

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 1906 of 2001

THE EAST AFRICAN PORTLAND CEMENT CO. LTD.....PLAINTIFF

VERSUS

MEKA AGENCIES LIMITED.....DEFENDANT

RULING

Before me is a preliminary objection by the defendant seeking the striking out of the plaint filed on behalf of the plaintiff on the grounds that the said plaint was incompetent as it was verified by the affidavit sworn on 4th December 2001 that was incurably defective and therefore invalid. The defendant contends that the plaint offends the provisions of **Order VII Rule 1 (2) and Rule 1(1) (e) of the Civil Procedure Rules** and therefore should be struck out. The parties herein agreed by consent to file written submissions in support of their respective opposing positions. It is on the basis of the said written submissions that this court is making this ruling.

My understanding of the defendant's preliminary objection is that the verifying affidavit sworn by Patrick Komen, the finance manager of the plaintiff was invalid and incurably defective because it did not state the person or the advocate who drew the said verifying affidavit. It was the defendant's case that pursuant to the provisions of **Sections 34 and 35 of the Advocates Act**, there was a mandatory requirement that the person who draws or prepares a legal document is mandated to endorse thereon his name and address. The defendant submitted that since the said verifying affidavit did not contain an endorsement of the advocate that had drawn it, then the same was invalid and ought to be struck out. The defendant cited several cases in support of its argument that the court should invoke its jurisdiction and strike out the said verifying affidavit. While conceding that the verifying affidavit had no endorsement of the advocate who drew it, the plaintiff denied that the verifying affidavit was invalid and therefore liable to being struck out. It was the plaintiff's contention that it was never the intention of the law that a pleading be struck out for non- endorsement of the advocate or party who drew the legal document in question. The plaintiff submitted that even if this court were to find that the verifying affidavit was incompetent, it would not be fatal to the plaintiff's case, as in accordance with decided cases, the plaintiff can be given an opportunity to file another affidavit in verification of the plaint on record.

I have carefully considered the rival submissions filed by the parties herein in support of their respective opposing positions. I have also read the authorities cited by the parties in support of their respective arguments. **Order VII Rule 1(2) of the Civil Procedure Rules** requires that a plaint which is filed shall be accompanied by an affidavit verifying the correctness of the averments contained therein. In the present application, an officer of the plaintiff swore an affidavit in verification of the correctness of the facts pleaded in the plaint. The said verifying affidavit did not state the person or the advocate who drew it. According to the defendant, this omission was fatal to the plaintiff's case as it rendered the said verifying affidavit invalid and therefore liable to being struck out. Various courts have given interpretation to the application of **Sections 34 and 35 of the Advocates Act** on pleadings. From the time the first decisions were rendered in regard to whether an incompetent verifying affidavit can invalidate the entire suit, the trend of decisions by the courts has been to allow parties to cure any defect in the verifying affidavit with a view to sustaining the suit.

For instance, in **Jovenna East African Ltd vs Silvester Onyango & 4 others Nairobi HCCC No.1086 of 2002 (unreported)** Nyamu J (as he was then) struck out an incompetent verifying affidavit but gave leave to the plaintiff to file and serve another but competent verifying affidavit within ten (10) days of the order. In **Dubai Bank Kenya Ltd vs Come – Cons Africa Ltd Nairobi HCCC No.68 of 2003 (unreported)** Ibrahim J when confronted with a similar application to the present one held at page 11 of his ruling as follows:

*“We should view this situation vis-à-vis the provisions in **Section 35(2) [of the Advocates Act]**. In my view from a simple reading of the words in the said provision, I am unable to come to any conclusion that the said subsection invalidates or declares such a document or instrument in question to be defective. Of course the document should not have been filed in court. It should have been rejected at the counter, so to speak. However, it has now been filed and this suit commenced. Yes, an offence was committed by the said omission, yes, the Registrar failed to enforce the provisions of **Section 35(2)** by not rejecting or refusing the filing thereof. Is the verifying affidavit in the circumstances incurably defective that it should be struck out? Again, with much respect, I do hold that there is no word, statement or stipulation in **Section 35(1) and (2)** that renders an instrument or document with the omission of the endorsement of the name and address of the advocate who drew or prepared, incurably invalid, void or defective.”*

I am of a similar view with Ibrahim J. I do not think, with the greatest respect to the defendant, that failure by an advocate to endorse his name on an affidavit as the person who drew the affidavit would render such an affidavit incompetent. I have in mind the fact that an affidavit is essentially sworn evidence in a written form adduced by the party whose name appears on the affidavit as deponent. In the present application, it was clear that the person who swore the verifying affidavit identified himself and stated in what capacity he swore the said verifying affidavit. Whether the affidavit was drawn by the advocate or by the deponent himself is not relevant for the purposes of validating whether the affidavit sworn is a verifying affidavit within the meaning of **Order VII Rule 1(2)** of the **Civil Procedure Rules**. Having perused the said verifying affidavit, I am not prepared to hold that failure by an advocate to indicate the person who drew the verifying affidavit rendered such affidavit invalid and thereby subject to be struck out by this court. I hold that the defect in the verifying affidavit is not of such a magnitude or legal significance as to invalidate the said verifying affidavit. I hold that the said verifying affidavit is competent.

I find no merit with the defendant's preliminary objection dated 12th February 2009. I proceed to dismiss it with costs to the plaintiff.

DATED IN NAIROBI THIS 24TH DAY OF JUNE 2009

L. KIMARU

JUDGE