**Mayers & another v Akira Ranch Ltd**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 17 September 1973

**Case Number:** 166/1971 (60/74)

**Before:** Harris J

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*[1] Evidence – Admissibility – Affidavit – Containing hearsay – Inadmissible on application to rectify*

*share register of company.*

*[2] Civil Practice and Procedure – Affidavit – Striking out – Retention of inadmissible matter would be*

*oppressive – Civil Procedure* (*Revised*) *Rules* 1948, *O.* 18, *r.* 6 (K)*.*

**JUDGMENT**

**Harris J:** By an originating notice of motion brought under the Companies Act (Cap 486) and filed on 2 February 1971, Mrs. H. M. Mayers and Mr. D.D. Mayers (to whom I will refer as “the applicants”) seek an order pursuant to s. 118 of the Act for the reinstatement of their names in the register of members of Akira Ranch Ltd as the holders of one share each. In support of the motion they rely upon an affidavit sworn on 29 January 1971 by Mr. Cyril Herbert Mayers, the husband of the first-named applicant and father of the second-named applicant. The company is named as the respondent to the motion, notice of which has been served also upon Mr. Lloyd-Jones, a director of the company, and upon a company known as Control Ltd which is the secretary of Akira Ranch Ltd. Mr. R. S. Cameron, to whom reference will be made, is a director of Control Ltd. The hearing of the motion commenced before me on 6 December 1972 but was adjourned on the application of the applicants who sought and obtained leave to file a further affidavit for the purpose of identifying the two shares referred to in the motion. This affidavit, sworn by Mr. C. H. Mayers on 15 December 1972, has since been filed. By a chamber summons issued on 22 December 1972 the company now seeks an order to strike out portions of the earlier affidavit of Mr. C. H. Mayers of 29 January 1971, upon which the motion is grounded. In reply to this the applicants, as respondents to the summons, by letter dated 6 January 1973 from their advocates, expressed to have been written “in view of the recent Practice Note issued by the Chief Justice”, gave notice to the advocates for the company of their intention to raise four preliminary objections as follows: “(1) that the application will take more than one half hour and should accordingly be listed for a firm date at the call-over; (2) that such evidence was accepted without objection on the part of the respondent by the Court of Appeal and that the point now raised as to hearsay is res judicata by the Court of Appeal decision; (3) in the alternative if the point now raised in the application is still open to argument, such point is already in issue on the main application and this second application must be stayed under s. 6 of the Civil Procedure Act; (4) that the said application is an abuse of the process of the Court for reasons stated in the numbered paragraphs 2 & 3 above.” I am informed by the Chief Justice that he has not issued a practice note such as would enable any of these four objections to be raised in this fashion and accordingly I will deal with the objections, not as a matter for preliminary consideration, but as part of the applicants’ case in reply to the company’s chamber summons. What is now before me is the chamber summons to strike out portions of Mr. C. H. Mayers’ affidavit of 29 January 1971 in support of the motion but not the motion itself. The Court is therefore in no way concerned at this stage with the respective positions of the parties in relation to the names appearing on the register nor am I persuaded that the company can be said to have waived its rights, as is suggested by the applicants, in regard to the admissibility or otherwise of the passages in Mr. Mayers’ affidavit which are now challenged. The portions of Mr. Mayers’ affidavit which the company seeks to have struck out comprise three separate passages occurring in paragraphs 9 and 10 and the grounds as set out in the summons upon which it is sought to have them struck out are that the notice of motion is an application for substantive relief and should be treated as a suit rather than as an interlocutory application, and that the portions complained of are hearsay and not admissible in evidence by virtue of the provisions of s. 2 of the Evidence Act (Cap. 80). S. 2(1) of this Act declares that the Act shall apply to all judicial proceedings in or before any court, and s. 2(2) provides that, subject to the provisions of any other Act or of any rules of Court, the Act shall apply to affidavits presented to any Court. O. 18,r. 3(1) of the Civil Procedure (Revised) Rules, 1948, is in the following terms: “Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: 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.” Considering in the first place the proviso to r. 3 (1) I am satisfied, having regard to the view of the Court of Appeal in *Saint Benoist Plantations Ltd. v. Felix* (1954), 21 E.A.C.A. 105, and in *Boyes v. Gathure*, [1969] E.A. 385, that proceedings such as those in the instant case, that is, an originating application brought under s. 118 of the Companies Act, cannot be regarded as interlocutory in nature when there is no suit in existence within the framework of which they are brought. Furthermore, although the Court may grant leave to admit in evidence an affidavit containing statements of information and belief and showing the sources and grounds thereof, no such leave has been sought here and I do not feel that it would be proper, in view of the sharp contest which has arisen in the matter, possibly involving or thought to involve a question of principle, to grant such leave without it being expressly asked for. It becomes necessary therefore to consider whether the portions of Mr. Mayers’ affidavit to which objection has been taken should or should not be excluded by virtue of the restriction imposed by r. 3 (1), that is, whether those portions can be said to