



REPUBLIC OF KENYA

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

Civil Case 193 of 2005

EUROBANK LIMITED (IN LIQUIDATION).....PLAINTIFF

VERSUS

RIVETON INVESTMENTS LIMITED.....1ST DEFENDANT

KUZA FARMS & ALLIED LIMITED.....2ND DEFENDANT

RAJAB WALLAULA TRUST FUND.....3RD DEFENDANT

R U L I N G

This is an interlocutory ruling on an objection which has arisen in the course of the hearing of the plaintiff's application Amended Notice of Motion dated 11th November 2005.

By that application, the plaintiff had sought judgement on admission, which it said was in respect of a sum of Kshs. 32,939,037/60. In the alternative, the plaintiff sought judgement for the whole sum claimed in the plaint.

In the course of canvassing the application, the plaintiff made reference to two supplementary affidavits which the plaintiff had filed on 23rd June 2005. The basis for the said objection was that the said two supplementary affidavits only related to the Notice of Motion dated 19th May 2005 and also to the Replying Affidavits thereto, dated 17th June 2005.

As the Amended Notice of Motion dated 16th November 2005 was filed together with an affidavit in support thereto, the 2nd and 3rd defendants herein submitted that the plaintiff should limit itself to only that affidavit and the replying affidavits filed on 9th December 2005.

It is contended that if the plaintiff wished to refer to the affidavits which were filed prior to the filing of the Amended Notice of Motion, that could only be done with the leave of the court.

In answer to the objection, the plaintiff submitted that the affidavits in issue were pleadings, pursuant to the provisions of Section 2 of the Civil Procedure Act. Therefore, in the plaintiff's understanding there cannot be a bar to the court looking at the pleadings, in order to enable it determine the application. I was therefore asked to overrule the objection, and to proceed to give consideration to the supplementary affidavits, in the same vein as I would be expected to give due consideration to the plaint, which was also filed prior to the Amended Notice of Motion.

Section 2 of the Civil Procedure Act defines pleadings as follows;

“pleading” includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

Although the said definition is inclusive rather exclusive, I would agree with the advocate for the 2nd and 3rd defendants that affidavits do not fall within the category of documents which constitute pleadings. Affidavits are constituted of evidentiary statements, made under oath. Whilst pleadings constitute no more than allegations or assertions made by either a plaintiff or a defendant, or by a party to litigation; in which such party is laying out, in broad terms, its case. Thus a Plaint would be a pleading, as would a Petition or an Originating Summons; a Defence; or a Reply to Defence.

As is clear from the provisions of Order 6 rule 3 of the Civil Procedure Rules, it is only facts, not evidence, which should be pleaded.

In contrast, affidavits are defined by **“Chambers Concise Dictionary”, 2004 as;**

“a written statement, sworn to be true by the person who makes it, for use as evidence in a court of law. Latin meaning ‘he or she has been sworn on oath’ ”

That still begs the question whether or not affidavits which were filed in support or in response to an application, could thereafter still be used after the said application had been amended.

The 2nd and 3rd defendants did not cite any provision of law to support their contention that once an application was amended, the affidavits which had been filed before the said amendment could no longer be used. They also did not cite any authority to back their contention.

Therefore, as the onus was upon them to demonstrate the efficacy of that contention, they did not discharge it.

On the other hand, there is no doubt that on the face of the application dated 11th November 2005 it was expressly stated that the applicant would rely upon the annexed affidavit of Mohamud Ahmed Mohamud. That can only mean that the applicant was putting the respondents on notice, to the effect that that was the only affidavit that they would be relying upon.

If the applicant had intended to rely on any other affidavit, it would have been very easy for it to have said so. But they did not.

Therefore, when the applicant commenced this application by notifying the court that it would be relying on not only the affidavit annexed thereto, but also on the two supplementary affidavits which had been filed previously, it is conceivable that the respondents were taken by surprise.

If that be the case, I would have no hesitation in granting to the respondents an opportunity to file further affidavits, to address the contents of the two supplementary affidavits.

However, I also find that once affidavits have been filed in any given case, the court cannot be barred from making reference thereto when it was making a determination of an application filed subsequent to such affidavits. I believe that the justice of a case cannot be compartmentalised.

By that I mean that a party cannot purport to use evidence for only one or another application within the case; and to thereafter ask the court not to give consideration to such evidence in later or other applications.

Accordingly, the objection is overruled, but also the defendants are all given leave to file further

affidavits, if they should wish to respond to any of the issues in the two supplementary affidavits filed on 23rd June 2005. Such further affidavits, if any, are to be filed and served within the next SEVEN (7) DAYS from today.

The costs of the objection are to be in the cause.

FRED A. OCHIENG

JUDGE

Dated and Delivered at Nairobi by Azangalala J. this 8th day of February 2007.

F. AZANGALALA

JUDGE