REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

Civil Suit 117 of 2000

PETER KIPYEGON KIRUI...PLAINTIFF

VERSUS

AGRICULTURAL DEV. CO-OPERATION)

JOHNSTONE MISOI)

ATTORNEY GENERAL)...............................DEFENDANTS

R U L I N G.

The application before me was brought by the plaintiff, pursuant to the provisions of Order 50 rule 1 of the Civil Procedure rules, as read together with sections 3 and 3A of the Civil Procedure Act.

Through this application, the plaintiff hopes to obtain leave of the court to file

"A fresh and proper verifying affidavit in place of the one sworn on 24/8/2000."

It is the plaintiff's case that the original verifying affidavit which was filed with the plaint, on 24th August, 2000, contained an unintentional mistake. The said mistake was attributed to the advocate for the plaintiff, and the plaintiff says that it should not therefore be visited upon him, as he considers himself to be an innocent client.

The mistake in question is to be found in the fact that the jurat was on its own page.

The plaintiff concedes that when the jurat on an affidavit was on its own page, the said affidavit was rendered defective, and could not therefore stand.

It was in those circumstances that the plaintiff attributes the error to his advocate.

The application is supported by an affidavit sworn by Mr. Alfred K. Chepkwony, an advocate of the High Court of Kenya.

Principally, Mr. Chepkwony owns up to having made the mistake, in having had the jurat set out on its own page. He says that the mistake was due to an oversight on his part, and thus it was unintentional.

That being the position, as for as the plaintiff was concerned, if he was given leave to file a compliant

verifying affidavit, the defendant would not be prejudiced at all.

Furthermore, the plaintiff expressed the view that it would be in the interests of justice to allow him file a proper verifying affidavit, so that thereafter, the matters in issue could be determined on merit.

In support of the application, the plaintiff cited the following three authorities, for the proposition that the court had the discretion to determine whether or not to allow a plaintiff to file a verifying affidavit which would replace one that was defective:

(i) CHRISTOPHER MICHAEL STRONG VS. MWANGI MWANIKI GITONGA, ELDORET HCCC NO. 259 OF 2000 (unreported);

(ii) JOVENNA EAST AFRICA LTD VS. SYLVESTER ONYANGO & 4 OTHERS, MILIMANI, HCCC NO. 1086 OF 2002.

AND

(iii) MICROSOFT CORPORATION VS. MITSUMI COMPUTER GARAGE (2001) 2.E.A. 460.

In the three above-cited authorities, the court did allow the plaintiff to file a fresh verifying affidavit, to replace those that were defective.

The defendant opposed the application, firstly because it was said to be improperly before the court.

The foundation for that submission was that plaints are dealt with under the provisions of Order 7 of the Civil Procedure Rules. As rule 10 of Order 7 provides that applications under that Order would be by way of Chamber Summons, the defendant holds the view that it was not therefore available to the plaintiff to invoke the provisions of sections 3 and 3A of the Civil Procedure Act.

The court was asked to strike out the application on the grounds that it was defective, for having invoked sections 3 and 3A.

To support its position the 1st defendant cited **TAPARU VS. ROITEI (1968) E.A. 618**, wherein it was held by the Hon. Trevelyan J. that:

"A court's inherent jurisdiction should not be invoked where there is specific statutory provision which would meet the necessities of the case."

That holding was made in a case in which there had been lodged an appeal, to the High Court, from a judgment of a magistrate of the third class.

In the light of the provisions of Section 12 (1) of the Magistrate's Court Act 1967, the learned judge observed that appeals from judgments of magistrates of the third class lay to a magistrate of the first class. Therefore, he held that it was unacceptable for the High Court to say that notwithstanding that express statutory provisions, the High Court had inherent jurisdiction to hear appeals from the decisions of a magistrate of the third class.

Whilst in that case the learned judge held that section 12 (1) of the Magistrate's Court Act 1967 spelt out the court to which an appeal from the Magistrate's court of the third class would be lodged, the defendant herein did not specify any particular legal provision as being available to address the kind of issue which the plaintiff wishes to have addressed. Instead, the 1st defendant basically pointed out that plaints are dealt with in Order 7.

That, of course, is accurate. However, there is no specific rule under Order 7 of the Civil Procedure Rules which provides for what should or should not happen if a verifying affidavit was defective.

Had there been a specific rule under Order 7, for dealing with defective affidavits, I would have accepted the 1st defendant's contention that the application should have been brought by way of summons in chambers.

The 1st defendant did cite the case of **MUKANGU SUGAR INVESTMENT CO. LTD. VS. KANTILAL NYACHAND MALDE, KITALE HCCC NO. 69 OF 2005**, as authority to support its contention that the application should be struck off, on the grounds that it was improperly before the court.

In that case, the Hon. Karanja J. struck out an application which had been brought by way of chamber summons, instead of by Notice of Motion. In arriving at that decision, the learned judge held that courts should be careful not to render the rules of procedure irrelevant, especially when applications were filed by qualified counsel.

Whilst appreciating that rules of procedure ought not to be elevated to a fetish, the learned judge nonetheless did hold that;

"***Rules of procedure were not made in vain and counsel must be encouraged to observe them as much as possible***."

