



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE NO. 2038 OF 1996

MARY WANJIRU KANYUA PLAINTIFF

VERSUS

MUCHAI NG'ANG'A DEFENDANT

RULING

The Applicant had instituted these proceedings by way of an originating summons, dated 30/5/96. The said proceedings were instituted pursuant to the provisions of Order XXXVI rule 3D of the Civil Procedure Rules, Section 28 of the Registered Land Act, Sections 37(a) and 38 of the Limitations of Actions Act, and all other enabling provisions of the law. The Originating Summons was supported by the affidavit of Mary Wanjiru Kanyua, the applicant.

Following service of the Originating Summons upon the Respondent, Muchai Ng'ang'a, the said Respondent filed a Replying Affidavit. The only deposition in the said Replying Affidavit, which is relevant to this Ruling is that the Respondent was not the registered proprietor of the suitproperty. In the light of that revelation, the Applicant conducted a search at the Thika Lands Registry, and ascertained that the suit property was registered in the name of Ng'ang'a Njoroge. Having thus ascertained the identity of the registered proprietor the applicant applied to this court to have Ng'ang'a Njoroge joined as a Respondent to the suit. When the applicant filed an Amended Originating Summons dated 28/5/01; the new pleading incorporated Ng'ang'a Njoroge as the 2nd Respondent. The Amended Originating Summons was supported by the affidavit of Mary Wanjiru Kanyua (the applicant). The affidavit was sworn on 28/5/01. When the case came up for hearing before me on 26/1/04, the 1st Respondent raised a Preliminary Objection. In a nutshell, the respondent submitted that the originating Summons was a nullity because the applicant's supporting affidavit had not been sworn.

It is common ground between the parties that the affidavit attached to the originating summons dated 30/5/96 filed in court had not been commissioned by a Commissioner for Oaths. As far as Mr. Mbiyu advocate is concerned, the failure to commission the affidavit rendered the entire suit fatally defective. He noted that the provisions of Order 36 rule 3D (2) require the Originating Summons to be supported by an affidavit. And therefore, as the document titled "Affidavit" which was filed in support of the originating summons had not been commissioned the said originating summons was a nullity, as there was no supporting affidavit.

In answer to the respondent's submissions, Mr. Olewe did not purport to offer any cure to the original document. However, he did clearly state that the case presently before the court is the Amended Originating Summons dated 28/5/01. That pleading was supported by the applicant's affidavit, which had been duly sworn before Leah W. Mbutia, an advocate and Commissioner for Oaths.

In reply to the applicant's submissions, the respondent emphasized that the amendment of pleadings does not cure the fatality of the original suit. He emphasized that the suit itself dates back to 16/8/96, when it was originally filed. Both advocates are correct to some degree. The applicant is correct insofar it is true that the pleading presently before the court is the Amended Originating summons. But of course, the said Amended Originating Summons would not be capable of amending the failure to have commissioned the original supporting affidavit. Indeed the only real amendment was the introduction of a 2nd respondent. Thus the respondent is correct, when he says that the suit still dates back to 1996. If the said original Originating Summons were fatally defective, could the amendment which added another party to the proceedings cure the defect? The answer must be in the negative.

I also note here that the applicant's advocate informed the court that the supporting affidavit was actually sworn before Mr. A.D. Rachier, advocate and Commissioner for Oaths. Basically, what seems to have happened is that the applicant's advocates filed an affidavit which had not been commissioned by Mr. Rachier, whilst the document bearing the stamp and signature of the Commissioner for Oaths was inadvertently retained in the file of the applicant's advocates. But all this is in the realm of conjecture. However, what is clear is the fact that the said sworn Affidavit was not made available to the court. Order 36 rule 3D provides as follows:

“(1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed”.

The said provisions are very clear. It is mandatory that the originating summons, by which the proceedings are initiated, be supported by an affidavit. Thus if the originating summons was not supported by an affidavit, it would be irregular. But does such irregularity go to jurisdiction, so as to render the originating summons fatally defective? In order to answer this question adequately, the court believes that there is need to draw a parallel between the provisions of Order 36 rule 3D and Order 7 rule 2. The latter reads as follows:

“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments in the plaint”.

