



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 221 OF 2003

EMANUELE EMILLIO VILLA.....PLAINTIFF

=V E R S U S=

1. VALERIO BUCCIARELI.....1ST DEFENDANT

2. OMNI MEGA LIMITED.....2ND DEFENDANT

3. GABBIANO LIMITED.....3RD DEFENDANT

R U L I N G

The Plaintiff filed a Complaint on 11/9/2003 at Mombasa registry. The verifying affidavit as required under the provisions of Order 7 rule 2.

However, the Affidavit is sworn by a holder of Power of Attorney registered as IPA 10148.

On the same day he filed an application by Chamber Summons supported by an affidavit again drawn in the name of Emmanuella Emilio Villa the Plaintiff but signed by the holder of Power of Attorney IPA 10148.

This means that the person who appeared before the Commissioner of Oaths as required under Statutory Declarations Act, Cap.15 rule 7 Laws of Kenya was not the deponent but his Attorney. The holder of Power of Attorney registered as IPA 10148 is one Benedict Okare Ochieng and Silvana Francoli to act jointly and generally as Attorney and Agents of the Plaintiff.

This Power of Attorney was made on 15/1/03. However, on 12/8/03 the authority was revoked by document registered as CR. P/A 10355 registered on 13/8/2003 as regards one of the Attorneys Silvana Francoli. It is a major question therefore if as on 11/9/2003 the authority given under that document was available and valid to the person who has signed without disclosing his name.

On 19/9/2003 the 1st and 2nd Defendants filed grounds of opposition through their advocate Fadhil & Kilonzo, challenges the validity of the two affidavits verifying the Complaint and supporting the Chamber Summons application. The said advocates also filed a Notice of Preliminary Objections on the same points of the two affidavits being fatally defective.

The 3rd Defendant followed suit through its advocate Mouko & Co. The argument was made in court on 15/10/03 when Mr. Kilonzo advocate argued that the entire suit Complaint and Chamber Summons were fatally defective and should be struck on the ground that the affidavits offend the provisions of Cap.15 Laws of Kenya and provisions of Order 18 Civil Procedure Code.

I have considered submissions by counsel. It is clear that the deponent of the matters contained in the affidavits did not appear before the Commissioner of Oaths to swear. This is in contravention of Cap.15 rule 7 and it was unlawful for the Commissioner of Oaths to commission a document whose maker was not before him. There is nothing to indicate who really has the information contained therein, whether the holder of Power of Attorney or whether it is the named deponent.

In the case of Yusuf Abdul Gani vs Fazal Garage, 1955 K.L.R. 17.

The matter of Order 18 Civil Procedure Rules and making affidavits was discussed. The court said:

“There may be occasions in which affidavits may properly be sworn out by an Attorney or advocate on the information of litigant, for example, when the litigant himself is out of the jurisdiction or ill but where litigant himself is available or some third person himself aware of the facts then I am of the view that the best evidence rule implies that one of those persons should swear out the affidavit it not some agent, professionally qualified or otherwise to do so on their behalf, merely on information supplied by the litigant it may itself be hearsay”

These comments relate to Order 18(3)(1) where advocate swore affidavit on behalf of his clients.

In this case there is no evidence why the deponent had to sign by his Attorney. No disclosure whether he was ill or out of jurisdiction. In fact the affidavit indicates that he was right here in Kenya in Malindi.

My view is that the affidavit cannot be said to be sworn. The person who took oath before the Commissioner is not the deponent. It is not explained that deponent is aware of the contents of the affidavit. It is clear the deponent was not sworn by the Commissioner of Oaths as he did not appear before him and therefore the allegations contained in the alleged affidavit are not evidence to support the application. The affidavit is therefore a nullity. The same has to be said of the document verifying the Plaintiff.

Regarding the application to strike out the Plaintiff and the application, my view is that the situation can be rectified by the exercise of discretion granted under the rule 7(1)(3) of Civil Procedure Rules, meaning that the court order the Plaintiff without verifying affidavit to be struck out but it is not mandatory.

The upshot is that it is not clear who signed under the Power of Attorney as there is no description of the signatory. It could be the unauthorized one. Secondly, I find that the documents described as affidavits in support of application and verifying the Plaintiff were not actually sworn before Commissioner of Oaths by the maker and therefore do not amount to evidence. Both documents are a nullity and are hereby expunged from the record. However, I do not strike out the Plaintiff or the application.

Properly sworn affidavits must be filed within the next 14 days from the date hereof. The application is therefore adjourned for hearing on a date to be taken at the registry.

Dated at Mombasa this 20th day of February, 2004.

JOYCE KHAMINWA

J U D G E