



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

Civil Case 85 of 2001

ARITHO IGWETA.....PLAINTIFF

V E R S U S

M'IKUNYUA M'IKANDI.....1ST DEFENDANT

M'MWITHIGA M'MUKIRI.....2ND DEFENDANT

RULING ON A PRELIMINARY OBJECTION

1. The objection by Ms Mwangi to the verifying Affidavit annexed to the Complaint filed on 26.4.2001 is that the same is not a verifying affidavit within the meaning of Order VII Rule 2 of the Civil Procedure Rules and the same being in breach of those mandatory provisions must be struck off. Further, that once the affidavit has been struck off, then the Complaint would be a bare document without props and legal clothing and must also be struck off.

2. In opposition, Mr. Kirima argues that the Affidavit under attack is proper and verifies the contents of the complaint and that in any event, the matters raised were previously heard and determined and the objection is therefore res-judicata.

3. I have read the authorities cited i.e. Joe Owaka Ager vs Julius Ahoi HCCC 1831/2001 (Nai) and Delphis Bank Ltd vs Asudi K. Limited and Another HCCC 82/2003 (Nairobi) and I have noted the persuasive and lucid holdings of my brothers Ibrahim J and Mutungi J. respectively. I will advert to them shortly in any event.

4. The Verifying Affidavit sworn on 26.4.2001 if set out in full reads as follow:-

“VERIFYING AFFIDAVIT

1. That I am the Plaintiff in this case.

2. That I am the proprietor of piece of land NYAKI/MUNITHU/522 since 1964.
3. That I was issued with title deed since 1971.
4. That after gathering and demarcation the boundaries were shown to me at the same time and there was no objection from any quarters.
5. That at no time has the 1st defendant been my neighbour but the 2nd defendant has been my neighbour and he owns NYAKI/MUNITHU/860.
6. That what is deponed herein above is true to the best of my knowledge belief and understanding”.

Against the above must be read the mandatory provisions of Order VII Rule 2 of the Civil Procedure Rules which provides as follows:

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

7. The necessity for a verifying Affidavit according to the Rule is to ensure without fail, [hence the word “shall”] that the Plaintiff by Affidavit “verifies” the correctness of the averments contained in the plaint. The word “verify” has been defined in Collins Concise Dictionary 1999 edition to mean “to confirm” or “to prove to be true”.

8. The Affidavit reproduced above does not by its language, “confirm” or “prove to be true” the “correctness of the averments contained in the plaint” but instead sets out the Plaintiff’s case and is akin to a supporting Affidavit as envisaged by say Order L Rule 7 of the Civil Procedure Rules or any general Affidavit which is filed pursuant to the provisions of Order XVIII of the Civil Procedure Rules. It is not a verifying Affidavit as I have explained above.

9. I heard Mr. Kirima to say that even if the Affidavit is not a verifying Affidavit as I have found Order 6 Rule 12 can apply to save it from the sword of striking out. I do not think so and even if he was right, the more relevant provision would have been Order XVIII Rule 7 which provides as follows:

“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof”.

10. The question is whether the anomaly is a matter of form. Regrettably, I do not think so. Order VII Rule 2 is worded so clearly and in mandatory terms that parties must abide by it. I have said above that a verifying Affidavit in that Rule has a special purpose and is not to be otherwise framed as it was an evidential Affidavit in terms of other Rules that I have cited above.

11. Since there is therefore no verifying Affidavit on record, what purports to be a verifying Affidavit and which I have reproduced above must be struck off and it is so ordered.

12. Once there is no verifying Affidavit and where a party has not met the expectations of Order VII Rule 2, then Order VIII rule 3 automatically comes into operation. It provides as follows:-

“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”.

Ibrahim J. in the Delphis Bank Case (supra) had no hesitation in stating as follows:

“Once a verifying Affidavit has been struck out and the Defendant applies to have the plaint also struck out then the court must strike out the Plaint.”

13. Mutungi J. in similar terms held in the Joe Owaka Ager case that

“.....Once the verifying Affidavit is struck out the plaint is naked and equally incurably defective and must also be struck out in terms of sub-rule (3) of rule 1 of Order 7 of the Civil Procedure Rules; as null and void ; and in law there is no known cure for nullity. The plaint is only fit for the dustbin.”

14. Nothing more can be said as I wholly agree that the plaint in this suit cannot be saved for all the above reasons. It is hereby struck off.

15. The preliminary Objection is upheld and the whole suit is struck off with costs to the Defendant.

16. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 7TH .DAY OF FEBRUARY 2007 AT MERU.

ISAAC LENAOLA

JUDGE

In the presence of

Mr. Kirima Advocate for the Plaintiff

Mr. C. Kariuki Advocate for the Defendant

ISAAC LENAOLA

JUDGE