable and convenient to have written motions, unless expressly so provided, the court is not barred from entertaining an oral motion. When that application was first made on 28th January 2013, I granted the respondents time to reply upto 30th January 2013. I also note that the respondents have, in fact, responded by the written submissions dated 8th February 2013. Accordingly, any prejudice to the defendants is removed.

10. The nature and purpose of a witness statement can be distilled from Orders 3, 7 and 11 of the Civil Procedure Rules. A witness statement is a written statement signed by a person which contains the evidence which that person would be allowed to give orally. See *Halsbury's Laws of England* Vol. 11, 5th Edition Para 751 note 1. The primary objective of witness statements is "to improve the efficiency of trials". In an adversarial system there are elaborate rules for discovery to ensure that by the time of trial each party is fully prepared and no party is taken by surprise. There is an obligation upon each party to "come to trial with cards upon the table". See O'Hare John; *Civil Litigation* 15th Edition, Sweet & Maxwell, pages 243 to 253. To a large extent, the use of witness statements therefore aids in the pre-trial preparation process embodied in Order 11 of the Civil Procedures Rules 2010.

11. A key question is whether the written statement becomes binding on the oral testimony of the witness. Paraphrased, can the witness lead other evidence to support the third party notice or claim by the defendants against the third parties? A witness statement should set out the facts to which the witness will testify orally at the trial. According to *Halsbury's Laws of England (supra)* the learned authors state that;

"If a party has served a witness statement and he wishes to rely at trial on the evidence of the witness who made the statement, he must call the witness to give oral evidence, unless the Court otherwise.....Where a witness is called to give oral evidence under this provision, his witness statement will stand as his evidence in chief unless the Court orders otherwise. A witness giving oral evidence at trial may, with permission of the court, amplify his witness statement and give evidence in relation to new matters which have arisen since the witness statement was served on the other parties. The Court will give such permission only if it considers that there is a good reason not to confine the evidence of the witness to the contents of his witness statement"

12. Clearly, a witness statement remains a guide for the oral testimony in court. As part of evidence in chief it is subject to cross-examination. But the witness can deviate from it with leave of the court. It would thus be to turn logic on its head to strike out an action based entirely on the contents of the statements.

13. I am fortified in that finding by the following. The witness statement is not a deposition or sworn statement. I can draw an analogy: In proceedings commenced by originating summons, parties often choose to rely entirely on their affidavits to determine the matter. In such a scenario, a party may very well argue that the deposition does not disclose a case against it. The court in dealing with such matter would be well guided since all the evidence would be before it. In our instant case, the court is being asked to lock out the defendants on the basis of an inconclusive witness statement. That would defeat the ends of justice. As I have stated, the defendants are still at liberty to rely on their earlier statement filed on 18th July 2012. No suit ought to be dismissed in such a manner unless it is so hopeless and beyond redemption. See *DT Dobie & Company (Kenya) Ltd vs Muchina* (1982) KLR 1 at 9.

14. Granted those circumstances, a court should reluctantly employ the draconian measure of striking out a pleading. Here, the words of Madam J. A (as he then was) in *D. T. Dobie & Company (Kenya) Limited vs Muchina* (*supra*) are instructive. He delivered himself thus:

*"The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the trial as the Court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross examination in the ordinary way" (Sellers LJ in *Wenlock -v Maloney and Others* (1965)1WLR). As far as possible indeed there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right"*

15. As a witness statement is a synopsis of intended evidence at the trial, it is not the exclusive basis for evidence to be submitted in support of facts alleged in the claim. The Court can grant leave to deviate

from the statement, to amplify the evidence or even to refer to new matters. Considering the overriding objective of the court, I am thus disinclined to strike out the third party notice or the claim by the defendants against the third party at this stage. In the result, the oral application by the third parties is also dismissed with costs to the defendants.

It is so ordered.

Dated and delivered at Nairobi this 19th day of February 2013

G. K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Makori for Ms Kirimi for Plaintiff

Mr. Kairu for defendants

Ms Nyairo for Ms Jan Mohamed for third parties