



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
CIVIL CASE NO. 496 OF 1995

PETER ONYANGO ONYIEGO ..... PLAINTIFF  
- Versus -  
KENYA PORTS AUTHORITY ..... DEFENDANT

R U L I N G

Judgment in this case was delivered on the 19th December 2000. It would appear that both the parties required some clarification on some aspects of that judgment. They agreed that the plaintiff should apply for clarification which he did under Section 3A, 99 and 100 of the Civil Procedure Act. Having heard the application the court delivered its ruling on the 21st August 2003. The defendant being aggrieved by that ruling filed a notice of appeal within the time required and on the 17th December 2003 filed an application seeking a stay of the execution of that ruling until its appeal to the court of Appeal is filed, heard and determined.

The defendant argues that it has an arguable appeal and that if stay is not granted its appeal will be rendered nugatory. This is because the plaintiff being a retiree, with no known assets, will not be able to refund whatever amount that will have been paid to him if the appeal succeeds. On security it was argued for the defendant that it is a large corporation which will have no difficulty in paying whatever amount is due to the plaintiff if the appeal is dismissed. It is however ready, it was submitted, to comply with any orders the court will make on security.

The plaintiff opposed the application. It was argued on his behalf that this application is premature. Certain aspects of the judgment have yet to be worked out by the Deputy Registrar as ordered in the judgment and there is therefore no decree capable of being executed. It was further argued for the plaintiff that the affidavit sworn by Muhamed Hussan Alawi, a Principal Legal Officer of the defendant, in support of the application is fatally defective for failure to state that the deponent was duly authorized by the defendant to swear it. Reliance for this argument was placed on Justice Onyancha's decision in the case of **P & O Nedlloyd Ltd. Vs Global Gases Kenya Limited Mombasa HCCC No. 529 of 2001**.

Lastly, counsel for the plaintiff argued that the intended appeal is incompetent as leave to appeal has not been obtained. He argued that an appeal from an order made under Sections 3A, 99 or 100 of the Civil Procedure Act requires leave. In response counsel for the defendant applicant referred me to Order 18 Rule 7 of the Civil procedure Rules and urged me to overrule the technical objection raised on the affidavit. On leave to appeal counsel argued that Section 75(1) (c) of the Civil Procedure Act read together with Order 42 Rule 2 of the Civil Procedure Rules show that leave to appeal against the said order is not required.

I would like first to deal with the objection raised on the affidavit. In his decision in the said case of P & O Nedlloyd Limited Justice Onyancha followed Justice Ringera's decision in the case of **Microsoft Corporation -Vs Mitsumi Computer Garage Ltd. & Another [2001] 2 EA 460**. I have carefully read both judgments. I do not understand Justice Ringera to have laid down a principle that in all affidavits sworn on behalf of Corporations the deponent has to state that he or she has been authorized by the Corporation to swear it. I say this because of the provisions of law and the issues that were raised before

Justice Ringera in the **Microsoft case**. In that case the court was invited to strike out the plaint because the verifying affidavits were said to be ex facie incompetent, fatally defective and inadmissibly as verifying affidavits. Counsel referred the court, in that case, to the provisions of Order 3 Rule 2(c) and Order 7 Rule 1(2). I will first deal with the latter provision. Order 7 Rule 1(2) provides that:-

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

It is common knowledge that this requirement was introduced by the amendment in the year 2000 to Order 7 Rule 1 to curb the menace of the multiplicity of cases, especially on ambulance chases, by parties on one cause of action. So the requirement was and is still intended to prevent a situation where a case is filed without the authority of a party or where a party later denies having authorized a case to be filed on his behalf hence the requirement that every plaint shall be accompanied by a verifying affidavit sworn by the plaintiff. The affidavit cannot be sworn by say his advocate or anybody else. In the case of a corporation the verifying affidavit has to be sworn by the Corporation itself, and since corporations are not natural persons such affidavits have to be sworn by an officer of the corporation duly authorized by it. In my view such an officer must be one who, like in the case of banks, is authorized to sign legal documents like charges or discharges. In case of individual plaintiffs who for one reason or the other cannot personally swear such affidavits, the law requires that the person swearing it must be an authorized and in this case I can only think of one who has a power of attorney from the plaintiff. I believe that is why the provisions of Order 3 Rule 2(c) were referred to in the Microsoft case.

