

REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 623 OF 2013

MARY BAKIRA NDIKA.....PLAINTIFF

VERSUS

THE SALVATION ARMY.....DEFENDANT

RULING

The Plaintiff has filed a Notice of Motion herein dated 24th May 2013 seeking injunction orders from this court against the Defendant restraining them from interfering with the property known as Plot Number 2428 (hereinafter “the suit property”), pending the hearing and determination of this suit. The Defendant filed a replying affidavit opposing the said Notice of Motion sworn by Lt. Colonel Nahashon Njiru, its Chief Secretary, on 4th June 2013.

When the Notice of Motion came up for hearing on 23rd July 2013 the Plaintiff asked for leave to file a supplementary affidavit, which leave was granted by this court and the parties were also directed to file their submissions to the Notice of Motion. The matter was to be mentioned on 1st October 2012 to reserve ruling. The court also gave orders as to the *status quo* to be maintained.

The Notice of Motion duly came up for mention on 1st October 2013, and the counsel for the Defendant informed the court that he had not been able to file his submissions, as the Plaintiff had introduced new matters in their which were not in their Plaint. The counsel consequently made an oral application that the supplementary affidavit be struck out.

The Plaintiff’s counsel opposed the application to strike out the supplementary affidavit and stated that it was made in bad faith. He submitted that no new matter has been raised by the said supplementary affidavit, which was only buttressing the information given in the supporting affidavit to the Plaintiff’s Notice of Motion.

I have carefully considered the arguments made by the parties herein. The issue for determination is whether the supplementary affidavit sworn by the Plaintiff herein on 6th August 2013 and filed on 7th August 2013 should be struck out for the reason that it raises new matters that are not in the Plaint.

The provisions of Order 19 Rule 3 provide that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove. However, 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. Order 19 rule 6 gives the court powers to court strike out from any affidavit any matter which is scandalous, irrelevant or oppressive.

I have perused the impugned supplementary affidavit sworn by the Plaintiff, and she states therein that the matters she has deponed to are within her knowledge unless otherwise expressly stated. The Defendant’s counsel did not identify the matters in the said affidavit are not within the Plaintiff’s belief, knowledge, or whose source of information is not stated. There is also no requirement that the matter stated in an affidavit need to be stated in the Plaint, as the whole purpose of an affidavit as provided in Order 19 rule 1 of the Civil Procedure Act is to provide the evidence of the facts alleged either in a Plaint , Defence or in an interlocutory application.

The only limitation that applies in this regard as stated by Order 19 Rule 6 of the Civil Procedure Rules is

that the matters in an affidavit should not be scandalous, oppressive or irrelevant. It is also my opinion that the Defendant will not suffer any prejudice as it still has the opportunity to respond to any new matters raised by the Plaintiff's supplementary affidavit.

The Defendant's oral application for the striking out of the Plaintiff's supplementary affidavit sworn on 6th August 2013 and filed on 7th August 2013 is accordingly denied, and there shall be no orders as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ___29th___ day of ___November___, 2013.

P. NYAMWEYA

JUDGE