



REPUBLIC OF KENYA

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

Civil Suit 115 of 2001

AGRICULTURAL FINANCE CORPORATION.....1ST
PLAINTIFF

AGRICULTURAL DEVELOPING CORPORATION.....2ND
PLAINTIFF

VERSUS

DRIVE-IN ESTATE DEVELOPERS LTD.....
DEFENDANT

R U L I N G

This is an application by the defendant to strike out the plaintiff’s verifying affidavit, and the suit herein on the basis that the said verifying affidavit was filed outside the time allowed in the order granting leave to file the same. The application is expressed to be brought under the provisions of Orders L rule 1 VIA rule 6, Sections 3A and 63 (e) of the Civil Procedure Act and all other enabling provisions of the Law.

The origin of this application goes back to the order of my Learned brother Emukule J made on 4.5.2005. By that order the Learned Judge granted the plaintiff leave to file a further compliant verifying affidavit within 10 days of his order. The compliant verifying affidavit should therefore have been filed by the 14.5.2005. The defendant says that the purported verifying affidavit was filed on 21.7.05 without leave. In the premises the plaint remains unaccompanied with a verifying affidavit as required under Order VII rule 2 of the Civil Procedure Rules. Hence the application to strike out the plaint.

For the plaintiff it was argued that the failure to file the compliant verifying affidavit within the time allowed by the court is a minor procedural lapse which does not go to jurisdiction and should be ignored.

So the only issue for determination is whether or not failure to file the compliant verifying affidavit within the period allowed by the court is fatal and should result in the striking out of the plaint. The requirement for a verifying affidavit is contained in Order VII rule 1 (2) of the Civil Procedure Rules. Sub-rule (3) of the same rule reads:

“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 subrule (2) of this rule.”

In my view the use of the word “**may**” shows that the court has a discretion as to whether or not to strike out a plaint which is not accompanied by an affidavit verifying the correctness of the averments contained in the plaint. As it has been said by several eminent judges before me, in exercising the discretion give in

sub-rule (3) of rule 1 of Order VII of the Civil Procedure Rules the court should be alive to the principle of justice that procedural lapses, omissions and irregularities unless they go to the jurisdiction of the court or prejudice the adversary in a fundamental respect which cannot be atoned for by an award of costs are not to be taken as nullifying the proceedings affected.

In the present case the compliant verifying affidavit was filed slightly over 2 months too late without leave. Strictly speaking therefore the affidavit is irregularly on this record and the plaintiff has not explained the reasons for its failure to comply with the order of the court. However, in my view the failure to file the affidavit within the period allowed by the court, still remains a procedural lapse and does not go to the jurisdiction of the court. The defendant has also not demonstrated that it will suffer prejudice which cannot be atoned for by an award of costs.

I am aware that the plaintiff is having a second bite at the cherry but that alone cannot incline me to strike out the affidavit and the suit. That result in my view would appear not to be equal to the lapse committed by the plaintiff. Accordingly, in the exercise of my discretion under Order VII Rule 1 (3) of the Civil Procedure Rules, I decline to strike out the said verifying affidavit and plaint. In the interest of justice I order that the verifying affidavit filed on 21.7.2005 be and is hereby deemed duly filed with the leave of the court.

The defendant's application dated and filed on 29.6.2005 is dismissed. As the application was not altogether without merit I award the costs of the application to the defendant.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 10TH day of JULY, 2006.

F. AZANGALALA

JUDGE

10.7.2006

Read in the presence of:-