



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
ENVIRONMENTAL & LAND CASE 1784 OF 2007

HENRY ORYEM OKELLO.....1ST PLAINTIFF/RESPONDENT

ERISANWERO OPIRA 2ND PLAINTIFF/RESPONDENT

VERSUS

SUKHDEV SINGH LALY1ST DEFENDANT/RESPONDENT

LAZARUS KIBUI NDEGWA.....2ND DEFENDANT/RESPONDENT

AND

RESHAM LALYOBJECTOR/APPLICANT

RULING

1. The 2nd defendant in this suit has raised a preliminary objection under order 4 Rule (2) (3) and states that the plaintiff filed a plaint dated 15/6/2006 and attached a verifying affidavit sworn on the 9/2/2006. That the said affidavit was sworn verifying facts of a plaint that was non-existence as of 9/6/2006. Counsel for the 2nd defendant further argued that there are two plaintiffs in this matter and yet the verifying affidavit was sworn by the 1st plaintiff and no authority was filed with a verifying affidavit authorizing the 1st plaintiff to swear his affidavit on behalf of the 2nd plaintiff as required by law. Counsel submitted that because of this the suit is invalid as it was not accompanied by a verifying affidavit as required under order 4 Rule 2. He argued that the words in the Civil Procedure Act are 'shall be' and there procedure must be complied with and non-compliance makes the suit a non-started. He cited the following cases of *Delphis Bank Ltd. Vs. Asudi (K) Ltd and Another: HCCC No. 82 of 2003 and HCCC No. 450 of 2005: Supersonic Travels & Tours Ltd & Others Vs. National Bank of Kenya Ltd*, where in both cases the plaints were struck off for noncompliance of sub rule 2 of order 7 of the old Civil Procedure Rules. Counsel argued that rules of procedure are made to regulate the practice and one has to approach the Court within the rules and further that the suit was non-starter, incompetent and that it had no jurisdiction to hear the matter. He asked the Court to uphold the preliminary objection raised.

2. Mr. Mwaniki supported the preliminary objection raised by the 2nd defendant and asked the court to note that they had raised it in paragraph 16 of their defence. Mr. Parekh for the plaintiff replied by stating

that the suit was filed in 2006 and counsel has cited rules that came into force in September 2010. That at the time this suit was filed it was not practicable to comply with order 4 rule 2 (3) as it was not a requirement in law to have consent in writing of other plaintiff. On the verifying affidavit counsel referred to order 18 rule 9 and argued that the affidavit annexed states it is sworn by the 1st plaintiff that it was authorized by the 2nd plaintiff. He argued that the objection raised had no merits. He also drew the Court's attention to section 1A, 1B and 3 A of the Civil Procedure Act which came in force in 2009 and that the Court has wide powers and discretion to deal with the matters raised. For expeditious disposal of the suit counsel asked the Court to exercise its discretion and dismiss the arguments raised at this late stage which would cause injustice to the plaintiff. Mr. Begi for the 2nd defendant in response stated that the requirement of written authority is in the old Civil Procedure Act and the issue of order 18 rule 9 is quoted out of context as the said order deals with affidavits and not verifying affidavits and that section 1A, 1B and 3A are not there to cure incompetent suits.

3. I have considered the preliminary objection raised by the 2nd defendant I note it is on a point of law. I also note the provisions of order 4 (2) and (3) which state as follows;-

“(2) the plaint shall be accompanied by an affidavit it sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1) (f).

(3) Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others”.

These provisions came into force through legal Notice no. 36 of 2000. At the time this suit was filed it was a requirement that the plaint had to be accompanied by a verifying affidavit. The plaintiff does not deny that the plaint was filed on the 15/2/2006 with a verifying affidavit that was dated 9/2/2006. This was un-procedural as the verifying affidavit should have been dated the same date as plaint. I note that the plaint filed on the 15/2/2006 was not accompanied by a verifying affidavit. Although the objection raised has merit on procedure, I find that it is a technicality that should not be used to strike out this entire suit. Section 1A and B of the Civil Procedure gives the court discretion to facilitate the expeditious hearing of a matter before it. Article 159 2(d) of the Constitution states that justice shall be administered without undue regard to procedural technicalities. In my view although the provisions of order 4 rule (2) and (3), formally order 7 of the old Civil Procedure Rule gives a mandatory provision, I find that the omission to file a proper verifying affidavit in this case is an error that can be amended within the provisions of Section 100 of the Civil Procedure Act. In exercising my discretion I will not strike out the plaint. The plaint filed in this suit which is not verified as required by order 4 (2) (3) may be verified subsequently with the leave of the Court. I order that a fresh verifying affidavit may be filed within 21 days from the date of this ruling. Cost be in the cause.

Orders accordingly.

Dated, signed and delivered this 26th day of June 2012.

R. OUGO
JUDGE

In the Presence of:-

..... For the Plaintiffs/Respondents

.....For the 1st defendant/applicant

.....for 2nd defendant

..... Court Clerk