



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 300 of 2008 (OS)

DUNCAN GAKUNA KIONGA

HERBERT NGUNYI KAMAU

DAVID KIRUBI KAMAU (suing as the Executors of the Estate of

Peter Kamau Kionga(Deceased).....PLAINTIFF/APPLICANT

VERSUS

TIMBOROA HOTELS LIMITED

.....DEFENDANT/RESPONDENT

RULING

The plaintiff filed an application pursuant to the provisions of Section 7 of the Arbitration Act and Rule 2 of the Arbitration Rules seeking interim protective orders from the court restraining the defendant, by itself or its agents from developing and or in any other way dealing with the property known as LR No. 209/785/21 (*hereinafter referred to as the suit property*) pending the hearing and determination of the intended arbitral proceedings involving the plaintiffs and the defendant. The grounds in support of the application are on the face of the application. The application is supported by a joint affidavit of Duncan Gakuna Kionga, Herbert Ngunyi Kamau and David Kirubi Kamau, the executors of the last will of Peter Kamau Kionga – deceased. They swore a supplementary affidavit in further support of the application. The application is opposed. The defendant filed grounds in opposition to the application. It stated that the application was incompetent since it offended the provisions of the Companies Act and further was supported by an incompetent and incurably defective affidavit. Gerald Gikonyo Kanyuira, a director of the defendant, swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard the rival submissions made by Mr. Joroge for the plaintiffs and Mr. Kipkoge for the defendant. The issue that emerged for determination by the court is whether the affidavit sworn in support of the plaintiffs' application was competent. As stated earlier in this ruling, the executors of the last will of the deceased swore a joint affidavit in support of their application for interim relief pursuant to Section 7 of the Arbitration Act. Under Order XVIII Rule 5 of the Civil Procedure Rules:

“Every affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be to a distinct portion of the subject.”

Section 16 of the Oaths and Statutory Declarations Act provides that:

“Every affirmation shall be as follows: “I, A.B., do solemnly, sincerely and truly declare and affirm,” and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness.”

In England, The Supreme Court Practice 1998 Vol. 1 at page 649 reproduces Order 41 Rule 4 of the Rules of The Supreme Court (RSC) which is similar to our Order XVIII of the Civil Procedure Rules. It states as follows:

“Every affidavit must be expressed in the first person and unless the Court otherwise directs must state the place of residence of the deponent his occupation or, if he has none, his description, and if he is, or is employed by a party to the cause or the matter in which the affidavit is sworn, the affidavit must state the fact.”

It is evident that for an affidavit to be competent, it must be sworn by the deponent in the first person. It cannot be sworn by two persons. This court had occasion to consider whether an affidavit sworn by more than one deponent was competent in Pastor John Cheruiyot & 6 others vs. County Council of Baringo & 3 others Nakuru HCCC No. 120 of 2004 (unreported). At page 10 of its ruling this court stated as follows:

“An affidavit is sworn evidence in a written form. The presumption is that when a person swears an affidavit, he is swearing to what is within his personal knowledge. Affidavit evidence is comparable to sworn evidence that is given by a person in court. The only difference being that when a person swears an affidavit he may not be cross-examined on its contents without the leave of the court being sought.”

The plaintiffs argued that the affidavit sworn in support of the application was competent since Order XVIII of the Civil Procedure Rules granted the court jurisdiction to allow an affidavit sworn by two or more persons as is common in certain Common Law jurisdictions. It was submitted on behalf of the plaintiffs that the fact that the deponents in the affidavit in support of the application were more than one was a mere defect in form which could be excused by the court.

The plaintiffs relied on the Court of Appeal decision of Francis Kariu Gakumbi & Anor vs. Piliska Njoki Maina [2008] eKLR where it was held that, in certain Common Law jurisdictions, two or more persons can swear one oath at the same time. This similarly applied to two persons swearing one affidavit at the same time. This court concedes that there are certain circumstances where an affidavit sworn by two deponents may be admitted by the court. For instance, under the Law of Succession Act, two deponents can swear a joint affidavit as sureties in an application for the grant of letters of administration intestate. This is however specifically provided for in the said Law of Succession Act.

The Civil Procedure Act and the rules made thereunder does not envisage a situation where two deponents can swear to one affidavit. Having considered the said arguments made in regard to whether two or more deponents can swear to an affidavit in support of an application seeking interim reliefs under the Arbitration Act, I hold that the only competent affidavit which can be sworn in support of such an application is an affidavit sworn by one deponent. The plaintiffs can swear to as many affidavits as they wish in support of their application provided each affidavit is sworn by a single deponent.

In the premises therefore, I hold that the affidavits sworn in support of the plaintiffs’ application are incompetent and are therefore struck out. Since the application is not supported by any affidavit, it similarly struck out with costs to the defendant. The plaintiffs are however granted leave to file another application before court so that the issues that were raised therein may be determined on its merits. The plaintiffs should go back to the drawing board and return back to the court after they have filed a competent application.

It is so ordered.

DATED at NAIROBI this 26th day of NOVEMBER, 2008.

L. KIMARU

JUDGE