



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 219 of 2007

NAPHUTALY KIBUTU KANYORO

JOSHUA AYIEKO MBAGO

ESAU MUHANJI IMONJE (Suing on their own behalf and on behalf of 300 former

employees of Telkom Kenya)PLAINTIFFS

VERSUS

TELKOM KENYA LIMITED DEFENDANT

RULING

When the Chamber Summons application dated 2nd March, 2007 came up for hearing before this Court, Counsel for the Respondent, Mr. S. Ngugi raised a preliminary objection, arguing that the Verifying Affidavits, and other Supporting Affidavits filed herein were defective, and ought to be struck out.

More specifically, Counsel argued that in both cases, HCCC 219 of 2007 and 216 of 2007, which have now been consolidated, the Verifying Affidavits were sworn **before** the Plaint came into existence, and relying on the decision of Ibrahim, J in **Delphis Bank v. Asudi (K) Ltd & Ano** (HCCC 82 of 2003, Milimani), he submitted that the suits ought to be struck out.

Mr. Ngugi submitted further that the supporting and further affidavits in both the cases were defective in that there was no statement deponing to the truth of the statements, and no oath to show if statements were founded on belief, information or knowledge of the deponent. He relied on the cases of **Noormohamed Janmohamed v. Kassamali Virji Madhani** Civil Appeal No. 42 of 1951 and **Caspair Ltd v. Harry Gandy** Civil Appeal No. 31 of 1962.

Mr. Kaluma, Counsel for the Plaintiffs/Applicants acknowledged the defects outlined by Counsel for the Respondent, but argued that the defects were of “form”, not substance, that the defects did not go to the jurisdiction of the Court, that the defects were curable, and would cause no prejudice that could not be rectified by an Order of costs. He relied on this Court’s decision in **James Waithumbi Kimotho & 2 Others v. Robert Mwangi Kiberenge & Anor** Civil Appeal No. 363 of 2003, **Masterfield Trading (K) Limited v. Francis M. Kibui** Civil Case No. 1796 of 2000 and **Saanun v. Commissioner of Lands & 5 Others** [2002] 2 KLR.

There are essentially two issues here – first, whether the Verifying Affidavits are defective, and if so,

whether they should be struck out. Second, whether the omission to declare that the statements are true and made on oath renders the Affidavits incurably defective.

With regard to the Verifying Affidavits, clearly these were sworn **before** the **Plaint** came into existence. There is no dispute about that. This is what I said about that event in the case of **James Waithumbi Kimotho** (supra) which applies with equal force here, and which I adopt fully in this case:

“Mr. Machira, Counsel for the Appellants, argued that the Verifying Affidavits here, sworn some 2 months before the **Plaints** were signed, constituted an irregularity of form which could be cured by Order 18 Rule 7 which states as follows:

“Order 18 Rule 7: 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”.

He cited my own decision in **Agip (K) Ltd vs Jimmy Komo** (Nairobi HCCC No. 1738 of 2000) in which **I had held that “irregularities as to form which do not go to jurisdiction and which do not cause prejudice to the other side are not sufficient to invalidate proceedings before the Court.”** In that case the jurat in the accompanying affidavit did not indicate **where** it had been sworn as required by Section 5 of the Oaths and Statutory Declarations Act (Cap 15). **In finding that this was an irregularity of form, I had applied the provisions of Order 18 Rule 7 (supra) to cure the defect.**

On the other hand, Mr. Nyangicha, Counsel for the Respondents, submitted that the swearing of the affidavit before the **Plaint** had been prepared and signed was not an irregularity of form, but a substantive defect. I agree with him. The facts in this case do not constitute an irregularity of form such as a misdescription of the parties, or title or the indication of place in the jurat. The defect here is substantive. Let us examine the provisions of Order 7 Rule 1 (2) which states as follows:

1 (2) “The **plaint** shall be accompanied by an affidavit sworn by the **Plaintiff** verifying the correctness of the averments contained in the **plaint**.”

This is a relatively new rule which was added to the Civil Procedure Rules in the year 2001 by L.N. 128 of 2001. **Its purpose was to require of litigants to swear to the correctness of the averments in the **Plaint**, and take responsibility for the statements made in the **Plaint**. In other words, what is to be verified is the correctness of the averments in the **Plaint** and not necessarily the truth.**

Order 7 Rule 1 (2) provides in no uncertain terms that the **Plaint** **shall** be accompanied by an Affidavit by the **Plaintiff** verifying the correctness of the averments. This necessarily means that there is a **Plaint** in existence. One cannot verify the correctness of a non-existent **Plaint**. Therefore, the affidavits sworn on 27th May, 2002 could not have possibly “verified the correctness of the averments” in “future” **Plaints**, in this case in **Plaints** dated 17th July 2002. At the time the depositions were made, these were non-existent **Plaints**, and therefore there was nothing to verify at that time.

Accordingly, I must find, as I hereby do, that the three affidavits sworn by the **Plaintiffs on 27th May, 2002 purporting to verify the **Plaints** dated 17th July, 2002, in fact verified nothing as the **Plaints** were not in existence. All the three Verifying Affidavits are therefore struck out. However, the error made by the **Plaintiffs** here do not go to the jurisdiction of the Court, nor is this likely to occasion such prejudice to the Respondents that cannot be redressed by an award of costs. It would, therefore, not be in the best interests of justice that I strike out the suits because of this error. I believe every court wherever possible should attempt to sustain, rather than summarily dismiss, litigation.**

Accordingly, I decline to strike out the suits, and order that fresh Verifying Affidavits as required by Order 7 Rule 1 (2) be filed and served within the next 10 days, failing which the **Plaints herein shall stand struck out”.**

I would, therefore, decline here, as I did in that case, to strike out the suit, and order that fresh (and compliant) Verifying Affidavits be filed and served within the next seven days, failing which the Plaints herein shall stand struck out.

With regard to the omission to declare that the statements are true and made on oath – in all the Supporting affidavits – I find this to be a serious and fundamental omission.

An affidavit is not an affidavit when the “deponent” does not state under oath that what is deponed therein is “true” and indicate the source of his information – whether it is based on his personal knowledge or otherwise. The supporting affidavits sworn by the Applicants herein are more like “witness statements” than depositions.

I cannot accept them as “evidence”, and applying the cases of *Caspair Ltd v. Harry Gandy* Civil Appeal No. 31 of 1962 and *Noormohamed Janmohamed v. Kassamali Virji Madhani* Civil Appeal No. 42 of 1951 (supra) I must strike them out as incompetent and of no value. That also means that I must strike out the **applications** before this Court, with costs to the Respondent.

Dated and delivered at Nairobi this 5th day of July, 2007

ALNASHIR VISRAM

JUDGE