

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA
Civil Suit 27 of 2005

FRANCIS EKUTU WASHIKA.....1ST PLAINTIFF

WASHINGTON KHWALE.....2ND PLAINTIFF

VS

VINCENT SAMBULIA..... 1ST DEFENDANT

MUMIAS OUTGROWERS CO. (1998) LTD.....2ND DEFENDANT

R U L I N G

In a summons dated 14th April 2005 filed pursuant to the provisions of Sections 3, 3A and 63 (c) of the Civil Procedure Act and Order XXXIX rules 1, 2 and 3 of the Civil Procedure Rules, Francis Ekutu Washika and Washington Khwale, the plaintiffs herein sought for inter- alia to have Vincent Sambulia restrained from holding office or carrying out the functions of a director to Mumias Outgrowers Company (1998) Ltd the 2nd defendant herein. They also sought to restrain Mumias Outgrowers Co (1998) Ltd, the 2nd defendant, from carrying out, calling, conducting, organizing for the elections of the remaining directors of the 2nd defendant scheduled for July 2005 until the issue of the election of the directorship of the central Zone is resolved. The summons is supported by the affidavit of Francis Ekutu Washika and a further affidavit of Washington S.W. Khwale both sworn on 14th day of April 2005.

When the summons came up for interpartes hearing Mr. Lutta for the 2nd defendant sought to argue a preliminary objection contained in a notice dated 21st April 2005. The preliminary points of law were basically against both the aforesaid supporting and further affidavits.

The first point argued by Mr. Lutta was to the effect that the deponents of the above mentioned affidavits did not disclose their sources of information save for paragraph 17 of the supporting affidavit of Francis Ekutu Washika. Mr. Barasa who appeared for both the plaintiffs opposed this argument on the ground that the averments in the affidavits contained first hand information hence they were facts within the knowledge of the deponents.

Mr. Lutta did not cite the legal provisions which he thought the deponents of the two offending affidavits had breached in making them. However, I can only infer that he must have had in his mind the provisions of Order XVIII rule 3(1) of the Civil procedure rules which provides that:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

I have perused the two affidavits and I agree with the submissions of Mr. Lutta that paragraph 17 of the affidavit of Francis Ekutu Washika is the only paragraph in which the deponent disclosed the source of his information out of the 26 paragraphs therein. Washington Khwale, the deponent of the further affidavit did not bother to disclose the sources of his factual information. Mr. Lutta has urged me to have the two affidavits struck out due to this defect. Mr. Barasa for the plaintiffs argued that the affidavits can only be struck out if they are scandalous which according to him is not the case in this matter.

In a nutshell the two aforementioned affidavits did not disclose the deponents’ source of knowledge or

their basis of belief regarding the matters stated on information and belief. It is also apparent in the affidavits that there was no distinction between matters stated on information and belief and matters deposed to from the deponents' knowledge. The consequence of such a deficiency is to obviously have the affidavits struck out. In my view the defects render the affidavits fatally defective hence of no evidential value. I adopt the position taken by the court of Appeal for East Africa in the case of CASPAIR LTD VS HARRY GANDY (1962) E.A p 414 in which it held inter alia that the affidavit did not state the deponent's knowledge of or grounds of his belief in the matters set out in the affidavit nor did it distinguish between matters stated on information and belief and matters to which the deponent swore from his own knowledge. I will just restate that where an affidavit is made on information it should not be acted upon by any court unless the means of information are indicated. The second preliminary point which was argued by the 2nd defendant's counsel against the two affidavits was to the effect that the affidavit did not disclose where it was sworn contrary to the provisions of Section 5 of the Oaths and Statutory Declarations Act Cap. 15 Laws of Kenya. Mr. Barasa for the plaintiffs conceded to this objection but argued that the defect is purely on want of form hence excusable under the provisions of Order XVIII rule 7 of the Civil Procedure rules which gave this court the discretion to admit such affidavits because the defects relate to form. Mr. Lutta countered the arguments saying that the provisions of a subsidiary legislation cannot override the provisions of an Act of parliament.

It is not denied that the provisions of Order XVIII of the Civil Procedure rules are the provisions of a subsidiary legislation promulgated pursuant to the provisions of S. 81 of the Civil Procedure Act Chapter 21 Laws of Kenya. I agree with the submissions of Mr. Lutta that the provision Order XVIII of the Civil Procedure rules cannot override the provisions of Section 5 of the Oaths and statutory Declarations Act. The provisions are couched in mandatory terms and must be complied with. Failure to comply with that provision when making the two affidavits rendered the two documents void from the beginning. The commissioner for oaths failed to disclose where the affidavit was sworn. This is a fatal mistake which cannot be cured at this late stage.

For the above reasons the preliminary objection is sustained with the end result that the supporting affidavit of Francis Ekutu Washika and the further affidavit of Washington Khwale are ordered struck out. The consequence is that there is no competent summons before this court. The summons dated 14th April 2005 must go with the interrim orders which are hereby set aside with costs to the 2nd defendant.

DATED AND DELIVERED THIS 10th DAY OF May 2005

J.K. SERGON

JUDGE