REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 354 OF 2004 (UR.183/04)

KAMLESH MANSUKHLAL DAMJI PATTNI …….....……APPLICANT

AND

NASIR IBRAHIM ALI…….……. 1ST RESPONDENT

DINKY INTERNATIONAL SA ……..…….. 2ND RESPONDENT

WORLD DUTY FREE COMPANY LIMITED ……..…...… 3RD RESPONDENT

(An application for stay of the Judgment of the High court of Kenya at Nairobi (Mohammed Ibrahim, J.) dated 03.12.2004 In H.C.C.C. NO. 418 OF 1998)

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RULING OF THE COURT

There is an application before this Court filed under *Rule 5(2)(b*) of our rules, which came up for hearing on 08.02.05. The application seeks an order of stay of the Judgment of Hon. Mr. Justice Mohammed Ibrahim delivered on 3rd December, 2004 and all proceedings in HCCC (Milimani Commercial Courts) No. 418 of 1998 pending the hearing and determination of an intended appeal by the applicant.

Before it was heard however, learned counsel for the applicant, Mr. Wambua Kilonzo raised preliminary objections relating to an affidavit in reply filed by the advocates on record for the respondents. This he can do orally under *order XVIII rule 8 Civil Procedure Rules* as read with *section 3* of the *Appellate Jurisdiction Act (Cap 9*). We heard arguments of counsel on those objections and this ruling is therefore limited to those proceedings.

It is unnecessary, we think, for purposes of this ruling, to relate at length the history of this protracted dispute between the parties which in this application is covered in two volumes running into 1050 pages. Suffice it to say that the applicant and the respondents have for the last seven years or so locked horns in legal and factual battles over the ownership of some Duty Free shops in this country. The parties are scattered in various parts of the world: - the applicant is resident in Kenya; the 1st respondent is resident in Dubai, in the United Arab Emirates; the 2nd respondent (a limited liability company) is registered in Panama, and the 3rd respondent (a limited liability company) is registered in the Isle of Man, United Kingdom. It would also appear that the same advocates, have been on record for the parties throughout: M/S. Mugambi Imanyara & Co. for the applicant and M/S. D.P. Kinyanjui & Co. for the respondents. They are all based in Kenya and have instructed Mr. Wambua Kilonzo (hereinafter Kilonzo) and Hon. Paul Kibugi Muite

(hereinafter Muite), respectively, as lead counsel.

Kilonzo is not happy with the affidavit in reply sworn on 31.01.05 by Muite. It contains 8 main paragraphs and 9 sub-paragraphs. It is not the form of the affidavit he objects to. That would be curable under *order XVIII rule 7* of the *Civil Procedure Rules*. It is the contents in the various paragraphs and sub-paragraphs that Kilonzo says are scandalous, irrelevant and oppressive. That would at once attract the censure of striking out under *order XVIII r 6 Civil Procedure Rules*. The whole affidavit is also sworn by the advocate who is not a party to the proceedings as envisaged under *rule 50 (1)* of this Court's rules; that is to say, the "*person served with a notice of motion*". "Advocate" is defined under *rule 2* and therefore under rule *25* he only has audience of the Court to urge his client's matter. Muite could only appear in that capacity. The whole affidavit was therefore for rejection. It was also for rejection because Muite could only swear to facts which he is able of his own knowledge to prove. Instead all he states are matters of hearsay. There was no explanation, Kilonzo submitted, as to why the 1st respondent or any representative of the other two respondents could not swear and file the replying affidavit even outside the jurisdiction of this Court. As it is, Muite, the advocate, had exposed himself to the provisions of *order XVIII r 2* which empowers the court to order the attendance of any deponent for cross-examination. To illustrate and buttress his submissions, Kilonzo singled out the following paragraphs and sub-paragraphs of the affidavit and supplied the emphasis on his objections as underlined: -

"4. That in considering this stay application, I pray that this Honourable court bears in mind the following history of H.C.C.C No. 418 of 1998.

(a) The applicant, Kamlesh Mansukhlal Damji Pattni (hereinafter referred to as "KP") filed H.C.C.C No. 418 of 1998 in February of that year. On the same day that the plaint was filed, "KP" took out an ex-parte Chamber Summons in which he sought the appointment of a receiver in respect of the defendants 27 million US investment in Kenya; the duty free complexes at Jomo Kenyatta International Airport Nairobi and Moi International Airport, Mombasa. Lady Justice Owuor granted the orders prayed on the same day. With the stroke of a pen, the defendants were dispossessed of their said investment. Today, seven years later the defendants are still dispossessed of their said investment.

