



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 83 of 2012

PUFFINS INVESTMENT LIMITED PLAINTIFF/APPLICANT

VERSUS

1. KISHORO LEAPONYO NTIAPUYOK
2. WILSON WUANTAI KISHORO
3. LEPORIO KISHORO DEFENDANTS/RESPONDENTS

R U L I N G

The Defendant herein filed a **Notice of Preliminary Objection (P.O)** dated 16/4/2012. According to the said Preliminary Objection, the suit herein should be struck out on the grounds that the supporting affidavit to the said application together with the verifying affidavit both of one **Kartrick K. Shah** are patently false, misleading and plainly non-sustainable and have been made in contravention of **Order 19 Rules 3 and 4** and **Order 4 Rule 1** of the **Civil Procedure Rules** respectively.

Secondly, that **Order 3 rule 1** of the **Civil Procedure Rules** was not complied with and that the plaint was served without the summons in contravention of **Order 5 Rule 1** of the **Civil Procedure Rules**. That application does not comply with the provisions of **Order 51 Rule 1** of the **Civil Procedure Rules**.

The firm of **Manegene Advocates** appeared for the Plaintiff while the firm of **Masika & Koross** appeared for the 1st and 2nd Defendants.

The suit against the 2nd Defendant **Wilson Wantai Kishoro** was withdrawn on 21/3/13 by consent. It seems the 3rd Defendant, **Leporio Kishoro** has never been served.

The Preliminary Objection was canvassed by way of written submissions which I have duly considered.

It was submitted by counsel for the Defendant that the suit offends the mandatory provisions of **Order 4 rule (1) (f)** and **1 (2)** which state as follows:-

- (1) “(1) (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 plaint.
- (2) 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.” Paragraph No. 7 of the plaint avers that no suit is pending between the Plaintiff and the Defendants on the same subject matter nor have there been any previous proceedings between the Plaintiffs and the Defendants on the same subject matter.

Paragraph 3 of the verifying affidavit states that **“there is no other suit pending between the Plaintiff and the Defendants on the same subject matter nor have there been any previous proceedings between the Plaintiff and the Defendants on the same subject matter.”**

The Defendants’ counsel has relied on the affidavit of service in **Civil Suit No. 75 of 2012** which suit is between the same parties and over the same subject matter herein. Based on the said affidavit of service, it is contended that the Plaintiff was aware of suit **No. 75 of 2012** but failed to so disclose when the Plaintiff filed the suit herein. I have perused the said affidavit of service which is annexed to the affidavit of the 1st Defendant, **Kishoro Leponyo Ntiapuyok** sworn on 17/4/2012. The said affidavit contains matters of fact which are not admitted and need to be ascertained.

As stated in the case of **Mukisa Biscuit Manufacturing Co. Ltd. -Vs- West End Distributors Ltd (1969) EALR:-**

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

I have considered the authorities cited by the Defendants’ counsel. The same are distinguishable from the issues herein as the said authorities dealt with applications and not a Preliminary Objection.

The lack of compliance with **Order 3 rule 1** by failure to indicate the **“case track”** on the heading of the plaint is a matter of want of form which is curable under **Order 2 rule 4**.

Order 19 rule 4 states as follows:-

“Every affidavit shall state the description, true place of abode and postal address of the deponent, and if the deponent is a minor shall state his age.”

Failure by the Plaintiff to state his place of abode in the replying affidavit is not fatal and is only a matter of procedural technicality which is curable.

Article 159 (2) (d) of the **Constitution** states as follows:-

(d) “justice shall be administered without undue regard to procedural technicalities.”

With the foregoing, I find no merits in the Preliminary Objection raised and I hereby dismiss the same with costs to the Plaintiff.

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B. THURANIRA JADEN
JUDGE

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Dated and delivered at Machakos this **30th** day of **May** 2013.

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JUDGE