



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 692 OF 2010

EXPORT IMPORT BANK OF AMERICA.....PLAINTIFF

- VERSUS-

ROYAL MEDIA SERVICES LIMITED.....1ST DEFENDANT

DEEP RIVER ESTATE LIMITED.....2ND DEFENDANT

ROYAL CREDIT LIMITED.....3RD DEFENDANT

SAMUEL KAMAU MACHARIA.....4TH DEFENDANT

PURITY GATHONI MACHARIA.....5TH DEFENDANT

RULING

1. The application dated 9th October 2014 was brought by the plaintiff, **EXPORT IMPORT BANK of AMERICA**. It was brought pursuant to the provisions of Sections 3, 3A and 63 (e) of the Civil Procedure Act, as read together with section 19 of the Stamp Duty Act.
2. The plaintiff asks this court to make an Order requiring the Collector of Stamp Duty to assess the duty payable on a copy of the Security Agreement dated 15th October 1998.
3. The plaintiff also asks this court to make an Order accepting the Security Agreement dated 15th October 1998 in evidence, upon payment by the plaintiff, of the stamp duty assessed.
4. The application is premised on the grounds that the payment of duty and the registration of the Security Agreement was the defendants obligation, but the said defendants jointly and severally failed to fulfill that obligation.
5. Secondly, the plaintiff contends that the original Security Agreement was in the defendants' custody.
6. It is the intention of the plaintiff to rely on the Security Agreement during the hearing of this case, as it was a crucial document.
7. However, because the defendants had failed to fulfill their obligation, (*of paying duty on the Agreement*) the plaintiff fears that it would be unjust to allow the defendants to gain a windfall from their own error, at the expense of the plaintiff.
8. The plaintiff submitted that it was in the interests of justice that the stamp duty be assessed now, so that the plaintiff can thereafter pay it, so as to avoid delay in the conclusion of the case.
9. It was the understanding of the plaintiff that there was no need to enjoin the Collector of Stamp Duty to these proceedings, simply for the purposes of having the court address the omission by the

- defendants to remit the requisite stamp duty.
10. The plaintiff invited this court to direct the Collector of Stamp Duty to assess the duty payable on the copy of the Security Agreement, so that the said Agreement could then be admitted in evidence.
 11. But the defendants, **ROYAL MEDIA SERVICES LIMITED; DEEP RIVER ESTATE LIMITED; ROYAL CREDIT LIMITED; SAMUEL KAMAU MACHARIA and PURITY GATHONI MACHARIA**, deem the application to constitute an abuse of the process of the court.
 12. The first reason for that contention was that the court was being asked to make an Order against the Collector of Stamp Duty, who was not a party to the suit. By making an order directed against a person who was not a party to the suit, the court would have condemned the said person without first giving him an opportunity to be heard.
 13. There is no doubt at all that if the court were to make an order that was prejudicial to a person who was not a party to the proceedings, the said court would have condemned the said person without giving him an opportunity to be heard.
 14. I believe that that is one of the main reasons for the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules which provides as follows;

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.

15. That sub-rule gives the court great latitude to act either on the application of either party or on the court's own motion.
16. The main aim of giving such latitude to the court was to make it possible for the court to adjudicate upon and to settle questions involved in the suit.
17. In **JAMES NDUNGU WAMBU Vs REPUBLIC, CIVIL APPEAL No. 85 of 1992** the Court of Appeal noted thus;

“The prerogative orders granted by the Judge affected many people who had already been issued with title deeds, and if the parcels of land of which they claim to be registered owners, were to be subjected to fresh adjudication under the Act, the titles held by them would be rendered null and void. The registered owners were, therefore, in our view persons directly affected and ought to have been given a hearing, and natural justice demanded that they be informed of all the allegations made against them or the reasons why it was proposed to cancel their deeds”.

18. That pronouncement was made in the light of the provisions of Order 53 Rule 3(2) of the Civil Procedure Rules, which expressly stipulates that a notice be served on all persons directly affected by the orders sought.
19. In contrast, there is no express statutory provision that lays down a similar requirement in the matter before me.
20. However, that does not mean that the right to be heard only arises when it is specifically provided for by statute or through rules or regulations. The right to a fair hearing is inherent. It does not need to be enacted.
21. In this case, the plaintiff was seeking an order to require the Collector of Stamp Duty to assess the duty that is payable on the Security Agreement. It is almost like telling the Collector of Stamp Duty to discharge one of his functions. I would therefore not describe the order, if it were granted, as capable of being construed as prejudicial to the Collector of Stamp Duty.
22. On the other hand, it would appear that the plaintiff was not seeking any substantive relief against the Collector of Stamp Duty. I say so because there is no claim against the Collector of Stamp Duty, which if proved, would result in some orders being made against him.
23. The plaintiff appears to need a Security Agreement which is to be adduced in evidence. However,