(b) In the said suit, "KP" claimed that 6 years previously, he had purchased all the shares in the 3rd defendant from the 1st and 2nd defendants. It is incredible that a purchaser would part with the not inconsiderable sum of US $ 13.5 million which "KP" claims to have paid of the shares and then leave the business in the hands of the person from whom it was purchased to run it for his own account for 6 years.

(c) In 1991/93, there was in force in Kenya a strict exchange control regime. The Defendants were foreign investors who brought in hard currency and it is unbelievable that they would accept the alleged purchase price of US $ 13.5 million in local currency as alleged by "KP".

(d) Nasir Ibrahim Ali has consistently asserted that the sale documentation was a crude forgery. Investigations by the CID so found and forgery charges were laid against "KP" and his lawyer Bernard Kalove. The forgery case was stopped by the orders of Lady Justice Aluoch under the then Chief Justice Chesoni.

(e) One of the terms of reference in the ongoing Goldenberg commission of inquiry set up by the President is to investigate the impact the Goldenberg affair has had in the administration of justice in Kenya and whether the judiciary facilitated the expropriation of the defendants investment as part of the cover up of the Goldenberg affair.

(f) On the 14th of November 2003, the High Court of Justice in the

Isle of Man, United Kingdom, the country of the 3rd defendant's incorporation delivered a judgment in which it held that in Private International Law, shares are REM. Accordingly only the country of the

company's incorporation has jurisdiction to adjudicate a dispute regarding sale of such shares. The rationale for this principle of law in private international law is obvious: the register is kept in the companies registry of the country of incorporation. It is the company law of that country which governs the sale, transfer etc. of the shares and other matters like annual returns. A purchaser of shares of a foreign company would normally retain lawyers in the country of incorporation to ensure compliance with the country's laws and transfer of shares in the companies registry of that country and the issuance of fresh share certificates in the name of the purchaser. It is yet another oddity that "KP" would part with US$ 13.5 million without engaging professional services of lawyers of the country of "WDF's" incorporation. In the alleged sale documentation, "KP's" lawyer in the US$ 13.5 million transaction is said to have been Bernard Kalove. At that time, Bernard Kalove was a junior employee in the firm of Wetangula & Company Advocates. He was not even an associate leave alone a partner in the firm. Mr. Moses Wetangula has denied that his firm was ever instructed to handle the transaction. If indeed Bernard Kalove handled the transaction as alleged he must have been moonlighting. Again, it is incredible that any purchaser in this huge commercial transaction would engage a junior moonlighting lawyer to handle it. The High Court of Justice in the Isle of Man therefore held that the Kenyan courts did not have jurisdiction to adjudicate on share sale dispute and the judgement of the Hon. Mr. Justice Mbaluto of 25th September was consequently a nullity. "KP" applied for a stay which was refused. The court of appeal of the Isle of Man dismissed "KP"'s appeal as it did an application for stay. KP has now filed yet another appeal to the Privy Council

(i) "KP" immediately filed an application for stay in two huge volumes in this Honourable court. "KP" was insisting in his Stay Application that the Constitutional Reference be sent to the Chief Justice. When the Stay application came up for arguments before this honorable court, "KP" withdrew the same. With a sign of relief, the Defendants expected that their application for review would now at long last be heard. When the Defendants review application came up for hearing in the superior court, "KP" confronted them with yet another application this time asking the Hon. Mr. Justice Ibrahim to review his refusal to refer the Constitutional Reference to the Chief Justice. This application too was dismissed, whereupon KP again came to this court with yet another stay application. It is important for this honourable court to note that in "KP's earlier stay application, his argument was that if a stay was not granted the Hon. Mr. Justice Ibrahim would proceed to hear the Constitutional Reference alone. In the second Stay Application, it is the same point that was canvassed before this Honourable court. I crave leave of this court to refer this court to its ruling on this second application, P.K. Tunoi J.A, E.M. Githinji J.A and J.W. Onyango Otieno, Ag. J.A delivered on 23rd April 2004. The court specifically held at page 8 that in the public interest and to ensure certainty and uniformity in the procedure and court this issue (i.e as to whether there is any legal requirement or practice that a constitutional reference of necessity should be referred to the Chief Justice) was a matter that should be ventilated by his Honourable Court. "KP" has now filed a substantive appeal. If successful and as held by this court in ruling, the hearing of the Constitutional application by the Hon. Mr. Justice Ibrahim will be set aside. By parity of reasoning, the hearing of the review application will be set aside in the event that any appeal succeeds; but it cannot be argued that the appeal will be rendered nugatory by the hearing of the review application.

