



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPEAL 170 OF 1995

1. SIMON KITAVO NDUTO

2. JUBILEE INSURANCE COMPANY.....APPELLANTS

AND

BENSON OWENGA ANJERE.....RESPONDENTS

(Appeal from the ruling of the High Court of Kenya at Nairobi

(Hon. Mr. Justice Khamoni) dated 17th May, 1995

in

H.C.C.C. NO. 2452 OF 1982)

JUDGMENT OF THE COURT

This is an appeal against the ruling of the superior court (Khamoni, J.) whereby the superior court dismissed the appellant's preliminary objection which objection was directed to the manner in which the respondent had deponed to facts in an affidavit in support of his application for amendments to the plaint. The application for such amendments was filed some eleven years after the respondent had, on the 15th day of January, 1982, executed a discharge voucher accepting Shs.800,000/= in settlement of claims arising out of an accident which occurred on 8th day of August, 1979.

The appellant objected to the following paragraphs in the said affidavit.

"4 That in the interests of justice, it is necessary to update the plaint with all the information and material facts related to this suit which my lawyers erroneously failed to consider or which are necessitated with the delay.

4. That I have been advised by one lawyer in town which I believe that all monetary claims must be specifically pleaded with all facts for any claim to be valid in our courts.

5. That my previous lawyers who filed the plaint or who have handled this matter have not considered to include in the plaint all matters related to may claims which I now seek to include or and due to the long

period of time this suit has taken before being heard certain matters have come to light which need to be included in the plaint.

6. That I have been advised by the same lawyer, that it would be in my interest and interest of justice to amend my plaint and include all my pleading as necessary which advice I also believe correct.

Miss Janmohamed who appeared for the appellant in the superior court took a preliminary objection to the affidavit of the respondent basing her objection on order 18 rule 3 of the Civil Procedure Rules which reads:

“3(1) Affidavits shall be confined to such facts as the deponent is able on his own knowledge to prove; Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

Miss Janmohamed insisted, and in our view correctly so, that the name of the advocate who so advised the respondent ought to have been disclosed. It is well settled that where an affidavit is made on information it should not be acted upon by any court unless the source of information is specified. But what if the affidavit contains merely a correct statement of law like in the instant appeal? What the deponent is saying is that all special damages have to be pleaded and proved. Even without there being paragraph 5 of the affidavit (already set out above) it is a statement of law which could be made at the argument stages.

Bosire Ag. J.A. in his judgment in the case of East African Packing Industries Limited v. Zoeb Alibhai, Civil Appeal No. 124 of 1996, (unreported) said this:

“To my mind the sources of information and grounds of belief are primarily essential for purposes of veracity. Consequently a failure by a deponent to disclose with particularity the sources of the information he has deposed to has the effect of weakening the probative value of the information and even render it worthless. It does not, in my view, render the relevant paragraph defective.”

In that case (East African Packing Industries Limited) Kwach J. A., in concurrence with Pall J.A. and Bosire Ag. J.A. said:

“Mr. Small stated in his affidavit that he obtained the information from the appellant’s sales staff and customers. In my opinion there is a sufficient compliance with the requirement of the rule and if the respondent wanted to have further details it was open to him to obtain an order for the cross-examination of the deponent. I think in striking out that paragraph the judge took too technical a view and at a stroke destroyed the anchor of the appellant’s case.”

It was open for Miss Janmohamed to seek to cross-examine the respondent and obtain the name of the advocate who so advised the respondent but striking out such a paragraph would be too drastic more so when it only set out the law which need not have been set out. We understand, however, that as a result of the learned judge’s order to disclose the name of the advocate, the respondent has done so.

There was a justifiable complaint by Miss Janmohamed in regard to the learned judge treating the affidavit as a document which can be amended, and also as regards different treatment by a court of a layman as opposed to lawyers.

The learned judge said:

“The case of Kiwayu Safari Village Ltd v. Musaira Limited, Civil Case No. 4759/89 cited by the advocates for the defendant and the Court of Appeal authorities referred to in that case were cases being handled by advocates on both sides and therefore courts in those cases did not face the problem of a non Lawyer acting in person in a case defended by a very competent lawyer”.

That statement by the learned judge is a misdirection. A party acting in person is as much bound by the

rules of procedure as any advocate, competent or not. But we have already stated that what was deponed to amounts to what the law states and that eventually the source of the information was disclosed.

The learned judge erred when he equated an affidavit to a document which could be amended in such manner as the court directs and on such terms as to costs or otherwise, as are just. Order VIA rule 5(1) of the Civil Procedure Rules which the learned judge relied on to say that an affidavit can be amended does not envisage amendment of affidavits which of course contain statements made under oath and are therefore in the nature of evidence. A wrong statement of fact made in an affidavit makes that statement worthless. In some circumstances it could amount to perjury. 'Any document' cannot include an affidavit for the purposes of amendment. In so saying the learned judge was, with respect, erring.

The learned judge referred to the objection as "stifling moves made by the applicant". That was a misdirection. If an affidavit is defective in any respect the other side must be given an opportunity to object thereto rather than call it a "stifling move".

Miss Janmohamed asked this court to go into the issue as to whether or not a chamber summons or a Notice of Motion is a document that can be amended. That matter is not an issue before us and without the benefit of full arguments from both sides and before the superior court has ruled on the point, we are not minded to say anything on the subject. It must await another appropriate and opportune occasion.

This appeal in substance otherwise fails and it is dismissed with no order as to costs and we order that the respondent's substantive application be heard by any other judge in the superior court.

Dated and delivered at Nairobi this 31st day of July, 1997.

P. K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDE OF APPEAL

S. E. O. BOSIRE

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR