



**REPUBLIC OF KENYA**

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

**HCCC 179 OF 2001**

**MERCY KANYIRI MAKATHIMO.....PLAINTIFF/RESPONDENT**

**V E R S U S**

**FRANCIS MBURUGU MAKATHIMO.....DEFENDANT/APPLICANT**

**RULING**

1. The Application dated 7.7.2004 is premised on Order VII rule 1(3) and seeks orders that the Plaint be struck out because the Plaintiff had “filed a false verifying Affidavit.” An order as to costs is also sought. The issue in contention is fairly straightforward and it is this;
2. In the Verifying Affidavit accompanying the plaint and sworn on 9.10.2001 Mercy Kanyiri Makathimo depones at paragraph 2 thereof that what is averred “**paragraph 1-10 of the plaint is true to the best of [her] knowledge.**” At paragraph 10 of the Plaint she avers that “**there is no other suit pending nor has there been previous proceedings in any court between the parties herein over the same subject matter.**”
3. The Applicant now argues that in fact there has been a previous suit between the parties viz. H.C.C.C. 66 of 1993 (Meru) and in respect of the same issues and therefore since the Verifying Affidavit is false the plaint ought to be struck off. Reliance is placed on the decision of Tunya J. in Kitur and Another vs Standard Chartered Bank and 2 Others (No.2) 2002 I KLR 640 where the learned Judge held as follows:-  
**“The averments in the Plaint and in the Verifying Affidavit to the effect that there have been no proceedings between the parties were false and in contravention of the rules. A false affidavit is a non affidavit and thus even on a matter of technicalities, I do strike out the Verifying Affidavit [and] the plaint is therefore untenable”.**
4. Further reliance is placed on the decision in James Francis Kariuki and another vs United Insurance Co. Ltd; HCCC 1450/2000 (Milimani) where Onyango Otieno J. (as he then was) held that where a verifying Affidavit was defective because it was sworn by a partner of the Commissioner for oaths and had not stated the place where it was sworn, the same ought to be struck out and with that holding the suit had to be struck out as well.
5. The Respondent admits that HCCC 66/93 was indeed filed and the parties were the same but the land in issue in that case was Ntima/Igoki/253 and 260 while in the present suit, the land in dispute is Ntima/Igoki/5735. That therefore the Verifying Affidavit is not false and the suit should not be struck out.

6. The requirement that a Plaintiff shall contain an averment that **“there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter”** was inserted into Order VII rule 1 of the Civil Procedure Rules by legal Notice No. 36/2000. My understanding of this amendment was that it was necessary to stem the practice where parties would roam the country filing suit after suit over the same dispute thus clogging the court system and vexing the opposing parties. To tie parties to the averments in the Plaintiff including the above, Rules 1(2) and 3 of Order VII were inserted by the same legal notice and for avoidance of doubt they provide as follows:

**“Rule 1(2) - The plaintiff shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaintiff.**

Rule 1(3) - The court may of its own motion or on the application of the defendant order to be struck out any plaintiff which does not comply with sub rule (2) of this rule”.

7. In the instant case, it is admitted that the parties had “previous proceedings” in this same court namely HCCC 66/93. The question is was it on the “same subject matter?” It is admitted that it is so because in HCCC 66/93, the subject matter was land parcels numbers Ntima/Igoki/253 and 260 and in this suit land parcel number Ntima/Igoki/5720. The connection is found at paragraphs 5 and 6 of the Plaintiff whereby the Plaintiff avers that;

“5. The defendant, being the registered proprietor of land title No. Ntima/Igoki/253, which had been given to him by the deceased, on the 17.11.1998 caused the said pieces of land, namely title No. Ntima/Igoki/253 and Ntima/Igoki/260 to be combined, resulting in the new land title No. Ntima/Igoki/5720.

6. The defendant is now the registered proprietor of land title No. Ntima/Igoki/5735 measuring 1.79 hectares, which is a subdivision of land title No. Ntima/Igoki/5720”

With these averments in black and white, it follows that the Plaintiff has not complied with Order VII rule 2 in that the Verifying Affidavit has not complied with Order VII rule 1(e) and that being the case and since the Defendant has applied for striking out, then Order VII Rule 1(3) must be invoked as I hereby do. I would also agree with both Tunya J. in Kitur (supra) and Onyango Otieno J. (as he then was) in James Francis Kariuki (supra) that a defective verifying affidavit for whatever reason must be struck out and once it is struck out the plaintiff is standing on no legs and as it collapses must also be struck out as neither has any probative value (see also Ringera J. in Richard Karimi Kinoti t/a Happy Enterprises vs Naomi K. Githaka t/a Wagatumba Enterprises, HCCC 2176/2000 (Milimani)

I would only add one more thing; non compliance with Order VII Rule 1(2) includes in my view, a false averment because then the “correctness” of any averment is suspect when a false averment is made and I wholly adopt the words of Tunya J. above in this regard.

8. The upshot of all this is that the Application dated 7.7.2004 is clearly merited, is allowed and the suit herein is struck with costs to the Defendant/Applicant.

9. Orders accordingly.

Dated, signed and delivered this 26<sup>TH</sup> day of April 2007

**ISAAC LENAOLA**

**JUDGE**

**IN PRESENCE OF**

Mr. Mwanzia Advocate for the plaintiff/Respondent

Mr. B. Kariuki holding brief for Mr. Kioga Advocate for the Defendant/Applicant

**ISAAC LENAOLA**

**JUDGE**