



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL SUIT NO 966 OF 2000

PASTIFICIO LUCIO GAROFALO SPA..... PLAINTIFF

VERSUS

SECURITY & FIRE EQUIPMENT CO & ANOTHER..... DEFENDANTS

RULING

I have before me an application to strike out the suit herein on the basis that there is no verifying affidavit as is required by law. The application purports to be made under order VII rules 2 and 3 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The genesis of the application is that on 29th March 2001, the late Hewitt J struck out the affidavit accompanying the plaint and ordered that the plaintiff do file a fresh verifying affidavit within 21 days. In an affidavit in support of the application, Miss Jan Mohamed, counsel for the defendants depones that the twenty one days period expired on 19th April, 2001 and that her firm has not been served with any verifying affidavit.

At the hearing of the application, counsel for the defendant contended that the order of Hewitt J meant that the plaintiff was to file and serve the verifying affidavit within the 21 days period. Counsel pointed out that although there was an affidavit filed on record on 17th April, 2001, the same was not served on her firm. She contended that that affidavit was not in any event properly drawn or sworn and could not be a verifying affidavit within the meaning of the law. The affidavit in contention is sworn by one Emile Viola who describes herself as the Sales Manager of the plaintiff company. It purports to be sworn at Napoli in Italy by the deponent. There is no stamp or signature of attestation in the jurat although there is a stamp or seal of some sort on and against the typewritten indication that the document was drawn by Ahmednasir, Abdikadir & Co, Advocates of Nairobi. There is the stamp or seal on inscription in a language unknown to the Court which appears to be the Italian language.

There is also a certificate at the back of the affidavit again in the self same language. There are three other pages attached to the said affidavit which contain what appears to be a translation of the verifying affidavit in the Italian language. The objection taken to this affidavit is first that it is not sworn by the plaintiff before a competent person and secondly it is in a language other than English which is the language of the High Court. In support of the first limb of the objection, Miss Jan Mohammed argues that since the plaintiff is a limited liability company, it could only make the verifying affidavit through its recognized agent. Order III rule 2 (c) of the Civil Procedure Rules provides that in the case of a corporation, the recognized agent is an officer of the corporation duly authorized under the corporate seal. In her view, the Sales Manager of the corporation is not such a recognized agent. She further points out that the affidavit is not taken before a commissioner of oaths or a Notary Public. In support of her second limb to the objection, counsel submits that the language of the Court is English and yet the certificates endorsed on the affidavit are in a language other than English.

Mr Ahmed Nasir, counsel for the plaintiff, on his part submits that the application is incompetent as the rules on which it purports to be grounded do not relate to a verifying affidavit. He contends further that the chamber summons is incompetent for the additional reason that the endorsement required by order 50 rule 15 (2) to be on every motion or summons to the effect that “if any party served does not appear at the time and place above-mentioned such order will be made and proceedings taken as the Court may think expedient” is missing thereon. Counsel further submits that the plaintiff complied with the Court order as it filed the verifying affidavit within the 21 days ordered by the Court. The order did not require service of the affidavit within the same period. He also contends that the affidavit filed is in English and it is attested to by a Notary Public in Napoli. He asks me to ignore the translation as it does not affect the substance or form of the affidavit.

Miss Jan Mohamed in reply submits that the body of the application shows the rules cited were a typographical error and no prejudice has been caused to the respondent. In similar vein, she argues that the endorsement missing from the chamber summons does not go to the root of the application.

She also points out that the affidavit has four pages and Court cannot ignore any of them. Lastly, she submits, there is no indication that the person who took the affidavit is a Notary Public.

From the above submissions, it appears to me that the issues for decision in this application are (i) whether or not failure to serve the affidavit filed in Court on 17.4.2001 on or before 19.4.2001 was a contravention of the

Court order, (ii) whether or not Emile Viola the plaintiff’s Sales Manager is a competent person to swear a verifying affidavit on behalf of the plaintiff, (iii) whether or not the said affidavit is properly taken and is admissible in Court: and (iv) whether or not the defendant’s application is competent.

As regards service of the verifying affidavit, the order of Hewitt, J directed that the affidavit be filed within 21 days. In my opinion, to read the order to mean that service was also to be effected within the same period as counsel for the defendant contends is to stretch the said order. Had Hewitt, J meant to so order he would have done so. The plaintiff is not therefore in contravention of the order. What appears to have been lost to both counsel is that under the general law, where no time is fixed for the doing of a thing, the thing is to be done within a reasonable time. Hewitt, J must have had that in mind. As the defendants do not complain that they were not served with the verifying affidavit within a reasonable time but rather that they were not served with it within the period specified for the filing of the same, their complaint is without merit and it is rejected.

As regards whether Emile Viola is competent to swear an affidavit on behalf of the plaintiff corporation I find that he is. Order III of the Civil Procedure Rules does not define who an officer of the corporation is.

The Companies Act, Cap 486, defines an officer of a company in section 2 as including a manager. Although that definition is for the purposes of that Act, I would adopt it here. As the deponent is a Sales Manager, he is obviously an officer of the corporation and accordingly a recognized agent within the contemplation of order III rule 2 (c).

As regards whether the affidavit is taken before a Notary Public, there is no specific statute in Kenya or rules of court dealing with the formalities and admissibility in Court of affidavits taken abroad. However section

88 of the Evidence Act, Cap 80 of the Laws of Kenya provides that documents which would be admissible in the English Courts of Justice are admissible in Kenyan Courts without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed. In England by virtue of order 41 rule 12 of the Rules of the Supreme Court, affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp and seal or the official position of the person taking the affidavit. It accordingly follows that the same position obtains in Kenya. As there is no such presumption in favour of documents made outside the commonwealth, it follows that the affidavit in the instant case which was taken in Napoli, Italy, has to be

proved by affidavit or otherwise to have been taken by a Notary Public in Italy and that the signature and seal of attestation affixed thereto was that of such Notary Public. There is no such proof here. It may very well be that the certificates in Italian and the other writing in Italian was meant to do that. However, as there was no translation of the same into English-which is the official language of the

High Court-this Court cannot and will not know the position. In the result I find the verifying affidavit of Emile Viola inadmissible in evidence and I would order the same struck out of the record.

As regards the competence of the defendant's application, the plaintiff's submission that it is brought under the wrong rules of order VII is unassailable. However I regard the goof as a procedural lapse which does not go to jurisdiction or prejudice the adverse party in any material respect. I would not therefore have been inclined to dismiss the application on that ground. With regard to the endorsement required by order L rule 15, the plaintiff has not claimed to have been prejudiced thereby. And it is not evident that any prejudice has actually been caused as the application was served without any hearing date and accordingly the issue of the plaintiff appearing at the time and place mentioned therein did not arise.

In the premises, I find the omission of the endorsement from the foot of the summons to be also an irregularity which the Court could in the circumstances of this case excuse.

The last matter of consideration is whether having ordered the verifying affidavit stuck out, the suit should also be struck out. Sub rule (3) of rule 1 of order VII reads:

“ The Court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with subrule (2) of this rule.”

To my mind, the use of the word “may| shows the Court has discretion in the matter. In exercising such discretion the Court should be alive to the principle of justice that procedural lapses, omissions and irregularities unless they go to the jurisdiction of the Court or prejudice the adversary in a fundamental respect which cannot be atoned for by an award of costs are not to be taken as nullifying the proceedings affected. In the instant matter I am of the opinion that the filing of the defective verifying affidavit is such a procedural lapse. I am aware that this is the second such lapse but I am nonetheless prepared to grant the plaintiff the last chance to redeem its cases on terms I consider just to the defendant.

In the result, I order the verifying affidavit of Emile Viola purportedly sworn in Napoli, Italy, on 5th April, 2001 struck out with liberty to the plaintiff to file a fresh and compliant affidavit within 21 days of today. The defendant is awarded the costs of this application.

Dated and delivered at Nairobi this 3rd day of July, 2001

A.G. RINGERA

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JUDGE