



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO.1899 OF 2001

WIP JOSEPH MACHARIA KAMAU.....PLAINTIFF/RESPONDENT

VERSUS

STEPHEN KARIUKI WAIRIA.....DEFENDANTS/APPLICANT

RULING

On 24th October, 2003 the Defendant filed an application by Chamber Summons, under Order XLIX Rule 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. This was an *ex parte* application filed under Certificate of Urgency, and its prayers were:

- i. that leave be granted for enlargement of time to file a Further Affidavit;
- ii. that the costs of this application be provided for.

This application was supported by the Affidavits of Stella Wakiuru Gacharia dated 23rd October, 2003 and Nixon Kioko Wambua (23rd October, 2003).

The first deponent states as follows:

*The Plaintiff had filed a Notice of Motion on 22nd February, 2003 to which the Defendant filed a Replying Affidavit on 25th April, 2002. The matter was part-heard before the Honourable Lady Justice Rawal when she was transferred to another Division of the High Court. The deponent came on record for the Defendant on 9th June, 2003 having taken over from M/s. Asike Makhandia & Co. Advocates. There was an appearance before the Honourable Mr. Justice Rimita on 29th July, 2003, when it was agreed that the matter be heard *de novo*. On 29th July, 2003 the deponent's firm, M/s. Kiage & Co. Advocates applied for leave to file a Further Affidavit, and the Court ordered that such Affidavit be filed within 10 days, and the Defendant then swore a Further Affidavit on 6th August, 2003. Mr. Kiage left the country, leaving instructions with the firm's court clerk, Nixon Kioko Wambua to file the Affidavit. The clerk attempted to file the Affidavit, but on each occasion he was told that the file was missing from the Registry. Mr. Kioko was unaware that the Court had ordered that the Further Affidavit be filed within ten days, and the deponent learnt only much later, that the Further Affidavit had not been filed. The deponent then wrote a letter to the Deputy Registrar, requesting assistance in the tracing of the file, but even with further efforts, the file could not be found. Only on 17th October, 2003 was the Deputy Registrar able to report that the file had been found. The deponent says she then learnt that the Plaintiff had been to Court on 3rd September, 2003, and the hearing date of 25th November 2003 had been fixed *ex parte* for the hearing of the Plaintiff's application. The deponent pleaded that it was in the interests of justice that leave be granted to file the Further Affidavit out of time.*

In response there were Replying Affidavits by Mr. Alloys Aspell Kwengu, Advocate for the Plaintiff/Respondent (filed on 11th November, 2003) and Nelson Mbulu, a court clerk with the firm of Wangongu & Co. Advocates (filed on 11th November, 2003).

At the hearing of this matter on 13th November, 2003, Ms. Gacharia for the Defendant/Applicant objected to the Replying Affidavits filed on 11th November, 2003. She submitted that by Order L Rule 16, Replying Affidavits must be filed three clear days before hearing. She noted that the application was first served on 22nd October, 2003 and at that time the matter was fixed for hearing on 5th November, 2003. Even by this date, there was still no Replying Affidavit. On that occasion a different hearing date, 13th November, 2003, was fixed. Ms. Gacharia submitted that the Plaintiff/Respondent had had enough time to comply with Rule 16, but they had failed to do so. She was, therefore, applying for the Replying Affidavits in question to be struck off, in accordance with Order L, Rule 16(1). She cited Rule 16(3) of that Order which states that if a Respondent fails to file a Replying Affidavit or grounds of opposition, then the application will be heard *ex parte*.

Mr. Kwengu for the Respondent then applied for leave to adopt the Affidavit of 11th November, 2003. He stated as grounds of delay the fact that, at his firm, the offices were being relocated and this made it difficult for the Replying Affidavit to be sworn and filed. He submitted that adopting the belated Affidavit would cause no prejudice to the Defendant/Applicant. He also argued that the Defendant/Applicant was not coming to Court with clean hands in this application, because his own Affidavit was coming with a certain application out of time. Counsel argued that the requirement of Order L Rule 16(3) regarding a Replying Affidavit filed belatedly, did not take away the discretion of the Court, and it was possible to admit an Affidavit out of time. He requested that this discretion be exercised so as to enable the Plaintiff/Respondent to rely on the impugned Replying Affidavit.

Counsel for the Defendant/Applicant still opposed this new application and asserted that the relocation of firm offices was not good grounds, as there had been enough time to file a Replying Affidavit after the relocation had taken place. She submitted that the requirement of three clear days after service of a Replying Affidavit was annexed to the word shall, in Order L Rule 16(1), thus making this a mandatory prescription; but that the discretionary term may is only found in Rule 16(3), with regard to the range of decisions possible where there had been failure to comply with the requirement.

Counsel then applied for an adjournment to enable the Plaintiff/Respondent to comply with the provision of Order L Rule 16(1). Ms. Gacharia for the Defendant/Applicant had an objection to this application and argued on the obligation on the Respondents to keep their affairs in order, so as not to compromise the interests of clients. She remarked the fact that the substantive application had come under Certificate of Urgency, and was scheduled to be heard on 25th November, 2003. She, therefore, urged the Court to proceed with the hearing, considering in particular the fact that the application to be heard on 25th November, 2003 was the Respondent's application.

After hearing these submissions, I made the following Order:

“Having heard the strong case which the Applicant, has made for striking out the Respondent's belated Affidavit;

Taking into consideration the fact that urgency in this case is necessitated by another application by the Respondent, scheduled for hearing on 25th November, 2003;

Considering the merits of the Respondent's application that he be allowed to have today's hearing adjourned, to enable him to seek leave to file a Replying Affidavit under Order L Rule 16(1);

I have come to the conclusion that ends of justice require an adjournment of the hearing of the Applicant's application, as sought by the Respondent.

Accordingly, this matter is deferred, and a new hearing date is to be fixed at the Registry. In the meantime the Respondent will comply with the requirement of Order L Rule 16(1).

Costs of today's hearing to be borne by the Respondent."

On 25th November, 2003, the parties agreed in Court that the Defendant/Applicant's application of 23rd October, 2003 (filed on 24th October, 2003), be heard on 3rd December, 2003. And on 3rd December, 2003, Mr. Kwengu for the Plaintiff/Respondent submitted that the application of 23rd October 2003 be dismissed for non-attendance, under Order IXB, Rule 4 of the Civil Procedure Rules. There was no appearance for the Defendant/Applicant, and the Plaintiff/Respondent's counsel submitted that this was an abuse of the process of the Court.

Considering the focussed engagement of the parties in the proceedings of this Interlocutory Application, and the fact that hearing dates have been recorded in the presence of the parties, the non-appearance in Court of the Defendant/Applicant's counsel on 3rd December, 2003 is somewhat strange. It indeed justifies the application by counsel for the Plaintiff/Respondent; and accordingly, and by virtue of the provisions of Order IXB Rule 4 of the Civil Procedure Rules, I dismiss the application by the Defendant/Applicant and order that the Defendant/Applicant shall pay the Plaintiff/Respondent's costs in respect of the application.

DATED and DELIVERED at Nairobi this 19th day of December, 2003.

J. B. OJWANG

Ag. JUDGE

Coram: Ojwang, Ag. J.

Court clerk: Mutea

For the Defendant/Applicant: Ms. Gacharia, Instructed by M/s. Kiage & Co. Advocates

For the Plaintiff/Respondent, Mr. Kwengu, Instructed by Wangong'u & Co. Advocates.