



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 1579 of 2001

LUKE CHERUIYOT & 37 OTHERS PLAINTIFFS/RESPONDENTS

Versus

NATIONAL OIL CORPORATION OF KENYA DEFENDANT/APPLICANT

RULING

The Plaintiff's Verifying Affidavit:

Only One out of 38 Plaintiffs Deponed and

Filed a Verifying Affidavit. Whether the Plaintiff

should be struck out under Order VII Rule 1

Subrules (2) and (3), Civil Procedure Rules.

The Defendant filed this Chamber Summons dated 16th June, 2000 praying that the Plaintiff's suit in this matter be struck out with costs. The application is based on three grounds found on the face and starts with the ground that the suit herein does not comply with Order 7 Rule 2 of the Civil Procedure Rules; secondly that the suit is incompetent and incurably defective as the verifying Affidavit thereto does not meet the requirements of the law; and thirdly that the verifying affidavit sworn by the 30th Plaintiff Richard Muchoki, is non -affidavit.

Briefly, the Plaintiff in this suit lists 38 Plaintiffs. The suit was filed on 17th September 2001 and the Plaintiff was verified by the verifying affidavit of "**Richard K. Muchoki**" only.

The said Richard K. Muchoki by swearing the verifying affidavit dated 17th September 2001 and filed together with the plaintiff thereby held himself out as one of the Plaintiffs. But strictly checking through the names of the 38 listed Plaintiffs, the name Richard K. Muchoki does not appear. The nearest resembling name is Richard Muchoki, the Plaintiff number 30; and Mr. Oduk, learned counsel representing Plaintiffs, is saying in this Chamber Summons that the 30th Plaintiff is the one who deponed the verifying affidavit in question.

On the other hand Mr. Okongo Omogeni, counsel representing the Defendant, questions whether the 30th Plaintiff is the one who deponed the verifying affidavit. The learned counsel goes further to point out that even if Richard Muchoki is the same person as Richard K. Muchoki, there is nothing to show that he had the authority of the rest of the Plaintiffs to swear the verifying affidavit on their behalf. All he says is that

“I am one of the Plaintiffs herein, hence competent to swear this affidavit on behalf of my co-plaintiffs.”

Otherwise each Plaintiff should have filed own verifying affidavit.

Similarity with **LAW SOCIETY OF KENYA –v- COMMISSIONER OF LANDS & 2 OTHERS (2001) KLR 706** where it was held that under Order 1 rule 12 of the Civil Procedure Rules it is mandatory that in a representative suit the appearance of one of several Plaintiffs or defendants requires written authorities signed by each of the numerous persons forming the group on whose behalf the representative suit was or is to be instituted.

That was in relation to the filing of a suit which may not be as direct as the case of **ELIKANA MUKUNDI GATIMU –v- JOHN B. MUYA & 3 OTHERS, HCCC No. 471 of 2004** Milimani Commercial & Taxation Division, where there were two Plaintiff’s and one of them deponed a verifying affidavit without evidence that he was doing the same with the authority and on behalf of the other who did not file his own verifying affidavit, Justice Mutungi held that there was no compliance with the requirements of Order VII Rule 1(2) of the Civil Procedure Rules and proceeded to strike out the Plaint as totally defective under sub rule (3) of rule 1 of order VII. The relevant provisions state as follows:-

- “(1) The Plaint shall contain the following particulars: (a), (b), (c), (d) (e) (Not relevant here)**
- (2) The Plaintiff 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.”**

On the other hand, Mr. Oduk argues that there is nothing wrong with what happened. He says that if there are any defects, those are minor defects which cause no prejudice to the Defendant. Each Plaintiff came to the court on his own right and this is not a representative suit. The authority under Order 1 Rule 12 of the Civil Procedure Rules may be obtained at any time after filing suit and under Rule 11 any of the Plaintiffs may conduct the suit. Order VII Rule 2 does not say that each Plaintiff must file a verifying affidavit. The rule suggests a single affidavit and not a multiplicity of verifying affidavits. But even if such multiplicity was required, lack of them is not a fundamental defect and that defect can be rectified.

Moreover a verified affidavit cannot be struck out when all that is prayed for is the striking out of the suit.

Mr. Oduk referred to the case of **MASEFIELD TRADING (K) LTD –v- KIBUL, HCCC NO.1796/2000** in the Commercial and Taxation Division at Milimani where Hewett J. as he then was, held that the permissive language of Order VII, rule 1 (3) of the Civil Procedure Rules leads to the conclusion that despite its mandatory terms, a breach of order VII, rule 1(2) of the Civil Procedure Rules is an irregularity which can be waived or cured.

In that case the verifying affidavit was defective by reason of the annexation of the wrong power of attorney. It was not totally invalid as the deponent did have authority to swear it. The mistake was that of the Plaintiff’s Advocate who subsequently acted with speed to rectify the defect by filing an application for leave to file an affidavit supplementary to the verifying affidavit.

