



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

Civil Case 1520 of 2001

HOUSING FINANCE KENYA LTD.....PLAINTIFF

VERSUS

JOHN A. O MASESE t/a MASESE & CO. ADVOCATES.....DEFENDANT

RULING

Regarding the whole suit, the Defendant has raised an objection in limine that :

1. Suit offends provisions of section 4 Limitations of Actions Act Cap. 22. No leave was obtained for extension of time Section 26 & 28 refers.
2. Plaint not accompanied by verifying affidavit. The defective affidavit does not comply with Civil Procedure Vii Rule 1, 2 & 3 and is flawed under Section 34 & 35 of Act 16 Laws of Kenya.
3. Verifying affidavit does not disclose place of abode of deponent and has not shown authority to swear sealed with company seal and has not identified the person authorizing him to swear and sources of his facts.

The Applicant/Defendant prays that the purported verifying affidavit should be struck off, and totally be expunged from the record together with the plaint filed and dated 03.10.2001.

An examination of what purports to be a verifying affidavit sworn on 03.10.2001 before Commissioner of Oaths it is obvious the identity of drawer is not disclosed as required under Section 34 & 35 of Advocates Act Cap. 16.

4. The true abode of the deponent is not disclosed only postal address is shown.

However, the deponent has shown that he is a legal officer of the plaintiff company. Company authority sealed with company seal not exhibited. Paragraph 3 is confirmed by clause 1. Legal Officer has information of her own knowledge.

Regarding objection numbered one Section 4 of the Limitations Act it is set out therein that actions founded on contract, to enforce a recognizance enforce an award and other actions written there may not be brought after the end of six years from the date on which the cause of action arose. Paragraph 9 shows that the mistake was discovered January, 2001. The Time expired on 26.02.2001

However, the Plaintiff states that there was mistake of fact in drawing the payment and in payment of

money and the said mistake was not discovered until the month of January 2001. And this suit was filed on 03.10.2001. If the Defendant is correct then, the suit was out of time for 8 months.

The provisions of section 26 (c), provide in case of mistake, the period of limitation does not begin until the Plaintiff has discovered the mistake or could with reasonable diligence have discovered it.

The claim here is to recover the money paid under the mistake.

No application is made to extend time. However section 26 of the Act does not appear to require any application to be made. The plaintiff has explained in the plaint.

This issue can only be decided on evidence at the trial. On the issue of verifying affidavit, the Defendant has cited Section 34 & 35 of Advocates Act that the requirement to disclose the drawer Order 3 Rule 2 (c) provides that in cases of corporations recognized agents are officers of that corporation duly authorized under the Corporate Seal.

I have perused the Ruling of Hon. Judge Okwengu in *HCC No. 307 of 2007 Mohan Meakin Ltd. Vs Mohan Meakin (Kenya) and another*,

And I am in agreement with her views on the issue of the validity of verifying affidavit. It is the same case here where similar objections are taken. However, I would exercise discretion implied under Order 7 Rule 3, strike only the offending affidavit.

In the circumstances, I do not address the ground No. 3, 4, 5, 6 and 7.

Regarding ground No. 1, I am of the view that the Plaintiff has clearly indicated the time mistaken was discovered, in which case the Limitation of Actions Act does extend time under Section 26 thereof. This is a matter that is best dealt with at the hearing with evidence produced by witnesses.

The upshot is therefore that this suit is not time barred under the limitation of Actions Act Cap 22. However, it is my finding that the verifying affidavit is fatally defective and the same is struck off. In exercise of my discretion, I do not strike out the plaint but order that a correct verifying affidavit be filed within the next 14 days of today.

The costs of this Preliminary Objection shall be on the cause.

It is so ordered.

DATED this 15th day of October 2008.

JOYCE N. KHAMINWA

JUDGE