

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 1077 OF 2002

EAST AFRICAN FOUNDRY WORKS (K) LTD.....PLAINIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....DEFENDANT

RULING

At the commencement of the hearing of the motion on notice filed in court on 1.10.2002 by the defendant for the setting aside of *ex parte* injunctive orders issued by this court on 23.9.2002, Mr. Akiwumi, advocate for the defendant, took objection to paragraphs 3,4,8 (c) and (e) and 9 of the affidavit sworn by Mr. Ngatia, advocate for the plaintiff, on 14.10.2002 in opposition to the motion. Then in the course of argument Mr. Akiwumi initially urged that the entire affidavit of Mr. Ngatia be struck out but in the end he withdrew his objections save as regards paragraphs 3,4, 8 (c) and (9). So the issue for determination in the application is whether the said paragraphs should be struck out.

The said paragraphs read as follows –

“3. THAT unknown to the plaintiff, the defendant filed Miscellaneous Civil Case No.1257 of 2002 in this Honourable Court on 18th September 2002 and obtained *ex parte* orders on the same day.

4. THAT the plaintiff was apprehensive that the defendant was about to appoint a Receiver-Manager and the Plaintiff instructed me to file this suit and to seek injunctive orders urgently. The plaint and chamber application were filed in this Honourable Court on 19th September 2002.

8. THAT whilst arguing the motion, I was not aware of the terms of the *ex parte* orders that had been issued. Consequently, the correct factual position is as hereunder:-
(c) That the purported appointment of a Receiver- Manager was unknown to the plaintiff and is challenged in this suit.

9. THAT it is incorrect to contend that there has been misrepresentation and/or non-disclosure of material facts since a litigant cannot be expected to disclose information which is not within the litigant’s knowledge”.

The objection to paragraphs 3 and 4 was that they contain averments of fact which were not within the knowledge of the deponent and appeared to be based on information the sources whereof were not disclosed. It was argued that those depositions violated order 18 rule 3(1) of the Civil Procedure Rules which provides that: –

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof”.

Paragraph 8(c) was challenged on the same ground. So was paragraph 9. Mr. Akiwumi further contended that whether the plaintiff was or was not aware of the appointment of a receiver by the defendant company or was merely apprehensive of a possible appointment at the time it lodged its application for orders restraining the defendant from appointing a receiver were disputed matters of fact to which the plaintiff’s advocate could not competently depose. He relied on the High Court decision in *Caneland Limited v Dolphine Holdings & another* [HCCC No.1135 of 1998] and *Joseph Mwema Ngaca v United Insurance Company Ltd* [HCCC No.1409 of 2000]. In the former , Mbaluto J. deplored what he called the irregular habit which was becoming all too common these days of advocates swearing affidavits on behalf

of their clients in contentious matters which could lead to the awkward situation whereby an advocate may have to be put in the witness box to be cross examined in a matter in which he is appearing. In the latter, Hewett, J. upheld preliminary objections to the effect that an application was incompetent because it was supported by an affidavit sworn by an advocate who had no personal knowledge of the matter and who also deposed to contested matters of fact.

Mr Ngatia responded that his affidavit should be considered in the light of what transpired before Mwera J. on 19.9.2002 as manifested in the ruling by the Learned Judge delivered on 9.10.2002. He further pointed out that he was responding to an affidavit sworn by an advocate – none other than Mr. Akiwumi himself – and it was not reasonable to expect him to get his client to respond to the depositions of a fellow advocate.

He argued that paragraph 3 was a statement of fact which he came to learn when he appeared before Judge Mwera and it was not a disputed matter of fact that the plaintiff was unaware of the existence of Miscellaneous High Court Civil Cause No.1257/2002. He also contended that paragraph 4 contained a statement of an undisputed matter of fact. And so was paragraph 8. He also contended that paragraph 9 was a response from one lawyer to another.

I have considered the rival arguments. I accept the submissions of Mr. Akiwumi that in reality paragraphs 3,4 and 8(c) of the affidavit of Mr. Ngatia contain not statements of facts of which he had personal knowledge but statements based on information the source whereof he has not disclosed. Accordingly those paragraphs offend Order 18 rule 3(1) of the Civil Procedure Rules. I also accept the further submission of Mr. Akiwumi that indeed they consist of contentious averments of fact which an advocate should not be allowed to depose to in a case where he is appearing as such. I have always deprecated depositions by advocates on contentious matters of fact in suits or applications which they canvass before the courts and I have never had any hesitation in striking out such depositions as a matter of good practice in our courts. The unseemly prospect of counsel being called upon to be cross-examined in matters in which they appear as counsel must be avoided by striking out such affidavits as a matter of good practice. As regards paragraphs 9, I accept the submission of Mr. Ngatia that it is no more than a deposition as to his understanding of the law in response to an affidavit by a fellow advocate.

Having taken that view of the matter, I hereby strike out paragraphs 3,4, and 8(c) of the affidavit of Mr. Ngatia in opposition to the motion filed on 1.10.2002. I further order that the costs of the objection be costs in the motion.

Orders accordingly.

Dated and delivered at Nairobi this 22nd day of October , 2002

A. G RINGERA

JUDGE