



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CIVIL CASE 494 OF 2004

HALIMA BARE & 13 OTHERS..... PLAINTIFFS

VERSUS

MAENDELEO YA WANAWAKE ORGANIZATION DEFENDANTS

RULING

This Ruling relates to a Preliminary Objection filed by way of a Notice of Preliminary Objection dated 26th May 2004 specifically stating as follows:

“TAKE NOTICE that the Defendant/Respondent herein shall raise a preliminary objection that the application and the Complaint dated 14th May 2004 and the entire suit herein is bad in law and fatally defective as it offends mandatory provisions of the Civil Procedure Act and Rules (Cap 21) Oaths and Statutory Declarations Act Cap 15 and the Advocates Act Cap 16 of the Laws of Kenya.”

The suit and the application in question have been filed by 14 members of the Defendant Women’s Organization seeking certain declaratory and injunctive orders as relates to the elections of various of the organizations leaders in the Sublocational, Locational, Divisional, District, Provincial and National levels as announced in a circular dated 14th April 2004. Basically the Plaintiffs main contention is that the manner proposed for the said elections is contrary to the Organization’s constitution and that certain formalities require to be fulfilled prior to the elections being held. The Plaintiffs considered the circular and the calling of the elections so much a threat to their rights and those of other members that they, together with the Complaint filed an application for a temporary injunction by way of a Chamber Summons dated 14th May 2004 brought under Order XXXIX Rule 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. An interim injunction was granted under certificate of urgency on 17th May 2004 restraining the Defendant

“by itself, its electoral committee, its officers, servants, agents, or otherwise from holding or if they have started holding from further conducting elections for 2004 as announced in the document issued by the Chairman of the Electoral Committee titled “circular” and dated 14th April 2004 in the manner announced in that circular or as in any amended manner under this document or on the following dates:

- Monday 17th May 2004 – Sublocations
- Tuesday 18th May 2004 – Locations

- Thursday 20th May 2004 – Divisions
- Tuesday 25th May 2004 – Districts
- Friday 28th May 2004 – Provincial
- Saturday 5th June 2004 – National

The said order has remained in force and as a result the intended elections have been held in abeyance. Parties appeared before me for the inter partes hearing of the application dated 14th May 2004 on 31st May 2004, 24th June 2004, 13th July 2004, and finally on 27th July 2004. The Preliminary Objection was argued at length with numerous authorities being cited in support of the same and to counter the same. This, together with the Courts' summer vacation between 1st August to 16th September contributed to the apparent delay in delivering this Ruling. As I deliver the same I wish to commend counsel and parties on either side for their patience. In passing I must mention for the benefit of all concerned that my attention has been drawn to the contents of a letter written and copied to this court by counsel for the Defendants on 5th October 2004 raising concerns over a meeting apparently held on 30th September 2004 involving the Plaintiffs herein at which, according to counsel issues relating to Elections among others, were discussed. There was also, emanating from the said meeting, an announcement for a delegates conference meeting to be held on 13th October the agenda for which, according to counsel, is a contentious issue, and therefore subjudice and contrary to this court's order of 24th June 2004. Counsel attached to her said letter a cutting from the Kenya Times Newspaper of 1st October 2004 which suggested that the meetings were intended for the preparations for the stalled elections including setting in motion modalities of the elections "while the dispute was still in court", promote consensus among members. According to the article, the concerned director, Mrs Jane Kiano appealed to women countrywide to continue registering members at the grassroot levels and to nominate members (read candidates or representatives) from their respective areas before the national elections kick off."

Discussing the stalemate with a view to seeking a consensus, nominating candidates if that is what is intended does not appear to me offensive to the orders made herein which only stayed the formal elections as earlier proposed. I am surprised that the Respondents, who wish that the elections proceed without interference would be opposed to steps which appear to me helpful towards achieving that end.

I now turn to the Preliminary Objections and my main task of resolving the issues arising therefrom.

In her arguments, counsel for the Defendant submitted that her (clients) objections related to the following.

