



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT NO. 114 OF 2008

SPIN KNIT LIMITED.....PLAINTIFF

VERSUS

SUBSAHARA SUPPLIES LIMITED.....DEFENDANT

RULING

By a Chamber Summons dated 30th June 2009, and filed on 6th July 2009, the Defendant (*Applicant*), sought orders that -

- (1) The Plaintiff's/Respondent's suit Verifying Affidavit and the suit as set out in the Plaint dated 25th June 2008 herein be struck out,
- (2) The Plaintiff/Respondent be condemned to pay costs of the suit and this application.

The application was based upon the grounds on the face of it, that the plaint discloses no reasonable cause of action, that the Verifying Affidavit thereof sworn on 25th June 2008 is incurable defective, because it is sworn by a person without the authorization of the plaintiff company, or that there is no evidence that the plaintiff passed a valid resolution authorizing the commencement of proceedings nor any resolution thereon, that the plaint is bare and unsupported by the Verifying Affidavit contrary to Order VII rule 1(2) of the former Civil Procedure Rules.

The Plaintiff/Respondent filed on 15th December 2009 grounds of opposition dated 13th October 2009 and counsel for both parties filed and exchanged list of authorities upon which they relied. The question before me is **firstly** whether the suit herein discloses no reasonable cause of action, and **secondly** what is the effect of absence of a valid verifying affidavit upon a suit?

Mr. Kahiga who argued the application for the Defendant/Applicant contended that a Plaint which is not supported by a valid verifying affidavit is bare, and cannot stand alone, and should be struck out as it has been ruled in some decisions of this court such as **DOR WOODS COMPANY LTD VS. CHEMUSIAN COMPANY LTD** (*Milimani Commercial Courts, HCCC No. 347 of 2003*), **'Affordable Homes Africa Ltd vs. Ian Handerson & 2 others** (*Milimani Commercial Courts, Nairobi HCCC No. 524 of 2004*), **Francis Kamau Simon vs. Trans-National Bank Ltd & Legacy Auctioneering Services** (*Nakuru HCCC No. 300 of 2004*), and **Omar Mohsin Al-Mary Ltd. vs. MCKengie Maritime Holding Ltd and Kenya Ports Authority** (*Mombasa HCCC No. 10 of 2002*).

Mr. Kisilah who argued against the application on behalf of the plaintiff/respondent held a different view. He contended that a court had a duty to uphold or sustain a suit rather than strike it out, that an averment that the deponent is a director of the plaintiff company is enough. A Defendant contending otherwise should bring evidence to show that the deponent is not a director of the plaintiff company, that in matters of urgency it is not always possible to have all directors present.

Counsel also submitted that a director or an officer of the company has authority to do certain things, and that there is no law which says that there ought to be a resolution, that a deposition that one is an officer of the company is therefore sufficient without reference to authority, that the Affidavit is evidentiary in nature, and if in doubt, the court could always summon the deponent, and that even if there were omissions in the Affidavit, the court has wide discretion to allow another affidavit compliant to be filed. Counsel relied on the case of PACIFICIO LUCIO GAROFALO SPA VS. SECURITY & FIRE EQUIPMENT CO & ANOTHER [2001]KLR 483 ODUOR VS. COMMISSIONER OF LANDS & 5 OTHERS [2002]2 KLR 671, MICROSOFT CORPORATION VS. MITSUMI COMMUTER GARAGE LTD & ANOTHER [2001] KLR 470, & SONS ELECTRIC CENTRE LTD VS. KENYA NATIONAL SHIPPING LINE LTD [2001] 1KLR 516, GULAM & ANOTHER VS. JIRONGO [2004]1 KLR 158, and SECTION 1A & 1B of the Civil Procedure Act, Cap. 21, Laws of Kenya.

I have considered the application, counsel's submissions and the respective authorities relied upon by counsel. I now turn back to the issues I raised at the beginning of this Ruling. When does a suit raise a reasonable cause of action - or put differently, what is a cause of action?

In law, the phrase "*a cause of action*" means "*either a fact or a combination of facts which give rise to a cause of action, or a claim for remedy, in contract - a debt in simple contract, or deed, tort or trespass and a host of other claims, trust etc.* It is "*the act on the part of the defendant which gives the plaintiff his cause or reason for complaint.*" JACKSON VS. SPITTALL (1870) L.R. 5 C.R. 542).

In this case, the plaintiff's claim is based upon a contract of supply of goods, fabrics for a sum certain Ksh 2,494,783/=. It cannot be said within the meaning of "**without reasonable cause of action,**" that the plaintiff has no "**fact or combination of facts**" upon which to lay a claim against the Defendant/Applicant. There are facts in this case which give rise to the plaintiff's claim, and his claim cannot be regarded as being either non-existent or unreasonable.

The absence of a verifying affidavit or a non compliant affidavit does not in my humble view take away the fact or combination of facts upon which the plaintiff's claim is founded. The purpose of Order VII, Rule 2 was to ensure that there was no multiplicity of suits, and also root out frivolous and vexatious suits, but not a ground for striking out genuine claims. That is why, rule (1)³ of the same order donates to the court discretion either of its own motion, or on the application of the Defendant (*as in this case*), to either order to be struck out any plaint which does not comply with subrule(1)².

There is a Verifying Affidavit in this suit. Its defect is non-compliance with Order III rule 2 (c) that the recognized agent of a corporation (*like the Defendant herein*), is an officer of the corporation duly authorized under the corporate seal. A director is certainly an officer of the company, so would its Secretary or other senior executives, and their Principal Assistants.

In this case, Mr. Shahkunt Shah who swore the Verifying Affidavit, or his counsel who prepared the affidavit omitted to put the magic words - "**duly authorized**" in the Affidavit, and thus rendered the Affidavit defective in terms of Order III rule 2(c) (*now Order 4 rule 1(D) of the Civil Procedure Rules 2010*). This does not however prove or determine that there is no reasonable cause of action - as contemplated by Order VI, rule 13(a) (*now Order VII, rule 13(a) of the Civil Procedure Rules*). The absence of a proper affidavit is merely a procedural irregularity which is curable by filing a compliant affidavit.

I am also mindful of the provisions of Section 1A and 1B of the Civil Procedure Act (the so called **double O (O2) Oxygen provisions**) that no suit should be defeated on technicalities of procedure, and all suits should be determined on the basis of substantial justice. A court would not I think be doing substantial justice by striking out a suit which discloses a reasonable cause of action only on the basis of a defective affidavit.

I would therefore strike out the plaintiff's verifying affidavit sworn on 25th June 2008, and direct that a compliant affidavit be filed within 10 days of the date hereof.

The plaintiff will however pay the costs occasioned by the application herein. There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 6th day of May 2011

M. J. ANYARA EMUKULE
JUDGE