



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 166 OF 2004

GAYATRI INDUSTRIES LIMITED APPLICANT

VERSUS

HARAMBEE SACCO LIMITED RESPONDENT

RULING

By an application dated 23rd February 2004, the Plaintiffs are seeking an injunction to restrain the Defendant from selling some four (4) flats to third parties. The said application is founded on the doctrine of promissory estoppel.

Basically the Plaintiffs contend that the Defendant had given them the first option to purchase the properties. In line with the said first option, the Plaintiff's did put forward some offers to the Defendant, but the latter is accused of ignoring the said offers. Apparently, the Defendant was in the process of disposing of the properties by way of sale to third parties.

This application was scheduled for hearing before me on 1st March 2004. However, before the hearing of the substantive application could commence, the Defendant drew the court's attention to the Notice of Preliminary Objection which it had filed. It was therefore agreed between the parties that the Preliminary Objection would be canvassed first.

The Notice of Preliminary Objection, dated 27th February 2004, had 5 limbs to it, as follows;

1. The affidavit of Alnoor Amlani sworn on 23rd February 2004 offends the mandatory provisions of section 35 as read together with Section 34 of the Advocates Act Chapter 16 of the Laws of Kenya.
2. The said affidavit does not comply with the mandatory requirements of Order XVIII rule 4 of the Civil Procedure Rules.
3. The 2nd and 3rd Plaintiffs have not complied with the mandatory provisions of Order VII rule (1) (2) of the Civil Procedure Rules.
4. No summons to enter appearance have been served.
5. That from the pleadings filed on behalf of the Plaintiffs Alnoor Amlani is guilty of perjury".

Sections 34 and 35 of Advocates Act

In respect of ground 1, the Defendant submits that the Affidavit of Alnoor Amlani offends the provisions of Section 35 of the Advocates Act, as it does not disclose the deponent's abode nor the particulars of the person who drew the said Affidavit.

Section 34 specifies the documents and instruments which must not be prepared by unqualified persons. One such set of documents is those that relate to any legal proceedings.

In an endeavour to make it possible to identify the drawer of documents or instruments cited in Section 34 (1), parliament in its wisdom enacted the provisions of Section 35. And for the sake of a better and easier understanding of the issue before me, I believe that is necessary for me to set out herein the wording of section 35 (1). It provides as follows;

“Every person who draws or prepares, or causes to be drawn or prepared, any document or instrument referred to in Section 34 (1) shall at the same time endorse or cause to be endorsed thereon his name and address, or the name and address of the firm of which he is a partner and any person omitting so to do shall be guilty of an offence and liable to a fine not exceeding five thousand shillings in the case of an unqualified person or a fine not exceeding five hundred shillings in the case of an advocate: Provided that, in the case of any document or instrument drawn, prepared or engrossed by a person employed, and whilst acting within the scope of his employment, by an advocate or by a firm of advocates, the name and address of such advocate or firm”.

A perusal of the affidavit of Alnoor Amlani reveals that it does not strictly conform with the requirements of Section 35 (1). The affidavit does not have the name and address of the advocate or firm of advocates who drew it.

That omission is criminalized by statute. And I think that the manner in which it is criminalized needs to be given further consideration. It is to be noted, first, that Section 34 of the Advocates Act specifies those documents and instruments that cannot be prepared by unqualified persons. I believe that Parliament enacted this provision so as to provide a safeguard to consumers of legal services. Given the technicalities that need to be appreciated and captured in the documents and instruments, it was deemed necessary to leave their preparation and drawing to that body of persons who have received the requisite training to have the job done appropriately; That body of persons is made up of those that are qualified as advocates, in accordance with the provisions of section 9 of the Advocates Act. In other words, the person needs to have been admitted as an advocate; his name should be on the Roll of Advocates at the material time; and, he had to be holding a valid practicing certificate.

It is only those persons who have the privilege and responsibility of preparing and drawing the kind of documents and instruments spelt out in Section 34 of the Advocates Act. And it must be understood that that privilege and responsibility is not due to any supernatural abilities on the part of advocates. It is merely due to the fact that they have been trained in the relevant skill necessary to prepare and draw the legal documents and instruments.

The training of this category of professionals can be compared to that of other professionals such as

architects and doctors. Whilst an advocate may enjoy the status of a “learned” person, he would not be qualified to perform surgery, unless he was also qualified as a surgeon. Similarly, the advocate could not hope to use his legal expertise in producing architectural drawings and hope that he can persuade authorities that the said drawings should be approved. That responsibility and privilege rests upon architects.

Now then, section 35 of the Advocates Act does not just bar unqualified persons from drawing or preparing documents and instruments. It, significantly, also finds fault with any advocate who draws up such documents or instruments, but fails to put his name and address, or that of his firm.

But as far as the Plaintiffs are concerned, they submit that such an omission is not fatal. It is contended that it was sufficient for the chamber summons dated 23rd February 2004 to have stated that it was supported by the affidavit of Alnoor Amlani. By virtue of that mention in the application, the Plaintiffs argue that it was sufficient for them to have cited, on the application, the name and address of the advocate.

