



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 11 of 2006**

**LUCAS NJUGUNA SIMON KAROBIA ..... PLAINTIFF**

**VERSUS**

**CONSOLIDATED BANK OF KENYA LTD. .... DEFENDANT**

**R U L I N G**

In the plaint dated 16.1.2006 and filed on the same date the plaintiff seeks three primary orders:-

- (a) A declaration that the defendant has no valid statutory power of sale over L.R. No.Ngenda/Mangu/826.**
- (b) A permanent injunction barring the defendant from advertising for sale, selling, alienating or otherwise interfering with the plaintiff's possession of the suit title.**
- (c) An order for the discharge of the charge registered against the suit property and the delivery of the title documents to the plaintiff.**

The Plaint is accompanied by a verifying affidavit which was sworn on 13.1.2006.

Simultaneously with the Plaint, the plaintiff lodged an application under Order XXXIX Rules 1, 3 and 9 of the Civil Procedure Rules seeking the following primary orders:

- (1) a temporary injunction restraining the defendant from advertising, selling, alienating or interfering with the suit piece of land.**
- (2) the defendant do supply copies of the charge and statements of accounts.**
- (3) independent valuation of the suit property.**

On 20/1/06, when the application came up for hearing **inter partes** the defendant had not responded. I adjourned the application and granted a temporary injunction pending hearing of the application on 9/2/06.

On 27/1/2006 the defendant lodged the present application seeking an order that the plaintiff's said application and the suit be struck out with costs. The main reasons for the application are:-

- (1) That the prayers are at variance with those in the suit rendering the whole application and the entire suit untenable, incompetent and fatally defective.**

**(2) That at the time the verifying affidavit accompanying the Plaintiff was sworn on 13.1.2006, there existed no Plaintiff to verify.**

**(3) That the suit is incompetent, fatally defective, null and void as it is unaccompanied by a verifying affidavit or alternatively as it is accompanied by a strange verifying affidavit.**

**(4) That paragraph 2 of the said verifying affidavit contains falsehood and or lies under oath and the same amounts to perjury.**

The application is opposed and there is a replying affidavit sworn by the plaintiff. In the replying affidavit the plaintiff states that on 13.1.2006 he attended his advocate who showed him a Plaintiff, Chamber Summons and sets of affidavits, which documents the plaintiff read and on being satisfied that the contents of the affidavits and Plaintiff were true, signed the same. He has now been informed that the Plaintiff was not dated 13.1.2006 but on 16.1.2006 at the time of filing the same in Court. This according to the plaintiff was a mistake which can be rectified by amendment.

The application was canvassed before me on 7.2.2006 by Mr. Otieno, Learned Counsel for the applicant and Mr. Gathara, Learned Counsel for the respondent.

I have considered the application, the replying affidavit, the cases cited and the submissions of the Learned Counsels. Having done so I take the following view of the matter. At paragraph 3 of the plaintiff's application dated 13.1.2006, the plaintiff seeks that the defendant supplies him with copies of the charge and statement of accounts. The Plaintiff does not have such a prayer. It would appear therefore that paragraph 3 of the plaintiff's application has no foundation.

At prayer 3 of the Plaintiff, the plaintiff seeks an order for the discharge of the charge and delivery of the title documents to the plaintiff. This prayer is not in his Chamber Summons aforesaid. To some extent therefore, the prayers in the application are at variance with those in the suit. However, in my view, the variance is not fatal to the application and the suit. I cannot therefore strike out the application and suit on this ground.

The substantive objection to the Plaintiff and application is with respect to the verifying affidavit. The verifying affidavit was sworn on 13.1.2006. On that date there was no Plaintiff as it came into existence on 16.1.2006. It is clear therefore that on 13.1.2006 the plaintiff could not verify the correctness of a Plaintiff that did not exist. The result is that when the Plaintiff was filed on 16.1.2006, it was not accompanied by a verifying affidavit. In **Gawo vs. Nairobi City Council [2001] EA 69** the Court of Appeal held that **“Order VII Rule 3(2) of the Civil Procedure Rules clearly states that a Plaintiff shall be accompanied by an affidavit, sworn by the plaintiff verifying the correctness of the averments in the Plaintiff. The condition is mandatory and leaves no room for an interpretation that would allow an affidavit in support of an application by Chamber Summons to serve the same purpose”**. The Court of Appeal was dealing with an application of a temporary injunction under Rule 5(2)(b) of the Court of Appeal Rules. The applicant's suit had been struck out by the High Court for failure to comply with Order VII Rule 3 (2) of the Civil Procedure Rules. In my view the High Court had a discretion to strike out the suit and its exercise of discretion cannot be faulted. Ringera, J. as he then was and Ibrahim, J. in **S.B. Shah vs. Diamond Trust Bank of Kenya: HCCC No.2075 of 2000 (UR)** and **Delphis Bank Ltd. vs. Asudi (K) Ltd and Another: HCCC No.82 of 2003 (UR)** respectively also exercised their discretion given in the said Rule. Otieno, J. as he then was did the same in **James Francis Kariuki & Another vs. United Insurance Co. Ltd: HCCC No.1450 of 2000 (UR)**.

In **Mountainview Transporters Ltd. & Another vs. Alcon Holdings Limited and Another: HCCC No.385 of 2004 (UR)**, I observed that Order VII Rule 1 (3) is permissive. It gives the Court a discretion to strike out the Plaintiff or maintain it. I have had no reason to change my view. I will in fact go further and add that a Plaintiff which is not verified as required by Order VII Rule 1 (2), may be verified subsequently with the leave of the court. In my view, the omission to verify is an error or defect which can be amended within the meaning of Section 100 of the Civil Procedure Act.

In the result, I will not strike out the Plaint. I order that a fresh verifying affidavit be filed within seven (7) days of today.

The plaintiff's application dated 13.1.2006 cannot however be saved. The Plaint upon which the application is based does not comply with Order VII Rule 1 (2). A verifying affidavit has to be filed to give life to the Plaint upon which the application is based. The application in my view cannot be maintained. It is incompetent and I accordingly strike it out with costs to the defendant.

Orders accordingly.

**DATED and DELIVERED at NAIROBI** this 1<sup>st</sup> day of March 2006.

**F. AZANGALALA**

**JUDGE**

Read in the presence of :-