



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

**Civil Case 496 of 2003**

**INTERNATIONAL AIR TRANSPORT ASSOCIATION**

**Suing Through ABDULRAZAK KHALFAN.....1<sup>ST</sup> PLAINTIFF**

**MERCANTILE & GENERAL ASSURANCE**

**COMPANY LIMITED.....2<sup>ND</sup> PLAINTIFF**

**V E R S U S**

**SURE CONNECTION LIMITED.....1<sup>ST</sup> DEFENDANT**

**SHAMILLA KALISA.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

By a Chamber Summons dated 27<sup>th</sup> August 2007, the plaintiff who are International Air Transport Association, suing through Abdulrazak Khalfan (**1<sup>st</sup> Plaintiff**), and Mercantile & General Assurance Co. Ltd (**2<sup>nd</sup> Plaintiff**), have come to this court seeking the following orders: -

1. **That** leave be granted to the plaintiffs to amend their plaint.
2. **That** the draft amended plaint annexed hereto, be deemed as duly filed and served subject to the payment of the court's requisite fees.
3. **That** the defective verifying affidavit of Abdul Razak Khalfan be struck out and the same be substituted with the annexed verifying affidavit of Mohammed Hassim Pondor.
4. **That** the cost of this application be in the cause.

The Defendants in the suit are Sure Connections Ltd and Shamila Kalisa.

The application is brought under **Order I Rule 10(1)**, **Order VI A Rules 3 (1), (3), (4) & (5)**, and **Rule 5**, **Order VII Rule 2** of the Civil Procedure Rules, and **Section 3A** of the Civil Procedure Act. As stated on the body of the application and the supporting affidavit sworn by Mohammad Hassim Pondo the grounds upon which the application is premised are as follows: -

The 1<sup>st</sup> plaintiff sued through Abdulrazak Khalfan who was at the time of bringing the suit, the Eastern Africa Distribution and Financial Services Regional Manager of the 1<sup>st</sup> plaintiff, donated with the power

of Attorney to represent the 1<sup>st</sup> plaintiff in the region. The power of Attorney has apparently now been revoked, and the said powers donated to Mohammad Hassim Pondor, who is currently the 1<sup>st</sup> plaintiff's Distribution and Financial Services Regional Manager for Eastern Africa. The plaintiffs therefore wish to amend the plaint to reflect this change. The plaintiffs also wish to withdraw the verifying affidavit which was sworn by Abdulrazak Khalfan in support of the plaint, as the same is defective having been sworn before the date of the plaint.

It is contended that the defendants are truly and justly indebted to the plaintiff and no prejudice will be occasioned to them if the application is allowed. A copy of the proposed amended plaint has been exhibited, so has the power of Attorney donated by the 1<sup>st</sup> plaintiff in favour of Mohammad Hassim Pondor.

It is the contention of the plaintiffs' counsel that the error in the verifying affidavit was made by the 1<sup>st</sup> plaintiff's former counsel and the court should not therefore punish the 1<sup>st</sup> plaintiff by striking out his suit. Counsel further maintains that under **Order XVI A Rule 3** of the Civil Procedure Rules, the court can allow amendment of pleadings at any stage before the suit is determined.

In support of his submission counsel for the plaintiffs relied on the case of **Nairobi HCCC NO.810 of 2001** Microsoft Corporation vs Mitsumi Computer Garage Limited & Another, where Ringera J. (as He then was) stated:

***“Deviation from lapses in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected.”***

Counsel for the plaintiff also referred to **Nairobi – HCCC NO.966 of 2000** Pastificio Lucio Garofalo S. P. A. Vs Drive-In Estate Developers Limited, where Ringera J. (as He then was) again stated:

***“To my mind the use of the word ‘may’ shows the court has discretion in the matter. In exercising such discretion, the court should be alive to the principle of justice that procedural lapses, omissions and irregularities unless they go to the jurisdiction of the court or prejudice the adversary in a fundamental respect which cannot be atoned for by an award of costs are not to be taken as nullifying the proceedings affected.”***

Counsel for the plaintiff also found solace in the case of **Nairobi – HCCC No.1796 of 2000** Masefield Trading (K) Limited vs Francis M. Kibui, where Hewett J. stated:

***“the court now and always has had power to allow a supplementary affidavit to correct a deficiency in a prior one and that the interests of justice by which in this case I mean a hearing on merits, would be frustrated or delayed and are better served by allowing a supplementary affidavit than by striking out the suit.”***

As reflected on the grounds of opposition, the defendant opposed the application on the following grounds:

1. The application is an afterthought contrived in an attempt to subvert the defendants' application dated 2<sup>nd</sup> July 2007, and it is for dismissal for want of bona fides, any merit and delay.
2. The application does not cure the still born plaint on record as no valid stamped and registered power of attorney is annexed and it will be nihilistic to substitute one nullity with another nullity.
3. That application is an abuse of the process of court as it is brought four years since the incompetence sought to be cured was clearly pointed out by the defendants.

It was submitted by the defendants' counsel, that the issue of competence or otherwise of the plaint, was

raised at paragraph 7 of the defence which was filed on the **7<sup>th</sup> October 2003**. Nevertheless, the plaintiffs took no action until the defendants brought an application seeking to have the verifying affidavit and the plaint struck out. Counsel for the defendants contended that no verifying affidavit having been filed in respect of the 2<sup>nd</sup> plaintiff, the plaint is incompetent as against the 2<sup>nd</sup> plaintiff.

