



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 928 OF 2009

PAUL T. GICHUHI T/A SAPAMO CONSULTING ENGINEERS
PLAINTIFF

VERSUS

KENYA PIPELINE CORPORATION LIMITED
DEFENDANT

R U L I N G

1. I have been required by the advocates on record for the parties herein to deliver a Ruling as regards a Preliminary Objection raised by the Defendant/Applicant dated 17 may 2010 on regards the Plaintiff/Respondent Notice of Motion dated 16 February 2010. I say “*requested*” because this matter has already been aired by my brother Apondi, J. who has now been transferred away from the Commercial Division of this court.
2. Although I have referred to the Notice of Motion dated 16 February 2010 above, I note that on the 27 April 2010, leave to amend the Notice of motion was given with the consent of the parties by Apondi, J. The Draft Amended Notice of Motion was attached to a Chamber summons filed by the Plaintiff dated 14 April 2010 and filed herein on 19 April 2010. Apondi J. also ordered that the draft Amended Notice of Motion annexed to the Supporting Affidavit to the Chamber Summons are exhibit as ‘LAO 1” be deemed as duly filed subject to payment of appropriate Court fees. This it would appear that I have to rule on the Preliminary Objection dated and filed herein on the 17 may 2010 as regards the Amended Notice of Motion dated 27 April 2010.
3. The Preliminary Objection filed by the Defendant seeks to attack the Supporting Affidavit of the Plaintiff sworn on the 16 February 2010 so far as Annexure marked “PTG – 1” thereto is concerned. It also attacks what is entitled “Replying Affidavit” again sworn by the Plaintiff on 6 April 2010 by maintaining that the Plaintiff had no *locus standi* to swear a replying affidavit in an application before this Court where he is the Applicant. It is only the Respondent who can file a replying affidavit. Finally, if I was of a mind to allow the Plaintiff’s Affidavit sworn on 6 April 2010 to stay in, then I am being asked to strike off annexure “PTG – C” and ‘PTG – E” as being inadmissible in evidence being extracts and also in breach of the Stamp Duty Act.

4. As I understand the first ground of the said Preliminary Objection, I am being asked to strike out Annexure “PTG-1” of the supporting affidavit of the Plaintiff sworn on 16 February 2010 as being inadmissible in evidence as the same is in breach of the Stamp Duty Act. In its submissions, the Plaintiff attempts to persuade me with reference to the Schedule to the Stamp Duty Act (“*the Act*”) that the Exemption listed under paragraph 1 thereof:

“Agreement or any Memorandum of Agreement” under exemption (from payment of Stamp Duty) No. (3) that: “*Agreement or Memorandum of agreement, being a contract of service*” would include Annexure “PTG -1”. The Defendant on the other hand, submits that a “*contract of service*” is different from a “*contract for service*” and refers the Court to the distinction between the two as delineated in Chitty on Contracts 27th Edition at page 698 paragraph 37-001.

5. The Defendant further relied upon the authority of **Simmons v Heath Laundry Company** [1910] 1 KB 543 at page 549. First, I think that I should point to Cozens-Hardy M.R.’s statement at page 547 of the authority:

“I confess my inability to lay down any complete or satisfactory definition of the term “contract of service”. Various tests were suggested by contract, no one of which was beyond criticism”.

It seems according to Cozens-Hardy M.R. that it is a question fact to be decided by all the circumstances of the case. However, this Court is somewhat assisted by Cozens-Hardy M.R.’s next observation in the **Simmons v Heath Laundry** case viz:

“The greater the amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the grounds for holding it to be a contract of service, and similarly the greater the degree of independence of such control the greater the probability that the services rendered are of the nature of professional services and that the contract is not one of service”.

Further at page 551 as if to clarify the distinction as between contracts of service and contracts for service or services Cozens-Hardy M.R. detailed “It is not, of course, every contract under which services are rendered that can be described as a contract of service. If I take a railway ticket the company enters into a contract with me to render me service, but there is no contract of service and the railway company is not my servant. A contract of service is one which necessarily involves the existence of a servant, and the parties contemplated by this Act may be called, I think, wither employer and workman or master and servant, but subject to this limitation that the servant must be one who falls within the definition of workman as contained in Section 13. ‘A servant’, said Bramwell L. J. in **Yewens v Noakas** [1880] 6 QBD 530 at page 532 ‘is a person subject to the command of his master as to the manner in which he shall do his work’.

To distinguish between and independent contractor and a servant the test is, says Crompton J. in **Sadler v Henlock** 4 E & B at page 578, whether the employer retains the power of controlling the work. Sir Frederick Pollock in his book on Torts, page 79, says ‘the relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other’”.

6. The “Act” as referred to in Cozen-hardy M.R.’s Judgment was the English Workmen’s Compensation Act 1906. The judgment is over a hundred years old now and the English Act even older but as the Defendant points out there are pertinent definitions in Kenyan legislation. For example, the definition of “employee” in the Labour Institutions Act [2007] means: “a person who has been employed for wages or a salary and includes an apprentice or indentured learner”.

7. To my mind and despite its age, I am of the opinion that the **Simmons v Heath Laundry** case as well as the excerpt from Chitty on Contracts are persuasive arguments as to the distinction as between “*Contracts of Service*” and “*Contracts for Services*”. I accept that such is not defined in the Stamp Duty Act as put to me by the Plaintiff in his submissions on the Preliminary Objection. I do not agree with the

Plaintiff that annexure “PTG-1” to the Affidavit in support of the Notice of Motion is a “*contract of service*”. One only has to look at the header page of the annexure to see that it is a “*Contract for Consultant’s Services*” (underlining mine).

This is even more amplified by the fact that it is a Contract for Service which envisaged joint service to be provided to the Defendant herein as between Petroleum India International and the Defendant trading as Sapamo Consultants.

