



**Wambua v Kenya Power & Lighting Company Ltd (Environment & Land
Case 172 of 2016) [2023] KEELC 16513 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16513 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 172 OF 2016**

**A NYUKURI, J
MARCH 22, 2023**

BETWEEN

ANTONY MWAU WAMBUA PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY LTD DEFENDANT

RULING

Introduction

1. Vide a preliminary objection dated February 7, 2022, the defendant sought to strike out the plaintiff's suit on the following grounds;
 1. That the application and entire suit is misconceived, incompetent and bad in law.
 2. That the Plaintiff dated February 28, 2020 offends the mandatory provisions of Order 4 Rule 1 (2) and (6) of the [Civil Procedure Rules 2010](#).
 3. That the application and plaint is incompetent and incapable of conveying any benefit to the plaintiff in its current forum, the issues raised by the applicant especially on interest is governed by the provisions of the [Law of Contract Act](#) and the Environment and [Land Act](#).
 4. That the defendant prays that the suit be struck out with costs.
2. The parties filed their respective submissions which the court has considered. Therefore, the issues for determination are whether the preliminary objection is a proper preliminary objection and whether the preliminary objection is merited. a preliminary objection is a pure point of law which arises from pleadings where there is no dispute on the facts; and which objection may dispose of the matter. (See *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Ltd* [1969] EA 696.



3. A Preliminary Objection must be precise and state clearly which legal provisions have been breached. The precision on the point of law is meant to put on notice both the court and the opposite party on the exact nature of the point of law in contention. Therefore, general and ambiguous objections are not proper Preliminary Objections and cannot be canvassed as such.
4. I have considered the Preliminary Objection herein and I note that in grounds 1, 3 and 4, the objection is based on allegations that the suit is misconceived, incompetent, bad in law, and contrary to the Law of Contract Act and the Environment and Land Act. Clearly, there is no reference to any specific legal provision cited by the Defendant as having been breached. The manner in which the suit is misconceived, incompetent, bad in law or contrary to the two cited statutes is not demonstrated or clarified on the face of the Preliminary Objection. I therefore hold and find that grounds 1, 3 and 4 of the Preliminary Objection herein are ambiguous and must fail.
5. The remaining ground is ground number 2 which states that the Plaintiff dated February 28, 2020 offends the provisions of Order 4 Rule 1 (2) and (6) of the Civil Procedure Rules 2010. That provision states as follows;

4(1)(2) The Plaintiff shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in Rule 1 (1) (f) above.

4(1)(6) The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any claim or counterclaim which does not comply with Sub rule (2) (3) (4) and (5) of the rule.
6. Order 4 Rule 1 (1) (f) of the Civil Procedure Rules provides for averments that must be included in the Plaintiff as follows;
 1. Particulars of plaintiff
4 (1) The plaintiff shall contain the following particulars –
 - (f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the Plaintiff and the Defendant over the same subject matter and that the cause of action relates to the Plaintiff named in the plaintiff
7. Therefore, every plaintiff filed must have an averment that the suit is neither sub judice nor res judicata and that there is a nexus between the cause of action and the plaintiff in the suit. Besides, every plaintiff must be accompanied by a verifying affidavit which should verify the fact that the filed suit is neither sub judice nor res judicata and that the cause of action relates to the plaintiff.
8. I have considered the defendant's submissions to the effect that failure to attach a verifying affidavit to an amended plaintiff is a fatal error which must result in the striking out the plaintiff and which cannot be salvaged under article 159 of the Constitution.
9. In the instant suit, I note that the Plaintiff filed the original plaintiff dated October 27, 2016 filed on even date, together with a verifying affidavit in terms of Order 4 Rule 1 (2) of the Civil Procedure Rules. However, the amended plaintiff dated February 28, 2020 was not accompanied by a verifying affidavit as is required.
10. Therefore, the question that the court ought to address is whether a suit should be struck out where an amended plaintiff was not accompanied by a verifying affidavit. In my view, the requirement to file a verifying affidavit does not go to the jurisdiction of the case to necessitate striking out of a suit. It is a procedural lapse which may be corrected with leave of court because rules of procedure are meant to be handmaids and not mistresses of substantive justice.



11. In the instant case, the defendant has not stated that this suit is sub judice, res judicata nor that it has no relation to the plaintiff herein. They have also not stated any prejudice that they have suffered or will likely suffer due to the procedural lapse of failure to file a verifying affidavit by the plaintiff.
12. In the case of *Microsoft Corporation v. Mitsumi Computer Garage Ltd & another* Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470, the court stated on procedural lapses as follows;

Rules of procedure are handmaids and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form of procedure, which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the court should rise to its higher calling to do justice by saving the proceedings in issue.
13. Having said that, I note that the plaintiff, who appears in person filed the amended plaint together with a supporting affidavit, instead of a verifying affidavit. I therefore do not see any reason for striking out the suit on the ground that a verifying affidavit ought to have been filed where no prejudice has been exhibited to be suffered by the defendant. In the premises, I grant the plaintiff leave of fourteen days to file and serve the verifying affidavit to the amended plaint. Costs of the Preliminary Objection shall abide the suit.
14. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 22ND DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Ochieng holding brief for Mr. Mugun for Defendant

Mr. Antony Wambua in person – present

Ms Josephine – Court assistant

