**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**(MILIMANI LAW COURTS)**

**CIVIL CASE 513 OF 20**

1. **JAMES KARIUK I**
2. **PETRIZO LIMITED .....PLAINTIFFS**

**V E R S U S**

1. **PETER KARIUKI**
2. **RATTANSI EDUCATIONAL TRUST**
3. **GARAM INVESTMENT LTD .....DEFENDANTS**

**R U L I N G**

The Plaintiffs applied herein by **chamber summons dated 10th November, 2008** for two temporary injunctions pending disposal of the suit under **Order 39, rule 1 of the Civil Procedure Rules** (the Rules). The 1st Defendant raised a **preliminary objection** to the application by notice dated 26th November, 2008 upon the following grounds:-

1. That the application is misconceived and bad in law in that what was sought to be stopped by the temporary injunction had already taken place.

2. That the party in occupation of the suit premises is one **SAAPE LIMITED** which is not a party to this suit or the application, and which would be most prejudiced by the orders sought if granted.

3. That under regulation 13 of the articles of association of the 2nd Plaintiff the 1st Defendant is entitled to indemnity as therein provided.

4. That the 1st Plaintiff was joined in the suit without due authority.

5. That the supporting affidavit of **JAMES KARIUKI KINYUA** is incurably defective for failure to comply with the mandatory provisions of **Order 18, rule 4** of the Rules in that he has not stated therein his true place of abode.

The 1st, 2nd and 4th grounds raise issues of fact and cannot be canvassed in a preliminary objection. I cannot understand the 3rd ground; in any event, the learned counsel for the 1st Defendant did not canvass it. The only serious ground in the preliminary objection is the 5th one, and it was the one that was canvassed at length.

I have considered the submissions of the learned counsels, including the cases cited. It has often been stated that rules of procedure are the hand-maidens of justice, not its mistress. I would add that unless a rule goes to the root of the matter before the court, for instance if it has jurisdictional implications, breach thereof ought not to be permitted to defeat justice. Put another way, unless breach of a rule of procedure causes, or may cause, the opposite party such prejudice as may not be assuaged by an award of costs, such breach ought not to be permitted to defeat the wider interests of justice.

In the present case the breach is in the failure by the 1st Plaintiff to disclose in the supporting affidavit his particular place of abode in Nairobi. He has disclosed that his postal address is in Nairobi, and the affidavit is sworn at Nairobi. **Order 18, rule 4** states:-

"**Every affidavit shall state the description, true place of abode and postal address of the deponent, and if the deponent is a minor shall state his age."**

Although this rule is couched in mandatory terms, I believe the purport of the rule is that a deponent of an affidavit should fully and properly "**disclose"** himself so that if he is required, for instance, for cross-examination upon his affidavit, or for any other purpose, he can easily be found. In the instant case the deponent in question is the 1st Plaintiff who has already fully disclosed himself in the plaint and the verifying affidavit thereof. In his further affidavit sworn on 18th December, 2008 and filed on 6th January, 2009 he has disclosed that he is a resident of Kileleshwa in Nairobi. In these circumstances, what prejudice can the 1st Defendant have possibly suffered by the Plaintiff's failure to disclose in the supporting affidavit that he resides in Kileleshwa, Nairobi? There is absolutely none.

I do not agree with Mr. Wamae, learned counsel for the 1st Defendant, that the aforesaid lapse should attract the drastic consequence of striking out the affidavit that he suggests. He drew a parallel with **rule 3 (1)** of the same Order. That rule provides:-

"**3. (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:**

**Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."**

The intention of this sub-rule is obviously to exclude hearsay evidence from affidavits. But as can be seen from the proviso to the sub-rule, hearsay evidence in affidavits is allowed in interlocutory proceedings, and can be allowed by court in other proceedings.

Mr. Wamae quoted a number of decisions of the High Court where affidavits not complying with either **rule 3(1)** or **rule 4** of **Order 18** have been struck out, apparently upon reliance on the decision of the **East African Court of Appeal** in the case of **Premchand Raichand Ltd. –vs- Quarry Services & Others [1969] EA 514.** The court, which was the predecessor of our Court of Appeal, said:-

"**It has repeatedly been said by this court that affidavits based on information must disclose the source of information....This is not merely a matter of form but goes to the essential value of the affidavit ....."**

The court held that the offending affidavit should have been **disregarded**. The court did not hold that the affidavit should have been **struck out**. An affidavit will contain evidence. What the court was saying, in my understanding, is that hearsay evidence in an affidavit, otherwise admissible in interlocutory proceedings if the source thereof is disclosed, ought to be disregarded if the source is not disclosed.

The court did not say that the affidavit ought to be struck out. And it was for good reason. Striking out an affidavit that is sworn in support of an application will have a drastic consequence. The application will be left bear and unsupported by evidence, and thus liable to be struck out. On the other hand, merely disregarding a non-compliant affidavit means that it is of absolutely no evidential value, in which event the application will be dismissed for want of merit, not struck out. This is an important distinction. As I have tried to show, that decision appears, with respect, to have been misunderstood.

For the reasons I have given above, I do not, with respect, subscribe to the school of thought that an affidavit that fails to meet the requirements of either **rule 3(1)** or **rule 4** of **Order 18** must be struck out. That, in my respectful view, is to choose the easy way out. Courts ought not to be unduly enamoured of rules of procedure unless a fundamental issue, for instance jurisdiction, is involved. Rules of procedure should not be enforced at the expense of justice. The injunction of **section 3(2)** of the **Judicature Act, Cap 8** should always be remembered: **civil cases shall be decided according to substantial justice without undue regard to technicalities of procedure and without undue delay.**

I must, in the event, overrule the preliminary objection with costs to the Plaintiffs. The chamber summons dated 10th November, 2008 shall proceed to hearing on merit. It is so ordered.

**DATED AT NAIROBI THIS 21ST DAY OF MAY, 2009**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 22ND DAY OF MAY, 2009**