(1) Order 50 Rule 15 (2) which requires that

"(2) Every Motion and Summons shall bear at the foot the words –

"If any party served does not appear at the time and place above-mentioned such order will be made and proceedings taken as the Court may think just and expedient."

(2) The affidavits in support of the Chamber Summons and the verifying affidavit to the Plaint.

(3) The Plaint itself

(4) The Non Governmental Organizations Co-ordinating Act.

(5) The cause of action.

As regards Order L Rule 15 (2) Counsel submitted that the application clearly offends the rules by

omitting the words of Order 50 rule 15 (2). Although I not condone the omission I do not think the court ought to lay great emphasis on this issue at this stage since the Defendants have appeared and no prejudice has been occasioned them by the omission. I uphold the applicant's argument in this regard and make no further comment.

Counsel's submission on the objection to the Plaintiff/Applicant's affidavits were that:

- 1) The Supporting Affidavit sworn by Lorna Matewa on 14th May 2004 was defective in that the annexures thereto are not certified as required under the Oaths and Statutory Declaration Act, Chapter 15 of the Laws of Kenya which requires that all exhibits annexed to an affidavit be certified.
- 2) The same affidavit does not restrict itself to matters the deponent is able of her own knowledge to prove thus offending order 18 Rule 3. Counsel pointed out that Paragraphs 5, 6, 7 and 8 as well as the bulk of the said affidavit are based on hearsay
- 3) Mr. Mwenesi's affidavit of 14th May 2004 also offends Order 18 Rules 3 and 5 of the Civil Procedure Rules containing matters he is not capable of his own knowledge to prove and also uses the word "we" as opposed to "I".
- 4) The verifying affidavits of the 2nd to 6th Plaintiffs offend the provisions of Order 18 Rule 3 of the Civil Procedure Rules for not being confined to matters the deponents are able of their own knowledge to prove and not stating what matters are of information and/or disclosing the source of such information. Further the 2nd and 6th Plaintiffs have not in their affidavits disclosed their place of abode as required by law.

Counsel submitted several authorities in support of this objection and prays that the affidavits be struck off and expunged from the record of the court with the resultant effect that the suit, as well as the Chamber Summons filed herein fail for failure of appropriate legal support. Of the said authorities I particularly find the following to be of great assistance.

1. JOHN DISTELBERGER –vs- JOSHUA KIVINDU MUINDI & ANOTHER HC.C.C. NO. 1587 OF 2003
2. HOECSHT TRADING –vs- SPECIALIZED LIGHTING H.C.C.C. NO. 1251 OF 2002
3. GEOVENNA E.A. –vs- SILVESTER ONYANGO H.C.C.C. NO. 1086 OF 2002
4. NAROK –vs- TRANSIT HOTEL H.C.C.C. NO. 12 OF 2001
5. BARCLAYS BANK OF Kenya LTD –vs- DR. SOLLOMON OTIENO H.C.C.C. NO. 1736 OF 2001

Thirdly counsel submitted that the Plaint itself is defective and ought to be struck out for quoting provisions of various statutes, which, according to counsel amounts to pleading evidence instead of facts as required by rules of pleadings.

Fourthly, it was submitted that the filing of the suit offends the Non-Governmental Organizations Coordination Act 1990 under which the Defendant organization (of which the Plaintiffs are members) is governed. Counsel stated that there being a clearly laid down procedure in the said Act for the settlement of complaints this suit ought not to have been filed, as doing so amounts to an abuse of the process of the court. Counsel also submitted that the suit itself as seen from the pleadings is scandalous, vexatious and an abuse of process and should be dismissed.

I find that the objection itemized as 3, 4 and 5 above, that is, as relates to the Plaint, the operation or

application of the Non Governmental Organizations Act and the cause of action are not matters for this Preliminary Objection. I agree with counsel for the Plaintiff/Applicants that the Defendants ought to move the court appropriately under Order VI Rule 13 if they wish to have the Plaint struck out, and/or the suit be dismissed for disclosing no reasonable cause of action.

