



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 696 OF 2003

DAVID KINYANJUI KARIGACHA.....1ST PLAINTIFF

JOSEPH KARIBU KABUKI.....2ND PLAINTIFF

CHARLES KIMANI NJOROGE.....3RD PLAINTIFF

V E R S U S

1. YUSUF IBRAHIM ISMAIL.....1ST DEFENDANT

2. CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

RULING

The single point for decision here is in interpreting Order 50 Rule 16(1) of the Civil Procedure Rules. It reads at the material part: -

“(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.”

(2)....

(3) If a respondent fails to file a replying affidavit, or a statement of grounds of opposition the application may be heard ex parte.

In this case, the Respondent has filed two affidavits together with grounds of objection and Mrs. Kasongo objects saying the action is contrary to Order 16 Rule (1) of the Civil Procedure Rules and therefore all the three cannot be admitted on argument, but Mr. Daudi for Respondent says the two affidavits are from two different persons and should be admitted because of the nature of the application and that the statement of objection filed may be superfluous in view of the affidavits but is not entirely objectionable .

In interpreting the rule it is clear that “or” is used but not “and” whose presence has only been assumed by counsel but as mode of interpretation, words appearing in any legislation ought to be given their natural meaning. The words OR and AND are normally used together and “OR” as used in Order 16 Rule (1) are either disjunctive and conjunctive respectively which means therefore that filing of an affidavit is distinct in purpose from filing grounds of objection hence “OR”. When an Applicant has filed one he may not file the other but had the rule read “AND” then that would have been conjunctive.

In interpreting these two words sometimes the Court may make “OR” which is disjunctive mean “AND” which is conjunctive but this can only happen in rare occasions where the intention of the legislature would be

derailed or misconstrued otherwise and where to maintain a disjunctive intent would render the meaning of the action intended inapplicable when read together with the rest of the legislation in question. Order 16 Rule (1) here does not import any of these doubts. It is quite clear that the rules intend that the pleader makes an election so that if he files an affidavit then he may not rely on statement of grounds of objection. This is made abundantly clear when the present Order 16 Rule 1 is compared to the amended Order 16 Rule 1 where the requirement was conjunctive and the rule said...

“An.ny respondent who wishes to oppose the application shall within 7 days file and serve on the applicant in addition to any affidavit, a statement of the grounds upon which he will oppose the applicatio

(2) If no affidavit AND no statement under sub rule 1 is filed an order may be made on the application exparte.

One therefore cannot now file both.

Secondly the rule talks of a replying affidavit and this denotes singularity and not multiplicity of affidavits. They cannot be two unless there is leave of Court.

The omission to follow the rules renders the mode of pleading, irrelevant, but more confusing to the opposite party. You cannot be several in the game if you play by your own rules. The Respondent ought to have elected whether to adopt one affidavit or statement but he did not. In the premises the three are hereby struck off with costs of the application to the Applicant. However, the Respondent may be at liberty to apply. DATED this 23rd day of July 2003

A.I. HAYANGA

JUDGE