



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA Civil Case 76 of 2008**  
**KWIK FIT TYRES & AUTOCARE.....PLAINTIFF**  
**VERSUS**  
**1. MOHAMED SALIM JUMA**  
**2. JUMA MOHAMED JUMA**  
**3. MUNICIPAL COUNCIL OF MOMBASA.....DEFENDANTS**  
**RULING**

The plaintiff, by a Notice of Preliminary Objection dated 4<sup>th</sup> December 2008, objects to the defendants' application dated 15<sup>th</sup> October 2008 on two grounds namely that the supporting affidavit sworn by Juma Ali Mohamed Juma on 17<sup>th</sup> October 2008 is fatally defective for failing to set out the true place of abode of the said Juma in terms of Order XVIII Rule 4 of the Civil Procedure Rules and that the application has not been served on a necessary party to wit the 3<sup>rd</sup> defendant.

In the written submissions filed with the leave of the court and the oral highlights thereon only the 1<sup>st</sup> ground has been argued. I assume therefore that the 2<sup>nd</sup> ground has been abandoned. In support of the first ground of objection, the plaintiff invoked the said Order XVIII Rule 4 of the Civil Procedure Rules and several decisions of the High Court including Serгон J's decision in **Re Amarco (Kenya) Limited [2006] e KLR**. In that case the Learned Judge held that an affidavit which does not comply with the provisions of Order XVIII Rules 3 (1) and (4) is incurably defective and should be struck out. Serгон J was considering among other things, a verifying affidavit accompanying a Petition for winding up, which affidavit did not contain the deponent's true place of abode. Also invoked in aid of the same proposition was the case of **Daima Bank Ltd – v – Patrick Mwau Musimba [1006 e KLR]** in which Ochieng J agreed with the decision of Serгон J that an affidavit which did not state the deponent's true place of abode was defective. Reliance was also placed on the case of **Bare & 13 others – v – Maendeleo ya Wanawake [2004] 2 KLR** in which Mugo Ag. J, as she then was, held that it was mandatory that every affidavit should state the true place of abode and postal address of the deponent failing which it would be struck out. Lastly, Njagi J's decision in **Mariam Said Mwabora & 7 others – v – Hotel Span Limited & 3 others (HCCC No. 62 of 2007)** was also invoked in the same strain. In that case the Learned Judge held that failure to comply with Rule 4 of Order XVIII of the Civil Procedure Rules renders the subject affidavit incurably defective and liable to be struck out.

In response to the preliminary objection, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants argued that failure to set out the place of abode of a deponent in an affidavit does not render the same fatally defective as the defect is a mere irregularity in form which does not affect the substance of the affidavit. For that proposition, section 72 of the Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya) is invoked. Also invoked for the same proposition is Rule 7 of Order XVIII of the Civil Procedure Rules. Reliance is also placed on the recent amendment to the Civil Procedure Act which introduced section 1A which further codifies the overriding objective of the Civil Procedure Rules.

Counsel also cited the following cases to buttress his contention: **Mwanthi – v – Imanene [1982] KLR 323, First American Bank of Kenya Limited & Anor – v – Grandways Venture Limited (Civil Application No. 104 of 2002), Tom Okello Bondo – v – National Social Security Fund (Nairobi HCCC No. 1759 of 1999) and Manji – v – Arusha General Store [1973] E.A. 137.**

On the cases relied upon by the plaintiff, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants submitted that the provisions of section 72 of the Interpretation and General Provisions and rule 7 of Order XVIII were not brought to the attention of the courts when the decisions were rendered. On the basis of the above cases counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants submits that the omission to indicate the deponent's place of abode is a curable defect if not should be overlooked as the same does not prejudice the plaintiff.

I have considered the rival arguments on the preliminary objection and carefully read all the cases and statutory provisions invoked. Having done so, I take the following view of the matter. Rule 4 of Order XVIII reads as follows:-

**“4. Every affidavit shall state the description, true place of abode and postal address of the deponent.....”**

It is plain that under the said rule, it is a requirement that any deponent of an affidavit must state his true place of abode. Juma Ali Mohamed Juma who swore the supporting affidavit impugned has only given his postal address which is at Mombasa but not his place of abode. The omission to state his true place of abode is clearly a defect and the affidavit is therefore not in compliance with the aforesaid rule. Is that defect fatal to the affidavit? Rule 7 of Order XVIII reads as follows:-

**“7. 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 title or other irregularity in the form thereof.”**

This rule gives the court the power to cure a defect which is an irregularity which does not go to the substance. Juma's affidavit merely fails to give his true place of abode. That failure to my mind is a defect in the form of the affidavit which does not go to the substance of the affidavit. Sergon J, in **Re Amarco (Kenya) Ltd** (supra) struck out an affidavit which did not comply with both rules 3 (1) and 4 of Order XVIII. It is significant that in striking out the affidavit, the Learned Judge felt bound by the East African Court of Appeal decision in **Premchand Raichand & Another Ltd – v – Quarry Services & Others [1969] E.A. 514.** In that **case the court had observed as follows:-**

**“It has repeatedly been said by this court that affidavits based on information must**

**disclose the sources of information.....This is not merely a matter of form but goes to the essential value of the affidavit.....But since the source of the information may have been unreliable, the affidavit can have no evidential value.”**

It is significant that the East African Court of Appeal in the Premchand Raichand case considered an affidavit which did not comply with Rule 3 (1) of Order XVIII and not Rule 4 which is the only rule offended in Juma’s affidavit. I am not able to say whether Serгон J would have struck out the affidavit in questioning in **Re Amarco (Kenya) Ltd** if the affidavit only failed to comply with Rule 4 of Order XVIII. The Amarco case is therefore distinguishable from this case.

