



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL & LAND CASE 312 OF 2011

ASHOK RUPSHI SHAH.....1ST PLAINTIFF

HITEN KUMAR AMRITRAL RAJA.....2ND PLAINTIFF

VERSUS

JACOB JUMA.....1ST DEFENDANT

COMMISSIONER OF LAND.....2ND DEFENDANT

REGISTRAR OF TITLES.....3RD DEFENDANT

RULING

The application before this Court for consideration was filed by the 2nd and 3rd Defendants by way of a Notice of Motion dated and filed on 23th March 2010. It is supported by an affidavit filed on the same date and sworn by Wanjiku Mbiyu, a Senior Deputy Chief Litigation Counsel at the office of the Attorney General. The 2nd and 3rd Defendants are seeking the following substantive orders in the said application:

1. That the Honourable Attorney General Counsel for the 2nd and 3rd Defendants be granted leave to amend the defence filed on 11th September 2009.
2. That the proposed amended draft defence be deemed duly filed and served.
3. That leave be granted to the Honourable Attorney General to withdraw the Chamber Summons dated 23rd September 2009 and filed by Onyancha Mose – Senior Litigation Counsel and the same be struck out and expunged from the court record.
4. That leave be granted to Honourable Attorney General to withdraw the Replying Affidavit filed on 22nd September 2009 on behalf of the 2nd and 3rd Defendants and sworn by one Silas Kiogira Mburugu and the same be struck out and expunged from the records.
5. That leave be granted to Honourable Attorney General to withdraw the skeleton submissions filed by Onyancha Mose Senior Litigation Counsel on 19th October 2009 and the same be expunged from the record.
6. That appropriate directions do issue pursuant to the foregoing prayers.

The main grounds for the application are that the pleadings sought to be withdrawn and/or amended were drawn and filed by one Onyancha Mose, an Advocate and state Counsel then practicing with the Attorney General as a Senior Litigation Counsel without instructions from the 2nd and 3rd Defendants or authority of the Attorney General. Further, that the instructing clients provided the instructions on 1st October, 2009 and not at the date of filing of the pleadings on 11th September 2009.

The 2nd and 3rd Defendants give a detailed background on the processes and sequence of events leading to the filing of the said pleadings, in the supporting affidavit, and also state that as a result the said Mr. A. Onyancha Mose has since November 12th 2009 deserted from duty and was under suspension, and that disciplinary proceedings had been commenced against him. In a supplementary affidavit sworn by the same deponent on 8th December 2010 it was further stated that the said Alexander Onyancha Mose was dismissed from the public service with effect from 13th November 2009, and a copy of a letter from the Public Service Commission to that effect dated 22nd September 2010 was annexed.

The 1st Defendant opposed the application relying on a replying affidavit he swore on 16th June 2010 and a supplementary affidavit sworn by Alexander Onyancha Mose on 22nd December 2010. The 1st Defendant in his affidavit states that paragraphs 8, 26, 27, 45, 50, 57, of the affidavit sworn by Wanjiku Mbiyu, contained hearsay matters and touched on matters of fact in dispute and hence not within her personal knowledge and ought to be struck off with costs.

The 1st Defendant avers that the said Alexander Mose was duty Counsel at the time of filing of the impugned pleadings, and that he had the duty and responsibility of filing suitable pleadings on behalf of the Honourable Attorney General in accordance with instructions received from the relevant line ministry. Further, that the office of the Attorney General did receive instructions from the Ministry of Lands *vide* a letter dated 1st September, 2009 signed by Mr. S. K. Mburugu, Chief Lands and Administrative officer on behalf of the Commissioner of Lands, Ministry of Lands. A copy of the said letter is annexed as an exhibit.

The 1st Defendant further avers that after receipt of instructions Mr. Alexander Onyancha Mose put in a memorandum of appearance on behalf of the 2nd and 3rd Defendants dated 11th September, 2009, and filed a defence drawn in accordance with the express instructions of the 2nd and 3rd Defendants. He also filed a replying affidavit duly sworn and signed by Silas Kiogora Mburugu on behalf of 2nd and 3rd Defendants which was a true reflection of the instructions received from the Ministry of Lands. Further that the said Silas K. Mburugu has not sworn any affidavit to resile from the instructions contained in the letter dated 1st September, 2009 nor disowned his own affidavit on record in this case.

It was the 1st Defendant's contention that the 2nd Defendant's letter of 1st October, 2009 countermanding that of Mr. Silas Mburugu must have been written after the said Mr. Alexander Onyancha Mose refused to co-operate with the emissary sent by the 2nd Defendant with a request to amend the defence already filed on record on their behalf. Further, that the application herein has been brought in bad faith, is an abuse of the court process and is meant to confuse issues and delay the hearing and final determination of this matter.

