



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CIVIL SUIT NO. 95 OF 2011

GIFTED HAND FURNISHING & FABRICS LTD.....PLAINTIFF

VERSUS

KIBUWA ENTERPRISES LTD.....DEFENDANT

CYCLO SYSTEMS KENYA LIMITED.....INTERESTED PARTY

RULING

The Plaintiff filed a Chamber Summons dated 27th March 2013 seeking orders that Samuel Patrick Kibuchi ceases acting as Advocate for the Defendant for reasons that he swore an affidavit on their behalf, and that the Plaintiffs have already been granted leave by this court to cross-examine him on that affidavit. The Plaintiffs also seek an order that they be given an opportunity to proceed with the said cross-examination, and that the ruling delivered on 31st May 2011 by Okwengu J. (as she then was) be amended to reflect that it is Samuel Patrick Kibuchi as the deponent to be cross-examined and not John Muriuki Kibuchi as was erroneously indicated.

The grounds for the application are detailed out in a supporting affidavit sworn on 27th March 2013 by Cyros Nyori Ndungu Mbugua, a Director of the Plaintiff. He attached copies of a Notice to cross-examine Samuel Patrick Kibuchi dated 19th April 2011 and the ruling delivered by Okwengu J. (as she then was).

The Defendant's counsel Samuel Patrick Kibuchi opposed the Plaintiff's Notice of Motion in a replying affidavit he swore on 12th April 2013. He stated that he was also serves as a Director of the Defendant company, and that the practice rules do not bar him from stating a matter of fact in an affidavit, or statements of information or belief based on evidence from another. The Advocate stated that he swore an independent affidavit that captured the contents of a disputed forged letter and supported the same with a document examiner's report, who would be the best person to give evidence on the matter. He also stated that he would be giving evidence on matters on which he relied on another, which would be tantamount to hearsay. Further, that the Advocate Practice rules give the trial court discretion to determine whether an advocate may testify at the trial, and that what is presently before the court was an interlocutory application.

The counsel also stated that the thrust of main case between the parties herein the dispute relates to whether this matter is correctly before this Court, as the dispute resolution mechanism chosen by the Plaintiff and the Defendant herein was arbitration as provided in a sale agreement they entered into

between the plaintiff and the Defendant. Further, that the Plaintiff has raised several objections during the hearing of this matter at various stages, and all of which have resulted in the further continued and repeated delay in the due conclusion of the Defendant's application for stay of proceedings dated 15th March 2011 filed in accordance with the provisions of Section 6 of the Arbitration Act.

The parties were directed to file written submissions in court. The Plaintiff's counsel filed two sets of submissions dated 6th May 2013 and 2nd July 2013. He argued therein that order 19 rule 2 of the Civil Procedure Rules grants power to this court to order the attendance of a deponent for cross examination . He also relied on section 9 of the Advocates (Practice) Rules and various judicial authorities to argue that if an advocate is likely to be a witness in any matter he shall not continue to appear. The counsel in this regard contended that the affidavit deponed to by Samuel Patrick Kibuchi contains serious allegations of forgery which constitutes the foundation of the Defendant's application dated 15th March 2012, and is also a Director of the Defendant. Further, that he cannot therefore continue to act owing to the fact that he has a personal interest in this matter, and as he is set to be cross-examined by the Plaintiff, will also be a witness in the matter.

It was also further submitted by the Plaintiff's counsel that the Defendant's application dated 15th March 2011 was heard on merit and dismissed by this court on 31st May 2011. Further, that before the Defendant's counsel must be examined before the Defendant's application dated 6 September 2011 can be heard, as the said application raises issues that were introduced by the Samuel Patrick Kibuchi's affidavit.

The Plaintiff's counsel further submitted that this suit is not subject to arbitration as the dispute herein is not with regard to matters agreed to be referred to arbitration, and concerns the fraudulent misrepresentation by the Defendant. Further that the defendant has never acted upon orders issued by Okwengu J. (as she then was), and that as the Defendant's counsel is also a director of the Defendant he is thus involved in malpractice.

The Defendant's counsel filed submissions dated 6th June 2013 and gave an account of the applications filed herein by the various parties. He argued that Order 19 was not applicable where a party is seeking to vary a court order issued earlier, and which would have to be specifically amended by way of the provisions of section 80 of the Civil Procedure Act and Order 45 Rule 2 of the Civil Procedure Rules. Further, that no notice to cross-examine the Defendant's Advocate was filed in respect of the application dated 6th September 2011 and it is not one of the prayers sought by the Plaintiffs in their Notice of Motion.