On my part, I respectfully agree with those view expressed by my Honourable sister. And in so doing, I also note her following findings;

"***Applications under section 3A and 63 (e) of the Civil Procedure Act should be brought to court by way of motion and not by way of chamber summons."***

Given that this application was brought pursuant to section 3A of the Civil Procedure Act, it would thus follow that it was properly brought by way of Notice of Motion. Accordingly, I hold that the application was not improperly before the court, as had been asserted by the 1st defendant.

Another issue raised by the 1st defendant was that it would be greatly prejudiced, if the application was allowed.

The contention by the said defendant was that it had filed a notice of a preliminary objection to the suit, founded upon the defective verifying affidavit. Therefore, when the plaintiff brought this application, one year later, the 1st defendant perceives that action as intended to defeat the preliminary objection.

In the circumstances, the 1st defendant feels that the grant of the application would prejudice it, by depriving it of a defence.

Furthermore, the 1st defendant feels that the plaintiff is not entitled to the relief sought because he had not explained why the jurat was on its own page. The reason advanced for that submission is that it was not enough for the plaintiff's advocate to merely say that that was a mistake.

As far as the 1st defendant was concerned, the plaintiff's advocate should have stated either that he was not aware of the rule or alternatively that he had ignored the said rule.

In support of that submission, Mr. Kiarie, advocate for the 1st defendant relied on the decision of the Hon. Karanja J., in **MICHAEL NGANIA VS. ELPHAS MUNYOLIMO, KITALE HCCC NO. 65 OF 2003**. In that case, the advocates for the appellant had failed to include a certified decree in the memorandum of appeal. They then stated that the omission was occasioned by a mistake on the part of the advocates for the appellant. For that reason, the appellant asked the court not to visit the mistake of

their advocate on the said appellant.

The court held as follows:-

"***The advocates should have filed the*** *affidavit to explain why that very vital document was missing from the memorandum of appeal. This is the only way to decide on whether this was a genuine inadvertent mistake, or sheer laxity or negligence on the part of counsel. If it was a genuine and inadvertent mistake, then the court would have been swayed to rule in favour of the applicant. If on the other hand the omission was caused by laxity or negligence on the part of the advocates, then the court could be less sympathetic to the applicant herein. I wish to draw the distinction herein if a mistake is inadvertent, then in that case, his omission should not be visited on his client. If on the other hand, the mistake was caused by counsel's laxity, negligence or sheer carelessness, then the court cannot condone such conduct by indulging such an advocate."*

It is instructive to note that in that case, the affidavit in support of the application had been sworn by the applicant.

In contrast, the affidavit herein was sworn by the advocate who had caused the defective affidavit to be filed in court.

In any event, I find myself, respectfully, unable to accept the concluding remarks above-cited. I say so because even if an advocate had erred due to laxity, negligence or sheer laxity, the court would not be giving an indulgence to such an advocate, if it should decide not to visit such a mistake on the client. In my considered view, there cannot be an absolute bar to the court exercising its discretion favourably simply because the advocate acting for a party had been lax, negligent or careless when he made a mistake.

To rule otherwise would, in my view, amount to visiting the mistake of the advocate on his innocent client. I believe that that would be improper, unless perhaps the party itself is shown to have been involved in the making of the mistake.

Finally, the 1st defendant submitted that the plaintiff would end up with two verifying affidavits, if this application was granted. The 1st defendant expressed the view that the plaintiff had not sought the striking out of the offending verifying affidavit.

I am afraid that the 1st defendant seems not to have noted that the order sought by the plaintiff was for leave to file a fresh affidavit, in place of the one sworn on 28th August, 2000. Obviously, if one affidavit was being sworn "in place of" the earlier one, that implies that the said earlier one would no longer be in place.

The only other issue that I need to address my mind to is in relation to the possible prejudice which the 1st defendant may suffer if the plaintiff was granted leave to file a verifying affidavit which was compliant.

In the case of **MICROSOFT CORPORATION VS. MITSUMI COMPUTER GARAGE LTD (2001) 2 E.A. 460 at page 467**, the Hon. Ringera J. (as he then was) held that the verifying affidavit was defective. He therefore struck it out but declined to strike out the plaint. His explanation for that decision was as follows;

"***Deviations from or lapses in form and procedure which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected.***

If a discretion can be exercised in the case *of an omission of the verifying affidavit, a fortiori it is exercisable in the event of such an affidavit being incompetent."*

I share that same view, and find that although the verifying affidavit sworn on 24th August, 2000 was defective, it can be replaced by another verifying affidavit, which was compliant.

I am conscious of the fact that by allowing this application the court would have pulled the rug from under the 1st defendant's preliminary objection. In that regard, I could only re-echo the above-cited words of the Hon. Ringera J. In other words, there was never any assurance that the defence, if any, founded on non-compliance with Order 7 rule 1 (2) of the Civil Procedure Rules would have any impact on the plaint.

And now that the 1st defendant filed the Notice of preliminary objection on 25th June, 2004, but did not seek to prosecute it, I do not think that it would serve any useful purpose in trying to second-guess what the outcome would have been, had the preliminary objection been actively pursued.

In the result, the application dated 2nd September, 2005 is allowed. The plaintiff is to file and serve a compliant verifying affidavit within **SEVEN (7) DAYS** from today. However, the costs of the application shall be borne by the plaintiff's advocates in any event. The said advocates will also meet the costs of the preliminary objection dated 24th June, 2004.

It is so ordered.

Dated and Delivered in Court at Kitale this 7th day of May, 2007.

FRED A. OCHIENG.

JUDGE.