contain only facts which the deponent is able of his own knowledge to prove. Before turning to the precise passages of the affidavit which are challenged in the summons it will be expedient to mention the preliminary objection to the summons taken by the applicants as respondents namely, that the issue sought to be raised cannot be entertained by reason of ss. 6 and 7 of the Civil Procedure Act (Cap. 5) and of the principle of res judicata. I have considered these provisions but am unable to see in them any ground for not entertaining and disposing of the present summons. Two further objections taken by the respondents are, first, that the summons is premature inasmuch as it seeks to challenge the affidavit before it has been tendered in evidence, and secondly that the summons is too late and should have been raised “at the hearing of the motion”. The affidavit has been duly filed and is before the Court, the motion is still at hearing, and I do not propose to spend further time on these conflicting objections which are accordingly rejected. As has been mentioned, the company challenges three separate passages in Mr. Mayers’ affidavit, two being in para. 9 and one in para. 10. The first of these passages is as follows: “Some weeks later I was informed by my said advocate and verily believe the same that he had been verbally assured by Mr. Cameron that the transfers were being registered. I am further informed by my said advocate and verily believe the same that he had received no new certificates.” The criterion to be applied in determining what is to be excluded under the hearsay rule is shortly stated in Vol. 15, p. 266, Halsbury’s Laws of England, 3rd Edn., in these words: “A witness cannot be called, in proof of a fact, to state that he heard someone else state it to be one. Care must be taken to distinguish between evidence which is tendered to prove that someone else has spoken certain words when the fact of which proof is required is merely the speaking, and evidence which is tendered to prove that someone else has spoken certain words as leading to a conclusion that the words spoken were true. The former is admissible (as in the cases where the uttering of a slander has to be proved); the latter is not.” Again, at p. 295 of the same volume it is said that the two principal objections to the admission of hearsay would appear to be the lack of an oath administered to the originator of the statement and the absence of opportunity to cross-examine him. Applying these tests to the passage in the affidavit I am of the opinion that the words “that he had been verbally assured by Mr. Cameron that the transfers were being registered” and the words “that he had received no new certificates” are hearsay and inadmissible in evidence. The second passage in Mr. Mayers’ affidavit to which objection is taken is also to be found in para. 9 and is as follows: “. . . and I am informed and verily believe the same that my said advocate has also not received any reply to the said notice from the company or the directors or officers of the company”. This passage does not state by whom the deponent was so informed but, assuming that it was his advocate, the passage, for the reason stated above, is clearly inadmissible. The third passage objected to, which constitutes the greater part of para. 10 of Mr. Mayers’ affidavit, falls under the same rule as the other two and, for the reasons indicated, is inadmissible. This passage reads as follows: “On this occasion my said advocate and I were informed by Mr. R. S. Cameron that he had received verbal instructions from Mr. D. T. E. Lloyd-Jones, a director of the company, authorising him to register the said transfers and Mr. D. T. E. Lloyd Jones had accordingly arranged for the register of members to be delivered to the said Mr. R. S. Cameron for that purpose. The said Mr. R. S. Cameron also informed me and my said advocate on the said occasion and I verily believe the same to be true that the registration of the said transfers had been effected and the names of the applicants above named entered in the register of members. However, Mr. R. S. Cameron informed me and my said advocate and I verily believe the same that subsequent to the entry of the names of the applicants above named in the register of members the said Mr. Lloyd-Jones on behalf of the directors had given verbal instructions to him to delete the said names from the said register of members. Mr. Cameron informed me that he had agreed to do this and had effected such deletion of the said names in the register of members.” In the result, therefore, each of the three paragraphs of the affidavit particularised in the chamber summons is held to be inadmissible in evidence in these proceedings and it remains to consider whether they should accordingly be struck out as being irrelevant and oppressive. O. 18, r. 6 provides that the Court may order to be struck out any matter which is scandalous, irrelevant or oppressive, three characteristics which it is clear, despite the applicants’ contention to the contrary, are to be read disjunctively where, as here, an affidavit contains averments of apparent importance in the proceedings but which transgress the requirements of O. 18, r. 3 (1) and in regard to which the leave of the Court under the proviso to that sub-rule has not been obtained, the retention of such averments in the affidavit contrary to the expressed wishes of the opposing party would, in my opinion, be oppressive within the meaning of r. 6 of the Order. Accordingly the application by chamber summons succeeds and those portions of paragraphs 9 and 10 of Mr. Mayers’ affidavit dated 29 January 1971 already indicated are struck out. The company will have the costs of the application to be taxed on the disposal of the originating motion. *Order accordingly*

For the applicants: *DN Khanna* (instructed by *Khanna & Co* Nairobi)

For the respondent: *P Le Pelley* (instructed by *Hamilton Harrison & Matthews*, Nairobi)