In the circumstances of that case therefore, the court, I think, correctly stated that

“In exercise of its discretion when faced with an application to strike out a suit due to a failure by the Plaintiff to file a proper affidavit, the permutations of the circumstances under which the court might exercise its discretion in favour of the Plaintiff are never closed. Undue delay in seeking to rectify the defect will tend to disentitle the Applicant. Errors on the litigant’s advocates will be more readily overlooked than errors on the part of the Litigant. A court will consider the extent to which the innocent party can be compensated in costs and court will exercise its discretion in light of the totality of circumstances before it. A court will proceed on the basis that the defect is an irregularity which can be cured or waived, and not a nullity.”

In GOODEARTH LIMITED – v- ARIBI ABDUL KARIM, HCCC No. 303/2004, Commercial and Taxation Division at Milimani, where the verifying affidavit was not endorsed with the name of the person who drew or prepared or caused it to be prepared or drawn, Azangalala J. dismissed the application to strike out that affidavit and the relevant plaint holding, like in the case of MASEFIELD TRADING (K) LTD (*supra*), that sub-rule (3) of rule 1 of Order VII uses permissive language. The learned Judge went on the say:

“This rule in my view gives the court a discretion to either strike out or not a plaint which is not accompanied by an affidavit verifying the correctness of the averments contained in the plaint.”

The Judge referred to his earlier decision in GEOLOGY INVESTMENTS LTD –v- ROGONYO NJUGUNA AND OTHERS Nairobi HCCC NO. 1067/2002 in which he held that an affidavit is a document envisaged by section 35(1) of the Advocates Act as it is covered by section 34(1) (f) of the said Act. But those sections were not intended to invalidate documents or instruments by advocates who had omitted to endorse their names and address thereon. He went on to say that the mischief intended to be prevented was to discourage unqualified persons from preparing certain documents.

The verifying affidavit in that case, save for the omission to endorse the name of the drawer thereon, qualified as a verifying affidavit. The learned Judge said he did not find it wanting in any other form or content. It did not offend provisions of order 18 of the Civil Procedure Rules or the Oaths and Statutory Declaration Act (Cap 15 Laws of Kenya). He did not therefore strike the affidavit or the Plaint out. Instead he ordered a compliant affidavit to be filed. He was of the view,

“that courts should lean in favour of doing substantial justice to the parties rather than in favour of slavish adherence to rules of procedure.”

The decision of Ibrahim J in DUBAI BANK KENYA LTD -v- COME –CONS AFRICAN LTD, Nairobi HCCC No. 68 of 2003 where the Plaintiff had failed to endorse his name on his verifying affidavit, is on similar lines as the decision of Azangalala J.

From the aforesaid therefore, where does the instant case stand? First on the name. This is a legal matter, a case in a court of law and parties must be precise in what they say. Carelessness is not acceptable. If a party comes in a suit with the name Richard Muchoki, that party has to maintain that name throughout the proceedings, of course with liberty to amend or correct. Strictly speaking therefore to come in later with a name like Richard K. Muchoki without amendment or correction, as in this suit, is not legally acceptable as that kind of conduct can be prejudicial to the Defendant even if not prejudicial to any of the other Plaintiffs in a suit with more than one Plaintiff as in the instant case.

It follows that in the instant case, it is doubtful in the mind of the court whether the person Richard K. Muchoki who deponed the verifying affidavit concerning the Plaint is the 30th Plaintiff Richard Muchoki.

If Richard K. Muchoki is not the 30th Plaintiff Richard Muchoki, then there is no dispute that the Plaintiff has not been verified and should be struck out in terms of Order VII Rule 1(3) of the Civil Procedure Rules as even Mr. Oduk has not attempted to argue why such a situation should be tolerated in the face of clear provisions of Order VII Rule 1 subrules (2) and (3) of the Civil Procedure Rules.

If on the other hand, Richard Muchoki the 30th Plaintiff is Richard K. Muchoki, the deponent of the verifying affidavit, then the court becomes faced with the arguments before it as already summarized above and those are the arguments I deal with below. I should start by saying that I wish Mr. Oduk was more consistent than he was in his submissions to enable me see the direction of the case he was presenting. Otherwise, and this is with all due respect, I found him going in different directions and could not easily see the direction of the case he was presenting.

He says, for instance, that this is not a representative suit. Each Plaintiff came to the court on his own right. Order VII Rule 1(2) suggests a single affidavit and not a multiplicity of affidavits. But even if each Plaintiff has to swear a verifying affidavit, the defect obtaining in this suit is a minor defect which can be rectified. From those statements, it is not clear whether it is the Respondent's case that the Plaintiff should remain with one verifying affidavit or it can now have more than one such affidavit.

The decisions cited, Hewtt J, Ibrahim J and Azangalala J, were in cases where, in each, there was the required number of verifying affidavit or affidavits and the only problem was that those affidavits were said to be defective. In the instant case, assuming Richard K. Muchoki is the 30th Plaintiff, the issue is the adequacy of his verifying affidavit in terms of Order VII Rule I (2) and (3) of the Civil Procedure Rules. That affidavit is not being said to be defective and adequacy here suggests the presence or absence of the required number of verifying affidavit or verifying affidavits. Those case authorities are therefore distinguishable from the instant case which I pointed out was similar to the case of ELIKANA MUKUNDI GATIMU (*supra*) where Mutungi J. held there was no compliance with Order VII Rule 1(2) because one of the two Plaintiffs had not sworn a verifying affidavit. The learned Judge said:

“There should be two verifying affidavits – one by each Plaintiff failing which, - - - there is clear non-compliance with the mandatory provisions of Order 7 rule 1 (2).”

