



NAHYE SAID GUHUM1ST PLAINTIFF

DAVID NGOGOYO2ND PLAINTIFF

JANE GITAU.....3RD PLAINTIFF

AYUB HAMISI4TH PLAINTIFF

PETER MALIMA5TH PLAINTIFF

VERSUS

HITAN C. MAJEVDIA1ST DEFENDANT

MAMTA MAJEVDIA2ND DEFENDANT

RULING

Before court is the Preliminary Objection dated 23rd June 2009. The Notice of Preliminary Objection raises several points for consideration as follows:-

“1. **THAT** the injunction sought cannot be granted as the distress for rent that the plaintiffs are seeking to stop has already been levied.

2. **THAT** the injunction sought is not capable of being granted as the plaintiff’s suit is fatally defective for want of compliance with the provision of O.VII Rule

1 (2)

3. **THAT** the orders seeking a blanket order to restrain the defendant from levying distress which is tantamount to stopping the defendant from exercising their lawful rights even in deserving circumstances.

4. **THAT** the Plaint is fatally defective for want of compliance with O.VII Rule 4(1).

5. **THAT** the letters of administration *ad-coligenda bono* cannot give the plaintiff the right to institute a suit for the estate”.

I intend to deal first with ground (2) of this Notice of Preliminary Objection as in my view it touches on the very crucial question of the validity of this suit. O. VII Rule 1(2) of the Civil Procedure Rules provides that:-

“(2) ***The*** *plaint shall be accompanied by a verifying affidavit sworn by the plaintiff verifying the*

correctness of the averments contained in the plaint”.

In this suit the Plaint dated 10th June 2009 was filed in court on 11th June 2009. The verifying affidavit accompanying the plaint was sworn by one Nahye Said Guhum on 11th June 2009 and filed in court on 11th June 2009. Mr. Hamsa for the Applicant argues that where a suit (like the present one) involves more than one Plaintiff then **each** Plaintiff must file a separate verifying affidavit. In this suit there are five Plaintiffs. Only one of them being the 1st Plaintiff filed a verifying affidavit. The 2nd to 5th Plaintiffs merely signed a document filed in court on 11th June 2009 stating as follows:-

“We do hereby give authority to MRS. NAHYE SAID GUHUM to sign and stand on our behalf at the said suit No. 191 of 2009”.

Taken in its clear and ordinary meaning this states that the 2nd to 5th Plaintiffs give the authority to the 1st Plaintiff to institute the suit on their behalf. A verifying affidavit requires much more than that. Its purpose is to confirm the identity of each Plaintiff, secondly to confirm that the said person is indeed a Plaintiff in the named suit and thirdly and in my view more importantly that the said Plaintiff confirms (verifies) the factual correctness of all the averments in the Plaint. This is not an exercise that one Plaintiff can undertake on behalf of the others. **Each** Plaintiff must be in a position to make such verification for themselves. A blanket authority such as the one signed by the 2nd to 5th Plaintiffs cannot and will not suffice. Such verification of the Plaint can only be done on an individual basis, it cannot be a communal act done by one on behalf of the others. I am guided in this view by the case of **Dr. Perez Malinde Olindo and another –vs- Dr. John Karungai Nyamu and 4 others HCCC 246/2006** where Hon. Justice Mary Kasango held at page 3 that:-

“Counsel for the 1st and 2nd defendants argued that the plaintiffs’ suit cannot lie because the verifying affidavit is only sworn by the 1st plaintiff, who swore it on the authority of the 2nd plaintiff and also on his own behalf. Counsel relied on the authority of HCCC 973 of 2001 Peter Njunge Nganga & Keziah Wanjiku Nganga (The Joint Administrators of the Estate of George M.K. Nganga (deceased) –vs- The Estate of Alim Omar (deceased) (UR). The court held in that case that each Plaintiff had to swear a verifying affidavit in a claim where there are other plaintiffs”.

This is exactly the situation in the present case. I see no need to deviate from this decision.

I am indeed mindful of the fact that striking out is deemed to be a draconian measure which should only be used as a last resort. I am also mindful of the authority cited by Mr. Gikandi for the Respondents **Shashi Kant C. Patel –vs- Oriental Commercial Bank HCCC 264 of 2005** in which the learned Judge held that rules of procedure are handmaids of justice and ought not be given pedantic interpretations. That case however is in my view distinguishable from the case before me in that in the latter the Plaintiff had in fact filed a verifying affidavit which was found to be incompetent. In the present case there was no verifying affidavit filed at all by the 2nd to 5th Plaintiffs. This similar to the case of **Latifa Yakub and 4 others –vs- Shamshudin M. Kassam HCCC 226/2000** in which at page 4 Hon. Justice Maraga held that:-

“In this case like the GWAO case (supra) no verifying affidavit, not even a defective one, was filed at all. The suit is therefore a nullity For these reasons I hold that this suit is a nullity and the plaint is therefore incapable of amendment for you cannot amend what in law does not exist

I am of a similar view. This Plaint could have been saved if the 2nd to 5th Plaintiffs had filed verifying affidavits even if these were defective. As it is they did not file any such affidavits at all. The court therefore has nothing to work with. Rules of procedure exist for a reason. They cannot be ignored/or overlooked when it seems convenient to do so. Any plaint filed in a court of law **MUST** confirm with the laid down rules of procedure. This Plaint filed on 11th June 2009 does not comply with O. VII rule 1(2). For that reason I rule that it is a nullity. I accordingly strike out this suit. Costs are awarded to the Respondent.

Dated and Delivered at Mombasa this 16th day of October 2009.

M. ODERO

JUDGE

Read in open court in the presence of:-

Mr. Gikandi for Plaintiff/Applicant

Mr. Hamsa for Defendant/Respondent

M. ODERO

JUDGE

16/10/2009