



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 242 OF 2009

JOEL OSORO ONYARI.....PLAINTIFF

VERSUS

DAVID GITHERE 1ST DEFENDANT

ANDREW MATTAZA 2ND DEFENDANT

KENYA NATIONAL CHAMBERS

OF COMMERCE & INDUSTRY3RD DEFENDANT

RULING

Before the court are 2 Chamber Summons emanating from H.C.C.C. No. 242 of 2009 & H.C.C.C NO. 253 of 2009. On the Application of Mr. Nyabena for the applicants in 242 of 2009 the two suits were consolidated.

Both suits are seeking for injunctive orders to allow the smooth running of the Kenya National Chamber of Commerce and Industry. For ease of reference I will in this ruling in regard to both application refer to the Plaintiffs in H.C.C,C NO. 242 of 2009 as the applicants and the Plaintiffs in H.C.C.C NO. 253 of 2009 as the respondents.

I propose first to deal with the preliminary objection filed by the applicant, in objection to the respondents' Chamber Summons dated 19th May, 2009. The Chamber Summon has been brought under Order XXX1X Rules 1 & 2 of the civil procedure Rues and Section 3A of the Civil Procedure Act.

The application is seeking –

1. That the application be certified urgent and be heard exparte in the first instance.
2. That the defendants herein, by themselves, their agents and/or servants be restrained from interfering, trespassing or in any way whatsoever disrupting the operations of the Kenya National Chamber of Commerce and Industry pending the hearing and determination of this application. The O.C.S. Central Police Station be directed to enforce these orders.

3. That the Defendants herein, by themselves, their agents and/or servants be restrained from interfering, trespassing or in any way whatsoever disrupting the operations of the Kenya National Chamber of commerce and Industry pending the hearing and determination of this suit.

4. That the costs of this application be provided for.

The applicant Preliminary Objection is dated 10th May, 2009. The grounds of the Preliminary Objection are as follows:-

That the suit offends the mandatory Provisions of section 6 of the civil procedure Act in that the respondent has another suit pending being C.M.C.C. NO. 2384 of 2009 & That the suit contravenes Order VII Rule 2 of the Civil Procedure Rules as there is no verifying affidavit by all plaintiffs and that no authority to sue was executed by the 2nd to the 17th plaintiffs.

The respondents on the other hand argue that they have not filed any other suit. They contend that they are strangers to C.M.C.C. No.2384 of 2009. Further that they have sued in their personal capacity and need not authorize the 1st respondent (read plaintiff). In regard to the Verifying Affidavit they submit that, irregularity if any is not fatal.

The issue before me is whether the respondents pleadings in H.C.C.C. No. in 253 are competent.

On the 1st limb of the Preliminary Objection. I note that defendants in C.M.C.C. NO.2284 of 2009 are the 1st and 3rd defendant in HCCC No. 253 of 2009. The Plaintiff is totally different.

Order VII rule 1(2) provides that –

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

Although there are 17 plaintiffs in H.C.C.C. NO.253 of 2009, only one of them has verified the contents of the plaint.

The issue for determination is whether the court should strike out the plaint as the 1st respondent (Plaintiff) did not obtain the written authority of his co-plaintiffs to swear the verifying affidavit. The correct procedure would be for all Plaintiffs to verify the contents of the plaint by way of a verifying affidavit where there are many Plaintiffs as in this instance, the more logical thing to do would have been to obtain written authority from the other Plaintiffs authorizing the 1st plaintiff to depone on their behalf. An Affidavit by one of the Plaintiffs only renders the same defective.

However, will this defect render the plaint fatal not warranting the discretion of the court to save it? I am of the view that the court has discretion not to strike out the plaint but may allow the Plaintiffs to rectify the error. I make reference to Ringera J (as he then was) in **GULUM & ANOTHER** vs **JIRONGO** (2004) 1 KLR where he held-

3 **“ An affidavit by one plaintiff verifying the correctness of the facts of a plaint, where the plaintiffs are two, and where the deponent does not state that he is making it on behalf of himself and the other plaintiff and the authority and basis on which he would so do on behalf of that other plaintiff is defective.**

4. **The court has discretion not to strike out a plaint which is accompanied by a defective verifying affidavit. The affected party may make an oral application for the exercise of the courts discretion and the court should exercise its discretion as appropriately in the Light of the circumstances**

5. Rules of Procedure should be seen as hand maiden of justice and not its mistress and accordingly, unless procedural lapses have caused the adversary a prejudice which cannot be compared with costs or there is clear manifestation of an intention to overreach, the same should not be accorded fatal consequences”.

In MOHAN MEAKIN LIMITED & MOHAN MEAKIN (KENYA) LIMITED versus LONDON DISTILLERS(K) LIMITED High Court Civil Suit No.307 of 2007 Okwengu J in finding that a verifying affidavit was defective held -

“In exercise of the courts discretion under order VII rule (3) of the Civil Procedure Rules I do not find it appropriate to strike out the plaint but order that the plaintiff shall file a verifying affidavit in compliance with order VII rule (1) (2) of the Civil Procedure Rules within 14 days of the date hereof”.

Guided by the rulings above of Learned Senior Judges I decline to accord the plaint in H.C.C.C. NO.253 Of 2009 a fatal consequence as prayed.

I hereby order as follows

1. That a proper verifying affidavit accompanied by the authority letter of all the other plaintiffs be filed in court within the next 14 days of the date hereof.
2. The chamber summons dated 19th May, 2009 do proceed for hearing inter- partes.

I shall deliver the ruling on both applications together as issues raised are similar.

Dated and delivered at Nairobi this 10th day of June, 2009

ALI- ARONI

JUDGE