



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 531 of 2006

MURGIAN TRANSPORT (KENYA) LIMITED.....PLAINTIFF

VERSUS

HUNKAR TRADING COMPANY LIMITED.....DEFENDANT

R U L I N G

By a Notice of Motion brought under Order XXXV Rule 1 (i)(a) of the Civil Procedure Rules, Murgian Transport (K) Ltd. has come to this court seeking summary judgment against the defendant Hunkar Trading Company Limited for Kshs.4,833,918.74 together with interest thereon as prayed in the Plaint. It is the plaintiff's contention that the Statement of Defence dated 25th October 2006, filed herein by the defendant is a sham and does not raise any triable issues. The plaintiff also contends that the defendant is indebted to the plaintiff and the Statement of Defence filed is an abuse of the court process and should therefore be expunged from the court records.

The defendant has filed a notice of preliminary objection to the hearing of the plaintiff's application on the grounds:

- (a) That the verifying affidavit filed in support of the Plaint does not comply with the law, and the suit is therefore null and void.
- (b) That the current application being premised on incompetent suit should be struck off.

In support of that preliminary objection, **Mr. Gachui** who appeared for the Defendant has submitted that the plaintiff suit is bad in law as the verifying affidavit filed in support of the Plaint is not in compliant with Order VII, Rule 1(2) of the Civil Procedure Rules. It is contended that contrary to Order VII, Rule 1(3) which requires the deponent of the verifying affidavit to verify the correctness of the averments contained in the Plaint, **O.A. Murgian**, the deponent of the verifying affidavit, depones in paragraph 2 of the verifying affidavit that he is confirming on behalf of the plaintiff that the "allegations" in the Plaint are true.

It is contended on behalf of the defendant that 'allegations' is defined in the Oxford Dictionary as a '**statement made without proof**' and is not therefore, a verification of the correctness of the statements made in the Plaint. It is further contended that the verifying affidavit is defective as the name of the deponent is not indicated in the jurat.

The case of **National Bank of Kenya vs. Hulashban N. Darbar & two others HCCC (Milimani) 1464 of 2000** was cited in support of the submissions made on behalf of the defendant. It was submitted that the notice of motion being based on a defective suit cannot stand.

Mr. Njagi who appeared for the plaintiff submitted in response to the preliminary objection that it was an abuse of the court process simply intended to block the prosecution of the motion for summary judgment. Referring to Order XVIII Rule 7 of the Civil Procedure Rules, he submitted that a mere irregularity in an affidavit cannot invalidate it. He submitted that the failure to indicate the name of the deponent in the jurat was not a material defect but a mere irregularity whose remedy lies in costs under Order XVII, Rule 7 of the Civil Procedure Rules. He submitted that under Rule 10 of the Oaths and Statutory Declarations Rules, the format of a jurat is provided for in the 3rd schedule and the format provided does not include the name of the deponent. He therefore maintained that as long as the name of the deponent appears in the body of the affidavit, the name did not need to be repeated in the jurat.

Mr. Njagi further sought assistance from the marginal notes to section 72 of the Interpretation and General Provisions Act Cap 2 of the Laws of Kenya, wherein it is indicated that an instrument cannot be void by virtue of omission in the form as long as no prejudice is suffered.

Mr. Njagi also relied on the case of **Microsoft Corporation vs. Mitsumi Computer Garage Limited, [2001] 2 EA 460**, wherein **Ringera, J.** (as he then was) expressed the view that rules of procedure are the handmaidens and not the mistresses of justice and that they should not be elevated to a fetish which would be precisely the position if the suit was struck out on account of a defective affidavit.

He urged the court to find that the alleged error was excusable. He further urged the court to disregard the definition of “allegation” referred to in the Oxford Dictionary, and adopt the definition in the Osborn’s Concise Law Dictionary which defines allegation as “***a statement or assertion of a fact made in any proceeding as for instance in a pleading; particularly a statement or charge which is as yet unproved***”.

Mr. Njagi also referred to Order XIV, Rule 1 of the Civil Procedure Rules, under definition of evidence in s.3 of the Evidence Act.

In reply to **Mr. Njagi’s** submission, **Mr. Gachui** maintained that the failure to indicate the name was not want of form but went to the root of the affidavit.

Having considered the application, the affidavit in issue, and the submissions made by both parties, I find Order VII, Rule 1(2) of the Civil Procedure Rules, very explicit that the Plaintiff shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the Plaintiff. The rule does not refer to verification of any facts but refers to verification of averments. Averments as defined in the Concise Oxford English Dictionary, is as follows:

“An affirmation or allegation, a formal statement including an offer of proof or substantiation”

In the Oxford’s Concise Law Dictionary, averments is defined as “***an allegation in pleading***”.

In my view therefore, the statement made by the deponent, in the verifying affidavit confirming that the allegations delineated in the Plaintiff are true and correct, complies with the requirements of Order VII, Rule 1(2) and nothing turns on the submissions made by the defendant’s counsel in this regard.

As regards the failure to include the name of the deponent of the affidavit in the jurat that was evidently an omission, the question is whether the omission is a minor defect which is a mere irregularity, or whether it is a material defect which vitiates the affidavit.

It is evident that under the Oaths and Statutory Declaration Act, Chapter 15 of the Laws of Kenya, the form of the jurat provided does not require the restatement of the name of the deponent in the jurat. However, the verifying affidavit sworn by **O.M. Murgian** deviated from the format provided in schedule 3 of Cap 15 as it included the words, “sworn by the said...” As was pointed out by **Mr. Njagi**, S.72 of the Interpretation and General Provisions Act, provides that an instrument or document which purports to be in the prescribed form shall not be void by reason of deviation from that form, as long as the deviation does not affect the substance of the instrument or the document and is not calculated to mislead. It is

obvious that the addition of the identity of the deponent to the verifying affidavit, did not in any way affect the substance of the document nor was it intended to mislead. Looking at the document, it is very clear that it is sworn by **O.M. Murgian** and the failure to indicate the name in the jurat does not in any way mislead the parties as to who has sworn the affidavit. In my considered view, that omission is a minor defect which must be ignored.

In the light of the above, I overrule the preliminary objection and order that the parties do take a date for the hearing of the Notice of Motion dated 15th December, 2007.

Dated this 29th day of January, 2008

H. M. OKWENGU

JUDGE

M. WARSAME

JUDGE