In effect, the provisions of the 2 rules both require the pleadings by which a suit is commenced to be supported or accompanied by an affidavit. Although Order 7 rule 2 was only introduced fairly recently, it has already been litigated upon on numerous occasions. I therefore believe that I should be able to receive a reasonable amount of guidance from some decisions on that provision. Mr. Mbiyu advocate for the Defendants cited the authority of Civil Application No. NAI 345 of 2000 Bishop Joshua Gawo & Others V. Nairobi City Council & Others In that case, the court of appeal held that the provisions of order VII rule 1 (2)

“clearly state that the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint. Mr. Wamalwa for the applicants sought to show that the affidavit in support of the application served the same purpose to be served by the affidavit which should have accompanied the plaint. In our view, the rule is so clear as to leave no room for such interpretation”.

I do adopt the said decision of the Court of Appeal, and adapt it in this case. The nett result would be that if the originating summons was not supported by an affidavit, there would be no other conclusion other than that the said originating summons was incurably defective. To borrow the words of Shah J.A. in Civil Application No. NAI 270 of 2001 Lt. Colonel Joseph Mweteri Igweta V Mukira M'Ethaa & Another,

“Yes, if a procedural defect is fundamental to the proceedings a case of nullity may

arise and a nullity, of course, is not curable because what is null and void ab initio remains so”.

In the light of the foregoing, I must now attempt to answer the question as to whether the failure to file a sworn affidavit is a mere procedural inadequacy that does not go to jurisdiction. Is such a defect curable?

The provisions of Order XVIII rule 7 stipulate as follows;

“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof”.

Thus if the affidavit had some defect by misdescription of the parties or otherwise, or other irregularity in form, the court could possibly exercise its discretion and receive it in evidence. However, that rule clearly envisages an affidavit that had been sworn. Once an affidavit had been sworn if it had irregularity in form, the court could possibly receive it. The difficulty in this case is that the “affidavit” of Mary Wanjiru Kanyua attached to the originating summons dated 30/5/96 was neither dated nor sworn. At best the said document could be described as the final draft of Kanyua’s affidavit. It could not become an affidavit until and unless it was sworn by Kanyua before the Commissioner for Oaths. I therefore have no alternative but to conclude that the originating summons was not supported by an affidavit, as required by Order XXXVI rule 3D. The said originating summons is thus fatally defective, and must be struck out, with costs.

However before I conclude this Ruling, I wish to observe, obiter, that the Plaintiff’s “affidavit” in this case bears a signature which I presume was that of the intended deponent. If that be the case, it would mean that the said document was signed by the plaintiff, in the absence of the commissioner for oaths. It would appear that the document would thereafter have been presented to the commissioner for oaths for his signature and stamping. Any party, advocate or commissioner for oaths who might be practising this method of administering any oath or taking of any affidavit must be reminded that such a practice is completely irregular. The practice may lend itself to many people due to convenience, but anybody practicing it must appreciate that, strictly speaking, the final document is not an affidavit. Whereas it might be difficult for the court or any other third party to ascertain the fact that the commissioner for oaths appended his stamp and signature in the absence of the signatory to the said document, if the truth should be out, the document would definitely be struck out. And this court would also make recommendations, in such cases, that the professional body that regulates the practice of advocates, (who are commissioners for oaths) should take appropriate disciplinary actions against such professionals.

I know that some advocates and parties may frown at these remarks, but I hope that everybody concerned will take time to digest it. Remember that if you are a commissioner for oaths and you append your stamp and signature to a document not signed in your presence, you really have no idea whether or not the signature had been forged. The said document would also be telling a lie on its face, whereat it proudly declares that it had been “sworn before me”.

In conclusion, and for the avoidance of any doubt, I order that the originating summons dated 30/5/96 be struck out with costs. The consequence of this order is that the Amended Originating summons dated 28/5/01 stands struck out too.

Dated at Nairobi this 1st day of March 2004.

FRED A. OCHIENG

Ag. JUDGE

