



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Case 200 of 2005

K ORICA (U) LIMITED

mitsui O.S.K. LINES LIMITED..... PLAINTIFFS

VERSUS

KENYA PORTS AUTHORITY.....DEFENDANT

RULING

The Defendants Chamber Summons dated the 31st August 2006 seeks under Order 7 Rule 1(2) and (3) and Section 3A of the Civil Procedure Act the striking out of the verifying affidavit and consequently the plaint itself on the ground that the verifying affidavit has not been sworn by an officer of either of the Plaintiffs.

Mr. Noorani for the Defendant submitted that Mr. Wilson Nyangala who swore the verifying affidavit is an officer of Inchcape Shipping Services Ltd which is not a Plaintiff in this case. He submitted that the Plaintiffs being corporations a verifying affidavit could only be sworn on their behalf by an authorized agent as provided under Order 3 Rule 2 of the Civil Procedure Rules. As Mr. Nyangala has not even claimed to be an agent of either of the Plaintiffs the verifying affidavit should be struck out. Consequent upon striking out of the verifying affidavit he said the plaint itself should also be struck out.

Mr. Omondi for the Plaintiffs holds a different view. According to him Mr. Nyangala being an employee of Inchcape Shipping Services Kenya Limited an agent of the Plaintiffs he was duly authorized to swear the verifying affidavit. He concluded that as the issue of Inchcape Shipping Services Kenya Ltd's agency of the Plaintiffs is pleaded in the plaint and admitted in the defence if the replying affidavit is struck out then the Plaintiffs should be given 45 days to put their house in order by filing a proper verifying affidavit. He said taking that course will not prejudice the Defendant in any way.

The objective of verifying affidavits is to avoid suits being filed without the authority of the Plaintiffs

themselves. That is why Order 7 Rule 1 requires that the filing of complaints should be accompanied by verifying affidavits sworn by the Plaintiffs themselves as authority that the suits are filed with their authority. I agree with Mr. Noorani that in the case of a corporation a verifying affidavit should be sworn by an officer of the corporation duly authorized to do so. In this case although the Defendant has admitted that Inchcape Shipping Services Ltd is an agent of the Plaintiffs there is nothing to show that Mr. Nyangala who swore the verifying affidavit is an authorized agent of either of the Plaintiffs. Being merely an employee of the agent is not enough. In the circumstances there is no nexus between him and the Plaintiffs. Consequently I grant prayer 1 of the application and strike out the verifying affidavit sworn by the said Nyangala on 14th September 2005.

Striking out of a verifying affidavit does not automatically render the plaintiff incompetent. As stated by the Court of Appeal in **Joseph Sigilai –Vs- Gotak Sanik Ltd & 4 others Civil Appeal No. 98 of 2003** in such an eventuality the court has a discretion of either striking out the plaintiff or giving the Plaintiff time to file a proper verifying affidavit. Exercising my discretion in this matter I grant the Plaintiff's plea for time to file and serve a proper verifying affidavit and order that the Plaintiffs shall within 30 days of the date hereof file and serve a proper verifying affidavit failing which the plaintiff in this suit shall stand struck out with costs of the suit to the Defendant. The Defendant shall have the costs of this application.

DATED and delivered this 17th January 2008.

D.K. MARAGA

JUDGE