



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 283 of 2006

WEETABIX LIMITED..... PLAINTIFF

VERSUS

HEALTHY U TWO THOUSAND LIMITED.....DEFENDANT

RULING

On 30.5.2006, the plaintiff instituted these proceedings by way of a plaint dated 22.5.2006. Appurtenant to the plaint the plaintiff lodged a Chamber Summons seeking inter alia interlocutory injunctive reliefs. The Chamber Summons came up before Hon. Waweru J on 31.5.06 who certified the same as urgent and fixed the same for hearing inter partes on 8.6.06.

The application came up before me for hearing on the said date. Before commencement of the hearing, the defendant raised a preliminary objection to certain parts of the affidavits in support of the application as per its notice thereof dated 5.6.2006. The preliminary objection is premised upon the following grounds:-

1. That the annexures marked “**RM**” pages 1 to 8(c) to the affidavit of Richard Martin are incompetently sealed and or commissioned and therefore inadmissible by way of affidavit evidence.
2. That annexure marked “**RM**” at page 7(a) to the affidavit of Richard Martin is inadmissible in evidence for non-payment of stamp duty.
3. That paragraphs 7, 13, 15, 16, 17 and 20 of the affidavit of Richard Martin do not exhibit any document and are therefore entirely hearsay and incompetent.
4. That the annexures marked ZM at pages 1 to 6(g) are incompetently sealed and or commissioned and therefore inadmissible by way of affidavit evidence.
5. That paragraphs 11, 12, 16 and 17 of the affidavit of Zia Manji constitute unsubstantiated unsupported hearsay and should be struck out.

I have read the two challenged affidavits and the annexures thereto. I have also given due consideration to the submissions of both counsel and the case cited. I will refer to some of the case in this ruling. It appears that the objection is predicated upon Rules 9 and 10 of the Oaths and Statutory Declarations Rules made under Cap. 15 of the Laws of Kenya and on Section 19 of the Stamp Duty Act Cap 480 of the Laws of Kenya.

Rules 9 and 10 of the Oaths and Statutory Declarations Rules read:

“9. All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner and shall be marked with serial letters of identification.

10) The forms of jurat and identification of exhibits shall be those set out in the third schedule”

It was submitted for the defendant that the bundle of annextures identified as “**RM**” in the affidavit of Richard Martin aforesaid has not complied with the said rules and so has the bundle identified as “**ZM1 - 6g**” in the affidavit of Zia Manji. According to the defendant, the said annextures should be expunged from the said affidavits in which event paragraphs 7,13,15,16,17 and 20 of Martin’s said affidavit would be unsupported and paragraphs 11,12,16 and 17 of Manjis said affidavit would also be unsupported. Without the annextures the said paragraphs would contain hearsay evidence and should also accordingly be struck out.

The 2nd plaintiff further complained about the annexure at pages “**7(a)**” to “**7m**” of the said exhibit identified as “**RM**” in the said affidavit of Martin. The annexure is a copy of an assignment and according to the defendant, the same attracts stamp duty and should not be received in evidence as it is not stamped.

For the plaintiff it was argued that there was no basis for the challenge made by the defendant as in its view Martin’s said affidavit was not notarised under the provisions of the Oaths and Statutory Declarations Act but under English Law. With regard to the second complaint regarding want of stamp duty on the assignment, it was submitted that, there was no such requirement. In the alternative it was submitted for the plaintiff that if the court finds that the challenged paragraphs of the affidavits and the annextures have any defects the same are not fatal and have not occasioned any prejudice to the defendant and should be ignored.

Starting with the affidavit of Richard Martin, I note that the same was sworn before one Philip Jones a Solicitor and Notary of Windsor House, Victoria Street Windsor Berks, SL4 1EN England. I have perused Exhibit RM. It is just a plain paper. It has a stamp in the format recommended in Rule 10 of the Oath and Statutory Declarations Rules but it is not signed by the Notary who attested Martin’s signature. The annextures at pages 1 to 8 (c) are separate exhibits and are clearly not securely sealed as envisaged by Rule 9 of the Oaths and Statutory Declarations Rules. There is no doubt in my mind that all those annextures are not properly exhibited in accordance with Rules 9 and 10 of the Rules made under Section 6 of the Oaths and Statutory Declarations Act Cap. 15 of the Laws of Kenya.

