



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL CASE 666 OF 2002**

**STANLEY MATHARA MUCHUI.....<sup>1</sup> PLAINTIFF**

**PETER KIMURU MURIU.....<sup>2</sup><sup>ND</sup> PLAINTIFF**

**VERSUS**

**MAKOMBOKI TEA FACTORY:.....<sup>1</sup><sup>ST</sup> DEFENDANT**

**K.T.D.A.:.....<sup>2</sup><sup>ND</sup> DEFENDANT**

**HON. ATTORNEY GENERAL.....<sup>3</sup><sup>RD</sup> DEFENDANT**

**PETER MWANGI NJOROGE.....<sup>4</sup><sup>TH</sup> DEFENDANT**

**RULING**

The background information to this ruling is that the plaintiff moved to this court, by way of a plaint dated 18<sup>th</sup> day of April 2002 and filed the same date. Simultaneously filed with the plaint was an interim application brought by way of chamber summons seeking an interim injunctive relief. The plaint was subsequently amended on the 30<sup>th</sup> day of January 2003 and filed on the 5<sup>th</sup> day of February 2003. Summons were taken out and served on the defendant who entered appearance dated 5<sup>th</sup> March 2003 and filed on the 12<sup>th</sup> day of March 2003. 3<sup>rd</sup> defendant's defence is dated 17<sup>th</sup> day of March 2003 and filed on the 17<sup>th</sup> day of March 2003. The 2<sup>nd</sup> and 4<sup>th</sup> defendant's defence is dated 24<sup>th</sup> day of March 2003, and filed the same date. Whereas that of the 1<sup>st</sup> defendant is dated 25<sup>th</sup> April 2003 and filed on the 29<sup>th</sup> day of April 2003. There is on record a preliminary objection dated 20<sup>th</sup> day of May 2003 and filed the same date. On the basis of the said preliminary objection Rawal J struck out the amended plaint dated 30<sup>th</sup> January 2003.

There is now before me an application by way of chamber summons dated 8<sup>th</sup> May 2008 and filed on the 28<sup>th</sup> May 2008. It seeks two prayers namely:-

1. *That the plaint dated 18<sup>th</sup> April 2002 be struck out.*
2. *That cost of this suit and application be awarded to the 1<sup>st</sup> and 2<sup>nd</sup> defendant.*

The application is brought under order VI rules 13 (1)

(b) (c) and (d) of the CPR, order VII rule (e) and (3) 1 rule 12 and section 3A of the CPA and all other enabling provisions of the law. The application is supported on the grounds set out in the body of the application and written skeleton arguments. The major grounds are that:-

1. There is no written consent given by the 2<sup>nd</sup> plaintiff to the 1<sup>st</sup> plaintiff, authorizing the 1<sup>st</sup> plaintiff to plead on his behalf.
2. That the verifying affidavit is faulted on the same ground.
3. That upon striking out the verifying affidavit, the suit becomes incompetent and also a candidate for striking out and the court, is urged to strike out both processes.

In response the plaintiffs' counsel filed grounds of opposition dated 1<sup>st</sup> day of September 2008 and filed on the 2<sup>nd</sup> September 2008. They are five (5) in number namely:-

1. The application as drawn up is misconceived totally defective and ought to be struck out.
2. That the application is an abuse of the due process of the court, as the 2<sup>nd</sup> defendant is not a party to the suit as per orders on the 28<sup>th</sup> day of February 2008.
3. That the 1<sup>st</sup> defendant is guilty of aches as the suit against the 1<sup>st</sup> defendant was filed way back in 2002.
4. That no prejudice has been occasioned or demonstrated on the part of the 1<sup>st</sup> defendant and the provisions of order 1 rule 12 are not mandatory in nature.
5. That this honourable court, has reserve powers under order VI rule 12 CPR and section 100 of the CPA in determining the really issues in a suit, and as such the application is prematurely before this court.

In addition to the grounds of opposition, the learned counsel for the plaintiff submitted in their written skeleton arguments as follows:-

- (i). Since the purpose of a verifying affidavit is simply to verify the content of the plaint, and hence if there are any defects in the verifying affidavit, the same cannot be used to fault the plaint.
- (ii). The errors in the replying affidavit if any have not prejudiced the defendant/applicant in any way.
- (iii). That the suit should not be struck out and instead the court, should exercise its discretion to allow the plaintiff put right the offending replying affidavit.
- (iv). The court, is invited to note that the 2<sup>nd</sup> defendant is not a lawful party herein. He had been joined to the proceedings herein via the amended plaint which was been struck out,
- (v). By reason of what has been stated above, the court is urged to dismiss the application and allow the plaintiff to rectify any errors that may have been committed.

