



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 445 OF 2012

747 FREIGHTER CONVERSION LLC PLAINTIFF

VERSUS

ONEFOTONE AIRWAYS KENYA LTD. DEFENDANT

R U L I N G

1. When counsel for the parties appeared before this Court on 17th July 2013, Mr. Mungu for the first, second and fourth Defendants apologised for the delay in filing the Replying Affidavit sworn by the second Defendant on 9th July 2013. He explained that the delay had been caused by the time taken to extract the various documents in the 334 page Replying Affidavit plus annexures and exhibits thereto. He noted that some were in Chinese and the translation thereof was on-going. He requested of the Court that the Replying Affidavit be allowed in, late. He maintained that the same brought out all the matters in issue between the parties and that the sums involved were huge. It would be in the interests of justice to enlarge time as per **Order 50 rule 6** of the *Civil Procedure Rules, 2010*.
2. In his turn, Mr. Karega for the Plaintiff/Applicant confirmed that he had only just received the Replying Affidavit under protest. The Plaintiff/Applicant's Application dated 5th February 2013 had come for hearing on 6th May 2013. On that day, counsel for the first, second and fourth Defendants detailed to Court that he had just received the documents from his clients and sort the indulgence of the Court as regards the date for filing of a Replying Affidavit to the said Application. This Court had made the Order that the Replying Affidavit should be filed by 16th May 2013. It also ordered that costs in the amount of Shs. 20,000/-should be paid by the said Defendants to the Plaintiff by that date. That amount had not been paid to date. As a consequence, the Orders of the Court had not been obeyed. Counsel also drew attention to the provisions of **Order 51 rule 14** which provided that any response to an application should be filed 3 clear days before the Application was due to be heard. The Defendant's Counsel was very well aware that this matter was coming for hearing before Court and the reasons that he had given for delay were the same reasons that he had given before court on 6th May 2013. In Mr. Karega's opinion, the conduct of the said Defendants did not warrant the extension of the Court's discretion as to allowing in the Replying Affidavit. Such conduct was more strikingly brought out by the disobedience to Orders given on 6th May 2013. Under **Order 14 rule 6**, this Court had the power to strike out any affidavit which was onerous, offending or oppressive. Counsel prayed that the Replying Affidavit should be struck off the record and the Application dated 5th. February 2013 be

- allowed.
3. In response, Mr. Mungu confessed that he had overlooked the payment of the day's costs of Shs. 20,000/- to the Plaintiff and would arrange for payment to the Plaintiff as soon as possible. He maintained that when the matter was last before Court on 6th May 2013, he had been somewhat ambitious in detailing that he would have time to go through the documents that he had received from his clients. The Replying Affidavit raised issues of possible fraud as well as an unjust enrichment. He urged the Court to allow the same to stand.
 4. As regards the 3 clear days rule under **Order 51 rule 14 (2)** of the *Civil Procedure Rules, 2010*, I found it somewhat surprising that the Replying Affidavit was dated 9th July 2013 and it took another 7 days for the advocates acting for the said Defendants to file the same herein. If the Defendants' advocates had filed it on the same day that it was sworn, there would have been no breach of **Order 51 rule 14 (2)** as above. Further, as pointed out by counsel for the Plaintiff, this Court enjoys powers under **Order 19 rule 6** to strike out any matter which is scandalous, irrelevant or oppressive contained in an affidavit. However, I did not see the relevance of that submission from Plaintiff's counsel as I understood him to say that he was seeking that the entire Replying Affidavit be struck out not just parts of the same.
 5. The position with regard to an affidavit is being allowed into evidence late and contrary to orders of Court was examined by **Onyango Otieno J.** (as he then was) in the case of **Treadsetters Tyres Ltd versus Hussein Dairy Ltd HCCC No. 39 of 2000 (Mombasa)** when the learned Judge detailed:

“The Respondent states that the further affidavit sworn on 28th March 2000 was filed without leave of the court and that is true. All that Mr. Inamdar for the Applicant says is that the Respondent has never raised the same objection earlier on and has thus by conduct waived its right to object. That is an argument that would have been readily acceptable in contract cases but not in a case of this nature where the rules of the court were clearly violated. I do not think a party can, in pointing out the legal defects in a document, be estopped from getting justice if the defect is in breach of the law or failing to comply with the rules of the court. The Affidavit remains inadmissible however long it takes to point out the violation of the rules.”

