



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NUMBER 320 OF 2010

DANIEL KINUTHIA MUCHINA.....CHAIRMAN
JOSPHAT NYOTA MUCHIRI.SECRETARY
ELIZABETH WAITHERA MBURU.....TREASURER
SUING AS OFFICIALS OF KENYAN NATIONAL

ORGANIZATION

FOR VICTIMS OF ETHNIC CLASHES (KNOVEC).....PLAINTIFFS

VERSUS

RAPHAEL K MATURU.....DEFENDANT

R U L I N G

Before me is a Notice of Motion dated 23rd December, 2010 filed by the plaintiff. The application was brought under Order 51 rule 14 (3) of the Civil Procedure Rules, as well as Section 3A of the Civil Procedure Act (Cap 21). The prayers are two as follows: -

- 1. This honourable court be pleased to grant leave to the plaintiff/applicant to file a supplementary affidavit in respect of the application dated 18th June, 2010.***
- 2. Costs of this application be in the cause.***

The application has grounds on the face of the Notice of Motion. It was also filed with an affidavit sworn on 23rd December, 2010 by Boniface Njiru, Advocate for the plaintiff.

The grounds of the application are that, in a supplementary affidavit filed on 17th August 2010, the defendant attached a letter emanating from the Deputy Registrar of Societies purporting that he and his team were the genuine officials of the plaintiff. That when the plaintiff's counsel drew the attention of the Deputy Registrar, the said Deputy Registrar of Societies confirmed that the said letter was obtained

fraudulently and had been cancelled. That it was necessary to bring this development to the attention of the court before submissions were filed.

It was deponed in the supporting affidavit, inter alia, that the deponent wrote to the Registrar of Societies questioning the list of officials named. The Deputy Registrar of Societies wrote a response dated 7th December, 2010 in which he stated that the defendant was perpetuating a fraud by filing false minutes and not informing the Registrar of the same and also failing to disclose that there was also pending civil suit. It was further deponed that it was necessary for the plaintiff to file a further affidavit with regard to this new information.

The plaintiff's counsel on 25th February, 2011 filed written submissions. It was contended that in a Chamber Summons filed on 18th June 2010, the plaintiff asked for an injunction to restrain the defendant and his agents from purporting to act as officials of the plaintiff and from printing, designing or publishing letters or documents purporting to so act. The application came up for hearing before Mwera J. on 5th November 2010, and both counsel for the parties were requested to file submissions. In the meantime, the counsel for the plaintiff wrote a letter to the Deputy Registrar of Societies requesting confirmation of a letter that was annexed to an affidavit of the defendant sworn on 17th August, 2010. Thereafter, on getting a response dated 7th December 2010, this application for filing a supplementary affidavit was filed.

It was contended that if leave was granted for the plaintiff to file a supplementary affidavit, the defendant would suffer no prejudice because he would get corresponding leave to file a reply thereto. In addition, it was crucial that the letter dated 7th December, 2010 be availed to court when the application dated 18th June, 2010 is heard. That would rebut the false assertions made by the defendant in the supplementary affidavit filed on 17th August, 2010. This was because the Deputy Registrar Mr. Joseph Onyango had confirmed in writing that the letter dated 5th August, 2010 was obtained by illegitimate and fraudulent means.

The application is opposed. A replying affidavit sworn by the defendant on 17th February, 2011 was filed. It was deponed, inter alia, that the defendant had employed Boniface Njiru Advocate to assist him in the registration of the Society herein. That the application was bad in law and had been made without full disclosure of material facts. It should therefore, never be allowed to see the light of day. It was deponed that the plaintiff was working with crooked officers at the court registry to circumvent the due process by hiding the court file, and failing to list the same when it was fixed for submissions, in order to grant the plaintiff and his mercenaries time to manufacture suitable documents to favour them in the application herein.

The defendant through their counsel Mogire & Co. Advocates filed written submissions on 1st March, 2011. It was contended in the submissions that the plaintiff had filed an application on 22nd June 2010. The defendant filed a replying affidavit to the same on 20th July, 2010. On 3rd August, 2010 the plaintiff filed a further affidavit with leave of the court. The defendant filed a supplementary affidavit on 17th August, 2010. On 5th November, 2010 the court ordered that parties file written submissions to that application. The application was fixed for hearing on 5th November, 2010 when the same did not appear in the cause list.

