



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL SUIT NO. 13 OF 2016**

HEZEKIAH WAN'GOMBE GICHOHI.....1<sup>ST</sup> PLAINTIFF  
HEZY JOHN LIMITED.....2<sup>ND</sup> PLAINTIFF  
ALLIMEX LIMITED.....3<sup>RD</sup> PLAINTIFF  
HII INVESTORS.....4<sup>TH</sup> PLAINTIFF  
CAROLINE W KAMARU.....5<sup>TH</sup> PLAINTIFF

**VERSUS**

DAVID N MUTHOGA.....1<sup>ST</sup> DEFENDANT  
ANTONY WAGURA IKIKI.....2<sup>ND</sup> DEFENDANT  
PETER GICHOHI GITAU.....3<sup>RD</sup> DEFENDANT  
UMOJA SERVICE STATIONS LIMITED.....4<sup>TH</sup> DEFENDANT

**RULING**

1. The application is dated the 7<sup>th</sup> March, 2018 and is brought under the provisions of Order 8 Rules 3 and 5 and Order 51 Rule 1 of the Civil Procedure Rules. The plaintiffs/applicants seek the following orders;

- i. The plaintiffs/applicants herein be granted leave to amend the plaint herein dated 5<sup>th</sup> September, 2016 in terms of the draft amended plaint herein;
- ii. The annexed amended plaint be deemed as duly filed and served.
- iii. Costs be in the cause.

2. The applicants rely on the grounds on the face of the application and on the Supporting Affidavit made on the same date by **HEZEKIAH WANGOMBE GICHOHI** who depend that he is the 1<sup>st</sup> plaintiff herein and thus competent to swear the affidavit; he further avers that he has the authority of his co-plaintiffs to swear the affidavit.

3. This court has considered the application and perused the supporting affidavit and the affidavit in reply at length; and on its own motion has taken the liberty to peruse the court record also at length;

4. It is noted at paragraph 2 of the Supporting Affidavit it is expressly stated as follows;

**“That I have the authority of my co-plaintiffs to swear this affidavit.”**

5. From perusal of the record it is noted that the 1<sup>st</sup> Plaintiff is a shareholder and a director of the 4<sup>th</sup> plaintiff and can legitimately make the

affidavit on his own behalf; from the reading of the title of the Plaint herein this court notes that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs herein are corporations and that the 5<sup>th</sup> plaintiff is an individual; indeed where there are several plaintiffs one of them may swear an affidavit on behalf of the others; this court reiterates that it has perused the court record at length on its own accord and has not sighted any written authority given by the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> plaintiffs authorizing and empowering the 1<sup>st</sup> plaintiff to swear the supporting affidavit on its or her behalf;

6. It is trite law that the Civil Procedure Rules require such an authority to be in writing and to be filed; the law also requires that where the party is a corporation the affidavits shall be sworn by an officer of the company duly authorized under the seal of the company to do so; in the light of the above this court shall not delve into or address the merits of the application for amendment of the Plaint but will instead only deal with the effect of these omissions;

7. As pointed out the application is devoid of the written authorization of the three aforementioned plaintiffs thus rendering the supporting affidavit worthless and the only recourse left is for it to be struck out for non-compliance with the law;

8. The effect being that what remains is the application herein but it is devoid of a supporting affidavit; affidavit evidence is critical for the court to establish whether the applicants are entitled to the orders sought; this court is persuaded by the holding in the case of **Peter Kimonye & Others vs Barclays Bank of Kenya Ltd & 2 Others**; in which **Hon. Hatari Waweru Judge** held as follows;

*“ ...a document that goes counter to an express statutory requirement is invalid. An invalid document must be struck off the record.”*

9. The application cannot stand on its own and this renders it as being incompetent and incurably defective and the same can only be struck out;

#### **FINDINGS AND DETERMINATION**

10. In the light of the foregoing this court makes the following findings and determinations;

- i. The supporting affidavit is found to be defective and is hereby struck out;
- ii. There being no affidavit to support the application it follows that it is bad in law and incompetent and the same is also hereby struck out.
- iii. The respondent shall have the costs.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 27<sup>th</sup> day of September, 2018.

**HON. A. MSHILA**

**JUDGE**