



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 303 OF 2004

GOODEARTH LIMITED PLAINTIFF

VERSUS

ARIBI ABDUL KARIM DEFENDANT

RULING

Before me is an application expressed to be brought under the provisions of Sections 34 and 35 of the Advocates Act Order 7 rule 1 of the Civil Procedure Rules, the inherent powers of the Court, and all other enabling provisions of the Law. The application is by the Defendant. It seeks two main orders and these are that:-

1. The affidavit sworn by one Virendra Narsidas Ponda on 8th June 2004 and filed on 9th June 2004 be struck out.
2. The Plaint dated 8th June 2004 and filed on 9th June 2004 be struck out.

The application is not supported by an affidavit. The grounds for the application are that:

- (a) The affidavit aforesaid is not endorsed with the name of the person who drew or prepared or caused it to be drawn or prepared. And
- (b) Upon the affidavit being struck out the Plaint cannot stand.

The application is opposed and Grounds of Opposition have been filed.

The application was canvassed before me on 7th December, 2004 by Mr. Owino Learned Counsel for the Defendant and Mr. Oluoch Learned Counsel for the Plaintiff. Counsel for the Defendant relied upon the grounds set out in the application. He submitted that the verifying affidavit accompanying the Plaintiff contravenes the provisions of Section 34 and 35 on the Advocates Act as the drawer's particulars are not endorsed thereon. This failure to endorse the name and particulars of the drawer on the verifying affidavit rendered the affidavit incurably defective Counsel so argued. He prayed that the verifying affidavit should therefore be struck out. He added that consequent upon the striking out of the verifying affidavit the Plaintiff should be struck out as it would be incompetent under the provisions of Order VII rule 1(2) of the Civil Procedure Rules. Counsel placed reliance on two decisions of the High Court. The first one is the case of Barclays Bank of Kenya Ltd -v- Solomon Otieno Orero: Nairobi HCCC No.1736 of 2001 (UR) in which Njagi J. struck out an affidavit for failure to comply with the mandatory provisions of

Section 35(1) read with Section 34 of the Advocates Act. He also struck out the application supported by the defective affidavit.

Counsel also placed reliance upon the case of Johann Distelberger –v- Joshua Kirinda Muindi: Nairobi HCCC No.1587 of 2003 (UR) in which Nyamu J. also struck out an affidavit and the application it supported for the same reason.

On this authorities Counsel prayed that the verifying affidavit and the plaint it seeks to verify should be struck out with costs.

Responding to the above submissions, Counsel for the Plaintiff submitted that failure to endorse the name and address of the drawer of an affidavit is not fatal. He too relied upon several decisions of the High Court. He cited my own decision in Geology Investments Ltd –v- Rogonyo Njuguna and 3 others: Nairobi HCCC No.1067 of 2002 (UR) in which I held that an affidavit is a document envisaged by Section 35 (1) of the Advocates Act as it is covered by Section 34(1)(f) of the said Act. However, my view was that these sections were not intended to invalidate documents or instruments by advocates who had omitted to endorse their names and addresses thereon. The mischief intended to be prevented was to discourage unqualified persons from preparing certain documents. The verifying affidavit in that case, save for the omission to endorse the name of the drawer thereon, qualified as a verifying affidavit. It was not wanting in any other form or content. The verifying affidavit did not offend the provisions of order 18 of the Civil Procedure Rules or the Oaths and Statutory Declarations Act (Cap.15) Laws of Kenya. I therefore did not strike out the affidavit or plaint. I however ordered a compliant affidavit to be filed.

Counsel for the Plaintiff further relied upon the case of Dubai Bank Kenya Ltd –v- Come-cons Africa Ltd: Nairobi HCCC No. 68 of 2003 (U.R.) IN WHICH Ibrahim J. held, that failure to endorse the name of the drawer on an affidavit was an irregularity in form. He declined to strike out a verifying affidavit and the plaint whose contents it verified.

On these authorities Counsel urged me to dismiss the application to strike out the verifying affidavit and the Plaint in this case.

I have now considered the application, the Grounds of Opposition, the submissions of the Counsels appearing and the authorities cited. Having done so I take the following view of the matter.

The requirement for a verifying affidavit is contained in Order 7 rule 1 (2) of the Civil Procedure Rules. However sub-rule 3 of this rule uses permissive language. This rule in my view gives the Court a discretion to either strike out or not a plaint which is not accompanied by an affidavit verifying the correctness of the averments contained in the Plaint. The verifying affidavit in this case is a valid affidavit save for the endorsement of the drawer thereof.

In the Geology Investments Ltd –v- Rogonyo Njuguna and others case (supra) I was of the view that Courts should lean in favour of doing substantial justice to the parties rather in favour of slavish adherence to rules of procedure. I have no reason to change my view since I made that decision. Accordingly, in the exercise of my discretion under Order 7 Rule (3) I decline to strike out the verifying affidavit and plaint in this case. In the larger interests of justice I grant leave to the Plaintiff to file a supplementary affidavit to comply with Section 35 (1) of the Advocates Act. The supplementary affidavit should be filed within seven (7) days of today.

The Defendant's application dated 30 July, 2004 is dismissed. As the application was not altogether without merit I award costs to the Defendant.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY, 2005.

F. AZANGALALA

JUDGE

Read in the presence of :-