Indeed, I note from paragraph 14 of the Defence that the Defendants have stated as follows:

“14. The Defendant further avers that the Plaintiff’s suit is scandalous, frivolous and vexatious and more so does not disclose any reasonable cause of action against it and at the most appropriate time will apply for the same to be struck out with costs.”

I hold that this is not the most appropriate time for such an application since the Defendant has not come under the appropriate procedure and that what is before the court is the Plaintiff’s application for an injunction pending the hearing and determination of the suit.

In view of the above I find that the only issue now left for my consideration is whether the Chamber Summons application would stand in the presence of the many defects pointed out by counsel for the Defendants. The importance of the various affidavits filed along with the application cannot be down played. Indeed, looking at the Chamber Summons itself, the affidavits form the foundation of the application itself and are given prominence in that, the body of application itself contains the following words:

“WHICH APPLICATION is based on the several Plaintiff’s affidavits filed with this application and the following grounds generally:”

I have studied the various affidavits and subjected the same to this court’s microscopic eye and found that in addition to the various defects pointed out by counsel for the Defendant, all the signatures appearing on the affidavits filed herein, as well as the name and address of the Commissioner of Oaths are photocopies. Only the date 14th May and the Commissioner’s signature are in the original. Surprisingly the affidavit of DINAH BII, Plaintiff number 9 has the date 14th May superimposed over 16th May. Similarly in the affidavit by Lorna O. Matewa the date 14th is equally superimposed over 16th. The correct assumption in the circumstances is that the said affidavits were not sworn before the Commissioner for Oaths on the purported date of 14th May 2004, or at all, as the applicants would want the court to believe. If that be the case and this court finds it to be most probable then the affidavits are of no value. Affidavits are and must qualify to be sworn statements of evidence as defined in part 32.15.1 of the Civil Procedure Rules of England and other legal dictionaries. The said provision defines an affidavit as “a written, sworn statement of evidence” which when used in legal proceedings is in the form of “evidence in writing.”

Our own Civil Procedure Rules in Order XVII clearly provides, albeit generally, the contents of the affidavit, manner of drawing and also provides that the court may receive any affidavit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form. The latter is provided in Order 18 rule 7.

In his reply to the objections raised herein, counsel for the Applicants has submitted that the said provision applies in his client’s favour and that the court should disregard the irregularities on the grounds that

- (1) No prejudice has been caused to the Respondents
- (2) The Respondents have replied to the said affidavits and should be assumed to accept them as they are
- (3) The defects do not touch on jurisdiction.

Counsel cited various authorities in support of his arguments and in particular relied on the Ruling of the Hon. Mr. Justice Aaron Ringera (as he then was) in the case of PASTIFICIO LUCIO GAROFALO SPA –vs- SECURITY FIRE EQUIPMENT CO. [2001] E.A. 177 wherein an offensive affidavit was struck out but the Plaintiff given leave to file a fresh one.

Since our Civil Procedure does not provide details as relate to the body of the affidavit I have found it helpful to borrow yet again from the Civil Procedure Rules of England 2001 wherein Practice Direction 4 of Part 32 gives the body of an affidavit and states that the same

“MUST if practicable be in the deponents own words, should be addressed in the first person and the deponent should

(1) Commence “I” (full name) of (address) state on oath

(2) If giving evidence in his professional, business or other occupational capacity, give the address at which he works in (1) above, the position he holds and the name of his firm or employer,

(3) Give his occupation, and if he has none his description and (4) State if he is a party to the proceedings if it be the case.

The deponents’ description is an important part of an affidavit the reason being, I presume, the fact that the affidavit, being in itself evidence, must be proven to be the sworn evidence of some real person with legal capacity and not a fictitious one. Order 18 rule 4 provides that

“4. Every affidavit shall state the description, true place of abode and postal address of the deponent and if the deponent is a minor shall state his age.”

The words shall, must and should appear in both the local and English provisions and are therefore mandatory. Clearly demonstrated by the above is that describing the deponent as a party in the proceedings is not enough nor is the address of the legal counsel adequate. The postal address must be that of the deponent, a feature which, is absent in all the affidavits under scrutiny.