The Defendant's counsel also submitted that section 9 of the Advocates Practice Rules do not bar an Advocate from stating a matter of fact by himself or statements of information or belief based on evidence of another. He also argued that as a Director of the Defendant and as the Defendant's advocate he was most suited to defend the interests of the Defendant, but still bound to tell the truth as an officer of the court.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. The first issue before the court for determination and which is the basis of the other orders sought by the Plaintiff is whether this court can correct the ruling by Okwengu J. (as she then was) that was delivered on 31st May 2011 to state that Samuel Patrick Kibuchi is the deponent to be cross-examined and not John Muriuki Kibuchi. If this court finds that it can correct the said orders, it will then proceed to deal with the two other arising issues as to whether the Defendant's counsel Samuel Patrick Kibuchi can consequently be cross-examined, and whether he is thus disqualified from acting for the Defendant.

I note in this regard that the Plaintiffs application is brought pursuant to the provisions of Order 19 Rule 2 and 9, section 9 of the Advocates (Practice) Rules and section 3A of the Civil Procedure Act. This is therefore not an application to review the ruling under Order 45 Rule 1 of the Civil Procedure Rules, but one to amend the ruling to correct what the Plaintiff states is an error therein. Section 99 of the Civil

Procedure Act states as follows with regard to amendments and corrections of judgments and rulings:

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

What is meant by the “the court” in the said section? The Civil Procedure Act in section 2 defines court to mean the High Court or a subordinate court, acting in the exercise of its civil jurisdiction. Reference to “the court” rather than “a court” in the said section however raises an inference of a particular court and not any court. This particular court in my view is the court presided over by the judge who gave the judgment or order sought to be corrected. In addition, in a situation such as the one in the present case where the ruling sought to be corrected was given by a different judge, it would be difficult and indeed impossible to ascertain what the intention of the judge was with respect to the aspect of the judgment or orders sought to be amended and/or corrected.

I am also guided in this respect by the following passage from the **Halsbury’s Laws of England 4th Edition, Volume 26 at paragraph 557:-**

“After judgment or order has been entered, there is power both under the rules of court and inherent in the judge or master who gave or made the judgment or order, to correct any clerical mistake in it or error arising in it from any accidental slip or omission...the application should be made to the judge or master who made the order....”

Even if section 99 of the Civil Procedure Act was to be interpreted to mean that any judge can correct a judgment or order given by this court, it would not be possible to do so in the present case. This is for the reason that in the ruling by Okwengu J. (as she then was) it is indicated from the outset at paragraph 2 of the ruling as follows:

“...When the application for stay came up for hearing, Mr. Gicharu who appeared for the plaintiff/respondent indicated that in accordance with the notice served on the defendant/applicant, the respondent wished to cross-examine John Muriuki Kibuchi who had sworn the affidavit in support of the application...”

This statement formed the basis of the subsequent decision that the said deponent should be cross-examined. In particular in giving her reasons the learned judge at paragraph 6 stated as follows:

“Parties have sworn affidavits in support and in reply to the application dated 17th March 2011. This is what the court has to consider in order to enable the court arrive at a decision as to whether the provisions of section 6(1) of the Arbitration Act have been satisfied. It is therefore important that if there is an issue regarding the facts deponed to in the affidavit, as long as they are relevant to the questions raised in section 6(1) of the Arbitration Act, the parties must given an opportunity of testing those facts through cross-examination. For these reasons I will overrule the objections and order that the defendant avail the deponent of the affidavit filed in support of their application dated 17th March 2011, for cross-examination”

It is apparent from the said reasons that the judge had in mind the deponent of the supporting affidavit filed in favour of the Defendant’s application, which deponent was John Muriuki Kibuchi.

It is my view that effecting the changes sought by the Plaintiffs in the circumstances would amount to changing the entire character and purport of the ruling, and would provide a different relief than that intended by the learned judge. This would be going beyond correcting clerical or arithmetical mistakes or errors arising from accidental slip or omission as is intended by section 99 of the Civil Procedure Act. It is thus my finding that since the amendment and/or correction sought will substantially vary the ruling by Okwengu J. (as she then was), they cannot be granted by this court by way of correction of the said ruling. The Plaintiff should proceed to effect the said changes by way of review of, or appeal against the said ruling.

The upshot of the foregoing is that the Plaintiff's Chamber Summons dated 27th March 2013 fails, as all the other orders sought therein were predicated upon and consequent to the amendment and /or correction of the ruling by Okwengu J. (as she then was), which this court has declined.

The costs of the Plaintiff's Chamber Summons dated 27th March 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ___3rd___ day of ___October___, 2013.

P. NYAMWEYA

JUDGE