



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO.153 OF 2009

1. **TEENAGE MOTHERS AND GIRLS ASSOCIATION OF KENYA (TEMAK).....1ST PLAINTIFF**
2. **JOAB OTHATCHER.....2ND PLAINTIFF**
VERSUS
WAYNE D. MCLEMORE.....DEFENDANT

R U L I N G

1. The plaintiffs Teenage Mothers and Girls Association of Kenya (**TEMAK**) and **JOAB OTHATCHER** filed suit against the defendant one **Wayne D. Mclemore** on the 13th of October, 2009. The 1st plaintiff is described in the plaint as a Non-Governmental Organization registered and licensed under the Non-Governmental Organization Act No.19 of 1990. The 2nd defendant is described in the verifying affidavit accompanying the plaint as the founder member and Executive director of the 1st plaintiff. Together with the plaint the plaintiffs filed a chamber summons under **Order XXXIX Rule 1 & 2** and **Section 3** of the Civil Procedure Act and Rules.

2. The defendant filed a defence on the 2nd of February 2010 and a replying affidavit to the chamber summons on the 13th of November 2009. On the 2nd and 4th February 2010 the respondent filed notices for preliminary objection both to the effect that the 1st plaintiff had not verified the contents of the plaint nor given authority to the 1st plaintiff to swear the affidavit on its behalf.

3. In response to the Preliminary objection raised the plaintiffs' counsel contended that the matters raised by the defence can only be brought through an application and not a Preliminary Objection. Secondly counsel concluded that should the court uphold the Preliminary Objection then lack of verifying affidavit per se does not render the suit fatally defective.

4. Order V11 Rule 1(2) of the Civil Procedure provides as follows:

“(2). The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in a plaint.”

Sub-rule (3)

“(3). 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 sub-rule (2) of this rule.”

I do agree with the plaintiffs counsel that the defendant ought to have moved the court by way of an application and not a notice of Preliminary Objection in an attempt to apply the above quoted order as sub-rule (2) is clear that the defendant ought to make an application. See the case of **Lotan Versus Starlit Insurance Brokers Limited [2003] 2 E.A.** at 551. In the circumstances preliminary

objection therefore fails.

However there are three notable issues that this court must raise about the suit before court dispute dismissal of the Preliminary Objection.

1. That the 1st plaintiff is described as a non-governmental organization. Its legal persona is not described. Is it a legal entity capable of suing or being sued or is it to be sued through its registered officials.
2. The 2nd plaintiff is the executive director of the first. Should the first wish to have him swear or sign documents on its behalf an authority letter should then be filed within the cause to that effect secondly the affidavit should be clear. The 2nd plaintiff must specifically state so in the verifying affidavit
or
3. An official of the 1st plaintiff may wish to verify the contents of the plaint by signing the affidavit.

Without prejudice to the above and in the interest of justice and fair play am persuaded by the authority of Microsoft Corporation versus Mitsumi Computer Garage Limited the court hereby directs as follows that;

1. **The plaint be amended to incorporate the above observation;**
2. **A verifying affidavit be filed on behalf of the 1st plaintiff herein;**
3. **All the above be done within the next 14 days of the date hereof.**
4. **A mention date be filed to confirm compliance.**

Dated and Delivered at Kisumu this 26th November, 2010.

ALI-ARONI

J U D G E

In the presence of

.....counsel for plaintiffs

.....counsel for defendant