It was contended that the plaintiff and their advocates had all the opportunity to file the affidavit they intend to file. The letter from the Registrar of Societies which they want to annex to the intended affidavit was an after thought. To allow the said document through the current application would amount to trial

by affidavit as the deponent will not be cross-examined on the veracity of the said document. It was also contended that Boniface Njiru Advocate, erred in swearing an affidavit and deponing to evidential facts which, as an advocate, he should not have done. His action made him liable to be cross-examined on his deposition.

As an advocate he could not be counsel as well as witness in the same case. Reliance was placed on the case of **Kisya Investment Ltd Versus Kenya Finance Corporation High Court civil Case Number 3504 of 1993 Nairobi (unreported)**.

I have considered the application, documents filed, and the submissions of counsel on both sides. The plaintiff seeks leave to file an additional affidavit because of a letter which he received from the Deputy Registrar of Societies. The letter states in part that some documents relied upon by the defendant relating to records from the Registry of Societies are not genuine.

Though the defendant opposes the introduction of this letter, he does not say that the letter is irrelevant. The defendant claims that letter was obtained as a result of collusion in the court registry. In my view, that cannot be a ground to exclude that letter from the documents to be filed in court so long as that letter is relevant to the issues in the application that is pending. Besides, the letter comes from the Registrar of Societies, not from court.

The defendant has himself annexed several documents in his replying affidavit sworn in August, 2010. He is not the author of all those documents. He cannot rely on purported official documents in this affidavit and at the same time prevent the other side from relying on official documents. The fact that the document intended to be annexed to the further affidavit of the applicant was not made by the applicant cannot be a ground for excluding the same from these proceedings.

The respondent has argued that Mr. Boniface Njiru Advocate has deponed to matters which are contested and is not competent to do so as an advocate for a party in these proceedings. Indeed, in the case of **Kisya Investments Ltd & Another Versus Kenya finance Corporation Ltd & others (Nairobi Civil Suit No. 3504 of 1993**, Ringera J, (as he then was) stated that an advocate cannot be both counsel and witness in the case cause. However, unlike in the case of **Kisia Investments** (supra) the advocate herein has disclosed the source of his information. He has stated that the information comes from the Deputy Registrar of Societies and that the same is by way of the letter intended to be annexed to the supplementary affidavit. Besides, it is very easy for the defendant or his counsel to find out from the Registrar of Societies' office, whether the letter intended to be annexed emanates from that office. That office is a public office and it has not been closed nor do I think there is an intention to close it. In my view, the affidavit sworn by Boniface Njiru Advocate is valid and proper.

The argument that the plaintiff should have sought to annex that letter to an affidavit before now, is an argument that cannot be sustained. The application to which the letter is intended to be relied has not yet been heard. Secondly, the application is the plaintiff's application. The letter sought to be annexed arises from new information that was not in the possession of the plaintiff when the application was initially set down for hearing for November, 2010. The letter in question was in fact dated 7th December, 2010.

In my view, it is in the interest of justice that the said letter be formally introduced in court. That can only be done through filing an additional affidavit.

Will the defendant suffer prejudice if the letter is introduced?

I find and hold that the defendant will not suffer any prejudice if the affidavit sought to be filed annexes the letter. The defendant will have an opportunity to file a response or reply thereto after service of the

same in accordance with the law. The court will also get an opportunity to consider the matter holistically, without leaving behind information that has already come to the knowledge of the parties and which is relevant to the pending application.

For these reasons, I find that the application has merits. I will allow the same.

Consequently, I allow the application and grant leave to the plaintiff to file a supplementary affidavit as prayed. The said supplementary affidavit after service will be filed and served within the next 14 days. The respondent will have a right to file a response to the said supplementary affidavit within the parameters allowed by law. Costs of this application will be in the cause.

Dated and delivered at Nairobi this 21st day of June, 2011.

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GEORGE DULU

JUDGE

In the presence of

Mr. B Njiru for plaintiff

Mr. Mogire for defendant

C Muendo – court clerk