



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 60 OF 2003

PACIFIC FRONTIER SEAS LIMITEDPLAINTIFFS

- VERSUS -

IRMGARD BEIG also known as IRMGARD DEIS

SECURITY GROUP LIMITEDDEFENDANTS

R U L I N G

By a request for further and better particulars dated the 22nd April 2003 the plaintiff sought further and better particulars of the first defendant's defence dated the 14th April, 2003. They were not supplied with the consequence that the plaintiff applied for an order to compel the first defendant to supply them. Before the application could be heard the matter came up for mention before the Honourable Mr. Justice Mwera on the 8th April 2004 and the parties recorded a consent in the following terms:-

1. That the first defendant do supply the particulars sought within 21 days of that date and that the costs of the application be awarded to the plaintiff.
2. That the plaintiff do file reply to defence to counterclaim within 14 days of service of the particulars.
3. That the first defendant do file his list of documents within a further 14 days.
4. That the defendants be at liberty to apply for further particulars of the plaintiff's reply to defence and defence to counterclaim.
5. That the matter be mentioned again on the 7th May 2004 to confirm compliance with the above.

The first defendant still did not supply the particulars sought prompting the plaintiff to file two applications on the 30th April 2004 seeking to have the paragraphs of the first defendant's defence and amended defence and counterclaim in respect of which particulars had been sought to be struck out. The amended defence and counterclaim had been filed two days earlier on the 28th April 2003 after the request for particulars had been served. Those applications spurred the first defendant to comply with the consent order of 8th April 2004 by filing the answer to particulars on the 3rd May 2004 and applying on the 5th May 2004 for enlargement of time to comply with the consent order of 8th April 2004. The first defendant also filed a replying affidavit to the plaintiff's said application and a notice of preliminary objection. The points raised in the latter were:-

"1. THAT the application is fatally defective as the Request for Particulars dated the 5th May 2003 seeks particulars of non – existing pleadings that is the defence dated 14.4.2003, which have been vacated by the Amended Defence and Counterclaim dated

28th April 2003 and filed and served on 30th April 2003.

2. THAT the Application is fatally defective because:

(a) The Supporting Affidavit is sworn by the Advocate for the plaintiff one Mansur Satchu, contrary to rule 8 of the Advocates Practice Rules,

And,

(b) Without authority or allegation that he is duly authorized by the plaintiff to swear the affidavit

(c) The Application is not dated.

On the 22nd July 2004 counsel for the first defendant argued the preliminary objection. This ruling is therefore on the points raised on that preliminary objection.

Mr. Ndegwa for the first defendant submitted that the affidavits in support of the plaintiff's said applications have been sworn by counsel for the plaintiff who has not only no locus standi in the matter but has also no authority from the plaintiff to swear the affidavits. Citing the authority in **Triton Petroleum Co. Ltd. -vs- Kirinyaga Construction Co. HCCC NO. 803 of 2003**, Mr. Ndegwa argued that counsel should not descend to the arena and swear an affidavit in support of a party's application. He also cited Rule 9 of the Advocates Practice Rules in support of that contention. Mr. Ndegwa also submitted that the affidavits are also fatally defective as Mr. Satchu has not stated in the affidavits that he has the plaintiff's authority to swear them or that they are in support of those applications. He cited the authorities in **Microsoft Corporation -vs- Mitsumi Computer Garage Ltd. [2001] 2 EA 460** and **Silvanos Kipraisi Tubei -vs- Kenya Commercial Finance Limited HCCC No.261 of 2003** for that contention.

In response to the points raised on alleged defectiveness of the affidavits Mr. Omolo for the plaintiff submitted that those points are answered by Order 50 Rules 3 and 7 of the Civil Procedure Rules. While agreeing with Mr. Ndegwa that counsel should not descend to the arena and swear an affidavit in support of his client's application he submitted that that only relates to contentious matters of evidence. He argued that the facts deposed to in Mr. Satchu's affidavits relate to matters of his duties as counsel for the plaintiff and what action he had taken in the case and that they were not contentious matters of evidence. In his opinion Mr. Satchu was the one better placed to swear the affidavits. He said that the authority in the **Microsoft case (Supra)** is distinguishable. I have carefully considered the contents of the impugned affidavits. I agree with Mr. Omolo that they are not on any contentious matters of evidence. The depositions are mainly on the request for particulars that Mr. Satchu's firm, as advocates for the plaintiff, served on the first defendants advocates and how the same have not been furnished even in spite of the consent order recorded by court on 8th April 2004 in the presence of counsel for the parties. The case of **Triton Petroleum Company Limited (Supra)** is clearly distinguishable. In that case counsel swore affidavits in support of his clients application. For stay of execution pending appeal and deponed Inter alia that:-

“8. That no prejudice will be occasioned to the Respondent at all.