Ochieng J, in **Daima Bank Ltd – v – Patrick Mwau Musimba** (supra) held that the verifying affidavit in that case was fatally defective because the deponent did not state her place of abode. Notwithstanding that view, the Learned Judge concluded as follows:-

**“To my mind the defect in the verifying affidavit could not render the judgment irregular. The defect could only provide the defendant with material to attack the pleading. Until that was done any steps which were taken such as the entry of judgment were regular.”**

The Learned Judge does not appear to have struck out the offending verifying affidavit otherwise he would not have refused to set aside the default judgment. The final decision in the Daima case does not therefore support the plaintiff’s contention. The record of that case does not also show that the provisions of Rule 7 of Order XVIII were brought to the attention of the Learned Judge.

Mugo J, in **Bare & 13 others – v – Maendeleo ya Wanawake Organization** (supra) also held, *inter alia*, as follows:-

**“4. Under Order XVIII Rule 4, it is mandatory that every affidavit should state the description of the true place of abode and postal address of the deponent. Merely describing the deponent as a party in the proceedings is not enough nor is the address of legal counsel. The postal address must be that of the deponent.”**

I have carefully read the said case and note that the Learned Judge found many other defects in the plaintiff’s application which resulted in the dismissal of the same. Before she dismissed the application, the Learned Judge made the following observations:-

**“The defects in the applicants affidavits have nothing to do with the misdescription of parties, which I must hold to be parties in the suit not the deponents.....The irregularities herein are not restricted to the form but go to the evidential value of the affidavits themselves.**

**Further I am of the view that even when the court would admit or receive such an affidavit as is allowed under Order XVIII Rule 7, the decision of the court would depend on the degree of the non-compliance, I also think that the party wishing the court so to receive an affidavit would humbly request the court to do so and not try to**

**convince the court that the defects do not matter. In view of the defects and omissions herein I would not even think of a possibility of receiving the affidavits filed herein.....”**

Mugo J, was therefore considering several defects and omissions in the impugned affidavits and not a single omission as herein. The Learned Judge appeared to suggest that she could have received the impugned affidavits if the court had been appropriately moved. The decision in the Bare case is therefore clearly distinguishable from the facts in this case.

In **Mariam Said Mwabora & 70 others – v – Hotel Span Limited & 3 others** (supra), Njagi J held *inter alia*, that failure to comply with Rule 4 of Order XVIII renders the subject affidavit incurably defective and that the only remedy was to strike out the affidavit. It is significant that the Learned Judge does not seem to have considered the provisions of Rule 7 of Order XVIII. I am not sure that the Learned Judge would have struck out the impugned affidavit if the said provisions had been brought to his attention.

I am not alone in the view that an omission such as is found in Juma’s affidavit is not fatal. Ringera J in **Tom Okello Obundo – v – National Social Security Fund** (supra) held that affidavits which offended section 5 of the Oaths and Statutory Declarations Act (Cap 15 of the Laws of Kenya) were receivable. The Lerner Judge held as follows:-

**“The upshot of this matter is that I find the irregularity of form complained of is not fatal. The same can be excused by the court in its discretion. And as I find no prejudice to the plaintiff occasioned by such error, I excuse and overrule the preliminary objection.”**

The Court of Appeal in **First American Bank of Kenya Ltd and Another – v – Grandways Venture Ltd** (supra) held, *inter alia*, as follows:-

**“Failure to state the source of information or knowledge in an affidavit was an irregularity curable under Order XVIII Rule 7 of the Civil Procedure Rules.”**

And in **Mwanthi – v – Imanene** (supra) an affidavit which was not in conformity with Order XXXV Rule 1 (2), 9 and Form 3A in Appendix A of the Civil Procedure Rules was not fatal and could be saved by section 72 of the Interpretation and General Provisions Act (Cap 2). The court stated as follows:-

**“Any defects or omissions in the original affidavit may be cured or supplemented or supplied by an affidavit made subsequently and the court looks at the matter both on jurisdiction and on merits “at the end of the day” on affidavits which have been filed.”**

Section 72 of the Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya) reads as follows:-

**“Save as is otherwise expressly provided whenever a form is prescribed by a written Law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom or which is not calculated to mislead.”**

Juma's affidavit does not in fact deviate from the form of an affidavit under Order XVIII. It merely omits to state his place of abode. Whichever way I look at that omission, I can only find it a defect of form and not substance. In my view even more serious omissions can be saved by section 72 of the Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya).

The position in any event is now clear beyond peradventure with the introduction of section 1A to the Civil Procedure Act. The section is in the following terms:-

- (1) The overriding objective of this Act and thereunder is to facilitate the just expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**
- (2) The court shall in exercise of its powers under this Act or the interpretation of its provisions seek to give effect to the overriding objective.**
- (3) A party to a civil proceeding or an advocate for such party is under a duty to assist the court to further the overriding objective."**

In my view the overriding objective of the Civil Procedure Act as now codified would not be achieved if the plaintiff's preliminary objection is upheld. On the contrary the overriding objective will be achieved by declining the Preliminary objection.

The upshot is that, the preliminary objection is overruled as the said Juma's affidavit is not fatally defective and is receivable under Order XVIII Rule 7 of the Civil Procedure Rules.

Costs shall be in the cause.

**DATED AND DELIVERED AT MOMBASA THIS 21<sup>ST</sup> DAY OF MAY 2010.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Mr. Koech for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and Ms. Nyamweya holding brief for Mr. Gikandi for the Plaintiff.

**F. AZANGALALA**

**JUDGE**

**21<sup>ST</sup> MAY 2010**

