



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, MWERA & OTIENO-ODEK,  
JJA)**

**CIVIL APPEAL NO. 20 of**

**2007**

**BETWEEN**

**KENYA COMMERCIAL BANK LIMITED ..... 1<sup>ST</sup> APPELLANT**

**ELIZABETH NYAMBURA GICHARU *t/a* MARLENE AUCTIONEERS  
..... 2<sup>ND</sup> APPELLANT**

**AND**

**NAFTALI RUTHI KINYUA ..... 1<sup>ST</sup>  
RESPONDENT**

**PETER MWANGI MBUTHIA ..... 2<sup>ND</sup>  
RESPONDENT**

**OSMAN ABDI alias SAMOW EDIN OSMAN .....  
..... 3<sup>rd</sup> RESPONDENT**

***(An appeal from the Ruling and Orders of the High Court of Kenya at  
Nairobi (O. Mutungi, J.) dated 17<sup>th</sup> July, 2005 in H.C.C.C. No.173 of  
2003)***

**\*\*\*\*\***

**JUDGMENT OF THE  
COURT**

1. The respondents as plaintiffs filed suit against the appellants by a Plaint dated 28<sup>th</sup> March 2003. The Plaint was amended on 2<sup>nd</sup> July 2003; it was further amended on 5<sup>th</sup> December 2003. On 12<sup>th</sup> July 2004, the respondents filed a Chamber Summons application dated 8<sup>th</sup> July 2004 at the High Court seeking leave to re-amend the further amended Plaint and to join one ***Daniel Nyangoma*** as defendant in the suit. A draft re-amended further amended Plaint was annexed to the application. Before the High Court, the respondents as plaintiffs were represented by learned counsel Mr.

Langi while the appellants/defendants were represented by learned counsel Mr. John Kamunyori.

2. The respondents' Chamber Summons application to further re-amend the Plaintiff was opposed by the appellants herein. The replying affidavit dated 19th July 2004 was deposed by Mr. John Kirk Nyaga Kamunyori who was and is counsel on record for the appellants. The replying affidavit contains the following paragraphs 4, 5 and 6 which are the subject matter of this appeal: -

*"4. THAT to paragraphs 7, 8, 9 (a), 9(d), 9(e), 10 and 13, I respond as follows:*

- i. *that the plaintiffs herebefore filed a suit in this Honourable Court No. 653 of 2001 on 7<sup>th</sup> May 2001.*

*Annexed hereto is the relative Plaintiff marked "JKNK 2".*

- ii. *that the plaintiffs failed to prosecute the suit which was consequently dismissed on 11<sup>th</sup> November 2003 for want of prosecution. Annexed hereto is a copy of the relative Ruling marked "JKNK 3".*
- iii. *that in those circumstances, the option open to the plaintiffs was to file a fresh suit vis-à-vis the substance and content of the dismissed suit.*
- iv. *that the plaintiffs were unable to file a fresh suit because the fraud and breach complained of are alleged to have occurred in or before 1999 and therefore were time barred by the Limitations of Actions Act, Chapter 22 of the Laws of Kenya.*
- v. *that the intended amendments of the Further Amended Plaintiff contained in the above paragraphs are an endeavour to beat the provisions of the said Limitations of Actions Act and are therefore an abuse of the court process.*

5. *THAT in response to paragraphs 5, 6, 9(b) and 9 (c) I aver that the statutory power of sale of the 1<sup>st</sup> Defendant as Chargee was properly and legally exercised.*

*6. THAT in further reference to paragraph 9 (c) I aver that the two persons who allegedly outbid the 3<sup>rd</sup> Defendant were agents of the 1<sup>st</sup> Plaintiff assigned the role of spoiling and frustrating the auction."*

3. The respondents' Chamber Summons application dated 8<sup>th</sup> July 2004 came up for hearing before the learned judge (Mutungi, J.) who struck out the replying affidavit filed by Mr. Kamunyori on behalf of the appellants and granted the orders sought in the Chamber Summons application. In striking out the replying affidavit, the learned judge in a ruling dated 17<sup>th</sup> July 2006 expressed himself as follows:

***"I have closely gone through the Replying Affidavit, deposed by Mr. J. Kamunyori, Advocate on 19/7/04 and I have no doubt in my mind that the same violates the provisions of Order 18 Rule 3 of the Civil Procedure Rules. This is especially so as regards paragraph 6 of the said Replying Affidavit. Furthermore, the deponent of that Replying Affidavit, has entered into a conflict, because as an Advocate and officer of this court, he very well knows he should not depone on evidentiary matters since he cannot be summoned to give evidence on such matters. Accordingly, I hold such a Replying Affidavit on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's to be incompetent and strike it out of the record. The same is accordingly expunged from the record. All, in all, therefore, and for the above reasons, the application herein dated 8/7/04 and filed in court on 12/7/04, succeeds in terms of prayers Nos. 2 and 3."***

