

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 446 of 2007

BARCLAYS BANK OF KENYA PLAINTIFF

VERSUS

MARTHA KARWIRWA ANTHONY DEFENANT

RULING

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During the highlighting of the parties' skeleton submissions filed herein, Mr. Machira for the Applicant submitted, *inter alia*, that the replying affidavit sworn in this matter by Mr. Ogunde and filed on 18th March, 2010, was incompetent as an Advocate is not allowed to file an affidavit for his client in a contested matter of this nature. He also argued that the affidavit in question did not oppose the Defendant's application but instead supported it. He referred the Court to paragraph 18 of the said affidavit and submitted that an affidavit is not a pleading and cannot be amended.

In his response, Mr. Ogunde for the Plaintiff/Respondent told the Court that he had noticed an error in his replying affidavit. He therefore sought the Court's leave to file a supplementary affidavit to explain paragraph 18 of the said affidavit.

Mr. Machira strenuously opposed the application by Mr. Ogunde on the grounds that Plaintiffs have been sitting on an injunction order given by the Court and that the application to file an explanatory supplementary affidavit was mischievous. He further said that the deponent of the offending affidavit read it, and signed it and cannot amend it after the Applicant had made his submissions and relied on that affidavit. He therefore submitted that it would be unfair to the Applicant if Mr. Ogunde's application were to be allowed and thereupon urged the Court to disallow that application. In a reply, Mr. Ogunde submitted that the interest of justice dictates that his client should not be condemned on the basis of an application which Counsel had admitted was erroneous.

I have considered the rival submissions made by the respective Counsel. The contentious paragraph 18 of the replying affidavit sworn by Mr. Ogunde reads as follows –

“I make this affidavit from facts within my knowledge, information and belief, sources of which have been disclosed and pray that the application be granted as prayed.”

It is inconceivable that the deponent of a replying affidavit which, by its very nature, opposes the supporting affidavit would also support the latter affidavit. With respect, the contents of the replying affidavit herein speak for themselves and the last four words of paragraph 18 would, on the face of it, contradict all the previous 17 paragraphs which would clearly render the entire affidavit worthless. If such a state of affairs were left as they are, the whole affidavit would not make sense as, on the one hand, as it opposes the application, and on the other hand, the last four words thereof suggest that the affidavit supports the application. It is my humble view that in a situation like this one, common sense dictates that an amendment ought to be made in order to set the record straight.

Being of that persuasion, I direct that the deponent of the replying affidavit do file a supplementary affidavit to explain paragraph 18 as prayed as I believe that in so doing he will be stating the obvious. It is equally obvious, patently obvious, obvious to the meanest intelligence, that the purpose of that replying affidavit was only one i.e. to oppose the application and not to support it. The said supplementary affidavit be sworn, filed and served within 7 days.

Dated and delivered at Nairobi this 3rd day of July, 2010.

L. NJAGI
JUDGE