ElKana Mukundi Gatimu was a case where there were two Plaintiffs. With only one of them having sworn and filed his verifying affidavit, the plaintiff could perhaps have been said verified half way. But that was not held to be good enough. In the case before me, it is one Plaintiff, out of 38 Plaintiffs, who has sworn and filed a verifying affidavit. That is a minute fraction mathematically, of the Plaintiffs. And now Mr. Oduk having stated that this is not a representative suit, which indeed it is not, and that each Plaintiff come to the court on his own right, this court recognizes the legal right of parties under Order 1 Rule 1 to join as Plaintiffs and accepts Mr. Oduk's submissions that this is not a representative suit, in terms of Order 1 Rule 8 of the Civil Procedure Rules. At the same time and as a result, this court must expect the Plaintiffs to comply with Order 1 Rule 12 which states in sub rules (1) and (2) as follows:-

“(1) where there are more Plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings, and in like manner, where there are more defendants than one, any or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

2 The authority shall be in writing signed by the party giving it and shall be filed in the case.”

Emphasis in the quoted provisions are mine and I do add that it is important to read those provisions together with Order VII Rule 1 sub rules (2) and (3) of the Civil Procedure Rules which this court also expects the Plaintiffs to comply with.

From what has been brought to my attention during the hearing of this Chamber Summons, the plaint having been verified in the manner it has been done in this suit means that the Plaintiffs have not only failed to comply with order VII Rule 1 (2) but have also failed to comply with order 1 sub rules (1) and (2) of rule 12 of the Civil Procedure Rules.

Sub rule (2) of rule 12 of order 1 is mandatory and therefore in the absence of such written and signed authority filed in this suit, as it is the position now, the 30th Plaintiff's verifying affidavit having been worded in the way it is, done, the Plaintiffs have no legal basis to say that order VII rule 1 (2) suggests a single affidavit and that the 30th Plaintiff's verifying affidavit as filed is sufficient for the purpose of Order VII rule 1(2). There can be a single verifying affidavit only after order I sub rules (1) and (2) of rule 12 as well as order VII Rule 1(2) have been complied with and in addition the said single verifying affidavit, unlike the one filed in this suit, has to be worded in precise terms showing the deponent has been authorized by the other Plaintiffs to swear such affidavit on their behalf. Otherwise each one of the Plaintiffs must personally swear his or her own verifying affidavit to comply with clear provisions of the law.

Although Mr. Oduk submitted that the authority under Order 1 Rule 12 may be obtained at any time after filing suit, and though under rule 11 of Order 1 the court may give the conduct of the suit to such person as it deems proper, there is no evidence that the Plaintiff wanted any such step be taken, and indeed the Plaintiffs did not have to wait for four years or more to do that, and, in any case, they did not have to wait for the Defendant to wake them up through this Chamber Summons dated 17th June, 2005 and filed on 5th July, 2005. The Plaintiffs filed their suit on 17th September 2001. What has happened suggests the Plaintiffs had no intention of providing the authority required.

As stated earlier where I referred to passage from the case of MASEFIELD TRADING (K) LTD "the permutations of the circumstances under which the court might exercise its discretion in favour of the Plaintiff are never closed" and I should add that it is not therefore correct to say once the Plaintiff has failed to file a proper affidavit, his plaint must always be struck out. In that passage a few examples of circumstances in which the court should exercise its discretion in favour of the Plaintiff were given. But from what I have been saying in this application, none of those circumstances apply in this case and I do not find any other applicable circumstances. Here in this case, it is not a question of considering undue delay in seeking rectification of the failure to file a proper verifying affidavit or filling proper verifying affidavits but it is a question of considering a situation where the Plaintiffs have not shown any intention of seeking rectification. What has happened may be an error on the part of the Plaintiff's advocate and no error on the part of the Plaintiffs, but I hold the view that in the circumstances obtaining in this case, the court overlooking such an error is a court encouraging advocates to be, not only careless but also incompetent thereby prejudicing the administration of justice in accordance with the law. The court must exercise "its discretion in light of the totality of circumstances before it."

In light of the totality of circumstances of this case therefore, I do find merits in the Defendant's Chamber Summons dated 16th June, 2000; there having been failure by 37 out of the 38 Plaintiffs, if not all, to comply with Order VII Rule 1 (2) as read with sub rule (3) of the Civil Procedure Rules. Consequently the said Chamber Summons is hereby granted as prayed.

Dated this 23rd day of May, 2008

J.M. KHAMONI

JUDGE

Present

Mr. Chahenza holding brief for Mr. Omogeni for the Applicant

Mr. Oduk for the Respondent

Muturi, Court Clerk.