



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

**Civil Case 447 of 2007**

**GIANT CLOTHING DESIGNERS LTD & 2  
OTHERS.....PLAINTIFF**

**VERSUS**

**INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION LTD.....  
.....DEFENDANT**

**R U L I N G**

This suit was initiated on 30<sup>th</sup> of August, 2007 on a plaint which was filed by Otieno and Co. Advocates, on behalf of Giant Clothing Designers Ltd, Joseph Kioria Kahuko and Edith Muthoni Kahuko (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs respectively). The plaint was accompanied by a verifying affidavit sworn by Joseph Kioria Kahuko. The suit was against the defendant Industrial and Commercial Development Corporation Ltd.

By a notice of preliminary objection filed on 3<sup>rd</sup> March, 2008 the defendant has raised a preliminary objection to the 1<sup>st</sup> and 3<sup>rd</sup> plaintiff's suit, contending that the mandatory provision of order VII Rule 1 (2) of the Civil Procedure Rules have not been complied with, as the plaint was not accompanied by affidavits sworn by the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs, verifying the correctness of the averments contained in the plaint. It is also contended that the 2<sup>nd</sup> plaintiff who purported to verify the correctness of the averments of the plaint, on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs does not have the authority in writing to do so, contrary to provisions of Order 1 rule 12 of the Civil Procedure Rules.

Mr. Njoroge who appeared for the defendants submitted that under Order VII Rule 1(2) of the Civil Procedure Rules, each of the plaintiff should file a verifying affidavit as the suit was not a representative suit. Counsel relied on **Civil Appeal No. 321 of 2003 Research International East Africa Ltd vs. Julius Arisi and 213 Others** wherein the court of appeal stated that the true constructions of rule 1 (2) of order VII of the Civil Procedure Rules, is that even in cases where there are numerous plaintiffs each plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them in writing and file such authority in the case, to swear a verifying affidavit on his behalf. Counsel for the defendant also relied on **HCCC Milimani .No.876 of 2001 Anthony Kaburi Kari & 2 Others vs. Ragati Tea Factory Ltd and two Others** wherein P.J. Ransley commissioner of Assize (as he then was) struck out the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiff from the suit for not complying with order VII rule 2 of the Civil Procedure Rules.

Ms. Othieno the advocate for the plaintiff submitted that the court has discretion to give the 1<sup>st</sup> and 3<sup>rd</sup> plaintiff the opportunity to comply with order VII rule 1 (2) of the Civil Procedure Rules. She maintained however, that the two authorities cited were distinguishable from the present case, as those authorities involved numerous plaintiffs whilst the current suit involved a man, his wife and a company where both were directors. Ms Othieno argued that Order 1 Rule 12 of the Civil Procedure Rules only applies to the prosecution of the suit and not the verifying affidavit which is fully governed by Order VII rule 2 of the Civil Procedure Rules.

I have considered the contending arguments of both counsels and the authorities cited. In my considered view the situation herein is neatly captured by the court of appeal in the case of **Research International**

**East Africa Ltd Vs Julius Arisi and 213 Others** (Supra): That Order VII Rule 1(2) of the Civil Procedure Rules requires that where there are numerous plaintiffs, each plaintiff is required to verify the correctness of the averments in the plaint by a verifying affidavit, and that where any of the plaintiffs has authorized a co-plaintiff to swear such an affidavit on his behalf, such authority must be in writing and must be filed in the case. It is immaterial as to whether the plaintiffs are over 200 as was the case in **Research International East Africa Ltd vs. Julius Arisi & 213 Others** or whether the plaintiffs are only three as in this case. As long as they are more than one, each must swear a verifying affidavit, or alternatively give express written authority for a verifying affidavit to be sworn on his behalf. It was submitted that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs were husband and wife who are directors in the 3<sup>rd</sup> plaintiff. The relationship between the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs is however not stated in the plaint and is therefore evidence given from the bar by the plaintiff's counsel. Be that as it may each of the plaintiffs is a separate legal entity suing in their own individual capacity. Order VII Rule 1(2) of the Civil Procedure Rules is therefore applicable to each of the plaintiffs.

I therefore uphold the preliminary objection to the extent that the verifying affidavit sworn by Joseph Kioria Kahuho is not sufficient to verify the correctness of the averments in the plaint on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs as no authority in writing from the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs has been filed. To this extent the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs' suit is defective.

This court has however the discretion to allow the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs to remedy the defect. In my considered view rather than strike out the plaint as against the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs, it would be in the interest of justice to give them the opportunity to comply with Order VII rule 1 (2) of the Civil Procedure Rules. Accordingly I do hereby order that the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs shall comply with order VII Rule 1 (2) of the Civil Procedure Rules within 10 days from the date of delivery of this ruling.

Those shall be the orders of this court.

**Dated this 16<sup>th</sup> day of April, 2008**

**H.M. OKWENGU**

**JUDGE**

Delivered this .....day of April, 2008

**JUDGE**

In the presence of: