



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 1723 OF 2000

SSEBAGGALA & SONS ELECTRIC CENTRE LTD..... APPLICANT

VERSUS

KENYA NATIONAL SHIPPING LINE LTD..... RESPONDENT

RULING

On 6th July, 2001 the defendant/applicant filed a chamber summons application under a certificate of urgency for stay of execution and an order that the Court be pleased to set aside the judgment registered herein. During the hearing of the application, the learned counsel for the plaintiff/ respondent raised a preliminary objection on two grounds; that the application does not comply with order 50 rule 15 (2), and that the supporting affidavit is irregular as the jurat is overleaf and thus should be struck out.

Mr Waweru for the applicant/defendant submitted that no notice of a preliminary objection was served on them as a matter of practice to which Mrs Effendi replied that this notice was contained in the affidavit filed on 13th July, 2001. Further, Mr Waweru submitted that the points raised do not go to the root or substance of the application, and that the contents of the affidavit are not disputed. This, the learned counsel submitted, was a purely technical matter which does not go into the main issue of the application.

As a general proposition with regard to affidavits, the jurat should follow immediately after the text and should never be hanging alone on a different page. Affidavits should never end on one page with the jurat following overleaf, but the jurat should follow immediately after the end of the text (Supreme Court Practice, Vol 1, 1999, order 41 rule 1/12). An affidavit which is in breach of this proposition is so to speak an irregular affidavit.

Thus as the counsel for the respondent rightly points out, in the instant application the supporting affidavit has its jurat hanging alone in a separate page with the text ending on another page.

The counsel for the respondent submits that in light of this irregularity, the supporting affidavit should be struck out from the record. *In the Matter of the Central Bank of Kenya and Reliance Bank Ltd and in the Matter of section 34 of the Banking Act Miscellaneous Appl No 427 of 2000*, High Court at Nairobi, (Milimani) cited as authority that the defective affidavits such as this, with the jurat overleaf separate from the main text are struck out. In this case, Gacheche, CA disregarded the contents of the affidavits and dismissed them.

However, it has always been recognized that technicalities which do not touch on the substance of the application or go to the root of the case and which do not prejudice the other side should not be used to emasculate or strike down Court documents filed by one party.

In *Najibhai Prabhindas & Co vs The Standard Bank Ltd*, Newbold J stated:

“the Courts should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature.”

This proposition was adopted in *Boyes vs Gathure* (1969) EA 385, where the passage was quoted *in extenso* and the Court stated that matters of procedure such as this, which do not cause any prejudice nor do they go to the very root of the application or substance of the application or affidavit as the case may be, do not go towards extinguishing jurisdiction or occasioning any failure of justice.

In any event, order 18 rule 7 allows the Court to accept an affidavit despite its defect of form. If the irregularity can be cured without undue hardship, or it is not a matter of substance or affects its actual contents, then it should be put right (see Supreme Court Practice (*supra*) order 41 rule 4). Striking down pleadings, like the affidavit complained of here, is of a most drastic nature and should be exercised with due care and judicial caution. I do not find any undue hardship, which the respondent will suffer should the affidavit be admitted, see also *Agip (K) Ltd vs Jimmy Komo* HCCC No 1738 of 2000.

Likewise the same fate befalls the second limit of the preliminary objection.

In *Namukasa v Burkya* (1966) EA 433 and *Kigoya vs Attorney General of Uganda* (1966) EA 463, applications brought in the wrong form were struck out as incompetent. The Court stated that the rules were not made in vain but were there to be followed. However in *Boyes v Gathure* (*supra*) Spry JA had this to say about the Court’s action:

“Certain remarks in those judgments taken in isolation, might appear to suggest that a Court lacks jurisdiction if the initial step in the proceedings is in a form contrary to statutory requirement, but reading the judgments as a whole, and having regard particularly to reference to the probability of amendment, I am satisfied that was not what the learned Chief Justice intended.”

The proper procedure in such circumstances is for the offending party to seize the opportunity to apply for amendment once an irregularity has been pointed. *Agip (K) Ltd Vs Jimmy Komo t/a Kiambu Stores* HCCC No

1738 of 2000, it is stated that it now appears that no application may be defeated merely by use of a wrong procedural mode.

It is always a duty of the counsel to scrupulously adhere to the laid down procedure of the law in bringing or setting forth their claims or applications where it has been recognized that the procedure adopted is wrong, it is incumbent upon the party who adopted the faulty procedure to right its wrongs, but such an irregularity does not extinguish the substance of the application or claim, it is only to the form. As it has not been shown any prejudice the plaintiff would suffer and that the irregularity is fundamental, I decline to uphold the preliminary objection. Costs will be in the cause.

Dated and delivered at Nairobi this 31st day of July, 2001

J.K. MULWA

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JUDGE