It is also important for this Honourable court to note that the issue of referring the matter to the Chief Justice cannot now be pursued by way of appeal since the appeal was never filed within time; yet two thirds of the contents of the present Stay Application relate to the very same issue of refusal by the lower court to send the matter to the Chief Justice. This is no longer a live issue and to continue to persist with it is in my view abuse of the court process. In my view, "KP" is now limited to appealing against the substantive ruling of the superior court dismissing his Constitutional Reference.

7. That, I pray that in considering this Stay Application, the court takes into account the fact that the Defendants have been deprived of their investment for seven years and it is in the interests of justice that the Review Application be heard without any further delay. The conduct of the applicant demonstrates that the real objective of all these plethora of applications is to filibuster and obstruct and delay the hearing of the Defendants Review Application for as long as possible while he continues being in possession of the defendants investment.

8. That I make this affidavit in response to the application herein the facts disposed to <u>being true and with my knowledge save wherein otherwise stated."</u>

Kilonzo submitted that the underlined portions were contentions of law and not factual; argumentative, scandalous, irrelevant, expressions of opinions and beliefs of counsel; oppressive and at times the language used is injudicious. He called for striking out of the entire affidavit or a major portion of it.

Muite was characteristically firm in his protestations against those objections. There was nothing in the rules of this Court, he submitted, which prohibits an advocate from swearing an affidavit in his clients' cause. *Rule 43* of the Court of Appeal rules requires the applicant or "*some other person or persons having knowledge of the facts*" to swear an affidavit in support of an application. The making of the affidavit is not limited to the applicant. By parity of reasoning, persons other than the respondent can swear the affidavit in reply. Everything he stated in the affidavit was true and within his knowledge and he challenged Kilonzo to put him in the witness box to test it in cross-examination. We understood Muite to intend that he would be prepared to stand down as counsel to become a witness for purposes of cross-examination since he cannot execute both roles simultaneously without embarrassment. Muite further submitted that his main object was to show a chronology of deliberate efforts made in this matter for the last seven years to frustrate the respondents from recovering their business enterprise. The objections should therefore be rejected to pave way for the hearing of the main application and the prosecution of the respondents' application before the superior court.

We have anxiously considered the rival submissions of both counsel and have come to the conclusion that Mr. Kilonzo's objections are not entirely without merit. The affidavit of Muite is rather unusual and tends towards prolixity. Shorn of the heading "affidavit", it may well pass for a summary of submissions made from the bar. Nevertheless want of form, as we have stated above, is curable.

Neither counsel cited any authorities on what a valid affidavit ought to be, or to put it another way, what a defective affidavit is, and the consequences attendant thereto. But the courts have, times without number, grappled with objections made on affidavits and kept a delicate balance between adherence to technical propriety and dispensation of substantial justice. We shall refer to one or two of those authorities presently.

The starting point, we think, is the legislation on affidavit evidence which underscores the obvious position in law that it is sworn testimony on matters of fact. Since 1969 (by Act No. 10/69) the provisions of the Evidence Act have been applied to affidavits and therefore the rules of admissibility and relevancy apply. Hearsay evidence is for exclusion. So are legal opinions. *Section 2 (2)* of the Act however provides: -

"Subject to the provisions of any other Act or <u>any rules of Court</u>, this Act shall apply to affidavits presented to any Court."

Which brings us to *order XVIII* of the Civil Procedure Rules and to *rule 3 (1)* thereof which emphasizes the primacy of the best evidence rule, thus: -

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove."

The proviso to that rule which relates to interlocutory applications does not detract from that provision. In other words, it is not permitted anywhere that a statement may be deponed to as being a fact when the source of that knowledge is information. What is permitted is that if a matter is deposed to on belief and the ground of that belief is information from a third party, that information is admitted, provided its source is specified. The proviso states: -

"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."

This Court put it even more succinctly in Kenya Horticultural Exporters (1977) Ltd v Pape [1986] KLR 706 when it held:

"*Order XVIII rule 3(1)* of the *Civil Procedure Rules* is not to be understood to provide that an affidavit in interlocutory proceedings may be sworn by a deponent who is unable of his own knowledge to prove facts, or that such an affidavit may be confined entirely to statements of information and belief even if the sources and grounds are shown. The words "may contain" suggest that the main body of such an affidavit has to be confined to facts which the deponent is able of his own knowledge to prove."

