



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

Civil Suit 644 of 2002

ALFA MOTORS LIMITED.....PLAINTIFF

VERSUS

TOYOTA EAST AFRICA LIMITED.....DEFENDANT

R U L I N G

Before the Plaintiff/Applicant could argue its application dated 27th March, 2007 objection was taken to paragraph 20 of the further supporting affidavit sworn by AZIM TAIBJEE Advocate dated 14th May, 2007. It was Miss Malik's submission that the said paragraph offended the provisions of Order XVIII, rule 3 of the Civil Procedure Rules. The offending paragraph states:-

“20 THAT paragraphs 12 and 13 of the affidavit are false as indicated by the annexed three documents marked ‘A.T.3’, two of which stated that the Defendant is “managed and controlled” by Toyota Tsusho Corporation (T.T.C.), the proposed second Defendant.”

The objection raised was two fold:-

- (i) that the deponents Mr. Taibjee did not disclose the source of the three documents he annexed under that paragraph.
- (ii) that since the defendant has denied that the Defendant's company is controlled by Tsusho Corporation, Mr. Taibjee, the Defendant's Advocate was debarred from swearing to contentious matters.

Mr. Rebelo who replied to the preliminary objection on behalf of the Defendant's Company submitted that the source of the three documents was not in issue as they were part of the list of documents filed by the Plaintiff in support of its claim. Mr. Rebelo submitted that by annexing the three letters Mr. Taibjee was making it easier for the court to trace the documents. In reply Miss Malik submitted that the documents had not been admitted as exhibits and that their admissibility was in issue.

Order XVIII, rule 3 of the Civil Procedure Rules provides:-

“3.(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

I have already set out the relevant paragraph objected to by Miss Malik on behalf of the Defendant. Mr. Rebelo did admit that indeed the source of the documents was not disclosed in Mr. Taibjee's affidavit. However Mr. Rebelo was of the view that since the letters were part of documents filed in court as part of discovery, they are part of the court record and the Defendant should not question their source.

I have considered the oral submissions by both counsels on the issue of non-disclosure of the source of the three letters annexed as 'A.T.3' in the Taibjee's affidavit. Order XVIII, rule 3(1) of the Civil Procedure Rules is very clear that in interlocutory proceedings affidavits shall be confined to facts which the deponent can prove of his own knowledge or alternatively the affidavit may contain statements of information or belief showing the sources. That is the law it has to be followed. The paragraph as framed falls under the latter provision. The deponent carefully phrased the statement of facts contained in the paragraph in issue. It is however clear that the deponent was not the source of the three letters and further it is also clear that the source was not alluded to or disclosed. The deponent cannot argue that since the documents are ear marked as exhibits in the suit that he is excused from complying with the provisions of the law phrased in mandatory terms. The case cited by Defendant's Advocate, BENJAMIN KIPKETER TAI vs STANDARD CHARTERED ESTATE MANAGEMENT LTD, MILIMANI BANKRUPTCY CAUSE NO. 24 OF 1999 is on all fours with the instant case. On that ground alone, the preliminary objection raised should be upheld.

The same paragraph has been objected to on grounds the Advocate who swore it is not a party to the suit and that since it swore to contentious issues, it ought to be struck out.

Mr. Rebelo argued that even though courts frowned on Advocates deponing to contentious issues, they however recognize that situations may arise in the course of proceedings in which an Advocate has personal knowledge of some of the events.

The offensive paragraph avers that the Defendant's affidavit was telling a lie in paragraph 12 and 13 because of certain information contained in letters Mr. Taibjee annexed to his affidavit. The Plaintiff's Advocate, Mr. Taibjee, was not only denying certain facts deponed to by the Defendant's representative in the suit but went further to present facts to correct the alleged lies. Surely, what Mr. Taibjee was doing was not deponing to facts of which he had personal knowledge of by virtue of acting for the Plaintiff. I do not believe that the facts deponed to by the Advocate are those Mr. Rebelo alluded to in his submissions, which he claimed the courts could allow an Advocate to a party to depone to. The facts deponed to by the Advocate were matters in issue in the case and which are contested by the Defendant in his affidavit in reply to the application.

The Applicant seeks to join a second defendant said to have taken over the control of the 1st Defendant's overseas. The current Defendant has not only denied that fact but has contested the same. Surely Mr. Taibjee lacks capacity to answer to the Defendant's contention. For this reason, Mr. Taibjee's paragraph 20 offended Order XVIII, rule 3 (1) of the Civil Procedure Rules as he deponed to facts of which he had no personal knowledge, facts which were contested rendering the contents of the said paragraph incompetent.

I do not wish to interpret what Waweru, J. said in his ruling alluded to by Miss Malik since it is my firm belief that the issue raised in this preliminary objection is new. I should confine myself to the matter before me. I will therefore overlook Miss Malik's submission on the issue of Mr. Taibjee's alleged continued habit.

The two cases relied on by Miss Malik JOSEPH NGALA vs UNITED INSURANCE CO. LTD HCCC 1409/2000 (Milimani) and EA FOUNDRY WORKS (K) LTD vs KCB (2002) LLR 1677 are persuasive and give a correct interpretation of the application of rule 3(1) of Order XVIII.

Having come to the conclusion I have on the preliminary objection raised by Miss Malik, I proceed to uphold the preliminary objection and to strike out paragraph 20 of Mr. Azim Taibjee's affidavit dated 14th May, 2007.

I have not considered the third issue raised against the titles of the various affidavits sworn in support of the application including that Mr. Taibjee's affidavit dated 14th May, 2007 and Mr. Bhogal's affidavit of 11th May, 2007. I believe the title given, if at all a misnomer as described by Miss Malik, was a defect of form and not substance. I find the fact the word "Affidavit" appears in the title of these affidavits is sufficient to describe them for the purposes of the application before court.

The preliminary objection succeeds to the extent stated in this ruling.

Dated this 25th day of May, 2007 at Nairobi.

LESIT, J.

JUDGE

Read, signed and delivered in presence of:-

Miss Malik for Respondent/

Masinde holding brief for Rebelo for Applicant.

LESIT, J.

JUDGE