



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 189 of 2006

GEORGE C.M. KARIITHI & TWO OTHERSPLAINTIFFS

VERSUS

CO-OPERATIVE BANK (K) LTD.....DEFENDANT

RULING

The defendant raised a preliminary objection before the hearing of the plaintiff's application dated 12th April 2006.

The objection was in the following terms:

1. That the application and the accompanying supporting affidavit contravenes the mandatory provisions of the law.
2. The application is fatally defective, frivolous, incompetent and an abuse of the court process.
3. The purported exhibit annexed to the supporting affidavit have not been endorsed by Commissioner for Oaths as required by law.

The plaintiff in the affidavit in support of the aforesaid application annexed various documents as exhibit, which each page bears a page number but the commissioner of oaths seal only appeared on the first page of those bundles of documents.

The defendants preliminary objection was on the basis that the plaintiff in so marking those exhibits breached Rule 9 of The Oaths and Statutory Declaration Rules, which provides:

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

Plaintiff in support of the preliminary objection argued since it was only on the first page of the bundles of exhibits, where the commissioner's seal appeared the other documents following that first document ought to be struck out for being in breach of the aforesaid rule and because there was no evidence that the same were presented before the commissioner for oaths. That once those documents are struck out or expunged the defendant sought the striking out of the plaintiffs aforesaid application on the basis that the same would not be supported by evidence.

Defence relied on Bankruptcy cause No. 45 of 2000: IN THE MATTER OF RATILALA SHUVJI MALDE AND OTHERS particularly to the finding in relation to Rule 9 of The Oath And Statutory Declaration Rule.

“.....the documents allegedly attached to further affidavit of one Martin are no marked by a commissioner for Oaths and are clearly not exhibited at all as is required by the provisions of Oaths and Statutory Declaration Act, particularly rules made there of..... it appears that they were not presented to the commissioner for Oaths at all.”

The objection was opposed on the basis that the defendants’ interpretation of the Oaths and Statutory Declaration Rules was not correct and could not support the preliminary objection.

Plaintiff argued that it was clear that the plaintiff had only one exhibit which had different documents therein. That the first page of that exhibit was properly sealed by a Commissioner for Oaths as required by the rules, and he indeed appended his signature thereof. Plaintiff relied on the case HCCC NO: 1552 OF 2001 MILIMANI – MARY WAMBUI NJURI – V – CO-OPERATIVE BANK OF KENYA LTD and others. The judge in that matter stated:

“In my view, it is an innocuous irregularity in respect of which appropriate steps can be taken to rectify the anomaly and prepare the matter to be heard and determined on merit.”

I have considered the arguments presented before me. It is clear that the defendant abandoned the 2nd preliminary objection and the court therefore will not consider it in this ruling.

Having considered counsel’s arguments and having looked at the alleged offending exhibits I am of the view that Rule 9 has not been contravened at all. The deponent of the affidavit which annexed the exhibit clearly indicated when referring to the different exhibit by quoting the exhibit “GCMKI”. That exhibit “GCMKI” had different pages, that is it was paginated and perhaps for ease of the judge who will hear that applciaiton it would have assisted if the pages could have been mentioned in the affidavit each time the exhibit is relied upon. But that failure is not tantamount to a breach of Rule 9, at all. It is, after all, not unusual for the court, in full hearing, to accept different documents to be marked as one exhibit and the different documents in that exhibit only being distinguishable with marking of perhaps (a) (b) (c) and so on. The bottom line is that there ought to be no confusion as to what is being relied upon either by a witness giving oral evidence or by a deponent of an affidavit. I find that in the present affidavit there cannot be said to be any such confusion.

The end result is that the defendants preliminary objection dated 19th August 2006 must and does fail. The same is hereby dismissed with costs to the plaintiff.

MARY KASANGO

JUDGE

Dated and delivered this 16th June 2006.

MARY KASANGO

JUDGE