



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.157 OF 2017

MOMBASA CEMENT LIMITED.....PLAINTIFF

-VS-

1. SALIM MASDUD ABDALLA

2. KHALFAN ABDALLA

3. RASHID MOHAMED SALIM

4. AHMED MOHAMED SALIM

5. SALIM AL-AMIN SULEIMAN.....DEFENDANTS

RULING

1. This Ruling is in respect of the Notice of Motion dated 19th July 2017 filed by the 5th Defendant/Applicant. It is brought under Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules. The Applicant is seeking the following orders :

1. THAT this Application be certified as urgent and service be dispensed with in the first instance.

2. THAT this Honourable Court be pleased to order that the Affidavit sworn by the 5th Defendant on the 8th June, 2017 be expunged from the Court record and adopt the Affidavit dated 19th May 2017 and which comprises (as exhibits SMA -1 therefore) part of the bundle in the Replying Affidavit of Salim Masoud Abdalla sworn on 23rd May 2017 and filed herein on the 25th May 2017.

3. THAT the defence filed by M/s Kanyi J. Advocates on behalf of the 3rd, 4th, 5th Defendants be amended in order to expunge the name of the 5th Defendant and further, the 5th Defendant be granted leave to file his Defence in the matter.

4. THAT the costs of this Application be provided for.

2. The Application is based on the grounds on the face of the Motion and supported by the Affidavit of Salim Al-Amin Suleiman Mazrui, the Applicant, sworn on 19th July 2017. Briefly, it is deposed that the Applicant was the former Chairman of the Board of Trustees of the Development Welfare Wakf Land Trust up to 7th May, 2017. The Applicant avers that on 19th May 2017 he swore an Affidavit which is annexed to the Replying Affidavit of Salim Masoud Abdalla sworn on 23rd May, 2017 and filed on 25th May, 2017. The Applicant avers that later, he got wind of information which he later confirmed to be true that he had allegedly signed and swore an Affidavit in Mombasa dated 8th June, 2017 prepared by Kanyi J Advocates but denies having made such an Affidavit. The Applicant contends that he was not in Mombasa at the time as he was still admitted for medical care in Nairobi after which he returned to Malindi on 21st June 2017. The Applicant states that the said Affidavit contains falsehoods and does not form any part of what he stands for and therefore should be expunged from the Court record as the same is a forgery and baseless. He further states that he did not and has never given the firm of Kanyi J Advocate's instructions to represent him or his interests in this matter.

3. The 1st and 2nd Defendants support the Application and have filed a Replying Affidavit and a further Affidavit sworn by Salim Masoud, the 1st Defendant in which he avers that he believes that where any person feels that his position on any matter before the Court has been misstated or distorted, then such a person should be allowed to make his position known to the Court and to seek the expunging of any

erroneous statements that are falsely attributed to him.

4. The Application has been opposed by the 3rd and 4th Defendants through separate Replying Affidavits sworn by either of them on 14th September 2017, and a further Affidavit on 24th January, 2018. They aver that together with the Applicant, they have been joint trustees of the Mazrui Land Development Board and that the transactions revolving around the suit property were authorized by the trust trustees and this included engaging the advocates who prepared the legal documents now in dispute. That while the Applicant was still incapacitated by his ailment, they thought it wise to engage the firm of Kanyi J & Company Advocates to enter appearance and file defence for all trustees sued since time was running out. They aver that the Affidavit dated 8th June 2017 was sworn by the Applicant in Malindi and not Mombasa and the Applicant appended his signature on all pages of the Affidavit and cannot now denounce it. Relying on legal advice, the 3rd and 4th defendants contend that the Affidavit sought to be expunged from the record was made on oath and the Applicant's present Application amounts to a criminal offence. They add that they are aware that the Applicant, in as much as he pretends to have denounced any connection with the Plaintiff herein, he is still seeking for and obtaining favours from the Director of the Plaintiff Company and therefore is a person of double standards. Further, they aver that the Applicant together with all other trustees participated fully in the transaction, the subject of the suit and that the Plaintiff's payments were directly channeled through the Applicant. They have annexed a letter marked "A" allegedly written and signed by the Applicant and bundle of cheques marked "B". It is the 3rd and 4th Defendants contention that the Applicant's Affidavit now sought to be expunged from the record remains his only reflection of the truth. Again relying on advice, the 3rd and 4th Defendants aver that the Applicant's defence filed on his behalf on 3rd July stands withdrawn and as such his Application cannot stand without his pleadings on record, and that having expunged the Notice of Appointment and pleading filed on his behalf by the firm of Kanyi J and Company Advocates, the Applicant never filed any Notice of Intention to act in person before engaging any other advocate to file any document on his behalf. In the further Affidavit, they have attached a report of a document examiner on the signature in the two Affidavits in issue.