- in the understanding of the plaintiff, the said Agreement could not be admitted in evidence until the duty was paid for it. Therefore, I understand the plaintiff to be seeking the perfection of the documentary evidence.
24. The person who can do the needful, in the opinion of the plaintiff, was the Collector of Stamp Duty. In other words, the Collector of Stamp Duty was not becoming a party to the suit. He was only being required to facilitate the assessment of the duty which is payable on the Security Agreement.
 25. In the circumstances, this court holds the considered view that the Collector of Stamp Duty is not a necessary party to the case. He need not be a party at all.
 26. At best, the Collector of Stamp Duty could be called upon to be a witness. Therefore, although the court can, in appropriate circumstances, order that a necessary party be enjoined to a suit, even without an application being brought by any of the parties, I find no reason to so order in this case.
 27. In **SUNDERJI NANJI LIMITED Vs MOHAMEDALI KASSAM BHALOO [1958] E.A 762**, the appellant sought to put in evidence an unstamped letter of guarantee. The respondent objected to the said document as an unstamped guarantee was inadmissible in evidence.
 28. The learned trial magistrate did not make a ruling on the admissibility of the guarantee, at the time when the appellant wanted to produce it in evidence. Instead, the trial court held, in its final Judgement, that the guarantee was inadmissible, because it was unstamped.
 29. The appellant challenged the decision because it had been deprived of an opportunity of paying the duty and the penalty, which would have made the document admissible in evidence. In effect, the appellant was saying that the trial court should have given its ruling on the issue of admissibility, at the time when that issue arose.
 30. The appellate court expressed itself thus;

“As was held in Bagahat Ram Vs. Rattan Chand (2) (1930) A.I.R Lah. 854, before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty. The position in this case is exactly the same. The appellant has never been given the opportunity of paying the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in support of his claim against the second defendant/respondent, and he must be given that opportunity”.

31. The appellate court proceeded to impound the guarantee, and thereafter levied the requisite stamp duty and the prescribed penalty.
32. Finally, the appellate court directed that upon payment of the duty and penalty, the guarantee would become admissible in evidence. Having given those directions, the appellate court referred the case back to the trial court, which would then dispose of the case, with the guarantee having been duly admitted in evidence.
33. There is no doubt that until and unless the Security Agreement in this case had duty paid upon it, it could not be admitted in evidence.
34. The Respondent does not dispute that fact. The Respondent’s position was that it was premature for this court to determine the issue of admissibility, when this court was not sitting as the trial court.
35. Section 19(3) of the Stamp Duty Act stipulates as follows;

“Upon the production to any court (other than a criminal court), arbitrator, referee, company or other corporation, or to any officer or servant of any public body, of any instrument which is chargeable with stamp duty and which is not duly stamped, the court, arbitrator, referee, company or other corporation, or officer or servant, shall take notice of the omission or insufficiency of the stamp on the instrument and thereupon take action in accordance with the following provisions –

- a. ***If the period of time within or before which the instrument should have been stamped has expired and the instrument is one in respect of which a person is specified in the Schedule to this Act as being liable for stamping thereof, the instrument shall be impounded and, unless the instrument has been produced to a collector, shall forthwith be forwarded to a collector;***

- b. *In any such case, before the exclusion or rejection of the instrument, the person tendering it shall, if he desires, be given a reasonable opportunity of applying to a collector for leave under section 20 or of obtaining a certificate under section 21;*
- c. *In all other cases, unless otherwise expressly provided in this Act, the instrument shall, saving all just exceptions on other grounds, be received in evidence upon payment to the court, arbitrator or referee of the amount of the unpaid duty and of the penalty specified in subsection (5), and the duty and penalty, if any, shall forthwith be remitted to a collector with the instrument to be stamped after the instrument has been admitted in evidence”.*

36. In the light of those provisions, the applicant submitted that this court should impound the Security Agreement, and then forward it to the Collector of Stamp Duty.

37. Although that point has been made in the submissions, the application itself did not request this court to impound the Agreement. The application simply asks the court to require the Collector of Stamp Duty to assess the duty payable on the Security Agreement dated 15th October 1998.

38. But even before that, **Mr. RICHARD D. BRACKLEY**, who is an employee of the plaintiff, did;

“respectfully request that this Court compel the Defendants to produce the original Security Agreement so that it can be properly stamped in the registry office and submitted to this Court as evidence”.

39. That means that the plaintiff does not hold the original document. They want this court to compel the defendants to produce the original.

40. However, the plaintiff also expressed the view that the defendants would not be prejudiced if the photocopy of the Security Agreement is used in evidence.

41. The difficulty which the plaintiff faces is spelt out in paragraph 11 of Brackley’s affidavit, in which he says that the plaintiff’s advocates, messrs Anjarwalla & Khanna have informed the plaintiff;

“that the Lands Registry will not receive a photocopy of the Security Agreement for registration”.

42. Presumably, that means that if the court were to purport to impound the photocopy which the plaintiff has, it would, nevertheless not be received at the Lands Registry, for registration.

43. That would explain why the plaintiff was saying that the court should, first, compel the defendants to produce the original document before the court.

44. Section 19 (3) of the Stamp Duty Act spelt out what is to happen *“upon the production”* of any instrument which is chargeable with stamp duty.

45. As I understand it, the production of a document in evidence, takes place when a witness makes it available to the court.

46. If the document was not an original, and the party wishing to rely on it wants to persuade the court that it was admissible pursuant to Section 67 of the Evidence Act, the said party would be required to satisfy the court why the secondary evidence should be admitted in evidence.

47. I do therefore agree with the defendants, that this application has been brought prematurely.

48. The application is therefore rejected. The costs of the application are awarded to the defendants.

DATED, SIGNED and DELIVERED at NAIROBI this 5th day of October 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Mutea for the Plaintiff

Mrs. Muhoro for the 1st Defendant

Mrs. Muhoro for the 2nd Defendant

Mrs. Muhoro for the 3rd Defendant

Mrs. Muhoro for the 4th Defendant

Mrs. Muhoro for the 5th Defendant

Collins Odhiambo – Court clerk.