



**REPUBLIC OF KENYA
HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 1361 of 2005

NICHOLAS K. KOSITANY PLAINTIFF

VERSUS

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION.....DEFENDANT

RULING

By a plaint dated 10.11.05 the firm of Kandie Kimutai Advocates on behalf of the Plaintiff filed this suit against the Defendant. The plaint was accompanied by a verifying affidavit dated 10-11-05 in which the deponent NICHOLAS K. KOSITANY made oath and stated as follows:

- (1) That I am the Plaintiff herein and thus competent to make this affidavit.**
- (2) That I have read and understood the statements and averments contained in the plaint herein and wish to state that the same are true correct and in accordance with my instructions to the advocate on record**
- (3) That I make this affidavit to confirm and verify the contents of the plaint herein**
- (4) That what is deponed to herein is true and within my personal knowledge.**

On 10-4-06 the Defendant filed the application under consideration and expressed to be brought under Section 3A of the Civil Procedure Act and Order VII Rule 1, 2 and 3 of the Civil Procedure Rules for orders that the plaint herein be struck out. The application is based on the ground that the Plaintiff has not complied with the provisions of Order VII R. 1(2); that the verifying affidavit attached to the plaint herein relates to another suit to wit Nairobi Milimani Commercial Courts HCCC No. 1361 of 2005, Nicholas K. Kositany verses Kenatco Taxis Company Limited; that the verifying affidavit should be struck out and that it is only fair and just that the plaint be thereby struck out in accordance with Order VII Rule 1(3). Mr. Mulwa for the Defendant submitted that the verifying affidavit annexed to the plaint relates to a different suit filed in a different Court Milimani Commercial Court where the Plaintiff has sued KENATCO TAXIS. This is conceded by Mr. Sitonik Counsel for the Plaintiff but submits that the defect is curable under Order XVIII of the Civil Procedure Rules and urged the Court to disallow the application and sought leave to regularize the error.

A close scrutiny of the verifying affidavit the same and not contain an averment that there is no other suit pending and that there have been no previous proceedings in any Court between the plaint and the Defendant over the same subject matter as required under Order VII Rule 1 (2) of the Civil Procedure

Rules. Order VII Rule 1(3) of the Civil Procedure Rules reads: -

“1(3) The Court may on its own motion or on application of the Defendant order to be struck out any plaint which does not comply with Sub-Rule 2 of this rule.”

The only defect here is that the format of the verifying affidavit shows that the suit was filed at Milimani Commercial Courts instead of at the Central Registry. Otherwise the parties and the case number are correct. This is conceded by the Plaintiff who applies for leave regularize the error. This is a genuine error which is curable under the rules.

For the above reasons I strike out the verifying affidavit and Mr. Sitonik having applied for leave to formalize the same I exercise my discretion as implied under Order 7 Rule 3 in refusing to strike out the plaint and instead order that the verifying affidavit be filed and served within 10 days of this order. Failure to file the verifying affidavit within the stipulated time the plaint to stand struck out.

Costs of this application be paid to the Defendant in any event.

DATED at Nairobi this 8th day of February 2007.

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J.L.A. OSIEMO

JUDGE