9. That we are fearful that if the money is paid directly to the plaintiff the plaintiff will not be able to refund the same if we succeed on appeal.

10. That the applicant is fearful that if the judgement proceeds.”

The Respondents in that application disputed those facts by filing documents to prove that it was financially sound and could have no problem in refunding the decretal sum if the appeal succeeded. Those were clearly contentious matters of evidence which are not obtaining here. More over counsel's affidavits in that case failed to meet the test of Order 18 Rule 3 (1) by his failure to disclose the basis of his client's alleged fears.

Mr. Ndegwa also cited Rule 9 of the Advocates Practice Rules in support of his argument that Counsel should not swear any affidavit in a matter he is acting for a party. I want to believe that he cannot have read the proviso to that Rule which clearly allows counsel to swear an affidavit on formal and non-contentious matters.

The authority of **Microsoft case** is also distinguishable. It related to a verifying affidavit which by dint of Order 7 Rule 1 of the Civil Procedure Rules must be sworn by the plaintiff himself and in the case of a corporation by a duly authorized agent. An authorized agent to swear such an affidavit as provided in Order 3 Rule 2 of the Civil Procedure Rules is “an officer of the corporation duly authorized under the corporate seal” of the corporation.

The other point raised with regard to Mr. Satchu’s affidavits is that he failed to state that he had the authority of the plaintiff to swear it. Does that failure render the affidavit fatally defective? Before I answer this question I would like to consider what an affidavit is.

The Concise Oxford Dictionary of current English 8th Edition defines an affidavit as “a written statement confirmed by oath, for use as evidence in court.” In the Oxford Dictionary of Law 4th Edition an affidavit is defined as “A sworn written statement used mainly to support certain applications and in some circumstances, as evidence in court proceedings.” From these definitions it is clear that an affidavit is a sworn statement usually given to be used as evidence in court. In **Mwanthi Vs Imanene [1982] KLR 323** Madan JA said “an affidavit is a repository of evidence or information.” It follows therefore that anybody swearing an affidavit for or on behalf of a corporation can also testify for or on behalf of that corporation. Save for matters stated in Order 3 of the Civil Procedure Rules and acts like signing contracts, and security documents in the case of banks, one does not need to have the authority of a corporation given under seal in order to testify, or swear an affidavit on its behalf. All one needs is to be possessed of facts or information on the matters that one deposes to. For instance in the case of a bank a loans officer who interviews customers and approves on behalf of the bank advances to them is perfectly entitled to swear affidavits or testify on matters relating to such duties. And if it is clear from the affidavit that he is in the know on the matters he has deposed to and was authorized by the bank to perform them, in my view, failure to state in the affidavit that he has the authority of the bank to swear the affidavit on its behalf does not render the affidavit fatally defective. The person alleging that such an officer does not have the authority of the bank to swear such an affidavit has the burden of proving that allegation.

In this case it is not contended for the first defendant that Mr. Satchu has no instructions to act for the plaintiff in this case. As I have already stated the matters he has deposed on in the affidavits in support of his client’s applications relate to his duties as counsel for the plaintiff pursuant to his client’s or instructions and are matters he has personal knowledge of and or information on. His failure therefore to state that he has the authority of the plaintiff to swear the affidavits on its behalf does not make the affidavits fatally defective.

The last point raised by Mr. Ndegwa is that the particulars sought were those of the defence dated the 8th April 2003. An amended defence and counterclaim having been subsequently filed, Mr. Ndegwa argued that the defence is deemed to have been vacated. I agree with him on that. However, I do not agree with him that the first defendant is not obliged to supply the particulars sought for two reasons. Firstly, the particulars are sought are of paragraphs retained in the Amended Defence and counterclaim without any amendment. Secondly, the consent order requiring the first defendant to supply the same particulars was recorded on the 8th April 2004 about a year after filing the amended defence and counterclaim.

For these reasons I find no merit in the preliminary objection raised by the first defendant. In my view the same is a vain attempt by the first defendant to evade its compliance with the consent order and to defeat the plaintiff's application seeking to strike out certain paragraphs of its amended defence and counterclaim. Consequently I dismiss it with costs to the plaintiff.

DATED this 17th day of September 2004.

D.K. MARAGA
AG. JUDGE