Another reason why I find the affidavit not qualifying as a sworn statement of evidence is the fact that it does not support the grounds 1 to 5 of the application but refer to paragraphs in the Plaintiff. I am of the view that a document in the nature of evidence should be in itself clear enough as to provide proof of the contentions put forth without necessarily having to read another pleading.

Turning specifically to other points raised in the Preliminary Objection I find that in addition to some of the affidavits not disclosing the place of abode as pointed out by counsel, the affidavit of LORNA MATEWA does contain matters of hearsay and fails to disclose the source of information of matters which she herself is not capable of proving. The same affidavit also contains annexures which are not marked as required by Rule 9 of the Oaths and Statutory Declaration Act Chapter 15 of the Laws of Kenya which provides as follows:

“9. (a) All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner and shall be marked with serial letters of identification.”

The said provisions should be read together with Section 10 of the said statute which provides that:

“10. The form of jurat and identification of exhibits shall be those set out in the third schedule.”

The said schedule in turn is in the nature of a form as follows

“This is the exhibit marked “....” Referred to in the annexed affidavit of sworn/declared before me this day of at”

In the present application as was in the case of DIAMOND TRUST BANK (K) LTD –vs- GAREX (K) LTD H.C.C.C. NO. 147 of 2001 the Applicants have not had their exhibits marked or sealed as required by the above provisions of the law but have placed pink pieces of blank paper over the alleged exhibits and sealed the same. Surely the mark and endorsement must be taken to refer to the pink pieces of paper, not the alleged exhibits. Without the said endorsements there is clearly no connection between the photocopies of documents and the affidavit.

I consider the defects herein to be major. I do not consider that Order XVIII Rule 7 can help the Applicants in that whereas it provides that

“The court may receive any affidavit sworn for the purposes 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.”

the defects in the applicant’s affidavits have nothing to do with the misdescription of parties, which I must hold to be parties in the suit, not the deponents, in view of what I have previously held as regards Practice Directive 4 of Part 32 of the Civil Procedure Rules (England) and Order XVIII Rule 4. The irregularities herein are not restricted to the form but go to the evidential value of the affidavits themselves.

Further, I am of the view that even where the court would admit or receive such an affidavit as is allowed under Order XVIII Rule 7, the decision of the court would depend on the degree of the non-compliance I also think that the party wishing the court so to receive an affidavit would humbly request the court to do so and not try to convince the court that the defects do not matter. In view of the gravity of the defects and omissions herein I would not even think of a possibility of receiving the affidavits filed herein, which must be struck off and expunged from the record.

I find myself in a similar position as my brother Justice Ibrahim in HOECSHT TRADING –vs- SPECIALIZED LIGHTING H.C.C.C. NO. 1251 OF 2002 in which he states as follows:

“In the light of the above and assuming I am correct in my ruling the Plaintiff ought to consider the future of these suits in view of the jurats in the verifying affidavit.”

The Plaintiffs herein ought to consider their position and the future of their suit in view of the objections raised herein and the findings thereon contained in this ruling. In closing, I find it necessary to comment on the verifying affidavit sworn by counsel for the applicant notwithstanding that the same relates to the Plaintiff. The position as regards what an advocate can and cannot depose to in an affidavit filed on behalf of his client has been clearly settled in the case of East African Foundrey Works (K) Ltd. –vs- Kenya Commercial Bank Ltd [2002] KLR 443 wherein it was held that

“an advocate should not be allowed to depose on behalf of his client on contentious matters which he has no personal knowledge in a case where he is appearing as counsel.”

In view of my findings herein that the Chamber Summons dated 14th May 2004 is without legal support the same must be and is hereby dismissed with costs to the Respondents.

Dated and Delivered this 21st day of October 2004.

M.G. Mugo

Ag. Judge

In the presence of:

Lavuna present for S. Musalia, Mwenesi & Company Advocates for the Plaintiffs

A. Onyancha present for Yano & Company Advocates for the Defendants