



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

Civil Case 522 of 2006

PANIAN OLE MOTUA1ST PLAINTIFF
EMMANUEL LESHAI SANE.....2ND PLAINTIFF
KENYATTA OLOITIPITIP.....3RD PLAINTIFF
HAROUN MESOPIR KIPARO.....4TH PLAINTIFF

VERSUS

THE REGISTERED GROUP REPRESENTATIVES

KIMANA TIKONDO GROUP RANCH.....DEFENDANT

RULING

On 19th May 2005 the plaintiffs who are members of KIMANA TIKONDO GROUP RANCH instituted a suit in the High Court against the Defendant. The Registered Group Representatives Kimana Tikondo Group Ranch. The plaint was accompanied by a verifying affidavit sworn by PANIAN OLE MUTUA.

At the hearing of the matter on 13th June 2006 Mr. Nyaga counsel for the defendant raised a Preliminary Objection on a point of law. He submitted that the plaintiffs suit herein is misconceived, incompetent and unmaintainable in law as the affidavit verifying the plaint is fatally defective and totally bad in law and hence the same ought to be struck out. He argued that the verifying affidavit sworn on 19th May 2006 by Painan Ole Mutua, the Jurant does not state when this affidavit was sworn. This violates the provisions of Section 34 of the Oaths and Statutory Declaration Act and that the effect of such an omission renders such an affidavit a nullity. counsel further submitted that the provision is worded in mandatory terms and for that reason the affidavit cannot stand and should be struck out.

And in conclusion he submitted that once the verifying affidavit is found defective and struck out the plaint too must be struck out for none compliance of Order VII Rule 1 (2) of the Civil Procedure Rules. The application is opposed by Mr. Agina counsel for the plaintiff. He submitted that an objection should normally be brought under Order VI Rule 7 but the defendant's objection is expressed to be brought under Order VI Rule 16 and therefore the same is incompetent and should be dismissed. Counsel conceits that the verifying affidavit has an omission in that the jurant does not state where this affidavit was sworn but rubber stamp shows Nairobi and submits that the defect is curable under OXVIII Rule 7

which provides that 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. Should the defect or irregularity in the affidavit lead to striking out of the suit? The rules of procedure are meant to facilitate the administration of justice in a fair orderly and predictable manner, not to fetter or choke it.

In my opinion where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standard, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from form or lapses in form and procedure which do not go to the 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.

In those circumstances the court should rise to its higher calling to do justice by saving the proceedings in issue. Order 41 Rules 4 of the rules of the Supreme Court provides that an affidavit may with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof. See **TOM OKELLO OBONDO V. NSSF [HCCC NO. 1759 OF 1999]** where it was held that the omission to state where an affidavit was taken was a mere irregularity which the court could excuse under the provisions of Order XVIII Rule 7 of the Civil procedure Rules.

In **HALSIBURY'S LAWS OF ENGLAND 3RD EDITION VOLUME 15 at PARAGRAPH 15** it is propounded:-

“The parties cannot waive irregularities in the form of a jurant but where the place of swearing is omitted, the court may possibly assume that the place was within the area in which the notary before whom it was taken was certified to have jurisdiction, and the irregularity may be over looked.”

In this matter at hand I am of the view that the error manifest in the verifying affidavit neither goes to the jurisdiction of the court nor prejudices the defendant in any fundamental respect. And indeed no prejudice has been alleged. Being of that persuasion, I think the ends of justice would best be served by sustaining the proceedings by declining to strike out the suit.

The costs of the Preliminary Objection be costs in the cause.

Dated and delivered at Nairobi this 7th day of July 2006.

J.L.A. OSIEMO

JUDGE