5. The Application has also been opposed by the Plaintiff through a Replying Affidavit sworn by Akram Mohamed, the Human Resource Manager of the Plaintiff Company on 3rd October 2017. It is the Plaintiff's contention that the Affidavits sworn and filed on 19th May 2017 and 8th June 2017 are evidence under oath and cannot be trivialized especially given that they address core issues in dispute in this case. In a bid to give what it considers as a clear understating of the Applicant's character which it describes as person of double speak, the deponent has given a set of communication allegedly made by the Applicant in which *inter alia*, he seeks favours from the Plaintiff company as well as discussing the case herein. According to him, the only reason why the 5th Defendant seeks to change his Affidavit and keep on defending the suit is to avoid looking and be seen as a traitor before the community and not because what is alleged by the Plaintiff in the main suit is untrue. He avers that it is manifestly clear that the correct position is that the Affidavits that should be precise and useful for the resolution of the dispute before Court are those filed by Kanyi J & Company Advocates on 8th June 2017. He further avers that the circumstances under which the Affidavit dated 8th June 2017 was sworn and filed should be taken through interrogation during the main trial to delve into the depths of the real issues in the case and for appropriate determination of the case. The deponent wants an order to have the 5th Defenan/Applicant take an oath through the Chief Kadhi according to Islamic Sharia Law so as to mitigate his tendency of misleading the Court and other stakeholders in this matter. Relying on advice, he states that to allow the applicant to switch Affidavits at will routinely where he seems to contradict himself enables him to depart from his pleadings which is barred by law and amounts to giving false testimony in judicial proceedings touching on matters material in question in this case and lying under oath which is perjury and that the Applicant ought to face criminal charges.

6. The Application was disposed of by way of written submissions which were filed and highlighted by the Advocates for the respective parties.

7. I have carefully examined the Affidavits on record, the Written Submissions of the parties and the able highlights thereon by counsel. I have also considered the authorities relied on by Counsel. The Application seeks to have the Affidavit sworn by the Applicant on 8th June 2017 expunged from the Court record and have the one sworn on 19th May 2017 adopted. It also seeks to amend the defence filed by Kanyi J & Company Advocates on behalf of the 3rd, 4th and 5th Defendants by expunging the name of the 5th Defendant and further grant him leave to file his defence in the matter.

8. I have looked at the Affidavits in issue. In the Affidavit dated 8th June, 2017, the deponent avers that the contents of the Affidavit dated 19th May, 2017 are totally alien to him and therefore is opposed to the allegations therein. In the Affidavit dated 19th July 2017 in support of the present Application, the Applicant has this time round disowned the Affidavit dated 8th June 2017 and wants to go by the contents of the Affidavit dated 19th June 2017. According to the Applicant, the said Affidavit of the 8th June 2017 does not form any part of what he stands for and therefore wants it expunged from the Court record.

9. It is clear that the three Affidavits are at variance. The 1st and 2nd Defendants as well as the 3rd and 4th defendants have each filed reports of a different document examiner on the signatures in the said Affidavit. It is clear that the issue at hand is no longer between the 5th Applicant and the firm of Kanji J & Company Advocates as it has roped in the other parties in the case as evidenced by Affidavits filed, both in support and against. My view in this matter is that the Application raises a critical issue for determination, and that is whether this Court has the jurisdiction to expunge the contested Affidavits at this interlocutory stage in view of the contradiction in their contents and conflicting documents which touch on issues to be determined in the main suit? The other issue is whether the defence should be amended in the manner sought.

10. Paragraph (2) of the motion states:

“(2) That this Honourable Court be pleased to order that the Affidavit sworn by the 5th Defendant on 8th June 2017 be expunged from the Court record and adopt the Affidavit dated 19th May, 2017 and which comprises (as exhibits (SMA -1) therefore) part of the bundle in the replying Affidavit of Salim Masoud Abdalla sworn on 23rd May 2017 and filed herein on the 25th May 2017” (emphasis added).

A plain reading of the above paragraph implies that the Affidavit in question was sworn by the 5th Defendant on 8th June 2017. However, in the grounds set out in the Motion the words used are “*the Affidavit purportedly signed by him on 8th June 2017.*” These are clearly two different positions in the same document. Whereas from the words in paragraph (2) of the Motion the Applicant admits, in my understanding that the Affidavit was sworn by him, the grounds set out a totally different position. The question that arises is, which position is the Court expected to act on? The first or the second?

11. I have also looked at the Affidavit in support of the Application herein. The applicant has not made his position clear. For instance in paragraph (4) thereof, he depones that he later got wind of information which he later confirmed to be true that he allegedly signed and swore an Affidavit in Mombasa dated 8th June 2017 prepared by Kanji J Advocates which is alien to him as he never made such Affidavit. The Applicant further depones that the firm of Kanyi J Advocates does not represent him and that he has never given them instructions to act on his behalf, and through a notice of appointment and change (sic), he has appointed the firm of Oduor Siminyu & Company Advocates to act on his behalf in these proceedings. I note that in his letter to Kanyi J & Company Advocates marked “SASM 1”, the Applicant had indicated that his advocates when served would be M/s P. M. Kimani & Company Advocates. Of course, the Applicant was at liberty to appoint an advocate of his choice other than that stated in the letter. However, in law, there is no such document as “*notice of appointment and change*” as deponed by the Applicant. Under Order 9 of the Civil Procedure Rules, a party may file a Notice of Appointment of Advocate where he has been acting in person or file a notice of change of advocate where he has been suing or defending by an advocate. The Applicant herein filed a Notice of change of Advocate.

12. In this Application, the Applicant has taken a lot contradictory positions in the same proceedings. In my view, a party cannot be allowed to take two contradictory positions in the same proceedings. In other words, one cannot approbate and reprobate at the same time in the same proceedings. The positions taken by the applicant have been inconsistent. My view is that since both Affidavits are on record and they are statements made on oath, they both be subjected to interrogation at the main trial.

13. I must also take cognizance of the dispute herein where the defendants are fighting on who between them are the rightful trustees of the suit property. This Court is of the firm view that dealing with any contentions raised by the parties in the Affidavits herein at this stage would be untidy and burdensome as it would be forced to comb through the said Affidavits to establish what each party really wanted to detail to support their respective stands herein. In my view these are matters that are fit for determination at the main trial when parties will have the opportunity to subject the evidence of the other into cross-examination. The Court is of the view that it should at this interlocutory stage restrain itself from making any matter of opinion or conclusion on the merits of the matters in issue as that would be engaging in a mini trial which can hurt the fair trial of the main case on merit. As the documents in issue contain matters of evidential value, the Court ought to act very cautiously and carefully and avoid embarking on a mini-trial of the case. Doing so, I would be running the risk of making definitive and final conclusions without the advantage of hearing and seeing witnesses who have been subjected to cross-examination, the time tested device of testing the truth or falsity of evidence. See **Vivo Energy Kenya Limited –vs- Maloba Petrol Station Limited & 3 Others (2015 eKLR)**.

14. The Court also finds that the prayer sought by the 5th Defendant to amend the defence to expunge his name would not obtain in this Application as it would not fall within the realm of matters which a Court can grant in such an Application. Under Order 8 of the civil Procedure rules, a party is at liberty to amend his pleadings and the Applicant should therefore invoke the procedure provided therein.

15. In the result, the Notice of Motion dated 19th July 2017 fails and is dismissed with costs.

Dated, signed and delivered at Mombasa this 29th day of May 2018.

C. YANO

JUDGE