



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO.151 OF 2003

GEOFFREY MAKANA ASANYO PLAINTIFF

VERSUS

KENYA AGRICULTURAL RESEARCH INSTITUTE DEFENDANT.

RULING

I have carefully considered the Preliminary objection. Mr. Ogutu submitted that the supporting affidavits are defective that they do not comply with s.34 and 35 of the Advocates Act. It is not endorsed with the name of the drawer at the bottom of the affidavit.

Further it was submitted that the annexures referred to in the affidavits do not comply with rules 9 of the Oaths and Statutory Rules made under Rule 6 of the Act in that they are not stamped and sealed. The stamp and seal is on a separate piece of paper and not on the documents themselves.

The application was opposed. Mr. Kenyatta submitted that the counsel for respondent has substantially responded to the affidavits complained of. He further said the affidavits show who drew them.

As for the annexures he submitted that rule 9 of the oaths and Statutory Act was made to enable parties and the court to identify exhibits. The paper appended to the exhibits is properly stamped and sealed and as such the rule has been complied with. He said the annexures had many pages and it was not necessary to stamp and seal any page.

I have gone through the affidavits in support of the application. Page 4 of the affidavit of the applicant clearly shows the affidavit is drawn and filed by

Kagwimi Kangethe & Co. Advocates,

Shell & BP House, Ground floor,

Harambee Avenue,

P.O. Box 3009-00200.

It was to be served upon

Kenya Agricultural Research Institute,

Kisii Regional Research Centre,

P.O. Box 523,

KISII.

This clearly complies with S.35(2) of the Advocates Act. I would only presume that page escaped the eyes of the counsel for the respondent and I will not belabour on that point further.

The other issue is that of sealing and stamping the annexures to the affidavit. There is no dispute that there is no stamp and seal on each and every document attached to the affidavit. What there is a paper on top of each bundle of documents which is sealed, stamped and marked. I concur with counsel for the respondent that this does not comply with rule 9 made under S.6 of the Oaths and Statutory Declarations Act. True courts should not be tied down by rules but in this case it is not even clear what the documents are. For instance in para.4 of the affidavit the deponent states.

Annexed herewith and marked bundle “GM1” are the letters of allotment and receipts.” He does not say how many letters or receipts are in the bundle. If one is missing the court has no way to know that. He should have clearly indicated them. He should have stamped and sealed them. His explanation that they are many pages is not borne out. Though “many” may be objective what is referred to “GM1” has only 6 pages, GM2 only three, GM3 three pages. What was so difficult in sealing stamping and marking those pages. The Hon. Justice Onyango Otieno – as he then was put is very clear in the case of WEST KENYA SUGAR CO. LTD VS. PANACHAND JIVRAJ SHAH & OTHERS HCCC.NO.907 OF 1999 (MILIMANI). He stated that if a mere paper is sealed and signed one cannot ascertain the same exhibits referred to in the affidavit are the same exhibits the Commissioner of oaths did see and certify to be correct in the affidavit.

It is therefore clear that the sealing and signing of the annexures are improper and the preliminary objection would succeed to that extent. Counsel for the Respondent asked court to expunge par. 4,5, 6, 9, 10 and 13 of the applicant’s affidavit which will leave the affidavit just a skeleton and as such the application will not be supported by any affidavit. This seems to be the thing to do.

However I feel the courts have discretions to have defects rectified. The application itself is proper. The affidavit is also okay apart from the annexures. To do justice courts have in cases where no prejudice is done to the other party, bend backwards to allow a party to be heard on merit. I think this is a proper case to do so. I therefore will order the applicant to properly seal, stamp and sign all the annexures within 10 days from today’s date. He will also pay the respondent costs of this preliminary objection.

KABURU BAUNI

JUDGE

24/2/04

Signed, dated and delivered on 24/2/04 in presence of Mr. Ogotu who undertakes to forward ruling to Mr. Kangethe for he Respondent.

KABURU BAUNI

JUDGE.