



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL CASE NO. 43 OF 2010

C.M.C MOTORS GROUP LIMITED PLAINTIFF

V E R S U S

BENGERIA ARAP KORIR trading as

MARBEN SCHOOL1ST DEFENDANT

ST. ELIZABETH ACADEMY SCHOOL 2ND DEFENDANT

RULING

1. Section 5 of Oaths and Statutory Declaration Act Cap 15 provides as follows-

“Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

2. The reason reference is made to that Section is because the Plaintiff’s Preliminary Objection dated 25th September 2013 is directed at the jurat of the affidavit of Ann Wanjiku Wando. That affidavit is dated 10th September 2013. The learned Counsel for the Plaintiff in support of the Preliminary Objection submitted that the said affidavit was not sworn in accordance with Section 5 reproduced above.
3. Ann Wanjiku Wando swore an affidavit dated 10th September 2013 in support of the Notice of Motion of that same date. The jurat of that affidavit shows that it was signed by Wando in Nairobi but the Commissioner for Oaths stamp shows that he gave the oath in Mombasa.
4. The Plaintiff in submissions stated that the affidavit should be struck out for not complying with Section 5. The Plaintiff relied on the case **REGINA MUNYIVA NTHENGE -VS- KENYA COMMERCIAL BANK LTD (2005)eKLR** where the Court stated-

“The second issue raised by the Applicant is that the application should be treated as unopposed because the replying affidavit is defective since it is not properly commissioned. Section 5 of the Oaths and Statutory Declaration Act provides that-

“Every Commissioner for Oaths before whom any oath or affidavit is taken or made ... shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made in the jurat.”

The affidavit is shown as having been sworn at Machakos in the presence of Leah Mbutia Commissioner of Oaths on 13th October 2003 but whose stamp reads Nairobi. If the affidavit was sworn at Machakos, it should have been before a Commissioner for Oaths in Machakos and the stamp should show likewise. The only conclusion one can reach on looking at this affidavit is that the place the affidavit was sworn and where it was commissioned are two different places. That is irregular and unacceptable and that affidavit is, therefore, fatally defective as it was not sworn in the presence of a Commissioner for Oaths. It is likely that stamp was just affixed. This Court would have no alternative but strike off the replying affidavit as it is not properly commissioned and that means that the application would stand unopposed.”

As it will be seen, the Court in that case was faced with a similar discrepancy in the affidavit as in this case.

5. The 2nd Defendant's Advocate opposed the prayer of the Plaintiff on the ground that Order 19 of the Civil Procedure Rules 2010 does not provide for such striking out. He argued that that order provides the specific reasons that the Court would have for striking out an affidavit or paragraphs of an affidavit. He further submitted that the Constitution of Kenya, 2010 now requires the Courts to determine matter on merit.
6. I wish to agree with the latter part of the 2nd Defendant's Advocate submissions. Indeed matters should be determined on their merits. The merit as I find it in respect of Wando's affidavit is that the affidavit does not seem to have been sworn before a Commissioner of Oaths. For the avoidance of doubt the Blacks Law Dictionary defines an oath as follows-

“Oath is a solemn declaration accompanied by a swearing to God or a revered person or thing that one’s statement is true or that one will be bound to a promise ... The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false.”

Bearing that definition the question that needs to be answered is whether Wando took an oath before a Commissioner of Oaths. Looking at her affidavit it would seem that she signed the affidavit in Nairobi and the Commissioner of Oaths signed it in Mombasa. It will therefore seem that her affidavit fails to conform to the requirements of Section 5 of Cap 15. It is not an affidavit which is under oath. That being so the same is hereby struck out.

7. What then would be the fate of the Notice of Motion dated 10th September 2013? That Notice of Motion not being supported by an affidavit is fatal. Such an application ought to be supported by evidence which evidence ought to be under oath. Since it is unsupported by evidence it too is hereby struck out.
8. The orders of the Court are as follows-
 - a. **For the reasons stated above the affidavit of Ann Wanjiku Wando dated 10th September 2013 and the 2nd Defendant's Notice of Motion of the same date are hereby struck out.**
 - b. **The Plaintiff is awarded costs of the Preliminary Objection dated 25th September 2013. Those costs shall be paid by the 2nd Defendant.**

Dated and delivered at Mombasa this 17th day of October, 2013.

MARY KASANGO

JUDGE