However, upon an inquiry from the court as to whether the affidavit and the application were one and the same, the Plaintiffs’ advocate, Mr. Maweu, conceded that the two documents were separate.

The requirement of Section 35 (1) is that the person who draws or prepares any document or instrument referred to in Section 34 (1) shall at the same time endorse or cause to be endorsed thereon his name and address. Following the Plaintiffs’ concession that the Application and Affidavit are separate documents, it follows that the endorsement on the Application is not an endorsement on the Affidavit.

I therefore find that the Affidavit of Alnoor Amlani offends the provisions of Order 35 (1). I therefore need to decide the fate of the said Affidavit in the face of its inadequacy.

In Saggu V Roadmaster Cycles (U) Ltd [2002] 1 E A

258, the Court of Appeal of Uganda held that

“the defect in the jurat or any irregularity in the form of an affidavit cannot be allowed to vitiate an affidavit in view of Article 126 (8), of the 1995 Constitution, which stipulates that substantive justice shall be administered without undue regard to technicalities. I should perhaps mention that the jurat is the short statement at the foot of the affidavit indicating when, where and before whom it was sworn. It would follow that the learned judge had the power to order that the undated affidavit be dated in court or that the affidavit be resworn before putting it on record. He was also correct to penalize the offending party in costs”.

I accept the foregoing enunciation of the law as a correct overview on this subject. However, I must also say that the said case is distinguishable from the matter before me. In the Saggu case (supra) the deficiency in the affidavit was the absence of a date in the affidavit. That omission offends the provisions of the Ugandan Oaths Act. In this country, it would offend the provisions of section 5 of the “Oaths and Statutory Declarations Act” Cap 15, of the Laws of Kenya. That Section provides as follows;

“Every commissioner for oaths before whom any oath or affidavit

is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made”.

When faced with the undated affidavit, the superior court declined to make a ruling on the submission of counsel, that the affidavit was incurably defective. Subsequently the Court of Appeal was invited to hold that the affidavit was incurably defective. However, the Court of Appeal of Uganda held that the statutory provision

“which renders it mandatory to date the affidavit before tendering it in court simply means that an affidavit cannot be used without dating it or indicating where it was sworn and before whom. The errors and omissions regarding the date, place and the commissioner cannot vitiate an application”.

Again, I say that I accept as correct, the foregoing interpretation of the law. However, in the case before me, the omission was completely different. It was the failure by the drawer to cite his name and address on the affidavit.

In the case of Kotecha V Mohammed [2002] E A 112, the Court of Appeal of Uganda tackled a scenario that was close to that prevailing in the case before me. The court was called upon to address a problem relating to Section 66 (1) of Uganda’s Advocates Act. That section reads as follows;

“Every person who draws or prepares any instrument to which Section 65 of this Act applies shall endorse or cause to be endorsed thereon his name and address; and any person omitting so to do or falsely endorsing or causing to be endorsed any such requirements shall be guilty of an offence”.

At page 117 of the law report, Berko J.A. expressed himself thus;

“The sections are intended to identify and punish unqualified persons who prepare legal documents for fee or reward. The Notice of Motion was signed by Counsel for the Applicant/Defendant in the suit. It has not been suggested that the advocate who prepared the Notice of Motion did not have a valid practicing certificate. Besides, the affidavit in support of the application and the Notice of Motion were filed together and must be read together. The affidavit has endorsed on it the name of the firm of advocates who prepare (sic!) the instrument. Therefore, in case I am wrong in my interpretation of the sections relied upon, the names and address of the advocates on the supporting affidavit is enough to satisfy the provisions of the Act”.

- emphasis mine

The very thing that is missing in the case before me is the name and address of the advocates who prepared the affidavit. That omission has been criminalized by statute. I cannot see how this court can be expected to wish away that omission. I am therefore unable to assume that just because the application has the name and address of a firm of advocates, and because it states that it is supported by the affidavit of Alnoor Amlani, the said affidavit must have been drawn by the same advocates. Such a presumption is probable but not necessarily true.

If I permit the applicants to rely on the affidavit in issue, I would be giving them the benefit of a document that not only flouts procedural requirements, but one which has been criminalised by statute. I cannot do so, in line with the decision of the Court of Appeal for Kenya, in Civil Appeal No. 144 of 2001 Robert Njenga Ndichu V Brush Manufacturers Limited. Although I must also add that I do recognize the fact that whilst the appellant in that case was guilty of a deliberate disobedience of statutory provisions, there is no suggestion that in the case before me, the Plaintiffs or their advocates deliberately disobeyed the provisions of Sections 34 and 35 of the Advocates Act. However, whether or not the omission to put the name and address of the advocate was willful or inadvertent, it is nonetheless criminal.

I therefore uphold this Preliminary Objection.

