

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 80 of 1998

TRUST BANK LTD. PLAINTIFF

- Versus -

MOHAMED BAKARIMBWANA DEFENDANT

R U L I N G

Before me is the plaintiff's Notice of Motion dated the 29th October 2004 brought under Order 41 Rules 4 and 5 of the Civil Procedure Rules and the ever quoted section 3A of the Civil Procedure Act. It seeks a stay of execution of this courts order made on the 15th October 2004 pending the hearing of an intended appeal to Court of Appeal against that order.

In opposition to the application the defendant has filed a replying affidavit and grounds of opposition. The plaintiff argues that that cannot be. Under Order 50 Rule 16, it is contended for the plaintiff, a party has to choose what to file in opposition to an application; a replying affidavit or grounds of opposition. It cannot file both. The plaintiff has therefore raised a preliminary objection seeking the striking out of both the defendants' replying affidavit and grounds of opposition and has cited Justice Ombija's decision in **National Industrial Credit Bank Ltd. Vs Githuku Ngethe Gathui Milimani Commercial Courts Civil case No. 1628 of 2000** in support of its argument.

The issue for determination therefore is the interpretation of Rule 16 of Order 50 of the Civil Procedure Rules. Whether or not the filing of both grounds of opposition and a replying affidavit in opposition to an application is fatally defective.

For quick and ease of reference I would like to set out the provisions of Order 50 Rule 16(1). It reads:-

"16(1) Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any, not less than three clear days before the date of hearing."

What is mandatory in this provision; is it the filing of a document in opposition to the application or the election as to which document to file in opposition to the application or both the filing and the election?

To answer this question one has to consider the rationale behind the enactment of the rule. One has to consider the purpose the Rules Committee intended the provision to serve. To determine the intention and the purpose the Rules Committee had in mind in coming up with this provision, in my view, one has to consider the whole of Order 50.

In my opinion Order 50 is intended to provide for the smooth hearing of motions and applications. It is intended to avoid delay which can be caused by parties surprising their rivals with new issues or points at the hearing. It is intended to crystallise issues and save the courts time in dealing with applications and motions. That is why subrule (2) of Rule 16 allows an applicant, with the leave of court, to file a supplementary affidavit and respond to any points raised by the respondent in the replying affidavit or grounds of opposition. And that is why subrule (3) of Rule 16 stops a respondent who neglects to file a replying affidavit or grounds of opposition from coming to court and raising issues which will take an applicant by surprise and force him to seek adjournment thus wasting the court's time.

Once the parties have placed before court the legal and or the factual points they wish to rely on thus cristalising the issues Rule 18 of that Order empowers the court to stop parties from making rambling submissions by limiting the time allowed to each party to present its case.

In a nutshell therefore Order 50 is intended to facilitate the smooth and quick disposal of applications and motions.

Reverting to grounds of opposition and replying affidavits, my view is that applications or motions can be disposed of by raising and arguing legal and or factual points. Applicants can state the legal points upon which their applications are based in the body of the applications themselves. In case of notices of motion (see Order 50 Rule 3) and I think chamber summons under Order 6 Rule 13 1 (a) this is a must. Where the applications are also based on evidence, save for the chamber summonses under Order 13 1(a), affidavits in support have to be filed. Similarly respondents who wish to oppose applications on points of law only can state them in statements of grounds of opposition. Where they wish to rely on matters of evidence they have to swear and file replying affidavits.

What about situations where respondents wish to oppose applications or motions on both points of law and fact? In my view, in such situations they are perfectly entitled to file both statements of opposition and replying affidavits. The answer therefore to the question I raised earlier on in this ruling is that what is mandatory in Order 50 Rule 16 (1) of the Civil Procedure Rules is the filing of a document in opposition and not the election as to which document to file. A respondent who wishes to oppose any application or motion can file a statement of grounds of opposition and or a replying affidavit.

For these reasons I overrule the Applicants preliminary objection with costs to the Respondent.

DATED and delivered this 14th day of December 2004.

D.K. Maraga

Ag. JUDGE