



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 36 of 2007

SAFI PETROLEUM PRODUCTS.....PLAINTIFF

VERSUS

ABDIRAHMAN ABDI also known as

ABDIRAHMAN MUHUMED ABDI.....1ST DEFENDANT

THE COMMISSIONER OF LANDS.....2ND DEFENDANT

NOAH KATANA NGALA.....3RD DEFENDANT

JULIUS SUNKULI.....4TH DEFENDANT

CHEMECH LABORATORIES.....5TH DEFENDANT

KENYA AFRICAN NATIONAL UNION.....6TH DEFENDANT

HON. WILLIAM SAMOEI RUTO.....7TH DEFENDANT

HON. BILLOW ADAN KERROW.....8TH DEFENDANT

RULING

The application before this Court for consideration is brought by the 5th Defendant by way of a Notice of Motion dated and filed on 15th July 2011. It is supported by an affidavit filed and sworn on the same date by Stephen Musalia Mwenesi, the Advocate acting on behalf of the 5th Defendant. The 5th Defendant is seeking the following substantive orders in the said application:

1. The Complaint filed on 18th January 2007, the Amended Complaint filed on 30th January 2007 and the Further Amended Complaint filed on 17th May 2007 all be struck out.
2. The named 5th Defendant's Defence filed on 4th July 2007 and the Replying affidavit of Abdi Mohammed Issa sworn on 12th July, 2007 all drawn and filed by the firm of Alphonse Mutinda & Company Advocates on behalf of the named 5th Defendant be struck out and expunged from the court

record.

3. The Notice of Objection dated 13th February, 2009 and the Further Supplementary Affidavit of Abdi Mohammed Issa sworn on 12th February 2009 all drawn by the firm of Ahmednassir Abdikadir & Company Advocates on behalf of the named 5th Defendant be struck out and expunged from the court record.
4. Judgment be entered for Chemech Laboratories (Kenya) Limited and the suit be dismissed.
5. Costs of the suit and application are awarded to the 5th Defendant Chemech Laboratories (Kenya) Limited.

The main grounds for the application are that the Plaintiff claimed to have bought the suit property namely LR. No. 209/10772 from the 5th Defendant on 29th November, 1998 for a consideration of Kshs.5,000,000/=. The 5th Defendant denies being the owner of that property and denies that it ever sold the property to the Plaintiff. Further, that the 5th Defendant has never instructed the firms of Alphonse Mutinda & Company Advocates or Ahmednassir Abdikadir & Company Advocates to act on its behalf in this matter, and the said firms of Advocates misrepresented it. In this event all the pleadings, Affidavits and Notices filed by them on behalf of the 5th Defendant in this matter are nullities and ought to be struck out and expunged from the court records. These grounds are elaborated upon in the supporting affidavit by Stephen Musalia Mwenesi, the 5th Defendant's Advocate, sworn on 15th July 2012 and submissions dated 25th April 2012. The 1st Defendant supported the 5th Defendant's application in oral submissions made in court and written submissions dated 14th May 2012.

The Plaintiff opposed the application relying on a replying affidavit sworn by its Director, Mohamed Jama Noor on 26th October 2011 and submissions dated 10th May 2012. The Plaintiff states that the 5th Defendant's application as drawn is fatally defective, as the law does not permit an Advocate on record to answer on contested issues between the parties. Further, that the said Advocate, Stephen Musalia Mwenesi has not placed any authority on record on the allegations raised and hence the said affidavit is incompetent and ought to be struck out.

The Plaintiff also stated that the said Advocate cannot infer improper motive on the part of the Advocates who had earlier acted for the 5th Defendant, and the allegations raised are scandalous and frivolous. Further, that the 5th Defendant is bound by the pleadings previously filed by its Advocates and cannot now apply to expunge it from the record. The Plaintiff reiterated that the 5th Defendant sold the property to him, and is unlawfully attempting to deprive him of the suit property and aiding the 1st Defendant in acquiring the same.

I have read and considered the pleadings, evidence and submissions by the parties. There are three issues for determination. The first is whether this application is defective for reasons of the Applicant's Advocate deponing to contested issues between the parties. The law on this issue is in Rule 9 of the Advocate Practice Rules, which provides as follows:

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

I have had occasion to consider this issue in **Ashok Rupshi Shah & Another vs Jacob Juma & Others**

ELC Civil Suit No. 312 of 2011, and noted as follows:

“...to hold that an Advocate cannot depone to the fact that formal instructions have been received by a client would not only cause injustice to the said client, but be inimical to the general administration of justice. Rule 9 of the Advocates Practice Rules also allows an advocate to give evidence on affidavit on a formal matter of fact, in any matter in which he or she appears.

The only conditions that must be met in such a scenario are as provided in Order 19 of the Civil Procedure Rules – such information deponed to must be within the personal knowledge of the Advocate, and he or she should be able prove it, as held **Kenya Horticultural Exporters (1977) Ltd vs Pape (1986) KLR 705....**”

Mr. Mwenesi has attached to his supporting affidavit annexure “SMM 7”, which is an Affidavit of Facts and for Joinder of a Party of Mr. Jasani Vasant Kumar Nyalchand sworn on 13th May 2009 that demonstrates the fact of such formal instructions being given to him by the 5th Defendant. In addition, the circumstances leading to the application for the withdrawal of the impugned pleadings are facts that came to be in the said Advocate’s personal knowledge arising from the said instructions.

The second issue is whether or not the pleadings sought to be struck out were made with the authority of the 5th Defendant. The said pleadings namely 5th Defendant’s Defence filed on 4th July 2007, the Replying affidavit of Abdi Mohammed Issa sworn on 12th July, 2007, the Notice of Objection dated 13th February, 2009 and the Further Supplementary Affidavit of Abdi Mohammed Issa sworn on 12th February 2009 are disputed by the 5th Defendant on the ground that it did not instruct the firms of advocates which filed them, and the person alleged to have given the said instructions was not its director. It is on the other hand argued by the Plaintiff that there is no evidence produced of a resolution of the 5th Defendant authorising the firm of S Musalia Mwenesi Advocates to represent it in this matter.

My view on this issue is that it is an accepted principle of law that the acts of a company are exercised by its board of directors, who are required to give authority to an advocate to act on its behalf by way of a resolution as held in **East African Safari Air Limited vs Anthony Ambaka Kegode & Another (2011) eKLR**. The Court of Appeal in the cited case also held that an advocate need not go beyond the search carried out at the Registrar of Companies to ascertain whether a director giving him or her instructions had the authority to do so, and if the initial act of giving authority was defective, the principal can ratify the same, and upon ratification it is deemed to have been properly given.

The import of the letter dated 17th March 2009 annexed to the supporting affidavit as “SMM 6” received from the Assistant Registrar of Companies confirming that the 5th Defendant are Mr. Jasani Vasant Kumar Nyalchand and Societe Pour Linvestissement Afrique Sa, a company based in Luxemborg, and of the Affidavit of Facts and for Joinder of a Party of Mr. Jasani Vasant Kumar Nyalchand sworn on 13th May 2009, is that they are evidence of such ostensible authority having been given to the firm of S. Musalia Mwenesi Advocate to act on the 5th Defendants behalf. The door is not closed on any further ratification that may be necessary by way of resolution.

There is also on record a Replying Affidavit of one Abdi Mohammed Issa sworn on 12th July 2007 wherein he states that he is a director of the 5th Defendant, which is one of the pleadings sought to be struck out. While such an affidavit may be relied upon to confer ostensible authority, neither the Plaintiff nor the firms of Advocates previously on record for the 5th Defendant have brought any evidence or confirmation from the Registrar of Companies to show that the said Abdi Mohammed Issa was indeed a Director of the 5th Defendant and therefore competent to give instructions, nor of any subsequent ratification of his instructions by the 5th Defendant. It is therefore the finding of this Court that in the absence of such evidence, and in light of the evidence provided by the Applicant’s Advocate, the firms of Alphonse Mutinda & Company Advocates or Ahmednassir Abdikadir & Company Advocates had no authority to act on behalf the 5th Defendant.

The final issue for consideration is whether the Plaintiff filed herein should be struck out and summary judgment entered in favour of the 5th Defendant. The power of the Court to strike out pleadings should be used sparingly and cautiously, as was stated in **D.T.Dobie & Company (Kenya) Ltd. v. Muchina**[1982] **KLR 1**. The Court should not be quick to strike out pleadings if the defect complained of can be cured by amendment, and if there are triable issues that have been raised by the parties. Two triable issue that still need final determination in this suit are the nature of the Plaintiff's interest in the suit property, and the validity or otherwise of the said transfer of the suit property to the Plaintiff by the 5th Defendant as alleged.

These issues cannot be decided at this interlocutory stage without the benefit of further evidence and detailed examination and submissions on the same, and can only be decided upon after a full trial. It is therefore the finding of this Court that the Further Amended Plaintiff merits adjudication by this Court, and that the Plaintiff should be given the opportunity to present his case. In the event of any misjoinder the 5th Defendant has a remedy in terms of costs.

For the foregoing reasons the 5th Defendants application dated 15th July 2011 is allowed only to the extent of the following orders:

1. The 5th Defendant's Defence filed on 4th July 2007 and the Replying affidavit of Abdi Mohammed Issa sworn on 12th July, 2007 all drawn and filed by the firm of Alphonse Mutinda & Company Advocates on behalf of the 5th Defendant are hereby struck out and expunged from the court record.
2. The Notice of Objection dated 13th February, 2009 and the Further Supplementary Affidavit of Abdi Mohammed Issa sworn on 12th February 2009 all drawn and filed by the firm of Ahmednassir Abdikadir & Company Advocates on behalf of the 5th Defendant are hereby struck out and expunged from the court record.
3. The 5th Defendant is granted leave to file and serve a Defence within 15 days of the date of this ruling.
4. The Plaintiff is at liberty to file a reply to the said Defence with 15 days of service.
5. The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____30th ____ day of ____July____, 2012.

P. NYAMWEYA

JUDGE