



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1511 OF 2002

ABRAHAM MWANGI PLAINTIFF

VERSUS

S.O. OMBOO

JOSEPH LIJULU

GRORGE OKO

DANIEL BONGOKO DEFENDANTS

R U L I N G

The Defendant's application dated 20-2-2003 is by way of Chamber Summons purportedly made under order 39 rule 4 and order 22 rule 2 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. It prays four orders of which 2 and 3 are as follows:

(1)

(2) THAT the Ex-parte court order of 23-9-2002 and all consequential orders be stayed pending the hearing and determination of this application.

(3) THAT the Honourable court be pleased to vary/set aside or discharge its exparted Order of 23-9-2002

(4) -----

Before the hearing of this application Mr. Odera Obara for the Plaintiff raised Preliminary Objection on grounds that:

(i) The application is defective in form and substance for failure to comply with the provisions of Law.

(ii) That there is no any or any decree extracted Or referred to another court for execution as purported in the said application.

(iii) -- (abandoned)

(iv) the application is belated and amounts to abuse of courts process

(v) The entire application cannot lie for lack of locus

(vi) The applicants are guilty of willful suppression of material facts.

Mr. Odera said that the application made under Order 39 rule 4 should be by way of Notice of Motion and only rule 1 and 2 of that Order ought to be by Chamber summons. He referred to order 39 rule 9 which provides that

“Applications under rule 1 and 2 shall be by summons in Chambers”

and Order 50 rule 9 which provides that;

“All applications to the court save where otherwise expressly provided for under these rules shall be by motion and shall be heard in open court”.

Secondly he argued that the Orders were issued on 20/9/2002 and that application is made on 20-2-2003, five (5) months after the order hence inordinate delay.

Thirdly that there is no formal appointment of the advocate for the Defendant this was however, abandoned.

Lastly that the annexures or exhibits to the affidavit should be struck off because the seal of the commissioning Commissioner of Oaths ought to be affixed on the document itself and not on some piece of paper.

Mr. Manduku for Defendant opposes this Preliminary objection. First, he says that there was no change of advocate because the earlier advocates Ms Mose & Mose advocates only wrote a letter to the Chief Justice on behalf of the party but that was not a Notice of appointment so no change of advocates arose.

Of markings on the affidavit. He said it was not substantial.

For relying on order 21 rule 22 he said this was because stay was required and not order 39 rule 4 as it is only for varying or discharging orders.

Regarding order 50 rule 1 counsel submitted that order 50 rule 12 excuses any such omission and section 3A of the Act gives court discretion.

These objections relate to procedure and the question is whether ignoring procedural rules is fatal. I think it may depend on the way the rules are stated. Whether they are mandatory or merely directive but court of Appeal has deprecated ignoring procedural rules, strongly in the case of GALAXY PAINTS CO. LTD V. FALCON GUARD LIMITED C.A. NO. 219 of 1998 the court said:

“The Rules are designed to facilitate justice and further its ends. They are not things designed to trip people up.

They are not too technical. The Law Society of Kenya is adequately represented in the Rules Committee.

But due to rampant inefficiency negligence, dishonesty and general disregard for professional ethics on the part of the majority of the advocates in the country the rules are abhorred”.

They cannot be ignored as though they did not exist. Now take the Order 50 rule 12. It says all such applications as under order 39 rule 4 shall be by way of Notice of Motion and not Chamber summons. The purpose being that the former would be held in open court and the other merely in Chambers. The latter is restricted, the former is open there is a difference.

As for exhibits to the affidavit under Order 18 of the Civil Procedure Code is not exhaustive and one has to go to Cap 15 The Oaths and Statutory Declarations Act where the Rules Rule 9 says that

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

10: The Forms of jurat and of identification of exhibits shall be those set out in the Third Schedule.

That third Schedule reads

This is the Exhibit marked “...” Referred to in

The annexed affidavit of “...” sworn before me this

.... Day of at _____

Commissioner For Oaths

The rules envisage marking on the very document and that is to safeguard certainty. Exhibits should never be identified by fly papers attached to the document. The exhibit itself must be marked. We do not have detailed rules on this in Kenya but the Practice Rules in the English Order 41 of RSC that deals with the forms of affidavits and exhibits are common sense rules which should be adopted. It divides exhibits into documents and none documents. Fly papers are misleading and is fraught with uncertainty. Exhibits to affidavit which are loose flysheets for identification attached to them and do not bear Exhibit mark on them directly must be rejected. The danger is so great.

These exhibits are therefore rejected and struck out from the record. That makes the affidavit incomplete hence also rejected. That being the case application fails and is dismissed.

Dated this 21st Day of March 2003.

A. I. HAYANGA

JUDGE

Read to Mr. Odera.

Mrs. Wanyonyi

A.I. HAYANGA

JUDGE

21-3-2003