All the parties filed written submissions and made oral submissions at the hearing of the application on 23rd April 2012. The 2nd and 3rd Defendant submitted that the affidavit of Wanjiku Mbiyu deponed to matters that happened at the state law office, in her department and under her watch as head of department, and she was therefore a competent witness. Further that the 1st Defendant cannot be prejudiced by the said amendments and withdrawals as his Defence was filed on 27/7/2009 and he could not have relied on the said documents. The 2nd and 3rd Defendant relied on the authorities of **Eastern Bakeries vs Castellino (1958) EA 461** and **Hagod Jack Simonian vs S.K. Johar and Others (1962) 1. EA 336** for the position that amendments should be allowed if they do not cause prejudice to the other side.

The Plaintiffs supported the 2nd and 3rd Defendant's application in oral submissions made in court and written submissions dated 23rd April 2012 by the 2nd Plaintiff.

The 1st Defendant in his submissions argued that the application was incompetent to the extent that Order 19 of the Civil Procedure Rules prohibits the making and reliance upon the affidavit of Wanjiku Mbiyu as she has testified on disputed matters of fact, and in particular on whether or not the 2nd and 3rd Defendants issued instructions on the drawing and filing of pleadings. The Defendant's Advocate relied on the decision in **Kenya Horticultural Exporters (1977) Ltd vs Pape (1986) KLR 705** that an affidavit should contain such facts as the deponent is able of his or her own knowledge able to prove.

It was further argued that there is no provision of the law that allows for the withdrawal of an affidavit and the 1st Defendant relied on the decision in **Comet Products UK Ltd vs Hawlex Plastic Ltd & Anor (1971) 1 All E.R 1141** wherein the court held that when an affidavit has been used in evidence it cannot be withdrawn at the option of the party on whose behalf it was introduced in evidence.

The 1st Defendant also submitted that the Court may refuse to grant leave to amend pleadings where an application is not made in good faith. Further, that the 2nd and 3rd Defendant's application proposed amendment has the sole purpose of retracting the pleas and admissions in the original defence and defeating the 1st Defendant's right and defence, and that they were estopped from doing so by virtue of sections 24 and 120 of the Evidence Act. The 1st Defendant relied on various authorities in this respect including **Kyalo vs Bayusuf Brothers Ltd, Civil Appeal No. 38 of 1981**, **James Nandasaba vs Willis Wachilonga (2005) eKLR** and **James Ochieng Oduol t/a Ochieng Oduol & Co Advocates vs Richard Kuloba (2008) eKLR**. In all these cases leave to amend a plaint was refused as it would have had the effect of defeating the other party's defence.

I have read and considered the pleadings, evidence and submissions by the parties. There are three issues for determination. The first is whether certain parts of the affidavit sworn by Wanjiku Mbiyu should be struck out for offending Order 19 of the Civil Procedure Rules. Rule 3 of the said Order provides that:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

I have perused the impugned paragraphs, namely 8, 26, 27, 45, 50, 57, of the affidavit sworn by Wanjiku Mbiyu, and the said paragraphs state as follows:

8. That upon reporting to the Head Office I discussed with Mr. John W. Njogu Senior Principal Litigation Counsel (my predecessor) who was then in charge of the department on the modalities of allocation of case files.

26. That the said clerk informed me on 2nd October 2009 which information I verily believe to be true that the file could not be traced at the Registry or Mr. Ombwayo's office. I advised him to check for the file in all counsel offices as the file register movement record indicated the file was still in Mr. A. Ombwayo's office though physically it was not available.

27. That on 5th October 2009 which was a Monday, I still enquired from the check about the file and he did inform me that his efforts to trace it has not been successful.

45. That on 8th October 2009, the original file was retrieved from the Counsel's office by Mr. Abdi Rashid Gollo the Clerical Officer maintaining the Ministry of Lands Files who informed me that the file was placed inside another different file unrelated to it.

50. That it is during the telephone communication that the counsel informed me that our counsel Onyancha Mose Snr. Litigation Counsel had already filed the submissions which fact I was not aware of

as this time I had both the original file opened on 15/9/09 and the temporary file containing the photocopies of the court generated pleadings.

57. That I am also aware that in accordance with the Service Commissions Act and the Code of Regulations (Amended 2006) an interministerial Committee has been set up to investigate on the conduct of the Counsel and make its recommendations to the Accounting Officer which investigations are ongoing.

The deponent in the said paragraphs clearly states that she was either informed of the contents or that contents are within her personal knowledge, and are therefore not hearsay. In addition, where the facts deponed are based on information received, she has stated the source of that information. The only fact that is stated to be within her knowledge is that of the investigations on the conduct of the counsel (Alexander Onyancha Mose), which it was submitted was within the Deponent's knowledge in her capacity as head of department in which the said counsel was stationed, and the said facts are later verified by the supplementary affidavit sworn on 8th December 2010 by the same Deponent. It is therefore the finding of this Court that the said paragraphs are properly deponed to under Order 19 of the Civil Procedure Rules.

