



**Opondo (Suing on his Own Behalf and as the Administrator and Beneficiary of the Estate of the Late Erasto Opondo Otieno - Deceased) & another v Ogutu (Environment & Land Case E011 of 2022) [2023] KEELC 22574 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22574 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE E011 OF 2022  
AY KOROSS, J  
DECEMBER 7, 2023**

**BETWEEN**

**LAWRENCE OTIENO OPONDO (SUING ON HIS OWN BEHALF AND AS THE ADMINISTRATOR AND BENEFICIARY OF THE ESTATE OF THE LATE ERASTO OPONDO OTIENO - DECEASED) ..... 1<sup>ST</sup> PLAINTIFF**

**VINCENT ODONGO OKUMU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOHN ODHIAMBO OGUTU ..... DEFENDANT**

**RULING**

1. For determination before me is a notice of preliminary objection dated 2/07/2023 filed by M/s Row Advocates LLP who are the law firm on record for the defendant and they raised the following grounds:
  - a. That the amended plaint dated 25/05/2023 was not contemporaneously accompanied by a verifying affidavit contrary to the mandatory provisions Order 4 Rule 2 of the *Civil Procedure Rules*.
  - b. Therefore, the plaintiffs amended plaint dated 24/05/2023 should be struck out.

**Submissions**

2. As directed by the court, the preliminary objection was canvassed by way of written submissions and the defendant's earlier mentioned advocates on record filed written submissions dated 19/09/2023. Upon service of submissions by the defence, the plaintiff's law firm on record M/s Maube Muyeya & Associates filed written submissions dated 14/10/2023.



## Defendant's Submissions

3. The defence Submissions which were handled by counsel Mr. Okello identify a singular issue for determination; whether the preliminary objection is merited. Counsel submits the preliminary objection raises a pure point of law and met the threshold of the *locus classicus* case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* [1969] EA 696 which held that a valid preliminary objection is one that is based on a pure point of law and on undisputed facts.
4. Further, Mr. Okello contends the legal framework for filing a verifying affidavit together with a plaint or an amended plaint is provided for by Order 4 Rule 1 (2) of the *Civil Procedure Rules* which is couched in mandatory terms and could not be cured by Article 159 of the *Constitution*.
5. Accordingly, and to buttress his position, counsel relies on the persuasive decision of *Priska Onyango Ojuwang & another v Henry Ojuwang Nyabende* [2018] eKLR where the court struck out with costs a counterclaim for its failure to be accompanied by a verifying Affidavit at the time of filing. In this decision the court stated as follows: -

“That even if the court had jurisdiction to exercise discretion to allow late filing of verifying affidavit, the Defendant’s has taken rather too long to move the court.”
6. Counsel further submits the plaintiffs verifying affidavit was filed late having been filed 5 months after counsel Mr. Maube whose firm is on record for the plaintiffs, had filed his amended plaint.

## Plaintiffs' Submissions

7. Mr Maube submits *Mukisa Biscuit (Supra)* settled the principles of preliminary objections and the main issue in contention is whether the grounds hypothesised in the preliminary objection should be allowed.
8. According to counsel, the plaintiffs mistake of failing to file a verifying affidavit at the onset of filing an amended plaint is curable and from settled case law, the court should administer justice without undue regard to technicalities.
9. Thus, to support his position, counsel relies on several authorities including the persuasive decision of *Teclab Jepkirui Wilson Tuwei (Administrators of the estate of the late Malakwen Arap Cheruiyot) v Kimatyo Chirchir* [2021] eKLR where in allowing a party to file a verifying affidavit which did not accompany a pleading, the Learned Judge held that such an error was in the spirit of the provisions of Article 159 of the *Constitution*, a technical error.
10. Further, counsel relies on the persuasive decision of *Kiraku v Eastleigh Route Sacco Limited* (Civil Appeal E057 of 2021) [2022] KEHC 11809 (KLR) where the court relied on the binding decision of *Luke Cheruiyot & 37 others v National Oil Corporation of Kenya* [2015] eKLR which stated: -

“As recently as 11<sup>th</sup> July, 2014 the position taken by the Court in *Research International East Africa Ltd. v Julius Arisi & 213 Others (Supra)*, was reiterated in the case of *Kenya Oil Company Limited v Javantilal Dharamshi Gosrami* [Nairobi Civil Appeal No. 324 of 2005] (UR). There, we said:

“The provisions of Rule 1(6) of Order 4 (formerly rule 1(3) of Order VII), gives the court power to strike out a plaint which is not accompanied by a verifying affidavit containing the stipulated particulars.



The power to strike out the plaint or [counterclaim] under the Rule is not mandatory but permissive. The phrase “the court may...” in Order 1(3) and in the new Order 1(6) gives the court discretion whether or not to strike out a plaint as the court held in *Arisi case (Supra)*” “

### Issues for Determination

11. Having carefully considered the preliminary objection and parties’ rival submissions on the matter, two issues emerge for determination and they shall be addressed simultaneously: -
  - a. Whether the preliminary objection raises pure points of law.
  - b. Whether the preliminary objection should be upheld.