4. Aggrieved by the ruling dated 17<sup>th</sup> July 2006, the appellants lodged the instant appeal citing, *inter alia*, the following grounds in the Memorandum of Appeal

*“(i) The learned Judge erred in finding that the Replying Affidavit deposed by J. Kamunyori Advocate violated the provisions of Order 18 Rule 3 of the Civil Procedure Rules.*

- ii. The learned Judge erred in ignoring the Grounds of Opposition filed by the appellants.*
  - iii. The learned Judge erred in ignoring the substance of the affidavit of J. Kamunyori and holding that the whole of the said affidavit was incompetent and was for striking out of the court’s record.*
  - iv. The learned Judge erred in allowing the amendment of the Respondent’s plaint substantially on the grounds that the replying affidavit of Mr. Kamunyori was incompetent and was expunged from the court records.*
  - v. The learned judge failed to weigh the respondents’ case against the opposition by the 1<sup>st</sup> and 2<sup>nd</sup> appellants as propounded in the Replying Affidavit of Kamunyori Advocate.”*
5. At the hearing of this appeal, learned counsel Mr. Kamunyori appeared for the appellants while learned counsel Mr. A.M. Ndgewa appeared for the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
  6. Counsel for the appellants reiterated the grounds in support of appeal emphasizing that the appellants’ grievance is that the replying affidavit was erroneously struck out in entirety; that the learned judge erred in his consideration of the contents of the replying affidavit; that paragraph 4 of the replying affidavit simply states that there have been previous rulings in this matter and copies of the said rulings were annexed to the replying affidavit. Counsel urged this Court to note that the rulings annexed to the replying affidavit were matters within the personal knowledge of the deponent as counsel who acted for the appellants; that there is no conflict of interest when counsel brings to the attention of the court that there are previous rulings that have been delivered in the suit at hand.
  7. Counsel for the appellants submitted that the substance of the contents of Paragraph 4 of the replying affidavit is that the respondents did not disclose everything to the trial court in its application and that the averments in the further Amended Plaint aimed at circumventing the provisions of the **Limitations of Actions Act, Cap 22** of the Laws of Kenya. Counsel submitted that the learned judge erred in failing to take into account the substance of the contents of the replying affidavit and made a ruling based on technical justice. Counsel conceded that paragraph 6 of the replying affidavit went overboard and could properly be struck out of the record; he submitted that the learned judge should have struck out the offending paragraph 6 of the affidavit instead of striking out the entire replying affidavit; that the court should have considered the substance of the replying affidavit and the merits of the grounds of opposition. In conclusion, counsel urged this Court to set aside the ruling by the High Court, strike out paragraph 6 of the replying affidavit and order a re-hearing of the respondents’ Chamber Summons application dated 8<sup>th</sup> July 2004 and filed in court on 12<sup>th</sup> July 2004.
  8. Learned counsel Mr. A.M. Ndgewa for the respondent in opposing the appeal, urged this Court to note that all the issues raised by the appellant were canvassed and considered by the High Court in arriving at the decision to strike out the replying affidavit. It was submitted that the suit in the High Court was still pending from 2003 awaiting the outcome of the instant appeal. He submitted that the respondent took issue with paragraphs 4, 5 and 6 of the impugned replying affidavit because these paragraphs are evidentiary in nature; that it is the auctioneer, and not counsel for the appellants, who was in a better position to depose to the factual issues raised in paragraph 6 of the replying affidavit; that the issues of limitation was urged before the High Court and a ruling delivered. Counsel cited **Order 18 Rule 3** in support of his submission that the contents of paragraphs 4, 5 and 6 violate the said Order and Rule.

9. **Order 18 Rule 3** of the Civil Procedure Act is now **Order 19 Rule 3** of the said Act. The essence of **Rule 3** is that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove. In the instant case, the High Court struck out the entire replying affidavit on the ground that it violated the provisions of **Rule 3** of the aforesaid Order. We start by stating that as a matter of prudence and practice, an advocate should not swear/affirm an affidavit on behalf of his/her client if the latter is available -

See **Cordura Ltd Oysterbay Hotel and Jubilee Insurance Company of Tanzania Ltd, Misc. Case No. 21 of 2002 (unreported)**. In the case of **Kenya Horticultural Exporters (1977) Ltd. - v- Pape, (1986) KLR 707**

this Court stated that in the absence of an affidavit sworn by a party itself, it is doubtful whether an advocate could by his own affidavit prove all statements of information and belief.

10. We have considered the reasoning of the learned judge in allowing the respondent's Chamber Summons application dated 8<sup>th</sup> July 2004. Having struck out the replying affidavit, the learned judge proceeded to allow the Chamber application as if the same was unopposed. With due respect, the learned judge erred. The object of amendment is to ensure that litigation between parties is conducted not on a false hypothesis of facts but on the basis of the true state of things. Even if the replying affidavit were to be struck out, it was the duty of the court to examine the merits of the Chamber Summons application and determine if a case had been made out to support the application to re-amend the further amended plaint. Our analysis of the Ruling shows that the merits of the application to re-amend the further amended plaint were not considered and evaluated; this was a fatal error on the part of the court.

