



REPUBLIC OF KENYA

IN THE HIGH COURT OF NAIROBI(NAIROBI LAW COURTS)

CRIMINAL APPEAL NO.227 OF 2000

NAIROBI SKYLINE PROPERTIES PLAINTIFF

VERSUS

HOSEA MUCHUGU DEFENDANT

RULING

The plaintiff in this case filed a plaint on 3rd December, 2001 which is dated the same day praying for a number of reliefs. Two of the prayers seek restraining orders against the defendant. The orders sought are to restrain the defendant from trespassing on L. R. Number 209/561 and 209/562. Together with the plaintiff an application was filed by way of summons in chambers under order XXXIX r 1, 2, and 3 of the Civil Procedure Rules. It seeks temporary orders of mandatory injunction against the defendant.

The defendant was served and filed a replying affidavit sworn by one John Mwaura who states that he is the sole proprietor of the Beauty Shop the plaintiff seeks to be removed from its land. Grounds of objection were also filed.

The plaintiff's Counsel gave notice of a preliminary objection to the effect that both the affidavit and the grounds of objection were incompetent and needed to be expunged from the record.

I have perused and examined the affidavit.

The defendant in the case before me is Hosea Muchugu T/a Beauty Shop. It was therefore necessary for the deponent to state on whose behalf the affidavit is made and whether he is a party to the proceedings or not. He should have given his relationship with the Defendant/Respondent. As the Advocate for the Applicant rightly pointed out Mr. John Mwaura failed to state which of the statements in the affidavit are made from his own knowledge and which are matters of information or belief. He did not state the source of his information or belief.

The other complaint raised by the Advocate for the Applicant is that it is not clear from the affidavit who the commissioner of oaths is, and who the deponent is. The rubber stamp of G. M. MAGUNGA is impressed on two signatures. It is not clear who signed as the deponent and who signed as the Commissioner for oaths.

I agree that the jurat of the replying affidavit offends the requirements of the jurat in an affidavit. Put simply, these are: (a) Must be signed by the deponent.

(b) Must be completed and signed by the person before whom the affidavit was sworn whose name and qualification must be printed beneath his signature.

(c) Contain full address of the person before whom the affidavit was sworn.

The other issue raised is that the affidavit does not show by whom it was drawn (see sections 34 and 35 of the Advocates Act). Considering all the deficiencies in the affidavit, I am of the strong view that the same is bad in law and cannot stand. It is expunged from the record of the Court.

However, I do not agree with the applicant's Counsel's interpretation of Order L r. 16 (1) of the Civil Procedure Rules. The rule is in the following terms;

"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 date of hearing.

(2).

(3)."

Mr. Kwame for the applicant was of the view that a respondent is entitled to file a replying affidavit or grounds of opposition only and not both. I do not agree.

I think the rule allows the respondent to file a replying affidavit or grounds of opposition if he chooses, but is not prevented from filing both if he opts to do so.

I believe the respondent was entitled to file both the replying affidavit and the grounds of opposition.

The position is that the preliminary objection is partly sustained. The affidavit is struck off the record but the grounds of opposition remain. I will make no order to costs.

Dated and delivered at Nairobi this 13th day of February, 2002.

D. M. RIMITA

JUDGE