Order VII rule 1 (2)

The Defendant submits that the verifying affidavit offends the provisions of Order VII rule 1 (2). It is contended that Mr. Alnoor Amlani did not show that he had the authority of the 2nd and 3rd Plaintiffs to swear the verifying affidavit on behalf of the 2nd and 3rd Plaintiffs too.

In response to these submissions; the Plaintiff states that the requirement of the rules is that the verifying affidavit shall verify the correctness of the averments in the Plaintiff.

I am not sure that I fully appreciated the Defendant's complaint here. They are suggesting that if the deponent had also said in his affidavit that he had authority to swear the affidavit on their behalf, that would have filled some perceived void that is now in the affidavit.

I do accept the contention that by virtue of being a director in the 1st Defendant does not by itself donate competence to swear the affidavit on behalf of the 2nd and 3rd Plaintiffs. However I believe that the suggested addition would not have added much to the affidavit, unless it was perhaps also coupled with an averment that the deponent was personally conversant with the transactions between the Defendant and the Plaintiffs

This objection is thus overruled.

Summons to Enter Appearance

The Defendant contends that the Plaintiffs have failed to comply with the provisions of Order 4 rule 5. That rule provides as follows;

“Every summons shall be prepared by the Plaintiff or his advocate

and filed with the Plaintiff to be signed in accordance with subrule (2) of this rule”.

Mr. Chacha Odera, advocate for the Defendant complained that his client had not been served with summons to enter appearance. He therefore says that it has not been possible to file a Defence, which pleadings would be important for the court to give consideration to, in an application for an injunction.

My understanding of the rules is that the service of summons merely triggers off the period for the filing of a Defence. In other words, as soon as summons are served upon a Defendant, the time set for the

filing of a Defence, begins to run. However, I do not believe that there is any prohibition imposed on the Defendant against the filing of his Defence, simply because he has not been served with summons to enter appearance. I therefore believe that if the Defendant wishes to have the court give due consideration to their Defence, they would be well advised to file the said Defence, without waiting for summons to be served.

But in any event, I have perused the Court file and ascertained that the Plaintiffs did prepare and file summons, with the Plaintiff. In effect, the Plaintiffs have complied with Order IV rule 5 of the Civil Procedure Rules.

This objection is overruled;

Perjury (?)

The Defendant is accusing the deponent of the verifying affidavit of perjury. It is pointed out that at paragraph 13 of the Plaintiff, the Plaintiffs have pleaded that there is no other pending suit between the parties herein, over the same subject matter.

In the same vein Mr. Alnoor Amlani deposes that the averments in the Plaintiff are correct. By this averment, it must be understood to mean that the contents of paragraph 13 of the Plaintiff are correct too, as they are a part of the Plaintiff.

Later on, when the Plaintiffs filed the present application, it was supported by an affidavit sworn by Mr. Alnoor Amlani. At paragraph 12 of the supporting affidavit, Mr. Amlani deposes about another civil suit which is pending before the Commercial Courts, Milimani. For those reasons, Mr. Amlani is accused of perjury. I am therefore invited to exercise my equitable jurisdiction, and thus summarily dismiss this application.

In answer to this submission, the Plaintiffs point out that it is the Plaintiffs themselves who have made the information available to this court, regarding the other suit. Counsel then notified me that the subject matter of the suit that is pending before the Commercial Court, Milimani, is different from that which is the subject matter in the case before me.

However, I do not have the benefit of the pleadings in the other case. I am therefore unable to decide whether or not the parties and/or the subject matter in the two cases are the same. In these circumstances, I overrule this preliminary objection.

Conclusion

The grounds of preliminary objection have been overruled, save for one. However, the successful objection has resulted in the striking out of the affidavit in support of the application. Upon a perusal of the Grounds cited on the face of the application, I am convinced that the same are so intertwined with the affidavit which I have struck out, that the application cannot stand on its own.

Pursuant to the provisions of Section 3A of the Civil Procedure Act, the court is enjoined make such orders as may be necessary for the ends of justice. In my assessment, the dismissal of the application would be too harsh a penalty to impose on the Plaintiffs, for the criminalized omission, on the part of their advocates. The offending affidavit is deemed to have been expunged from record. However, in the exercise of the court's unlimited inherent jurisdiction, to make orders as may be necessary for the ends of justice, I hereby grant the Plaintiffs leave to file a fresh and compliant affidavit within 7 days.

The Defendant is awarded the costs of the Preliminary Objection.

DATED at Nairobi this 30th day of March 2004.

FRED A. OCHIENG

Ag. JUDGE

Head Note

1. Sections 34 & 35 of the Advocates Act, Cap 16.
2. Drawer of an affidavit must endorse his name and address on the affidavit.
3. Defect in the jurat or any irregularity in form should not vitiate the affidavit.
4. Order VII rule 1 (2).
5. Does the director of one company have authority to swear an affidavit to verify the Plaint in which there are other companies that are also Plaintiffs?
6. Order IV rule 5 –Summons shall be prepared and filed by the Plaintiff, at the same time as the Plaint is filed.
7. Defendant is not barred from filing a Defence, even if summons to enter appearance have not been served upon him