



REPUBLIC OF KENYA
THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
Civil Case 1172 of 2002

DELACO LIMITED.....1ST PLAINTIFF

REDRA LIMITED2ND PLAINTIFF

STEPHEN OMONDI OWINO.....3RD PLAINTIFF

OWINO OKEYO & COMPANY.....4TH PLAINTIFF

VERSUS

JOB OKUNA OYUGI.....1ST DEFENDANT

DOUGLAS ODHIMBO OYUGI.....2ND DEFENDANT

JOSHUA ONYANGO OGANGO.....3RD DEFENDANT

G M GENERAL CONTRACTORS LIMITED4TH DEFENDANT

CITY FINANCE BANK LIMITEDINTERESTED PARTY

R U L I N G

The Chamber Summons herein, dated 8.8.2003, under Order I r.10, Order 6 r. 13 (1) (b) (c) and (d) and Order 18 rule 3 and Section 3A of Cap. 21, seeks the Orders that:

1. - Already spent.
2. The consent order made on 15.11.2002 joining City Finance Bank Ltd. as an Interested Party to this suit be set aside.
3. The name of the Interested Party be struck out from this suit.

Alternatively,

4. The affidavit of Stanley Wakaba filed on 13.11.1002 and affidavit of Srinisavan Venkata Romani dated 5.12.2002 be struck out
5. Costs of this application to the Plaintiffs.

The application is supported by the affidavit of the 3rd Plaintiff – Stephen Owino – and is the grounds that –

- a) The Interested Party's affidavits are scandalous and oppressive;
- b) The facts in the Interested Party's affidavits are false and amount to misrepresentation
- c) The Interested Party has no interest in this suit.

I have carefully perused the pleadings herein, and considered the submissions by counsel for all the parties.

I begin by observing that for the purposes of this application, the Defendants are not Respondents. Effectively therefore, the application is between the Plaintiff/Applicant, represented by Mr. Owino, and the Interested Party, represented by Mr. Singh.

Order 50 rule 16 (1) of the Civil Procedure Rules under which the applicants seek striking out the Replying Affidavit of the Interested Party provides:

“Any Respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or statement of grounds of opposition, if any, not less than three clear days before the date of the hearing.”

Sub-rule (3) provides:

“If a respondent fails to file a replying affidavit or a statement of grounds of opposition the application may be heard ex parte.”

Factually, the Respondent – the Interested Party – herein filed its opposition to the application herein, on 23.9.2003, while the hearing date was 25.9.2003. This flies into the face of the above mandatory provisions of sub-rule (1) of the Rule 16 of Order 50 above.

On that basis, the applicants sought orders that the affidavit be struck out as invalid.

In opposition to the striking out prayers, Mr. Singh quoted the authority in **FRANK FERNANDES –VS- S. N. MURRAY WILSON**, Civil Case No. 235 of 1999, where the judgment by Mbaluto J. was based on the decision of the Court of Appeal Civil Appeal No. 75 of 1998, to the effect that an application should not be treated as unopposed so long as there was a replying affidavit or grounds of opposition on the record, albeit filed out of time.

With all due respect to the learned counsel for the Respondent – Interested Party herein, both the decisions, that by Mbaluto J. and that of the Court of Appeal, were prior to the 2001 amendments of Order 50 Rule 16 of the Civil Procedure Rules, vide Legal Notice 128/2001, where the period has specifically and mandatorily provided to be not less than three clear days before the date of hearing.

To that extent, the authorities are not helpful to the Respondents case. I have no doubt in my mind that were those cases heard under the current provisions, the decisions would definitely be different and in line with the statutory provisions.

Accordingly, I hold that the Replying Affidavit by the Interested Party herein is invalid for breaching a mandatory provision, and I hereby strike the same out.

Having struck out the Replying Affidavit, it naturally follows that the application dated 8.8.2003, is unopposed and I grant the application as prayed in prayer Nos. 2, 3 and 6 of the Chamber Summons herein.

DATED and Delivered in Nairobi this 20th day of May, 2005

O. K. MUTUNGI

JUDGE