On case law the applicants' counsel relied on the case of ANTHONY KABURI KARI AND 2 OTHERS VERSUS RAGATI TEA FACTORY COMPANY LIMITED AND 10 OTHERS NAIROBI MILIMANI COMMERCIAL COURT HCCC NO. 876 OF 2001 decided by Ransley J as he then was, on the 18<sup>th</sup> day of July 2001, on a preliminary objection raised to the plaintiffs application for an injunction. The preliminary objection is on the same ground, as the one raised herein, namely that the verifying affidavit

sworn by the first plaintiff was done so without the authority of the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiff and as such the same is incompetent. As such there is no compliance with the provision of order 1 rule 12 (2) CPR and order VII rule 2. The learned judge accepted the position as the correct one and struck out the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs from the plaint.

The case of BISHOP GAWO AND OTHERS VERSUS NAIROBI CA NO. NAI 345 OF 2000 decided by the CA on the 9<sup>th</sup> day of March 2001. It was an appeal which had arisen out of an objection raised in the superior court, on the ground that the plaint as presented infringed on the provision of order VII rule 3 (2). The argument put forward was to the effect that since the plaint was not accompanied by an affidavit, the same was incompetent and ought to be struck out and it was accordingly struck out.

At page 4 of the judgement line 3 from the bottom the law lords of the CA made the following observations:-

*“In this dispute the issue of verifying affidavit as per order VII rule 1 (2) of the civil procedure Rules is very important. The rule clearly stated that the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint. Mr. Wamalwa for the applicants sought to show that the affidavit in support of the application served the same purpose to be served by the affidavit which should have accompanied the plaint. In our view the rule is so clear as to leave no room for such interpretation. Having so said we tend that the intended appeal does not raise an arguable point that would warrant an order of this court under rule 5 (2) (b) of this courts rules.*

The respondent on the other hand relied on the case of MICROSOFT CORPORATION VERSUS MITSUMI COMPUTER GARAGE LIMITED AND MITSUMNET (K) LIMITED NAIROBI MILIMANI HCCC NO. 810 OF 2001 decided by Ringera J as he then was on the 2<sup>nd</sup> day of July 2001. The issues under interrogation were as follows:-

- (i). Whether an amended plaint should be accompanied by a verifying affidavit.
- (ii). Who can make a verifying affidavit on behalf of a corporation.
- (iii). Whether the provisions of the oaths and statutory declarations Act cap 15 apply to affidavits taken out of Kenya.
- (iv). Whether a court, has discretion to refuse to strike out a suit in which the verifying affidavit accompanying the plaint has been struck out.

On the purport and necessity of a verifying affidavit the learned judge as he then was at line 4 from the bottom on page 16:-

*“However the rule having been framed in broad terms verification of the plaint is now necessary in every type of action originated by a plaint. The broad purpose of the verifying affidavit is thus to verify the content of the plaint. That purpose may be attained by rejecting defective affidavits and ordering that a fresh and complying one be made and filed. On the record I would accordingly order that the verifying affidavit of Marylyn Lesley Pearman be struck out but the plaintiff be at liberty to file a fresh verifying affidavit within 15 days of today.*

*The upshot of this matter is that I decline to strike out the suit but order that the verifying affidavits of Marilyn Paerman and Louis Otieno be struck out of the record. I further grant liberty to the plaintiff to file and serve the defendants with a fresh and compliant verifying affidavit within 15 days of the giving of this order.*

The case of J.M. MUGO INVESTMENT COMPANY LIMITED VERSUS JACKSON MATHU T/A GATUGU FARM COFFEE BOARD OF KENYA MILIMANI COMMERCIAL COURT CASE NO. 1092 OF 2000 decided by Onyango Otieno J as he then was (now JA) on the 8<sup>th</sup> day of May 2001. It

concerned an application to strike out a plaint on account of it being supported by a defective verifying affidavit. At page 2 of the ruling, line from the bottom, the learned judge set out the content of order 7 rule 1 (2) thus:-

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

At page 3 line 7 from the top, the learned judge as he then was went on:-

*“All that order 7 rule 1(2) requires is that the plaint be accompanied by a verifying affidavit and unless it can be shown that the verifying affidavit is in law not an affidavit at all, the court, cannot strike the plaint out as a part from the court, satisfying itself that the same affidavit verifies the correctness of the averments contained in the plaint, the court, should not unduly concern itself with the other contents of the affidavit.*

At page 10 line 6 from the top the learned law lords of the CA went on to state thus:-

