



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 144 of 2008

GULAM HUSSEIN F. GULAM HUSSEIN

T/A HUSSEIN SERVICES STATION

SEA ANGLE SERVICE STATION LTD.....PLAINTIFF

VERSUS

CAPITAL CARGO SERVICES.....DEFENDANT

RULING

This is an application expressed to be brought under the provisions of Order L Rule 1 and 16 of the Civil Procedure Rules. The applicant has also invoked all other enabling provisions of the Law. The application is by the 1st Objector, Imperial Bank Limited, which seeks leave to file a supplementary affidavit to an earlier affidavit sworn on 28th November 2008 in support of its objection application dated 27th November 2008. The main reason for the application is that the deponent wishes to introduce annextures which had been inadvertently omitted in the earlier affidavit which event will not occasion the respondent any prejudice but will instead serve the ends of justice.

There is an affidavit in support of the application sworn by one Kombo Masud, the 1st Objector's Credit Officer Mombasa. The affidavit elaborates the said ground for the application. The respondent has opposed the application on the basis of a replying affidavit sworn by the 1st plaintiff Gulamhussein F. Gulamhussein. He believes that the application is defective and that a supplementary affidavit is permitted only where new issues have been raised in a replying affidavit. The plaintiffs contend that they will suffer if the order sought is granted.

At the hearing of the application, counsel for the plaintiffs in addition to replying on the said replying affidavit objected to the competence of the application contending that this application has been lodged by a firm of advocates which is not on record and further that the deponent of the supporting affidavit does not depose that the affidavit is sworn on the authority of Mary Mureithi who made the original supporting affidavit.

Since the plaintiffs' objections challenge the competence of the application, I have decided to first consider the same. On 2nd June 2009, M/S Joseph Munyithya and Company Advocates filed a Notice of Change of Advocates. The 1st Objector had previously been represented by M/S Musinga Munyithya &

Company Advocates and the new firm of advocates was taking over from them. This application was however lodged on 10th June 2009 by M/S Musinga Munyithya & Company Advocates from whom Joseph Munyithya & Company Advocates had taken over proceedings.

Technically, counsel for the plaintiffs is right that, having filed a Notice of Change of Advocates, subsequent documents should have been filed in the name of the new firm. However, can such a defect defeat an otherwise validly filed application? I think not. The objection raised in that regard is one of form and can be ignored and excused. The court as is often said exists for the primary purpose of dispensing justice to the parties. Sometimes, adherence to technicalities obscures the larger interests of justice. The objection is therefore overruled. With regard to the objection raised against the supporting affidavit, I am at a loss to appreciate the same. Kombo Masud clearly deposes that he was authorized to swear the affidavit by the 1st Objector. That in my view is the only authority he required to make the affidavit. As far as the supporting affidavit is concerned Masud did not require to be authorized by Mary Mureithi. The objection raised against the supporting affidavit is therefore also rejected.

With regard to the further objection that the intended supplementary affidavit will not address many issues and facts raised in the replying affidavit, I am not aware of any such limitation. The parties are their own master of their cases. They know when their pleadings are adequate and the Law allows them the right to perfect them to the best of their abilities unless in doing so the other side may be prejudiced beyond what may be remedied by costs. The plaintiffs have alleged that they are likely to suffer if the order sought is granted. They have not said how they are likely to suffer. They will after all, have the liberty to file a responding affidavit if they deem it necessary to do so. I detect no other prejudice or injury the plaintiffs will suffer if the order sought is allowed.

In the end, the 1st Objector's application dated 28th May 2009 is allowed in terms of prayer (1) thereof. The supplementary affidavit be filed and served within seven (7) days from the date hereof. The Respondents are granted leave to file and serve further or responding affidavit/s within seven (7) days of service.

Costs of the application to be borne by the 1st Objector.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF OCTOBER 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Kago holding brief for Munyithya for the 1st Objector.

F. AZANGALALA

JUDGE

7TH OCTOBER 2009