8. The Plaintiff put before Court that if the Annexure “PTG – 1” was not deemed to be exempt from Stamp Duty under paragraph 1 (3) of the Schedule to the Act then exemption from Stamp Duty for the annexure could fall under **Section 117** of the Act. In agreement with the Defendant’s submissions, I just cannot see where “PTG-1” can fall under any of the general exemptions from Stamp Duty detailed in that section. As I understand it in relation to what is generally known to the public about the Defendant and taking into account the Plaintiff’s description at paragraph 2 of the plaint, it simply cannot be taken to be as suggested by the Plaintiff, a State Corporation sufficient for it to be exempted from Stamp Duty under **Section 117**. It may well be that the Defendant is a state corporation under that definition, defined in **section 2** of the State corporations Act but that cannot be extended by any stretch of imagination for the Defendant to be considered as a corporation within the Community which clearly means the former East African Community.

9. In consequence of the above, I have no hesitation in upholding the Defendant’s first ground of its Preliminary Objection in that I do not consider that Annexure “PTG-1” is exempt from the payment of Stamp Duty as I do not see it falling under any of the general exemptions contained in the Act neither do I see it fall under the specific exemptions under paragraph 1 of the Schedule – Agreement or any Memorandum of an Agreement. To this end, I find myself on all fours with the findings of Azangalala, J. in **Weetabix Ltd. Vs. Healthy the Two Thousand Ltd.** [2006 – eKLR] and Ombija, J. in **Caltex Oil (Kenya) Ltd. Vs. Too** [2001] LLR 2555 as regards their remarks in relation to **Section 19** of the Act. I find that Annexure “PTG -1” is subject to Stamp Duty and there is no evidence that Stamp Duty has been paid in respect of that Agreement. Accordingly, I strike the same off the record but noting that such a lapse is curable under **Section 20** of the Stamp Duty Act.

10. The Defendant’s second ground raised in its preliminary objection is that the plaintiff has no “*locus stand*”, to swear what he terms a “*Replying Affidavit*” which was deponed to on 6 April 2010. As regards that title of the document, the Plaintiff in its submissions admits that the document should have been entitled “*Further Affidavit*” rather than *Replying Affidavit*”. My attention was drawn to the old **Order VIII Rule 7** of the *Civil Procedure Rule* which is now **Order 19. Rule 7** of the new Order reads:

“The Court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdirection of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality”.

The Plaintiff cited a myriad of cases as to where affidavits had been accepted by Courts despite deviations from form or lapses in procedure which provided that they do not go to the jurisdiction of the court or prejudice the other party in any basic respect ought not to be nullified.

11. On the face of it then, there would seem to be no reason why I should not accept the Plaintiff’s said Affidavit sworn on 6 April 2010 into evidence, despite the Defendant’s submissions that the Rules must be observed in citing to me the case of **Galaxy Paints Company Ltd. Vs. Falcon Guards Ltd.** – *Civil Appeal No. 219/98*. I agree with and I am bound by the Court of Appeal’s dictum on the point viz:

“The Rules are designed to facilitate justice and further its ends. They are not a thing to trip people up. They are not too technical. The Law Society of Kenya is adequately represented in the Rules Committee. But, due to rampant inefficiency, negligence, dishonesty, lack of diligence and general disregard for professional ethics on the part of the majority of the advocates in this country, the Rules are abhorred”.

Further, the Court of Appeal emphasized that:

“Unless the Rules, the hard maid of justice are observed, the administration of justice in this country will be eroded”.

12. This then is what this Court is required to do. Neither of the parties hereto referred me to the provisions of the old **Order L** in relation to Motions and other Applications. **Rule 16 (2)** thereof is clear and is now embodied in the new **Order 51 Rule 14 (3)**:

“Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with the leave of the court, file a supplementary affidavit”.
(underlining mine).

I have perused the record of this Court. I note that on 23 March 2010 before my learned brother Apondi, J. Mr. Olowe for the plaintiff submitted that:

“We have also agreed that the parties be granted leave to file any reply”.

That day in Court it appears that the parties were more intent upon taking the Plaintiff’s application by way of Notice of Motion dated 16 February 2010 out of the hearing list. The Court directed that the matter be heard on 27 April 2010. I did not grant any leave to the Plaintiff to file a further affidavit. Thereafter, the application to amend the said Notice of Motion came before this Court on 19 April 2010.

13. It should be noted that this was after the Plaintiff’s Affidavit sworn on 6 April 2010 had been filed. On 19 April 2010 the matter was stood over for hearing on 27 April 2010 and on that day this Court granted the Chamber Summons application amend the said Notice of motion. Thereafter, it adopted what it termed “*the consent of the parties*” which was that the amended Notice of Motion would be heard on 18 May 2010 and that leave would be given to the Defendant to file any further affidavit within 10 days. Further leave was given to the Plaintiff to file any further affidavit. By that time, the damage was already done and the Plaintiff had already filed the Affidavit sworn by him on 6 April 2010 on 7 April 2010. Leave cannot be given retrospectively. The Plaintiff’s said affidavit was filed without leave and thus offends **Order 51 Rule 14 (3)**. Accordingly I strike out the Plaintiff’s said affidavit sworn on 6 April, 2010.

14. By striking out the Plaintiff’s said Affidavit, that disposes of the second ground of the Defendant’s Preliminary Objection. As the Defendant’s third ground of objection was dependent upon my not striking out the Plaintiff’s said Affidavit, it now falls away. The upshot of the above, is that I allow the Preliminary Objection dated 17 may 2010 with costs incidental thereto to the Defendant.

DATED and DELIVERED at NAIROBI this 10th day of November, 2011.

J. B. HAVELOCK
JUDGE