It was also submitted that the said affidavit is sworn by an Advocate on a contentious issue contrary to 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.”

The contentious issue alleged is the instructions given by the 2nd and 3rd Defendants. Under Article 156(4)(b) of the Constitution the Attorney General is required represent the national government in court or in civil proceedings in which the national government is a party, and its officers are entitled to act as advocates under section 10 of the Advocates Act. The 2nd and 3rd Defendants are offices in the national government, and some of its officers have given conflicting instructions to the Attorney General. It is the Attorney General's professional duty and responsibility in the circumstances to advise its clients on the best way to advance their case according to the law and public interest.

The Attorney General's office in advancing its clients case has made a decision to amend the 2nd and 3rd Defendants' Defence relying on later instructions received from its client. In the circumstances, for this Court 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 Act – 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**. It is the finding of this Court that the Attorney General has demonstrated that the fact of such formal instructions were received from the 2nd and 3rd Defendants as the same were annexed to the supporting affidavit as ‘WAM’ 5. In addition, from the facts presented to the court, the circumstances leading to the application for the amendment and withdrawal of the pleadings cannot be deponed to by officers of the 2nd and 3rd Defendants as it was not within their personal knowledge.

The second issue is whether leave to amend the Defence should be denied on account of the application

not being made in good faith. As stated in the submissions by the 1st Defendant wherein he has quoted from *Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition* by I.H. Jacob at page 32:

“The first and in a way the paramount consideration is whether the application for leave to amend is made in good faith. For this purpose good faith means that the amendment is sought for the purpose of raising the real question in controversy between the parties and is not dishonest or intended to overreach the opposite party, or made for any other ulterior motive and relies on facts which are substantially true and germane to the matters in controversy between the parties.”

The Court can therefore only refuse an amendment if it is not satisfied as to the truth and substantiality of the proposed amendment. The Attorney General has provided evidence of instructions from its client necessitating the amendment, and it is admitted by the 1st Defendant that the said amendment will result in substantial changes to the 2nd and 3rd Defendant's Defence. This court cannot stand in the way of the parties raising the issues they consider germane to their cause of action or defences, and it is also not the role of this court to impose on any party as to what their case or issues shall be, but rather to be an impartial and fair arbiter.

In addition, the prejudice that is sought to be prevented by a proposed amendment is that which will be caused to the opposing party. The authorities cited by the 1st Defendant are distinguished on this ground, in that leave to amend the defence in the cited cases was denied because of the prejudice it would have caused to the Plaintiffs, not to a co-Defendants as in this case. It is my view that the 1st Defendant is still entitled to present his defence to the Plaintiff's claim, irrespective of whether it is different from, or compromised by that of the 2nd and 3rd Defendants'. In addition, estoppel is a substantive defence, and cannot be raised at this stage, but only during the hearing of the suit filed herein.

The final issue for consideration is whether this court has powers to allow the withdrawal of pleadings. Sections 3A of the Civil Procedure Act that provides for the inherent jurisdiction of the court to make such orders as may be necessary for the ends of justice, has now been augmented by sections 1A and 1B of the same Act, which provide that the overriding objectives and duties of this Court is to facilitate just and expeditious resolution of civil disputes.

Article 159 of the Constitution now also requires courts to administer justice without undue regard to procedural technicalities. The withdrawal of pleadings, submissions and affidavits in this application is sought to facilitate the 2nd and 3rd Defendants present and prosecute their case and to this end to also ensure that the matter before the court proceeds expeditiously.

For the foregoing reasons the 2nd and 3rd Defendants application dated 23rd March 2010 is allowed and it is hereby ordered as follows:

1. The Honourable Attorney General Counsel for the 2nd and 3rd Defendants is granted leave to amend the defence filed on 11th September 2009.
2. That the Attorney General to file and serve the amended Defence within 15 days of the date of this ruling.
3. The Plaintiffs and 1st Defendant are granted corresponding leave to file and serve Amended Plaints and/or Replies to the Amended Defence within 15 days of service by the Attorney General Counsel.
4. The Honourable Attorney General is granted leave to withdraw the Chamber Summons dated 23rd September 2009 and filed by Onyancha Mose and the same is hereby struck out and expunged from the court record.
5. The Honourable Attorney General is granted leave to withdraw the Replying Affidavit filed on 22nd September 2009 on behalf of the 2nd and 3rd Defendants and sworn by one Silas Kiogira Mburugu and the

same is hereby struck out and expunged from the court record.

6. The Honourable Attorney General is granted leave to withdraw the skeleton submissions filed by Onyancha Mose on 19th October 2009 and the same are hereby expunged from the court record.

7. The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____19th____ day of ____July____, 2012.

P. NYAMWEYA

JUDGE