My understanding of the provisions of Order 3 Rules 1, 2, 3, 4 and 5 of the Civil Procedure Rules is that they deal with acts that must be done by the parties themselves or that failing by their duly authorized agents or their advocates. For instance Order 3 Rule 1 provides that:-

**“Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf”.**

In Rule 2 of that Order, the provisions state who are the recognized agents of parties. It reads:-

**“The recognized agents of parties by whom such acts appearances, applications and acts may be made or done are:-**

(a) “persons holding powers of attorney authorizing them to make such appearances and applications and to do such acts on behalf of parties

(b) .....

**(c) In respect of a corporation, an officer of the corporation duly authorized under the corporate seal”.**

My understanding of the acts envisaged by these provisions are acts like drawing and filing of pleadings and appearing in court to present one’s case or make an application

Clearly those acts can only be performed by the parties themselves, their duly authorized agents or their advocates. I am fortified in this view by a commentary in **Mulla on the Code of Civil Procedure 12th Edition** in which the learned author in considering similar provisions stated at page 553 that “Acting includes the examination of witnesses, so a recognized agent can cross-examine witnesses”.

The question I would like to pose here is this: Are affidavits that are sworn and filed in courts among the acts covered by the provisions of Order 3 Rules 1 to 5 that must be done by the parties themselves or their duly appointed agents? Before I answer this question I should consider what an affidavit is. The concise Oxford Dictionary of current English 8th Edition defines an affidavit as “a written statement

confirmed by oath, for use as evidence in court”. The Oxford Dictionary of Law 4th Edition defines affidavit as “A sworn written statement used mainly to support certain applications and in some circumstances, as evidence in court proceedings”. From these definitions it is clear that an affidavit is a sworn statement usually given to be used as evidence. So anybody swearing an affidavit on behalf of a corporation can also give evidence for or on behalf of a corporation. To suggest therefore that everybody who testifies for or on behalf of a corporation has to have authority from the corporation given under seal as required by order 3 Rule 2(c) is in my view not correct. In the circumstances I hold that other than verifying affidavits which as I have stated must be sworn by plaintiffs themselves or their authorized agents all other affidavits filed and used in courts are not among the acts covered by Order 3 Rules 1 to 5. All other affidavits can be sworn on behalf of individuals or corporations by anybody as long as that person is possessed of the facts and or information that he deposes on, that in the rules of evidence, would be admissible. Mere failure to state that the deponent of such an affidavit has the authority of the corporation on whose behalf he swears it does not invalidate the affidavit. That is an irregularity which courts, can under Order 18 Rule 7 of the Civil Procedure Rules, ignore.

This being the view I hold, I overrule the objection raised by counsel for the plaintiff/respondent that the affidavit in support of this application is defective. The affidavit was sworn by the Principal Legal Officer of the defendant Corporation. If such an officer does not have the authority of his employer to swear such an affidavit then I doubt if he has authority to do anything else.

The other point raised by counsel for the plaintiff is that the appeal will not succeed as leave has not been obtained. Section 75(1)(c) cited by counsel for the defendant gives a party leave to appeal as of right from “an order modifying or correcting an award”. Can the order given by this court on the 21st August 2003 be said to be one modifying or correcting an award? I do not think so. Read together with paragraphs (a) and (b) of subsection 1 of the section 75 of the Civil Procedure Act the award referred to here must be an arbitration award. The section does not make mention of orders made sections 3A, 99 or 100 of the Civil Procedure Act under which the order in this case was made. Leave is therefore required to appeal from the order given in this case. Order 42 Rule 1(4) requires that such leave should be sought orally or by summons at the time of making the order. That having not been done although a notice of appeal was filed in time I do not think that the defendant/applicant will get far with its appeal. In the circumstances this application fails and I dismiss it with costs.

DATED this 23rd day of March 2004.

D.K. Maraga

Ag. **JUDGE**