



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**Civil Case 153 of 2002**

**M'IMPWI M'IKIUGU ..... PLAINTIFF**

**VERSUS**

**JOSEPH KITHINJI ..... 1<sup>ST</sup> DEFENDANT**

**CATHERINE NCHABIRA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

This ruling relates to a notice of preliminary objection raised by counsel for respondents with regard to the affidavit verifying the plaint. It was submitted that the affidavit which is dated 15<sup>th</sup> February 2002 purports to verifying the contents of a plaint dated 16<sup>th</sup> August 2002. In other words the affidavit was sworn of matters contained in a plaint which was non-existent at the time the affidavit was sworn.

Second point of preliminary objection is that the verifying affidavit is not in compliance with Order VII Rule 1 (2) of the Civil Procedure Rules in that it does not verify the correctness of the averments contained in the plaint.

The objection was opposed by counsel for the plaintiff who submitted that both the plaint and the affidavit are dated 18<sup>th</sup> February 2002. That paragraph 6 of the verifying affidavit is in compliance with Order VII Rule 1(2) of the Civil Procedure Rules.

Being a preliminary objection, the notice must conform to the strictures of raising preliminary objection as enunciated in the case of **Mukisa Biscuit Manufacturing Ltd V. West End Distributors** (1969) E.A. 696. Similarly Order 14 Rule 2 of the Civil Procedure Rules allows the court to consider and decide any question of law before evidence is taken.

Order VII Rule 1 (2) aforesaid was introduced by Legal Notice No. 36 of 2000. It provides:-

***“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.”***

Two issues are raised in this objection. First that the affidavit filed by the plaintiff does not verify the correctness of the averment in the plaint and secondly, that there is no verifying affidavit having been sworn before the plaint.

I will deal with the last aspect, being the most straight forward. The verifying affidavit on record bears the same date as the plaint. Learned counsel for the respondent produced a copy of another verifying affidavit dated 15<sup>th</sup> February 2002. It is the policy of the court that only pleadings and documents on record are the ones to guide the court. I am satisfied that the verifying affidavit in question is dated and

filed on the same date as the plaint as further confirmed by the official receipt. But even if the affidavit was dated before the filing of the suit Order XVIII Rule 9 provides the answer. It states:-

***“9. Unless otherwise directed by the court an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned.”***

Regarding the second point the affidavit avers to matters not suitable for such affidavit. A verifying affidavit in terms of order VII rule 1 (2) ought to depose as to the correctness of the contents of the plaint. Paragraph 6 of the verifying affidavit which is said to comply with those requirements is to the effect that:-

***“6. That what is contained hereinabove is true to the best of my knowledge, belief and understanding.”***

That certainly does not relate to the question of the contents of the plaint and their correctness. To that extent the verifying affidavit is defective and is struck out. The next fundamental question that then arises is what becomes of the plaint. Order VII Rule 1(2) is in mandatory words. That the plaint shall be accompanied by an affidavit. The affidavit has been struck out and the plaint therefore is not accompanied by an affidavit. Learned counsel for the defendant urged the court to strike out the plaint.

The Court of Appeal has correctly observed that there has been no unanimity in the decisions of the High Court (and I dare say also in the Court of Appeal) with regard to the next cause where the court strikes out a verifying affidavit or where the plaint is not altogether verified by one. See **Josephat Kipchirchir Sigilai V. Gotab Sanik Enterprises Ltd & 4 others**, Civil Appeal No. Eld. 98 of 2003. For instance, in **Aritho Igwata V. M’Ikunyua M’Ikandi & Another**, Meru HCCC No. 85 of 2001, Lenaola, J struck out the entire suit for lack of a proper verifying affidavit. In doing so, he relied on two High Court authorities, namely, **Delphis Bank Ltd V. Asudi (K) Ltd & Another**, HCCC No. NAI. 82 of 2003, where Ibrahim, J took the same view and **Joe Owaka Ager V. Julius Aho**, HCC No. NAI 1831 of 2001 where similar position was adopted by Mutungi, J. The Court of Appeal in **Gawo V. Nairobi City Council** (2001) IEA 69 held that the failure to have the plaint accompanied by a verifying affidavit renders the plaint incompetent and that such plaint is for striking out. Sub-rule 3 of Rule 2 provide:-

***“(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.”***(emphasis added).

My position has been and remains that the above provision is not in mandatory language, hence the use of the word “may” and that failure to comply with Order VII Rule 1(2) of the Civil Procedure Rules is a mere irregularity which is curable. See **Jonathan Ngumba Kata V. The AG & Samuel Ritho**, HCCC No. Mld 21 of 2004. By using the word “may” the Rules Committee gave the court the leeway to consider, in the circumstances of each case, whether to strike out the suit or not.

Striking out pleadings is a draconian and extreme measure which may only be resorted to where the court is of the view that the process of the court has been abused.

I held in **Jonathan Ngumbao** case (supra) that where a verifying affidavit has been struck out, the plaint has a life of its own independent of the verifying affidavit. The position has now been put beyond any peradventure by two recent Court of Appeal decisions, **Josephat Kipchirchir** (supra) decided in March 2007 and **Research International E.A Ltd V. Julius Arisi & 213 others**, Civil Appeal No. NAI 321 of 2003 (decided in April 2007) that where the verifying affidavit has been struck out or where there is total failure to file a verifying affidavit, depending on the circumstances of each case, the court has a discretion. It has a discretion of instead of striking out the plaint it can make any other appropriate orders such giving the plaintiff another opportunity to comply with the rule. That, only when the court is persuaded that the plaintiff is abusing the court process or his claim is frivolous or vexatious or scandalous or does not lie, that it will strike out a pleading under Order VI Rule 13 of the Civil Procedure Rules.

I come to the conclusion that the plaint raises triable issues and that the plaintiff deserves a chance to comply with Order VII Rule 1(2). In the result it is ordered that the plaintiff shall swear a fresh verifying affidavit and file the same within seven (7) days failing which the suit shall stand dismissed without further orders.

I award costs to the defendants.

Dated and delivered at Meru this 3<sup>rd</sup> day of June 2008.

**W. OUKO**

**JUDGE**