More recently, the Supreme Court has expounded on the position as regards the late filing of affidavits contrary to orders of the Court in **Petitions 5, 3 and 4 of 2013 Raila Odinga & 5 Ors v Independent Electoral and Boundaries Commission & 3 Ors (2013) eKLR** as follows:

“It should be noted that it is not mandatory for the Petitioner to annex an affidavit to his/her Petition. However, a Respondent is required to annex a Replying Affidavit to the Response. At the Pre-trial Conference, the Court, under the provisions of Rule 10 (f), may:

“give directions in regard to the filing and service of any further affidavits or the giving of additional evidence”,

Upon careful consideration of the said Rule and submissions by Counsel, we are of the view that the Court can only exercise its powers and/or discretion to allow further affidavits or additional evidence if it is specifically applied for, and may allow or refuse such an application. It is not a matter of right. As stated earlier, there is no provision for further affidavits in the Supreme Court Act, whatsoever.

The Supreme Court is a creature of the Constitution of Kenya, the Supreme law of the land. The Supreme Court Act was enacted by Parliament on the basis of the provisions of the Constitution. The Supreme Court is given the powers to make the Supreme Court (Presidential Election Petition) Rules by the Act. So, everything flows from the Constitution. It may be argued that the Supreme Court ought to apply the principle of substantial justice, rather than technicalities, particularly in a petition relating to Presidential election, which is a matter of great national interest

and public importance. However, each case must be considered within the context of its peculiar circumstances. Also, the exercise of such discretion must be made sparingly, as the law and Rules relating to the Constitution, implemented by the Supreme Court, must be taken with seriousness and the appropriate solemnity. The Rules and time – lines established are made with special and unique considerations.

The period for the filing, prosecution and determination of a Presidential Election is only 14 days from the time the results are declared. This is a very tight, short and limited period. The background to the setting of the strict time – lines must be known to most Kenyans. There was a purpose to this and the intention of the People of Kenya and of Parliament must be respect.

The parties have a duty to ensure they comply with their respective time – lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.

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 produced and relied upon. If it is small or 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 new material is so substantial involving not only a further affidavit but massive additional evidence, so 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 further affidavits and/or admission of additional evidence”.

Just as the Supreme Court is bound by its Rules, so is this Court – the *Civil Procedure Rules, 2010*. **Order 50** deals with matters of time. **Rule 6** thereof reads:

“6. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the cost of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

The telling words in the above Rule are: **“as the justice of the case may require”**. The Application by way Notice of Motion dated 5th February 2013 seeks Orders that the Defences filed herein by the first, second and fourth Defendants be struck out and judgement be entered as prayed for in the Plaintiff. Accordingly, by striking out the Replying Affidavit dated 9th July 2013, this Court would be denying the said Defendants the right to be heard so far as this suit against them is concerned. I have perused the Defendants’ Statements of Defence and I consider the issues raise therein to be important and worthy of trial. As counsel for the Defendants has pointed out, the amounts involved in the suit are substantial. The said Replying Affidavit does put before this Court a number of issues which the Defendants have put up in answer to the Plaintiff’s claim as against them. As a consequence, and in the interests of the justice of this case, I use my discretion to allow the Replying Affidavit filed on 16th July 2013 to stand. In view of its complexity, I give leave to the Plaintiff herein to file a Supplementary Affidavit in response thereto, if it considers so necessary, within 30 days of the date hereof. The Plaintiff may now take a date at the Registry for the hearing of its said Application dated 5th February 2013 as well as for its Application dated 22nd May 2013. In all the circumstances, costs will be for the Plaintiff as per the proviso to **Order**

50 Rule 6 (supra).

DATED and delivered at Nairobi this 23rd day of July, 2013.

J. B. HAVELOCK

JUDGE