Counsel for the defendant further submitted that there was no material upon which the court could exercise its discretion in favour of the plaintiffs as there was no affidavit filed accepting the error nor was any action taken from the year 2003 when the error was pointed out. Counsel for the defendants urged the court to follow **Civil Application No. Nai. 345 of 2001** Bishop Joshua Gawo & Others vs. Nairobi City Council & Others, where the Court of Appeal upheld the striking out of the plaint in the superior court for want of verifying affidavit. The court was further urged to find the authorities cited by the plaintiffs' counsel distinguishable, as they were in respect of situations where attempts were made to file a verifying affidavit.

It is evident that under **Order VI A Rule 3** of the Civil Procedure Rules, this court has powers to allow a party to amend pleadings at any stage of the proceedings, and that such powers may be exercised even where any relevant period of limitation has expired. In this case, the 1<sup>st</sup> Plaintiff has clearly explained why it is necessary for the plaint to be amended. The suit was filed through an agent of the 1<sup>st</sup> Plaintiff pursuant to a Power of Attorney. That agency relationship no longer subsists. Instead another agent has been appointed through another power of attorney which has been exhibited. In my view, there is a good basis for granting leave to the Plaintiffs to amend the plaint to reflect this change.

I have examined the original plaint and do note that it was dated **13<sup>th</sup> August, 2003** and filed on **14<sup>th</sup> August, 2003**. It is clear that the verifying affidavit sworn by Abdulrazak Khalfan, in support of the original plaint is defective as it was sworn on **27<sup>th</sup> June 2003**, about **43 days** before the plaint which it purports to verify. The question is whether such a defective affidavit can be withdrawn and substituted with a proper affidavit.

**Order VII Rule 1(2) & (3)** of the Civil Procedure Rules states as follows:

2 (1) .....

(2) The plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the Plaint.

(3) The court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with sub rule (2) of this rule.

In the case of Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Anor **HCCC (Milimani) No.810 of 2001**, Ringera J (as then was) had this to say regarding **Order VII Rule 1(3)** of the Civil Procedure Rules:

***“First sub rule (3) of rule 1 of Order VII itself seems by the usage of the word “may” to leave the striking out of a plaint which is not accompanied by a verifying affidavit within the realm of discretion. If discretion can be exercised In the case of an omission of the verifying affidavit, a fortiori it is also exercisable in the event of such an affidavit being incompetent ..... The broad purpose of the verifying affidavit is thus to verify the contents of the Plaint. That purpose may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on record.”***

I entirely concur with the interpretation of my brother Judge. Although the requirement for the filing of a verifying affidavit is mandatory, this Court has powers where necessary to reject a defective affidavit and order the filing of another affidavit so as to comply with the mandatory requirement.

A situation such as this one, where the defect in the affidavit arises from the dating of the affidavit and the

plaint, procedural matters in respect of which the 1<sup>st</sup> Plaintiff had to entirely rely upon its counsel, certainly calls for the intervention of the Court. For refusing to allow the 1<sup>st</sup> Plaintiff to substitute the defective affidavit with another would have the effect of dealing a death blow to the 1<sup>st</sup> Plaintiff's claim purely on such a procedural technical ground. That would not be consistent with the Court's general obligation to administer substantive justice.

It is true that the Defendant did indicate in paragraph 7 of the statement of defence that the plaint was incurably incompetent and bad in law. That general averment was sufficient to alert the defence that something was wrong. Nevertheless, it was not so specific on what exactly was wrong with the plaint such as to alert the Plaintiff about the verifying affidavit. It cannot therefore, be concluded that the Plaintiff deliberately failed to take action on the defective verifying affidavit having had due notice of such defect, nor do I find the delay in bringing the application to be deliberate or inexcusable.

Contrary to the submissions made by the defence Counsel, the cases of **Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another** (supra), **Pastificio Lucio Garofalo SPA vs. Security & Fire Equipment Co. & Another** (supra), and **Agricultural Finance Corporation & Another vs. Drive-in Estate Developers Ltd**, all involved applications for striking out defective verifying affidavits, and although in each case the court found the verifying affidavit defective and ordered same to be struck out, the court did not dismiss the suit but gave leave for another compliant verifying affidavit to be filed. Though these decisions are not binding on me, I find them to be similar to the present suit and therefore of persuasive value. On the other hand, the case of **Bishop Joshua Gawo & Others vs. Nairobi City Council & Others** (supra) which was relied upon by the defence counsel is easily distinguishable. First, it was an appeal and not an application in which the Judges could exercise discretion. Secondly, unlike the present case where the 1<sup>st</sup> Plaintiff recognizing that the verifying affidavit is defective, seeks to substitute the same with a compliant verifying affidavit, in **Bishop Gawo's** case, there was no verifying affidavit filed and the Plaintiff sought to rely on an averment in the plaint as serving the same purpose as the verifying affidavit. This is what the Court of Appeal rejected contending that the provisions of **Order VII Rule 1** were mandatory and that in the absence of a verifying affidavit the suit was properly struck out.

It was submitted that there was no verifying affidavit in respect of the 2<sup>nd</sup> Plaintiff and that the suit was defective to that extent. This was not contained in the grounds of opposition. Moreover, the application is essentially dealing with the 1<sup>st</sup> Plaintiff's claim. Noting that there is an application pending with regard to the 2<sup>nd</sup> Plaintiff's claim, I find that this is not the appropriate forum to deal with the 2<sup>nd</sup> Plaintiff's claim.

It was also alleged in the grounds that there was no valid stamped and registered power of attorney annexed. No submission was made in respect of this ground, and I fail to understand the purpose of this argument as a copy of a power of attorney is attached to this application and it will be a matter of evidence as to whether the same is properly registered.

The upshot of the above is that I allow the application and issue orders as prayed.

Orders accordingly.

Dated, signed and delivered this 12<sup>th</sup> day of March, 2008.

**H. M. OKWENGU**

**JUDGE**