



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CIVIL CASE 101 OF 2001

NAMAI ODDER BEATRICE.....PLAINTIFF

VERSUS

KENYA REINSURANCE CORPORATION LTD.....DEFENDANT

RULING

By a Notice of Motion dated 24.06.2001 the Defendant herein sought orders *inter alia* to discharge the order of injunction granted on 1.03.2001. The Appellants / Defendant failed to state at the foot of the application the mandatory caution required by Order L rule 15(2) of the Civil Procedure Rules which says:

“(2) Every Motion or Summons shall bear at the foot the words –

“If any party served does not appear at the time and place above mentioned such order will be made and proceedings taken as the court may think just and expedient.”

The Plaintiff also objects to the Defendant’s Notice of Motion on the ground that the Supporting Affidavit of one Jane F. Otieno sworn on 18.07.2002 does not comply with the requirements of Order XVIII rules 3(1) and 4 which are to the effect that –

“3(1) 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.”

On the first ground of the Plaintiffs Preliminary Objection dated 26.10.2004 to the Notice of Motion, Mr. Arum learned Counsel for the Plaintiff/Applicant contended that the said provisions of Order L rule 15(2) are mandatory in nature, and failure to comply with the same is fatal to the application, and is not an irregularity capable of being cured by amendment.

Similarly with regard to the second objection, Mr. Arum learned Counsel for the Plaintiff stated that Ms. Jane F. Otieno, the deponent of the Affidavit in support of the Notice of Motion had made averments therein which were not within her knowledge or information, the sources of which she had not disclosed.

The Plaintiff had a third ground for seeking to strike out the Defendant’s Notice of Motion. Counsel stated that this application was a duplication of a similar application filed on 16.08.2001, and that this application had also not been prosecuted. Counsel submitted that this being so, the Defendant’s application was being frivolous and vexatious and without merit and was an abuse of the process of court.

Commencing with the third objection, that there is a similar application dated 16.08.2001, there is indeed such similar application. It is an Amended Notice of Motion but seeks the same orders as in the Notice of Motion of 24.06.2002 namely that the orders of injunction granted by Hon. Mr. Justice Khamoni be set aside. It was however brought under the provisions of Order L rule 17. It might therefore not hold because the Defendant cannot probably be granted orders sought under that rule hence the filing of the application of 24.06.2002.

On the second ground that the Supporting affidavit of Ms Jane F. Otieno does not comply with the provisions of Order XVIII rule 3(1), the deponent avers that she is the Senior Legal Officer of the Defendant Company conversant with the issues at hand and duly authorized and competent to swear the Affidavit. In terms of Order III rule 2(c) of the Civil Procedure Rules, all that the deponent needs to show is that she is a recognized agent of a Corporation, she is an officer of a Corporation and to say that she is duly authorized to swear the Affidavit.

This was the position Ringera J. (as he then was) found in the case of ***Microsoft Corporation versus Mitsumi Computer Garage Ltd (2001) 2 EA 460 (CCK)***. There is therefore no basis for this ground of the Plaintiff's objection and the same fails.

On the Plaintiff's first and perhaps more fundamental ground that the Defendant failed to give the mandatory notice required under Order L rule 15(2), Mr. Havi learned Counsel for the Defendant told the Court that failure to state the notice was merely a procedural irregularity which does not go to the root of the application or affect the jurisdiction of the Court to determine the matter. Counsel submitted that the intention of the rule was to ensure that the party affected by the Notice of Motion or Summons was duly notified. As the party intended to be affected by the Notice of Motion was already in court, the intention of the order had been met, and the Plaintiff had not suffered any prejudice by reason of the failure to include the footnote to the application.

Those were the parties respective Counsel's arguments. I wish to express my opinion on the application.

Firstly, this application is like a headless chicken. It is only good for the *sufuria* or cooking pot. There is no prayer to the preliminary objection as to what the court is supposed to say at the end of it all. It does not say that the application of the Defendant be struck out if the Preliminary Objection was found to be a true preliminary objection based upon a pure point of law, which assumes that all the facts relating to it are agreed, and at the end of the agitation thereof would conclusively determine the issue – see the case of **MUKISA BISCUIT MANUFACTURING CO. LTD VS. WEST END DISTRIBUTORS LTD (1969) EA 696.**

There is nothing in either the Preliminary Objection or submissions by Counsel for the Plaintiff to show that the Preliminary objection would either dispose of the Defendant's application, or still less the suit herein which the Plaintiff is obviously not keen to prosecute as it is enjoying a prolonged injunction in the matter.

Secondly, although rule 3(a) of Order L is couched in apparently mandatory language, it is in my opinion directory in nature. ***De Smiths JUDICIAL REVIEW OF ADMINISTRATIVE ACTION***, has this to say at p. 142 – **DISREGARD OF PROCEDURE AND FORMAL REQUIREMENTS**.....

“When Parliament prescribes the manner or form in which a duty is to be performed or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescription. The court must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or avoidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done. (though in some cases it has been said that there must be a substantial compliance” with statutory provisions if the deviation is to be excused as a mere irregularity) in **CONEY VS CHOYCE [1975] 1 WLR 222** (where the attempt bona fide to comply and absence of prejudice from non-compliance are emphasized).

“.....the whole scope of and purpose of the enactment must be considered and one must assess the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act.”

.....breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, (R vs Decorum Gaming Licensing Committee, exp E.M.1 Cinemas and Leisure Ltd [1971] 3 ALL ER 666) or if substantial prejudice has been occasioned or suffered by those for whose benefit the requirements were introduced or if serious public inconvenience would be caused by holding them mandatory, or if the Court is for any reason disinclined to interfere with the act or decision that is impugned.”

There is of course no issue of serious or any inconvenience being caused to the public here. In the current application the intention of the Rules Committee was to ensure that the party affected by the Notice of Motion or Summons was notified or informed. That purpose has been fulfilled in this case. The party affected has appeared by her Advocate. The party has not been prejudiced in any way. The jurisdiction of this court is not in any way affected.

I am tempted to think and say that the sole purpose of this Preliminary Objection (which as I have stated above, is not a true Preliminary Objection at all) is to buy time and allow the Plaintiff to continue enjoying the injunctive orders granted to her on 1.03.2001. It is ill-motivated. It is not arguable. It is scandalous. It is an abuse of the process of the court.

For these reasons, the Plaintiff's Preliminary Objection dated 26.10.2004 is dismissed with costs.

Dated and delivered at Nairobi this 2nd day of June 2005

ANYARA EMUKULE

JUDGE