



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.56 OF 1998

NANAK BODY

BUILDERS LTD.....1ST PLAINTIFF/APPLICANT

-versus-

AKIBA BANK LIMITED.....DEFENDANT/RESPONDENT

R U L I N G

The learned counsel for the plaintiff/applicant has raised a preliminary objection in respect of the affidavit sworn by one Mr Desh B. Gupta in reply to that in support of the plaintiff's application.

There was not a notice served as practice demands but order 18 Rule 8 provides for an oral application and I believe a preliminary objection raised is covered thereunder.

The thrust of the objection is that the learned counsel for the defendant who drew the pleadings went ahead and drew the grounds of opposition and the replying affidavit and attested the said affidavit. This is if submitted it offends the provisions of section 4(I) of the Oaths and Statutory Declarations act Cap. 15 Laws of Kenya. The said provisions, it is submitted prohibits the advocate or even his subordinate staff from exercising powers provided under Cap. 15 aforesaid. Once it is established that an advocate has commissioned an affidavit on behalf of his client that affidavit has to be struck out.

In reply to the said objection, the learned counsel for the respondent stated that only when an advocate may be required to testify would such an objection be sustained. That is the mischief intended to be avoided. As Mr Kimani Kairu is not conducting these proceedings, no prejudice has been shown. In any case the provisions of Cap 15 relied upon apply to affidavits not preliminary objections. Further, order 6 Rule 12, of the Civil Procedure Rules provides that no technical objections should be raised on grounds of forum.

It has been pointed out by the learned counsel for the respondent that the plaintiff's application has not complied with order 50 Rule 7 of the civil Procedure Rules. He cited C.A. No. 211 OF 1996 National Bank of Kenya Ltd -v- Ndungu Njau. I shall revert to this later.

Section 4(1) of cap. 15 aforesaid provides as follows:

“4(1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognisance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceedings or concerned in the matter, or clerk to any such advocate, or in which he is interested.”

In the instant case, M/s Kimani Kairu & Co. Advocates appear for the defendant. The grounds of opposition were filed by the same firm. The replying affidavit was drawn by the same firm and Mr. P. Kimani Kairu commissioned the same.

Although it is Mr. McCourt who is arguing the application on behalf of the defendant, the proviso to section 4(1) of Cap 15 aforesaid are of mandatory nature. Mr P. Kimani Kairu could not have commissioned the affidavit of Mr. Gupta.

As commissioning perse does not affect the contents of the affidavit. I can only describe this as an irregularity which does not necessarily call for the striking out of the affidavit. However, the said irregularity must be corrected before the application is heard.

I said I shall return to the submission on order 50 Rule 7. The same goes to the root of the application and can only be addressed at the hearing of the substantive application, that is to say, when all papers are in place.

I therefore find that the preliminary objection has merit and uphold the same. The defendant shall regularise the position within 14 days of today. Mention on 1/4/98.

Costs in the cause.

Dated and delivered at Nairobi this 18th day of March, 1998.

A. MBOGHOLI MSAGHA

JUDGE