



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO.385 OF 2004

MOUNTAIN VIEW TRANSPORTERS LTD ::::::::::::::::::::1st PLAINTIFF

KYEVALUKI SERVICES LIMITED ::::::::::::::::::::2nd PLAINTIFF

VERSUS

ALCON HOLDINGS LIMITED ::::::::::::::::::::1st DEFENDANT

MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS ::::::::::2nd DEFENDANT

RULING

At the commencement of the hearing of the Plaintiff's Application for injunction dated 14th July, 2004 a Preliminary Objection was taken on behalf of the Defendants that the Plaintiffs were guilty of non disclosure of material facts and that the verifying affidavit and the affidavit in support of the application for injunction were incurably defective and should be struck out and the ex-parte orders set aside.

I will consider the objection raised against the affidavits first. The verifying affidavit of Godfrey Kasiri sworn on 14th July 2004 is challenged on the ground that the deponent does not state under what authority he swore the affidavit. Counsel for the Defendants submitted that an affidavit by a Corporation can only be sworn by an officer under authority of the corporation according to Order III rule 2 (c) of the Civil Procedure Rules. The deponent in the affidavit verifying the correctness of the Plaintiff in this case did not depone to this fact. In Counsels' view this defect was incurable. The verifying affidavit should accordingly be struck out. The Plaintiffs' application for injunction would therefore be founded on an incompetent Plaintiff.

As regards the supporting affidavit of the same Godfrey Kasiri sworn on the same date i.e the 14th July, 2004, objection is raised on the ground that the deponent could not purport to make the affidavit on behalf of another corporation i.e. the 2nd Plaintiff. Counsel submitted that for this defect this affidavit should be struck out.

Responding to the challenge made against the affidavits sworn by the said Godfrey Kasiri, Counsel for the Plaintiffs submitted that the deponent's verifying affidavit satisfies the requirements of Order VII. Relying on Ringera J.'s ruling in Microsoft Corporation –v- Mitsumi Computer Garage Ltd & Another: NAIROBI HCCC No.810 of 2001, Counsel argued that to strike out the affidavits challenged would be to elevate procedure to a fetish.

My own understanding of the Law is that an affidavit by a corporation can only be made by an officer who is duly authorized by the corporation to do so. Ringera J. as he then was in Microsoft Corporation – v- Mitsumi Computer Garage Ltd & Another (supra) said at page 8 of the Ruling that:

“.....it is incompetent of any other person howsoever conversant with the averments in the

plaint he may be to make an affidavit on behalf of the corporation”.

I agree with him entirely. The verifying affidavit of the said Godfrey Kasiri does not disclose the authority upon which it is made. This is a substantial defect which renders the said affidavit incompetent. I order it struck out. The Plaintiff does not therefore comply with sub rule 2 of Rule 1 of Order VII of the Civil Procedure Rules.

Order VII Rule 1(3) provides as follows:-

“(3) The Court may of its own motion or on application of the defendant order to be struck out any plaint which does not comply with sub rule (2) of the rule.”

This is a permissive section. It gives the Court a discretion to strike out the plaint or save it. In the interest of justice I exercise my discretion in favour of the Plaintiffs. The result is that although I have struck out the verifying affidavit I do not strike out the plaint. I order that a fresh and compliant verifying affidavit be made and filed within 15 days of today.

What about the application for injunction? The Plaintiff minus the verifying affidavit is a limping plaintiff. Until a compliant verifying affidavit is filed as ordered the Plaintiff in this case does not comply with Order VII Rule 1 (2). It cannot give life to the application for injunction dated 14th July 2004. The application cannot exist on its own. It is incompetent and accordingly struck out.

The Defendants had also complained that the Plaintiffs are guilty of material non-disclosure and were not entitled to the order granted ex-parte on 15th July, 2004. I have already decided the fate of this application on a different ground. I cannot however resist making my observations on this complaint. The amount in the 2nd Defendant's proclamation dated 5th July 2004 was Kshs 900,000/=. The Plaintiffs documents disclose an apparent payment of Kshs 400,000/= as at the time of the proclamation. No attempt was made by the Plaintiffs to explain whether or not the difference of Kshs 500,000/= was paid. To my mind this failure to explain whether or not this sum had been paid was a very material non-disclosure. As stated in the English case of *The King –v- General Commissioner for Income Tax (1917)* 1 KCB 486 at page 499:

“On an ex -parte application for an order the applicant is bound to state all the material facts. He has to form an opinion as to what facts are material and is responsible for his statement of them...”

I entirely agree with what Lord Scrutton LJ. Said in that case at page 515 and I quote:

“A Plaintiff applying ex -parte comes (as it has been expressed) under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that and the Court finds, when the other party applies to dissolve the injunction, that any material fact has been suppressed or not properly brought forward the Plaintiff is told that the Court will not decide on the merits and that as he has broken faith with the Court, the injunction must go.”

The Plaintiffs to this case have not given any reason for the non-disclosure. If I had not struck out the application, I would not have been inclined to grant the injunction sought for non-disclosure of material facts.

In the end I have struck out the verifying affidavit and the application dated 14th July, 2004 with costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF OCTOBER 2004.

F. AZANGALALA

AG. JUDGE

Read in the presence of: