



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
MISC. CIVIL APPLICATION. NO. 2 OF 2013

GIOVANNI GAIDA & 19 OTHERS.....APPLICANT

=VERSUS=

GIAN CARLO FERRARI.....RESPONDENT

R U L I N G

1. What is before me is the Respondent's Application dated 14th February, 2014 filed pursuant to the provisions of Rule 9 of the Oaths and Statutory Declarations Rules. The Respondent is seeking for the following orders:

- i. **That the Honourable court be pleased to strike out the exhibits annexed in the affidavit of the 1st applicant sworn on 21st March, 2013 and annexed to an application of even date.**
 - ii. **That the court be pleased to issue any other relief as it deems fit.**
 - iii. **That cost of this application be provided for.**
2. The Application is supported by the Respondent's Affidavit who has deponed that the bundle of documents referred to paragraph 8 of the Applicants' Supporting Affidavit should be struck out of the record save for the first annexure which is marked as GG-1; that the rest of the bundle is not marked and the documents therein are neither referred to in the Application nor in the Supporting Affidavit and that some of the exhibits are affidavits which have not been paid for nor filed in court.
3. The Applicant/Respondent's advocate filed his Grounds of Opposition on 26th March, 2014 and averred that Rule 9 of the Oaths and Statutory Declaration Rules does not preclude a deponent from producing as sealed and marked a bundle of documents as one exhibit; that the bundle of documents produced by the Applicant and Marked as GG 1 have not in any way prejudiced the Respondent from making a response to the Applicant's Affidavit and that in any event, the alleged defect can be cured by granting the Applicant leave to comply with the said Rule by filing a Further Affidavit.
4. The parties appeared before and made oral submissions which I have considered. I have also considered the authorities that the parties have relied upon.

Analysis and findings:

5. This suit was commenced by way of a Miscellaneous Civil Application. In the Application (the suit), the Applicant/Respondent is seeking for an order that the Respondent/Applicant should be committed to civil jail for willful disobedience of the court decree issued on 27th January, 2006

and served upon him on 18th March 2006.

6. Prior to filing the substantive Motion, the Applicant/Respondent filed an Application dated 21st March, 2013 seeking the leave of the court to commence contempt proceedings against the Respondent/Applicant. The Application was supported by an Affidavit together with a "bundle" of annexures. Paragraph 8 of the said Affidavit provides as follows:-

"I now produce as exhibits, a bundle marked "GG-1". It is consecutively paginated and demonstrates the foregoing matters."

7. The Respondents/Applicants advocate has submitted that the way the bundle of exhibits has been introduced offends the provisions of Rule 9 of the Oaths and Statutory Declarations Rules. According to counsel, the bundle of exhibits in the said Supporting Affidavit do not have corresponding averments in the affidavit and should therefore be expunged from the court record.
8. The annexure marked as GG1 is a decree issued on 27th January, 2006 in Nairobi Miscellaneous Civil Application number 792 of 2004. The Applicant/Respondent has made reference to the said decree at paragraph 2, 3 and 4 of his Supporting Affidavit which runs up to paragraph 9. None of the paragraphs in the Supporting Affidavit makes any reference to the bundle of annexures which runs from pages 13-58.
9. The exhibits which are in the single bundle include Affidavits, Photographs, and handwritten statements amongst other documents.
10. Rule 9 of the Oaths and Statutory Declaration Rules provides as follows:

"All exhibits to affidavit shall be securely sealed thereto under the seal of the Commissioner and shall be marked with serial letters of identification."

11. The Third Schedule of the Act prescribes the format that should be adopted when marking the exhibits for identification as follows:-

**"This is the exhibit marked.....
referred in the annexed affidavit."**

12. The requirement for parties to comply with the prescribed format in the Third schedule and Rule 9 of the Rules 12 is obvious: a party is required to know with certainty the allegations leveled against him by his opponent.
13. I am not sure how the Applicant/Respondent expects the Respondent/Applicant to respond to the exhibits annexed on the Supporting Affidavit when he has not made any reference to them in the body of the affidavit. A party who relies on an exhibit must specifically make reference to exhibit in his affidavit to enable his opponent respond appropriately and not to lump documents in an affidavit without stating in the affidavit their purport and relevance. Such a practice is prejudicial to the opposite party and is unprocedural. It is not an irregularity or a technicality that can be saved by the provisions of Article 159 (2) (d) of the Constitution and Sections 1A and 1B of the Civil Procedure Act.
14. In the circumstance and for the reasons I have given above, I allow the Respondent's Applicants' Application dated 14th February, 2014 in the following terms:

- a. **The exhibits annexed on the Affidavit of the 1st Applicant sworn on 21st March, 2013 are hereby struck out.**
- b. **The Applicant/Respondent to pay the costs of the Application.**

Dated and delivered in Malindi this 8th day of May, 2014.

O. A. Angote

Judge