*“How ever having said so, I will next ask the one question. If the plaint has a verifying affidavit which is declared un acceptable must that plaint be struck out?. My answer is it depends. And that is where a consideration of order 7 rule 1 (2) and order 7 rule 1 (3) come into play.....order 7 rule 1 (2) is mandatory, but that mandatory effect is watered down to some extent by order 7 rule 1 (3) which gives the court, the discretion to strike out such a plaint or not. That rule i.e. order 7 rule 1 (3) gives the discretion to the court, in cases where there is no compliance with order 7 rule 1(2) which to me means that even in cases where there is no verifying affidavit, at all accompanying the plaint, such a plaint would still not be automatically struck out. The court, can still look at the circumstances and decide whether or not to struck out such a plaint i.e see whether there are aggravating circumstances.....I think the court, would in its inherent powers allow the plaintiff to file a verifying affidavit to be in the file with a plaint although this time not accompanying the plaint, but it will be there with the leave of the court. This is just like in cases where further affidavits would be filed or any act would be done if the leave of the court, is obtained. Such an act would then be valid. In the same day even though the plaint may have had no verifying affidavit or may have had a defective verifying affidavit, as order 7 rule (3) gives the court, discretion over the striking out of such plaint, so would the court in allowing such a plaint to remain in the file allow the plaintiff to file a proper verifying affidavit”*

Due consideration has been made of the above set out rival arguments in the light of the provisions of law, and case law cited and this court, is of the opinion that three issues have arisen for the consideration of this court namely:-

1. Whether the applicants’ application subject of this ruling is competent by reason of the fact that it is not supported by a supporting affidavit.
2. Whether the second defendant has a lawful complaint herein.
3. Whether the plaint is liable to be struck out should the verifying affidavit be found to be faulty.

In answer to question 1, there is no doubt that being a chamber summons, it is a creature of order L, CPR. The only thing that this court, is to concern itself with is whether such an application in the form in which it is satisfies, the requirements of such application as provided for in order 50 CPR order L rule 7 CPR provides:-

*“Every summons shall state in general terms the grounds of the application being made and shall be heard in chambers and where any summons is based on evidence by affidavit, a copy of the affidavit shall be served”.* This courts’, construction of this provision is that a supporting affidavit is only necessary where evidence is to be adduced. Herein since the verifying affidavit is the one to be faulted on a point of law, no affidavit evidence was necessary. The application is therefore proper and will be considered on merit.

As for the lawfulness of the participation of the 2<sup>nd</sup> defendant. The court, agrees with the sentiments of the plaintiff's counsel that it is a busy body. The reason being that the 2<sup>nd</sup> defendant was introduced by the amended plaint which was struck out. That being the case the 2<sup>nd</sup> defendant cannot agitate anything herein.

As for the authority of the 2<sup>nd</sup> plaintiff to depone an affidavit on behalf of the 1<sup>st</sup> plaintiff, I agree with the 1<sup>st</sup> defendants' contention that the verifying affidavit is faulty. It is however the finding of this court, that the faulting is limited to the deponement as regards the authority to depone on behalf of the 1<sup>st</sup> plaintiff. That alone does not invalidate the entire affidavit. What is to be invalidated are the words:- "*and have been authorize by the 1<sup>st</sup> plaintiff to make this affidavit on his behalf* ", which words are accordingly struck out.

The striking out of the said words does not invalidate the suit in its entirety. It only invalidates the suit in so far as the 1<sup>st</sup> plaintiff is concerned. The first plaintiff is however not remediless. The case law construing the relevant provisions on the necessity to file a verifying affidavit as decided by the CA and dutifully followed by the superior court, is that the court, has a discretion to strike out the plaint or save it and allow the defaulting party to regularize his position.

As submitted by the plaintiffs' counsel, no prejudice has been demonstrated by the defendant that is likely to be suffered by them should the defaulting party be granted a reprieve by this court, to either file the authority to depone and act generally for him by the first plaintiff or for the said 1<sup>st</sup> plaintiff to file a verifying affidavit.

For the reasons given in the assessment the court proceeds to make the following order:-

1. The application is properly before this court, as presented without a supporting affidavit, as the same dealt with one point of law and not evidence and as such the same was in line with order L rule 7 CPR.
2. The 2<sup>nd</sup> defendant having been introduced by the amended plaint which was struck out, has no business participating in the application herein.
3. Indeed the authority of the 1<sup>st</sup> plaintiff to the 2<sup>nd</sup> plaintiff to depone the verifying affidavit on its behalf is not annexed. That alone does not invalidate the entire suit but only goes to invalidate the suit of the 1<sup>st</sup> plaintiff.
4. Room exist for the defaulting party to validate the suit by filing the authority to act on his behalf under order 1 rule 12 (2) CPR, in writing and filed in court.  
(ii) Alternatively to file a verifying affidavit.
5. If a verifying affidavit shall be filed, then the words and on behalf of the 1<sup>st</sup> plaintiff in his suit, in paragraph 1 of the 2<sup>nd</sup> plaintiff verifying affidavit shall stand struck out.
6. The 1<sup>st</sup> plaintiff has 30 days from the date of the reading of this ruling to either file the authority in terms of order 1 rule 12 (2) or a verifying affidavit.
7. The 1<sup>st</sup> defendant will have the costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF NOVEMBER 2009.

**R.N. NAMBUYE**

**JUDGE**