

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

Civil Suit 1277 of 2001

PETER NDEYA & OTHERS1ST PLAINTIFF

HAJI AZIZ KASSAM & OTHERS2ND PLAINTIFF

MARY WANGARI NDUTI & OTHERS3RD PLAINTIFF

VERSUS

SAMUEL NYOIKE t/a SAME AGENCIESDEFENDANT

RULING

The defendant filed a preliminary objection in the following terms:-

a) THAT the plaintiff suit is bad in law as the same contravenes the mandatory provisions of Order VII Rule 1(2) as read together with

(i) Section 5 of the Oaths and Statutory declarations Act Cap 15 Laws of Kenya

(ii) Section 34 and 35 of The Advocates Act Cap 16 of the Laws of Kenya.

On submissions the Defendant's advocate stated that the verifying affidavit contravene Order VI Rule 1(2) of Civil Procedure Rules in that it had failed to disclose the place of swearing of the affidavit. That failure was said to be contravention to Section 15 of The Oaths and Statutory Declarations Act. That Section requires that every Commissioner for oaths before who an oath or affidavit is taken ought to state the place and date the affidavit or oath is made. The Defendant was of the view that having contravened that section the verifying affidavit ought to be struck out. Having been struck out the defendant stated that under Order VII Rule 1(2) of the Civil Procedure Rules the plaint also ought to be struck out for failure to be supported by a verifying affidavit. The defence counsel stated that a plaint cannot exist without a verifying affidavit. He further submitted that that verifying affidavit was dated 20th May, 2001 whereas the Plaint was dated 12th July, 2001. He brought to the notice of the court that the verifying affidavit seemed to have been dated a date earlier than the plaint. On that ground also the defence sought that the verifying affidavit be also struck out. The Defendant relied on the case of **James Francis Kariuki & another v United Insurance co. Ltd. HCCC 1450 of 2000** where the court found that a verifying affidavit was defective. The court proceeded in that case to strike out the verifying affidavit and the court thereafter gave the following order:

“The Plaint cannot stand alone in the file without verifying affidavit. As the verifying affidavit has been expunged from the record, the Plaint must also be struck out as it s being on record without verifying Affidavit is not in compliance with Order 7 Rule 1(2)”.

The Defendant's counsel sought that this court too would reach a similar conclusion as aforesaid case. In brief response the Plaintiff's counsel said that the verifying affidavit is part of the Plaint but that once the Plaint stated the date it was drawn that date too would apply to the verifying affidavit.

The Defendant's submission in regard to Section 5 of the Oaths and Statutory Declarations is correct. Section 5 does indeed require that the Commissioner oaths would state the date and the place the oath was made. In this case the verifying affidavit does provide the date that is 28th July, 2001 but fails to state the place that the oath was taken. That is a mandatory requirement of the statute and it therefore ought to be complied with. It is correct to say that failure to comply with such a requirement would render the verifying affidavit to be defective. The end results therefore, would be that the verifying affidavit would be struck out. On the submissions that the verifying affidavit was dated on a date earlier than the date of the Plaintiff, that to my mind would not render the affidavit to be defective because Order XVIII Rule 9 of the Civil Procedure Rules, provides that unless directed by the court an affidavit would not be rejected solely because it was sworn before the filing of the suit concerned. For that reason dating the verifying affidavit on a date before the dating of the Plaintiff does not render the verifying affidavit to be defective. The Defendant had argued that the plaintiff's suit lacked authority since it was a representative suit by the other plaintiffs. The Defendant relied on Order 1 Rule 12 of the Civil Procedure Rules. That rule requires that authority be in writing and be signed by all the parties giving the authority. However, looking at that rule I find that it does not state that such an authority has to be filed at the time the suit is filed. I find that failure to file such an authority is an irregularity which can be cured by subsequent filing of such authority. The end result therefore is that the Defendant does succeed in its objection in as far as that the verifying affidavit failed to state the date and place that the oath was made and on that basis the verifying affidavit hereof would be struck off. Having been struck off I am of the view that it does not necessarily follow that the Plaintiff should be struck off the court can invoke its inherent power to allow the Plaintiff to file another verifying affidavit. It is also just to allow the Plaintiff time to file the authority given by the other parties to bring the present action. The orders of the court therefore are:-

- 1. That the verifying affidavit dated the 28th July, 2001 sworn by Peter Ndenya is hereby struck off with costs to the defendant.**
- 2. That the Plaintiff is granted leave to file another verifying affidavit within 14 days from this date hereof.**
- 3. That the Plaintiff is granted leave to file authority to bring the representative suit within 14 days from this date hereof.**
- 4. The Defendant is granted $\frac{1}{4}$ of the costs of the preliminary objection.**

MARY KASANGO

JUDGE

Dated and delivered this 2nd November day of October, 2006.

MARY KASANGO

JUDGE