



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 595 of 2009

DEWDROP ENTERPRISES

LIMITED.....PLAINTIFF/APPLICANT

VERSUS

WAMBUGU WAMBUI ANGELINE T/A A.W. KINUTHIA & CO.
ADVOCATES.....DEFENDANT/RESPONDENT

RULING

The application before the court is brought by an amended Originating Summons dated 5th February, 2010 and filed on 9th February, 2010. It is made under **Section 34(2) of the Advocates Act, Section 3A of the Civil Procedure Act, Order XXXVI Rule 8B and Order LII Rule 4 of the Civil Procedure Rules** and all other relevant provisions of the law. The Applicant seeks from the court orders that-

1. **This Honourable court be pleased to order the Defendant to pay the Plaintiff the sum of Kshs. 361, 504.00, and**
2. **That costs of this application be provided for.**

To that application, the Defendant filed a notice of Preliminary Objection based on the following grounds:

- (a) **That the supporting affidavit to the Originating Summons is fatally defective as the deponent has no authority to sign the affidavit on behalf of the Plaintiff Company.**
- (b) **That in the absence of a competent affidavit, the Originating Summons cannot stand and ought to be struck out in view of the mandatory provisions of Order LII Rule 2 of the Civil Procedure Rules.**

With the leave of the court, the parties filed written submissions. On its part, the Plaintiff submitted that **Section 3A of the Civil Procedure Act and Order XXXVI Rule 9 of the Civil Procedure Rules** provide for judicial discretion to order the production of additional evidence. It relied on the case of **MICROSOFT CORPORATION v MITSUMI COMPUTER GARAGE LTD. & ANOR. (HCCC No. 810 of 2001)** where Ringera J., as he then was held that-

“I would accordingly order that verifying affidavit of Marilyn Lesley Pearman be struck out but the plaintiff be at liberty to file a fresh verifying affidavit within 15 days from today.”

The plaintiff further relied on the East African Court of Appeal decision in **MUKISA BISCUIT**

MANUFACTURING CO. LTD v WEST END DISTRIBUTORS LTD (1969) E.A. where the court held that-

“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.”

The Plaintiff finally urged the court to find that it is in the interest of justice that the Preliminary Objection be dismissed with costs.

On the other hand, the Respondent submitted that the Plaintiff is a limited liability company and that when the Originating Summons application was filed, no resolution was exhibited to confirm that the company had authorized the filing of the same. The Respondent relied on the case of **MICROSOFT CORPORATION v MITSUMI COMPUTER GARAGE LTD & Another, HCCC No. 810 of 2001** where it was held that-

“...To conclude, the only merit I find in the first point of the preliminary objection is that the Deponent Pearman does not state that she makes the affidavit with the authority of Microsoft. To my mind that is a substantial defect which renders the said affidavit incompetent and courts its being struck out. I accordingly order it struck out for that reason.”

The Respondent also submitted that the Applicant’s suit does not meet the minimum procedural threshold set by the laws of the land and as such should be struck out. In summary, it is the Respondent’s case that the Applicant’s suit does not meet the mandatory provisions of law, is an abuse of the due process of law, and as such should be struck out with costs.

After considering the application, the grounds on which Preliminary Objection is based, the affidavits of the parties herein, and the submissions of the parties, I find that the main issues for determination are whether the supporting affidavit sworn by Edward Thiong’o Wachira is defective, and whether the Originating summon ought to be struck out.

In my considered view, the points raised by the Respondent herein are not in accord with the decision in **MUKISA’S CASE** in that the said points do not raise pure points of law as envisaged in that case. Furthermore, **Order 19 Rule 7** of the **Civil Procedure Rules** provides that-

“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”

It is therefore my humble opinion that the Respondent has raised issues of a procedural technicality, but the perceived irregularity is curable and it is not fatal. The parties have come to court for substantive and not technical justice. The authority to swear an affidavit can be produced and the court may exercise its discretion and ask the Plaintiff to produce such authority. Indeed, the Deponent has deposed that he is the Managing Director of the Plaintiff Company, and there is ample evidence to demonstrate that the Plaintiff Company passed resolutions authorizing the commencement of this action and that its Managing Director was duly authorized to swear all affidavits on behalf of the company. I accordingly find that the defect complained of is curable by an affidavit to the effect that the said officer is duly authorized to swear the affidavit, and that the defect is not fatal.

For the above reasons, I find that the Preliminary Objection has no merit and is hereby dismissed with costs to the Plaintiff. The Plaintiff is also granted 14 days within which to file and serve a more compliant affidavit.

It is so ordered.

L. NJAGI

JUDGE

DATED and DELIVERED at NAIROBI this 12th day of September, 2012

G. V. ODUNGA

JUDGE