



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 1606 of 2007

NJOROGE WANJAGI KAROKI PLAINTIFF

VERSUS

JOHN GITHII MUTHUA DEFENDANT

RULING

On a Preliminary Objection

1: Civil Practice and Procedure

1. In the year 2000, the then rules committee on the Civil Procedure code introduced a new rule under order VII rule 1 Civil Procedure Rules that deals with the “particulars to be contained in a plaint”.

2. The new rule was that

a. _____

b. _____

c. _____

d. _____

e. An averment that there is no other suit pending and that there have been no previous proceeding, in any court between the plaintiff and the defendant over the same subject matter.

(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the amendments 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 also not comply with sub-rule (2) of this rule”

3. I believe the purpose of this rule by way of LN 36/00 and later LN 128/01 was to deal with false statements made within the plaint. A party now has to state in their plaint that there is no suit pending prior to the filing of their suit then secondly they must attach to the plaint a verifying affidavit deposed to by the plaintiff.

4. In this case the plaintiff filed a plaint accompanied by a verifying affidavit. The said plaint clarified and stated that there was no other suit pending. The verifying affidavit stated as follows:-

Verifying Affidavit

“I, Njoroge Wanjagi Kariuki of c/o P.O Box 22859 Nairobi, in the Republic of Kenya do hereby make oath and state as follows:-

4.1) That I am the plaintiff herein hence competent to swear this affidavit.

4.2) That I have sued the defendant herein for general damages

4.3) That there is no other suit pending between me and the defendant in this court or any other court in the republic of Kenya

4.4) That what I have stated herein is true within my knowledge, save except where otherwise”.

5) Now, the said verifying affidavit failed to comply with the provisions of order VII Rule 2 Civil Procedure Rules (LN 36/00, LN 128/01). Namely, that the correctness of the averments contained in the plaint be deponed to. Instead, the plaintiff mentioned nothing of the correctness of the plaint. He instead stated that what he has stated in the verifying affidavit (herein) is true and within his knowledge “Save and except where otherwise”.

6. The defendants took up a Preliminary Objection on this point and implied that the court uses its discretion to struck out the suit or otherwise for non compliance of this rule.

II: Preliminary Objection.

7. In the preliminary objection the defendant stated that at paragraph 16 of the defence he had clearly said that the Preliminary Objection would be raised on this point. The plaintiff failed to take any action or response to this.

8. In reply the defendant stated that a replying affidavit was filed. The same was not defective. All that the Preliminary Objection was raising was a delay tactics. It was an after thought. The plaintiff in fact awaits to prosecute an applicant of Chamber Summons 7 February 2007 seeking amendments of the plaint and therefore the said Preliminary Objection be dismissed.

II: Opinion

9. The purpose of the rule in question is to contain the malpractice of litigants and their advocates presenting to court cases that are in itself false and a perversion of justice. Since its introduction if indeed a false or untrue averment is made, then there is a remedy where the litigant would be penalized, which could either be by way of contempt or a remedy not being granted.

10. The possibility of one not deponing to the verifying affidavit was foreseen and as such the rule 3 calls for the discretion of the court to either strike out the plaint or not. In the past this court has dealt with this issue by stating that an affidavit once filed is eviden It cannot be amended. The verifying affidavit herein is most certainly defective. The plaintiff cannot merely state that he can amend the same.

11. I would uphold he Preliminary Objection and struck out the Verifying Affidavit.

12. What now arises is whether the court should strike to the main suit.?

Under rule 3 of Order VII this is at the courts discretion. Being persuaded by the authority of:

Microsoft Corporation

Mitsuni Computer Garage Ltd & Another

Hccc810/01, Ringera, J.

Where a verifying affidavit was struck out but the court used its discretion on relying on the word “may” and ordered that a fresh Verifying Affidavit be filed and served upon the defendant.

13. I accordingly hold that the plaintiff do file and service a fresh Verifying Affidavit within 15 days of to-days date upon the defendant.

14. The costs of this Preliminary Objection be awarded to the defendant.

DATED THIS 5TH DAY OF JUNE 2008 AT NAIROBI.

M.A. ANG’AWA

JUDGE

K. Kibathi instructed by Wachira Ndungu & Co. Advocates for the plaintiff/and Respondent in the Preliminary Objection.

S.N. Nganga of Wanyoike Juma & Co. Advocates for the defendant/and applicant in the Preliminary Objection

[1] The Eastern and Southern African development Bank v African Greenfield’s Ltd & Another

Milimani court Hccc1189/00, Ringera J