



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS

Civil Case 367 of 2008

COMMERCIAL BANK OF AFRICA LTD. PLAINTIFF

VERSUS

PAULS IMISON 1ST DEFENDANT

LAND MARQUE LIMITED 2ND DEFENDANT

RULING

The plaint in this matter was filed on 2nd July, 2008. An amended plaint was subsequently filed on 15th February, 2010 pursuant to an order of the Court dated 12th February, 2010. The amended plaint was accompanied by a verifying affidavit sworn by one Owen Rubia, the Manager, Personal Credit Approval, of the Plaintiff Company. On 3rd March, 2010, the Defendants' Advocates filed a notice of Preliminary Objection on the basis that –

- (1) Owen Rubia, the deponent of the Plaintiff's verifying affidavit, does not disclose the sources of information on which he relied to verify the contents of the plaint, to wit, whether the same is upon personal knowledge, information, belief or speculation and accordingly offends the provisions of Order XVIII Rule 3 of the Civil Procedure Rules.***
- (2) The purported verifying affidavit is not an affidavit at all as it does not bind the deponent, Owen Rubia. The same does not verify whether the contents in the verifying affidavit are true.***
- (3) The verifying affidavit offends the provisions of Order XVIII Rule 4 of the Civil Procedure Rules as it does not disclose the deponent's true or any place of abode.***
- (4) That the verifying affidavit is fatally defective, incurably incompetent and admissible.***
- (5) The suit is invalid and a nullity.***

The respective Advocates for the parties agreed to file written Submissions, which they did, and which the Court has considered. After doing so, this Court is of the view that the only issue for determination is whether the verifying affidavit accompanying the amended plaint is defective, incurably incompetent and inadmissible as

alleged by the Defendants.

Order VII Rule 1 (2) of the **Civil Procedure Rules** states as follows –

“The plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the plaint.”

It is noteworthy that this provision does not provide for the contents of the verifying affidavit apart from “verifying the correctness of the averments contained in the plaint”. For that reason it is a moot question whether a verifying affidavit should comply with the requirements of **Order XVIII** of the **Civil Procedure Rules** which provides for proof of facts by affidavit. The purpose of a verifying affidavit is to confirm that the proceedings are indeed instituted with the sanction of the plaintiff and at that stage, in my view, the Plaintiff need not disclose the sources of his information in the same manner as in the proof of a fact or facts by an interlocutory affidavit.

By stating in the verifying affidavit herein that the deponent verifies the correctness of the averments contained in the plaint accompanied by the said affidavit, therefore, one would have expected that the said affidavit was compliant with **Order VII Rule 1 (2)**. However, the Defendants take the view that the affidavit is incurably incompetent and fatally defective. Assuming that it is defective as alleged, how should it be treated? In their written submissions, the Defendants suggest that the affidavit should be struck out. They further submit that once the affidavit is struck out, the plaint should also be struck out. The latter proposition is based on **Order VII Rule 1 (2)** which states that –

“The plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the plaint.”

The Defendants’ argument is therefore that once the verifying affidavit is struck out, the plaint is not any more accompanied by a verifying affidavit as required by **Rule 1 (2)** above, and therefore the plaint would not be compliant and should be struck out under **Rule 1 (3)** which provides as follows –

“The Court may of its own motion or on the application of the Defendant order to be struck out any plaint which does not comply with subrule (2) of this Rule.”

My view of this provision is that it is not mandatory that a plaint should be struck out for failure to comply with subrule (2). My reading of that subrule is that the word “may” therein modifies the verb “order” and that the phrase “of its own motion or on the application of the Defendant” is a non essential phrase which could be omitted without the whole Clause losing its meaning. In my view, that phrase was inserted to make it clear that the striking out could be effected either at the instance of the Court itself, on its own motion, or on the application of the Defendant. Therefore, the Court has discretion to strike out the plaint or not.

Times have changed. We now live in an era of shifting paradigms of jurisprudence in which more and more emphasis is being placed on substantive justice rather than technicalities of procedure. A technicality, such as a defective verifying affidavit, should not occupy the Court’s time unless the defect is prejudicial to a Defendant. **Order XVIII Rule 7 of the Civil Procedure Rules** empowers the Court to 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 form thereof. Failure to state expressly a deponent’s true place of abode and the failure by the deponent to disclose the sources of information in which he relied to verify the contents of the plaint are, in my respectful view, irregularities which would not render a verifying affidavit inadmissible as suggested by the Defendants. For these reasons, I would be inclined to receive the verifying affidavit in its present form. For what it is worth, however, and in order to pacify the Defendants, I direct that the verifying affidavit accompanying the amended plaint be and is hereby struck out, with leave to the Plaintiff to file and serve a fresh verifying affidavit, within 7 days, to include clearly the Plaintiff’s abode.

It is so ordered. Costs in the cause.

Dated and delivered at Nairobi this 13th day of May 2010.

L. NJAGI

JUDGE