### Analysis and determination

#### a) Whether the preliminary objection raises pure points of law

12. The case of *Mukisa Biscuit Manufacturing (Supra)* has been the subject of interpretation in several decisions and its principles are well summarised in the Court of Appeal decision of *Attorney General & another v Andrew Maina Gitinji & another* [2016] eKLR as follows:

“That is first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.”

See also the Supreme Court of Kenya decision of *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR.

13. *Black’s Law Dictionary, 11<sup>th</sup> edition* defines a preliminary objection as;

“...an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary. An objection to the courts jurisdiction is an example of a preliminary objection.”

14. The defendant argues because the plaintiffs have flouted provisions of law, it meant the amended plaint is incompetent and should be struck out. No doubt if this court is to find the amended plaint incompetent, the plaintiffs cannot be heard on the averments made on it and it may dispose of the suit. Mr. Maube has not disputed the preliminary objection meets the settled principles and it is also undisputed the verifying affidavit was filed well after the amended plaint was filed.
15. Having now considered the objections raised by the defendant, this court finds the grounds of incompetency of the suit can dispose of the suit preliminarily without having to resort to ascertaining the facts. Consequently, I find the preliminary objection raised by the defendant meets the threshold of *Mukisa Biscuit (Supra)*.

#### b) Whether the preliminary objection should be upheld.

16. As rightfully submitted by Mr. Okello, the legal framework for filing a plaint or amended plaint as the circumstances be, is found in Order 4 Rule 1 of the *Civil Procedure Rules*. In this framework, Order



4 Rule 1 (2) thereof, requires a plaint to be accompanied by a verifying affidavit. This provision states that: -

“the Plaint shall be accompanied by an Affidavit sworn by the Plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.” Emphasis added.

17. However, even if this proviso implies it is mandatory, the architecture of this provision cannot be read in isolation and has to be read conjunctively with Order 4 Rule 1 (6) thereof which grants this court discretionary power. This Order 4 Rule 1(6) states as follows: -

“The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule.”

18. Now, the issue raised in the preliminary objection is not new and has been the subject of determination in our legal system. Some of the persuasive decisions cited by both counsels had conflicting outcomes. In *Priska Onyango Ojuang’ (Supra)*, the facts in that case were different from those obtaining in this case. In that case, a party sought to file a verifying affidavit long after the plaintiff’s case had been closed yet the circumstances herein are different; this court is yet to hold a trial conference.

19. The Court of Appeal case of *Luke Cheruiyot (Supra)* which this court adopts as read together with Order 4 Rule 1 (6) affirms this court has discretionary power on whether to strike a suit for failing to be accompanied by a verifying affidavit.

20. In conducting such interrogation, respite is found in Sections 1A, 1B and 3A of the *Civil procedure Act* which echoes Article 159 of the *Constitution*. With the advent of these provisions which are now not so new, courts have to ensure the ends of justice are met and in doing so, it is bestowed with inherent power to issue orders that ensure the ends of justice are met.

21. Hence, challenges prior to introduction of the prevailing *Civil Procedure Rules* which forced courts to oftentimes take draconian steps such as striking out proceedings instead of sustaining a suit have shifted and in doing justice, courts endeavour to sustain a suit and it is only in the clearest of circumstances, that a suit is struck out.

22. While being cognisant of blatant and inexcusable breach of rules, this court is alive that the court should not throw out the plaintiffs from the seat of justice and they should be given their day in court.

23. Earlier, this court stated the suit is yet to be slated down for hearing and the plaintiffs have indeed filed and served their verifying affidavit. Therefore, I am not satisfied the defendant will be prejudiced if this court deems it as properly filed and I echo the sentiments of A.G. Ringera J in *Microsoft Corporation v Mitsumi Computer Garage Ltd & another* [2001] eKLR thus;

“In the matter at hand, I am of the view that the error manifest in the Verifying Affidavit neither goes to the jurisdiction of the Court nor prejudices the Defendants in any fundamental respect. Indeed, no prejudice has been alleged.”

24. At this juncture, the court finds and holds, it would be unjust and imprudent to strike out the plaintiffs amended plaint for failing to append a verifying affidavit to it.

25. The upshot of the foregoing is that the court finds and holds the defendant’s preliminary objection dated 02/07/2023 lacks merit and it is hereby dismissed entirely with costs being in the cause. The



verifying affidavit dated 18/09/2023 is deemed as properly on record. This matter shall be mentioned for a case conference on 21/02/2024.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 7<sup>TH</sup> DAY OF DECEMBER 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**07/12/2023**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Maube for the plaintiffs

Mr. Okello for the defendant

Court assistant: Ishmael Orwa

