



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL SUIT 64 OF 2004**

**GEOFFREY K. MATHIU & 10 OTHERS ..... PLAINTIFFS**

**VERSUS**

**CLERK COUNTY COUNCIL MERU CENTRAL ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY COUNCIL MERU CENTRAL ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

The hearing of the main suit in this case was halted when the plaintiffs made the instant application in which they seek leave to file a verifying affidavit to the amended plaint. That action has been prompted by the discovery that the amended plaint is not verified. Instead of verifying affidavit the original plaint is accompanied by a supporting affidavit which purports to verify the contents of the plaint. The amended plaint filed with the court's leave on 23<sup>rd</sup> November 2005 is verified by an affidavit sworn by the first plaintiff only on his own behalf and on behalf of the rest of the plaintiffs.

The instant application has also been prompted by the recent decision of the Court of Appeal in **Josephat Kipchichir Sigilai V. Gatob Sanik Enterprises Ltd** & 4 others, Civil Appeal No. 98 of 2003 (U.R.). The defendant/respondent's counsel has not replied to the application but responded from the bar that in terms of Order 7 rule 1(2) of the Civil Procedure Rules, every plaintiff must file a verifying affidavit and failure in this case to file verifying affidavits by all the plaintiffs was fatal to the entire suit. He cited the case of **Josephat Kipchirchir** (supra). But learned counsel for the plaintiffs/applicants argued that failure to file verifying affidavit for each plaintiff did not call for automatic striking out of the suit.

Order VII rule 1(2) of the Civil Procedure Rules has been the subject of numerous High Court and Court of Appeal decisions prior to the decision in **Josephat Kipchirchir** (supra). In that case the Court of Appeal explained the rationale of requiring a verifying affidavit to accompany the plaint in the following words:-

***“An affidavit, as a general rule, is evidence. It would appear to us that the affidavit is intended to make the plaintiff own every averment in the plaint. It was intended to change the averments in the plaint from being mere averments or pleadings into evidence as is true in other modes of instituting suits and to pin down the plaintiff to them and thus make them part of evidence in support of his case; and possibly to limit room for manourver.”***

The rule is worded in mandatory terms. It, therefore, follows that a plaint filled without or with a defective verifying affidavit has no legs to stand on. While it is generally agreed that where a plaint is accompanied by a defective verifying affidavit, that affidavit is for striking out, see **Geoffrey Orai Obura V. Martha Karambu Koome**, Civil Appeal No. 146 of 2000, there is no unanimity on what should happen to the plaint once the affidavit verifying it has been struck out. For example in **Gawo V. Nairobi City Council** (2001) IEA 60, Rawal, J struck out the suit in which the plaint was not accompanied by a verifying affidavit.

I hold the view which I expressed in **Jane Manyara & 2 others V. Mapenzi Resort Ltd & 4 others** HCCC No. Malindi 59 of 2005, that a verifying affidavit has a separate life independent of the plaint it verifies. It does not go to the root of the dispute which is contained in the plaint. That failure to file a proper and regular verifying affidavit or at all can be rectified with the court's leave.

See also **Microsoft Corporation V. Mitsumi Computer Garage Ltd & Another**, HCCC Nai. 810 of 2001. Furthermore, Order VII rule 1(3) does not impose a compulsory duty on the court to strike out any plaint not accompanied by a verifying affidavit. It simply provides that:-

***“(3) The court may of its own motion or an application of the defendant order to be struck out any plaint which does not comply with sub rule (2) of this rule.”*** (emphasis mine).

That is why the court in **Josephat Kipchirchir** concluded that:-

***“We think an omission to fully comply with the provision is a mere irregularity which, except in very clear cases, may be cured. We agree..... that striking out a suit is a draconian and extreme measure which should only be resorted to in the clearest of cases, where the court, after considering all facts and circumstances of the case comes to the inescapable conclusion that the plaintiff is abusing the court process or his claim is frivolous or vexatious or scandalous or does not lie.”***

The plaintiffs' suit cannot be said to be any of the above. There will be no prejudice to the defendant/respondent apart from the brief inconvenience caused to him by the halting of the hearing. That can be sorted out by an award of costs. The application, in the result, is allowed and the plaintiff/applicant directed to file, within seven (7) days from the date of this order, verifying affidavits complying with Order VII rule 1(2) of the Civil Procedure Rules. I award costs of this application to the defendant/respondents.

Dated and delivered at Meru this 13<sup>th</sup> day of November 2008.

**W. OUKO**

**JUDGE**