11. The gist of the respondent's Chamber Summons application dated 8<sup>th</sup> July 2004 is to re-amend the plaint and add another defendant to the suit. In **Atieno -v- Omoro (1985) KLR 677**, it is stated that there is a distinction between amendment to a plaint and addition or substitution of a new party which is governed by **Order 1 Rule 10** of the Civil Procedure Act. It is further stated that to permit an amendment by adding a party may have a retroactive effect to the date of the original plaint and this would most certainly be prejudicial to the rights conferred by Limitation of Actions Act. In the instant case, we have analyzed the Ruling delivered by the learned judge and found that the judge erred in failing to take into account the distinction between amendments to a plaint and addition of a new party to a plaint which has a retroactive effect and such addition may be subject to limitation of actions.

12. A ground of appeal urged before us is that the High Court erred in not considering the substance and merit of the grounds of opposition and replying affidavit filed to oppose the respondents' Chamber application. The Ruling delivered by the High Court did not allude to or consider the grounds in opposition dated 19<sup>th</sup> July 2004. This was an error on the part of the court.

13. An issue canvassed before us is that the learned judge erred in striking out the entire replying affidavit rather than striking out the offending paragraphs. Both counsel in this matter concede that paragraph 6 of the replying affidavit offends the provisions of **Order 19 Rule 3 (previously Order 18 Rule 3)**. Our reading of the said paragraph leads us to concur with counsel and the learned judge that paragraph 6 of the replying affidavit violate **Order 19 Rule 3**. We accordingly strike out paragraph 6 the replying affidavit dated 19th July 2004.

14. The next issue for our consideration is whether paragraphs 4 and 5 of the said replying affidavit violate the provisions of **Order 19 Rule 3**. The gist of paragraph 4 of the replying affidavit is that it contains annexures of previous rulings delivered in the case between the parties. The paragraph also raises the issue of limitation of actions.

15. It is our considered view that whether or not a cause of action is affected by limitation is a question of mixed fact and law; limitation goes to the competence of a suit. The learned judge erred in failing to note that paragraph 4 of the replying affidavit raised limitation as a point of law

relevant to the competence of the proposed further re-amended plaint. In **Faulkner -v- Agricultural Development Corporation (1976-80) 1KLR, 762**, it was held that an amendment to a plaint might be made after a period of limitation had expired if the court thought it just and no prejudice or injustice would be involved. The ruling delivered by the learned judge did not evaluate the competence of the re-amended plaint in view of limitation as raised in paragraph 4 of the replying affidavit; the question whether the court considered it just to further re-amend the plaint was not considered; and whether prejudice or injustice would be occasioned to the respondent was also not considered. We note that the grounds upon which limitation is founded are issues of fact and the learned judge in striking out paragraph 4 without considering the merits thereof erred in locking out the appellant from laying the basis upon which the court could determine the issue of limitation as a matter of law.

16. We have considered paragraph 5 of the replying affidavit and it is our considered view that whether or not the appellant properly and legally exercised its statutory power of sale is a question of mixed fact and law. The factual basis upon which any conclusion can be made on this matter can only be deposed to by the auctioneer and the 1<sup>st</sup> appellant and not counsel on record for the appellants. On this score, we concur that the learned judge had good reason to strike out the paragraph and we hereby strike out paragraph 5 of the replying affidavit dated 19<sup>th</sup> July 2004.

17. Having struck out paragraphs 5 and 6 of the replying affidavit, the final issue for our consideration is whether the said replying affidavit dated 19<sup>th</sup> July 2004 has any substance left to warrant the same to remain on record. The question is whether the offending paragraphs in the replying affidavit can be severed. **Order 19 Rule 6** of the Civil Procedure Act provides that the court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive. Having found that paragraphs 5 and 6 of the replying affidavit violate the provisions of **Order 19 Rule 3** we hold that the said paragraphs are irrelevant and can be severed and struck out from the replying affidavit.

18. In view of our finding that paragraph 4 of the Replying Affidavit raise a critical issue of limitation and competence of the further re-amended plaint and taking into account the errors by the High Court as pointed out here above, the final orders is that we hereby allow this appeal and set aside in its entirety the Ruling of the High Court dated 17<sup>th</sup> July 2006. We substitute in its place an order striking out paragraphs 5 and 6 of the replying affidavit dated 19<sup>th</sup> July 2004. We order that the respondent's Chamber Summons application dated 8<sup>th</sup> July 2004 be and is hereby remitted for fresh hearing on merit before the High Court with the grounds of opposition and replying affidavit as filed, with the paragraphs 5 and 6 of the said replying affidavit having been struck out. Each party to bear its/his/her costs in this appeal.

***Dated and delivered at Nairobi this 12<sup>th</sup> day of June, 2015***

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**J.W. MWERA**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**