With respect to the objection raised against the annexure at pages 7 (a) to 7 (e) i.e. the Assignment, it is not disputed that the same is not stamped. But does the annexure attract stamp duty? I think it does under the Eleventh Schedule of the Stamp Duty Act Cap 480 Laws of Kenya. The instrument is chargeable with stamp duty under Section 23 of the Act. As the instrument was not stamped it is clearly inadmissible under Section 19 (1) of the same Act.

The Section reads:

“19 (1) Subject to the provisions of Sub-Section (3) of this Section and to the provisions of Sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever unless it is duly stamped.

(2) No instrument chargeable with duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.”

Since the said instrument is one of the annextures I have found improperly exhibited, it cannot be admitted subject to the provisions of Section 19 (3).

In the premises the said annextures exhibited as “**RM**” to the affidavit of Richard Martin aforesaid are

struck out and expunged from the said affidavit. Having struck out and expunged the said annexures paragraphs 7, 13, 15, 16, 17 and 20 of Martin's said affidavit contain inadmissible hearsay and are also struck out.

I turn now to the affidavit of Zia Manji aforesaid. The affidavit has exhibited a plain blue paper with a jurat duly sealed by the Commissioner for Oaths to whom the affidavit was taken. Pages 1, 2, 3 (a), 3 (b), 4 (a), 4 (b), 4 (c), 4 (d), 4 (e), 4 (f), 4(g), 4(h), 4(i), 4(j), 4 (k), 4 (l), 5, 6 (a), 6 (b), 6 (c), 6 (d), 6 (e), 6 (f), 6 (g) are different and distinct exhibits and have clearly not been properly exhibited in accordance with Rules 9 and 10 of the Rules made under Section 6 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya. Faced with a similar situation in **West Kenya Sugar Company Ltd. vs. Panachand Jivraj Shah: HCCC No.907 of 1999 (UR)**, Onyango Otieno, J. as he then was said at page 6 of his ruling:

“My understanding of this rule (Rule 9 made under the Oaths and Statutory Declarations Act) is that the exhibit itself is the one to be sealed and not a clean sheet of paper to be sealed and annexed to the affidavit as was done here. I think the reason for this rule is to ensure that the person before whom such affidavit is made, sees the exhibits and ascertains that the exhibits produced before him confirms the statements in the Oath

I think the seal should be on the actual exhibit.

That it has always been done the way it was here is neither here nor there as two wrongs cannot add to a right.”

I agree with the Learned Judge entirely and hold that pages 1 to 6 (g) of the bundle annexed to the affidavit of Manji offend the provisions of Rules 9 and 10 made under Section 6 of the Oaths and Statutory Declarations Act. The decision of Onyango Otieno, J. aforesaid does not appear to have been brought to the attention of Mutungi, J. when he decided differently in **Giro Commercial Bank Ltd. vs. Superfoss Limited & 2 others: HCCC No.1584 of 2000 (UR)** and also to the attention of Ringera, J. as he then was in **Anna Wangui Paul vs. Victoria Commercial Bank Ltd.** who was of the view that the plain papers marked and identified are in fact covers of the annexed exhibits. The Learned Judge further stated that if he was wrong he would consider the non-compliance with the said Rule 9 of the Oaths and Statutory Declarations rules as a mere irregularity of form which was excusable under the provisions of Order 18 rule 7 of the Civil Procedure Rules.

On my part as I have already stated, I am persuaded by the decision of Onyango Otieno, J. as he then was in the **West Kenya Sugar Company case.** Being of that persuasion, I order that the offending annexures at pages 1 to 6 (g) of the exhibits appearing after the plain paper identified as **ZM1 – 6 (g)** in the affidavit of Zia Manji aforesaid be and are hereby struck out and expunged from the said affidavit. That leaves paragraphs 11, 12, 16 and 17 of the same affidavit unsupported. The said paragraphs in the absence of the struck out annexures contain inadmissible unsubstantiated hearsay and are also struck out.

The upshot of this matter is that the Preliminary Objection is upheld and Costs of the Preliminary Objection are awarded to the defendant.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 26th day of JUNE, 2006.

F. AZANGALALA

JUDGE

Read in the presence of: