

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
MILIMANI COMMERCIAL COURTS, NAIROBI
HCCC NO. 454 OF 2004

BELGO HOLDINGS LIMITED.....PLAINTIFF

-V E R S U S-

ROBERT KOTCH OTACHI1ST DEFENDANT

WILSON BIRIR.....2ND DEFENDANT

R U L I N G

On 22nd September, 2004, there came before the court for inter partes hearing of the application dated 12th August, 2004. Mr. Ochieng Oduol appeared for the plaintiff/applicant while Mr. Mogikoyo appeared for the defendant/respondent. Before the matter could proceed to hearing, Mr. Mogikoyo protested that he had been served with a long affidavit only the day before. That affidavit, he said had been put in without leave of the court.

Secondly, Mr. Mogikoyo submitted that he was entitled to at least three clear days, and yet he had been served only the day before. This was in contravention of O.50 Rule 16(1) of the Civil Procedure Rules. He therefore urged the court to strike out the affidavit. If however, the court was persuaded to admit it, he would need time to seek his client's instructions and, if need be, he would also need time to put in an affidavit in reply.

In response, Mr. Ochieng Oduol started by referring to the "offending" affidavit and its contents. Mr. Mogikoyo opposed any reference to the contents of that affidavit as it had been filed without leave of the court and therefore it was not properly before the court. The court agreed with Mr. Mogikoyo and ordered Mr. Oduol to lay down the ground for the admission of the affidavit without reference to it. Mr. Oduol then took the court through the original bundle of documents in a bid to demonstrate that there was ample justification for the affidavit to be admitted. In reply Mr. Mogikoyo reiterated his earlier submission that the affidavit had been filed without leave, and counsel for the applicant had not said why he could not wait to seek court's leave.

After hearing both counsel, I agree with Mr. Mogikoyo that some of the documents alluded to in the course of the arguments go to the very root of this case. In the circumstances, I would find it inappropriate to discuss their contents at this juncture as this would be going to the substance and merits of the main suit before the court. However, considering the issues in this matter, a quick look at Mr. Oduol's affidavit with its annexures shows that the matters deponed to therein are so closely interwoven with the main issues that it will no doubt serve to clarify the issues before the court. It is my considered view, therefore, that the justice of this case requires that the affidavit and its annexures be admitted.

By reason thereof, it is ordered that the affidavit of James Ochieng Oduol, Advocate sworn on September 20, 2004 and filed in court on September 21, 2004 be and is hereby admitted. The defendants/respondents are granted 14 days within which to file and serve any reply thereto if they so wish.

The plaintiff/applicant will meet the costs of this application.

Dated and delivered at Nairobi this 8th day of October 2004

L. NJAGI

JUDGE