It is common ground that the proceedings that were before the superior court in this matter were interlocutory in that the orders sought would not decide the rights of the parties but were meant to keep matters in *status quo* pending such determination. It is the proviso to *rule 3(1*) that therefore applies. We are aware of the strictures of the *ratio decidendi* in Standard Goods vs. Harakchand Nathu & Co. (1950) 17 EACA 99, and other cases that followed it thereafter upto 1963, requiring that affidavits made on information should not be acted upon by any court unless, firstly, the sources of the information are specified, and secondly, if it is not stated in the affidavit what is deponed to from the deponents' own observation and what from information. Both these requirements the deponent had to state expressly or the entire affidavit was for rejection. From 1963 onwards however, equitable principles were entertained in considering such affidavits and courts were looking at the substantive, rather than the formal contents of an affidavit. Without doubting the requirement of the Standard Goods case that averments sworn on information must disclose the source of information, the courts henceforth said there was no obligation on the deponent to distinguish what he swears to on knowledge and what on information and belief. The court would itself examine the affidavit and determine from a clear reading of it, which averments emanate from what source. Only the offending portions would then be rejected. That was the clear trend introduced in Nandala v Father Lyding [1963] EA 706 which was approved and applied by the predecessor of this Court in Camille v Merali [1966] EA 411.

In line with those principles we have examined the affidavit sworn by Muite and are satisfied that the bulk of the facts deposed to are derived from personal knowledge acquired by him in the last 7 years of existence of the suit. At any rate much of the information is before us in court records. The underlined portions in the paragraphs, which Kilonzo takes issue with however, are, we agree with him, fraught with argumentative propositions and expressions of opinion. It would be oppressive to allow such matters to masquerade as factual depositions. *Order XVIII r 6* donates the power to strike out scandalous, irrelevant or oppressive matter. The three characteristics are to be read disjunctively, and as Harris J stated, and we agree, in *Mayers & Another vs Akira Ranch Ltd* [1974] EA 169;

"Where an affidavit contains averments of apparent importance in the proceedings but which transgress the requirements of Order XVIII r 3(1) and in regard to which the leave of court under the proviso to that sub-rule has not been obtained, the retention of such averments in the affidavits contrary to the expressed wishes of the opposing party would be oppressive within the meaning of r 6 of the order."

Accordingly we hereby uphold the objections raised and strike out the portions of the affidavit sworn on 31st January, 2005 by Paul Kibugi Muite, which in this ruling are underlined in paragraphs 4(a), (b), (c), (d), (e), (f), (i) and 7. It would of course be another matter if the matters struck out were put forward as submissions of counsel in the course of his address to the court. But we say nothing about any objections they might attract at that level.

It only remains for us to consider whether the remaining parts of the affidavit are for rejection on the ground that it was the advocate and not the party who made them. Muite concedes it is desirable that the parties themselves should make affidavits in support of their claims or in reply.

He takes refuge however in the lack of any express caveat against advocates making affidavits on behalf of their clients. He further invokes special circumstances in this case where his clients are scattered in different parts of the world and the distinct possibility that in seeking them out to draw up and make affidavits outside the jurisdiction of this Court, it would cause even further delay and therefore injustice in the determination of the matter.

Muite is of course right in his concession that advocates should not swear affidavits on behalf of their clients when their clients are readily available to do so. It accords with the spirit of the best evidence rule and, in view of the provisions of *order XVIII r 2*, with common sense. It would otherwise be embarrassing to apply those provisions to an advocate who may have to relinquish his role as one, to become a witness. There is otherwise no express prohibition against an advocate who of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client. So too an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information. On both counts we do not find Muite's remaining affidavit offensive. As we stated earlier he is possessed of the facts stated therein and secondly he has explained, and we believe him in the circumstances of this case, that his clients were not readily available. The affidavit in reply in *Kenya Horticultural Exporters Ltd case* (Supra) was sworn by the advocate. It was however not struck out for that reason, but because the advocate could not prove all the statements of information and belief that he had stated even if he was to be cross-examined on them.

We do not strike out the remaining parts of the replying affidavit of Muite. The main application may now be set down for hearing. Costs in the application.

Dated and delivered at Nairobi this 4th day of March 2005.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

……..……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR