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

Civil Case 532 of 2004

AHMEDNASIR ABDIKADIR & CO ADVOCATES…….....….PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED…….....…….DEFENDANT

R U L I N G

By a notice of Motion dated 6th April 2006, the Defendant has sought the review of the ruling which was delivered by this court on 15th March 2006. In support of that application is an affidavit sworn by Mr. JOHN MORRIS OHAGA.

When the application was scheduled for hearing on 20th June 2006, learned counsel for the plaintiff, Mr. Ahmednasir, notified the court that he would wish to cross-examine Mr. Ohaga, on the contents of the affidavit which he had sworn in support of this application.

It was submitted that pursuant to the provisions of Rule 9 of the Advocates (Practice) Rules an advocate was prohibited from appearing as an advocate in a case wherein he might also be required to give evidence either by affidavit or even orally. Therefore, as the plaintiff was seeking leave to cross-examine Mr. Ohaga, it is contended that Mr. Ohaga had no option but to step down from his position as an advocate in this case. The plaintiff says that the need for Mr. Ohaga to step down stems from the fact that he had given evidence on substantive matters, which were contentious.

In the light of that application, the proviso to rule 9 allows an advocate to give evidence on formal or non-contentious matters. And as there was no replying affidavit in the application dated 6th April 2006, the defendant believes that on the matters of fact, there were no competing views. Therefore, it is said that the matters of fact were non-contentious. For that reason, the defendant holds the view that Mr. Ohaga was well within the proviso to rule 9, when he swore and filed the affidavit to support the application dated 6th April 2006. Accordingly, Mr. Ohaga feels that there is no justifiable reason to bar him from also appearing as counsel for the defendant, even though he had sworn the affidavit in support of the application.

In reply to those views, the plaintiff feels that the defendant was wrong to construe the term "**formal**" literally, as an application for review was very substantive, as opposed to a formality. Such an application allows the applicant to bring in further evidence. Therefore, as far as the plaintiff was concerned, the absence of a replying affidavit did not render the affidavit of Mr. Ohaga non-contentious.

In that regard, I hold the view that if one party has made statements on matters of fact, and the other party did not respond thereto, there would be no basis for the said matters being termed as being contentious. I have always understood such statements to be deemed as uncontroverted. Therefore, to the extent that Mr. Ohaga's affidavit has not been answered by any replying affidavit, I find that the matters of fact stated therein remained unchallenged.

For that reason, even though the plaintiff asserted that the issues in the application for review were contested on issues of both fact and law, the plaintiff is yet to contest the matters of fact, because it has not filed an affidavit in reply. Had there been a replying affidavit, the court would have been able to assess the same, so as to ascertain whether or not there were contentious issues of fact.

Pursuant to the provisions of Order 18 rule 2 of the Civil Procedure Rules, the court may, at the instance of either party, order the attendance for cross-examination of the deponent of an affidavit used as evidence in an application.

In my considered view any party who seeks to cross-examine a deponent must satisfy the court that there is a good reason for the proposed cross-examination. In other words, the party ought to lay down a proper legal foundation to justify his application for leave to cross-examine the deponent.

As the requisite rules do recognize the use of affidavits as evidence, especially in the course of interlocutory applications, my view is that the courts ought not to readily permit cross-examination of the deponents of affidavits. If the courts became too willing to allow for cross-examinations, the already limited time available for applications would be further curtailed, to the detriment of the wider interests of justice. Therefore, in order to try and ensure that no more time than is really necessary is further taken up by cross-examination, I believe that it is only in instances where the court is satisfied that the cross-examination was essential, in enhancing the course of justice, that the court should allow deponents to be cross-examined.

In this particular case, the plaintiff did not spell out the grounds for the desire to cross-examine Mr. Ohaga. Therefore, I find no reason to order that Mr. Ohaga be cross-examined, as the plaintiff did not lay a foundation to warrant it. For those reasons, I decline the plaintiff's request to cross-examine Mr. Ohaga.

But, in the event that the plaintiff still wishes to challenge the matters of fact, as contained in the affidavit of Mr. Ohaga, I hereby grant to the plaintiff leave to file and serve a replying affidavit within the next SEVEN (7) DAYS.

Meanwhile, it is to be noted that the provisions of Rule 9 of the Advocates (Practice) Rules, are in the following terms:

"**No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or declaration or affidavit, he shall not continue to appear:**

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears."

In my reading of that rule, it does not give rise to an automatic bar to affidavits being sworn by advocates who then also appear before the court for the hearing of matters in which the affidavits are adduced in evidence.

The rule allows advocates to swear affidavits on "**formal or non- contentious matter of fact, in any matter"**

In this case, the matter before the court is an application for review. The application is therefore not a formal one, in any sense of that word, as it is contested.

But, at the same time, until and unless the affidavit in support of the application were contested, by way of a replying affidavit, there was no way that the court could say that the facts deponed to, were contentious.

In that regard, Mr. Ohaga has already sworn an affidavit. Therefore, it was no longer a situation in which the said advocate was still contemplating whether or not he might "**be required as a witness to give evidence whether verbally or by declaration or affidavit…….**"

Mr. Ohaga had obviously considered the options and come to the conclusion that his evidence was required, hence his affidavit in support of the application.

And whereas the facts he deponed to may or may not turn out to be contentious, depending on the plaintiff's reply thereto, the fact will remain that the application itself was contentious.

That being the position, I hold the considered view, that following the swearing of the supporting affidavit herein, Mr. Ohaga cannot now continue to also appear as an advocate in the matter.

It is so ordered.

Dated and Delivered at Nairobi this 27th day of July 2006.

FRED A. OCHIENG

JUDGE