

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 489 of 2006

AKABA INVESTMENTS LIMITED..... APPLICANT

VERSUS

KENROID LIMITED.....RESPONDENT

R U L I N G

This suit was instituted by a plaint dated 1.9.2006 and filed on the same date. Simultaneously the plaintiff lodged a chamber summons under Order XXXIX Rules 2 and 3 of the Civil Procedure Rules seeking inter alia injunctive reliefs. When the application was served, the Respondent filed two replying affidavits and a Notice of Preliminary Objection based on the following grounds:-

- 1) **That the application is defective and incompetent for want of compliance with the Law.**
- 2) **That the entire suit is totally defective as the verifying affidavit is incompetent for want of compliance with the law and the suit as presented ought to be struck out.**

The objection was argued before me on 4.10.2006 by Mr. Orenge Learned counsel for the defendant and Mr. Ruthugua Learned counsel for the plaintiff. Counsel for the defendant had one quarrel with the verifying affidavit. The quarrel was that the deponent of the affidavit does not disclose that he had the plaintiff's authority to swear the verifying affidavit and that failure to do so renders it fatally defective. In support of that argument counsel quoted my own decision in **Mountain View Transporters Limited & Another – vs – Alcon Holdings Limited and Another: HCCC No.385 of 2004 (UR)**. I held in that case that as the deponent of the verifying affidavit did not disclose the authority upon which it was made, the verifying affidavit was incompetent and I ordered it struck out. I further held that the plaint therein did not in the premises comply with sub-rule 2 of Rule 1 of Order VII of the Civil Procedure Rules. That position had also been taken by Ringera J as he then was in **Microsoft Corporation –vs- Mitsumi Computer Garage Limited & Another** HCCC No.810 of 2001 (unreported). Counsel for the defendant therefore urged me to strike out the application.

In response, Mr. Ruthugua argued that the deponent of the verifying affidavit had implied that he had authority to swear the same and in his view the verifying affidavit was valid. Counsel further argued that even if there was defect in the affidavit, Order XVIII Rule 7 permitted the use of such an affidavit. It was further counsel's contention that the case of **Mountain View Transporters Ltd & Another – vs – Alcon Holdings & Another (Supra)** was distinguishable from the present case where authority to swear the verifying affidavit is implied.

Having considered the rival submissions made to me by counsel, I take the following view of this matter. It is not in dispute that the plaintiff is a body corporate and can only take an oath through the agency of a natural person in this case one Josphat Mwiti Magaju. He swore that he was competent to swear the affidavit and that as the plaintiff's Operations Manager was conversant with the contents of the statement in the verifying affidavit. He further swore the affidavit on behalf of the plaintiff. Those depositions are not clear on whether or not the said Josephat Mwiti Magaju had the authority of the plaintiff to swear the verifying affidavit. The view of the authorities is that a deponent has to state expressly that he/she has the plaintiff's authority to swear the affidavit. The matter should not be left to implication. That is the view I took in **Mountain View Transporters Limited and Another – vs –**

Alcon Holdings Limited and another (Supra). I am still of the same view.

Being of that view, the verifying affidavit of the said Josephat Mwiti Magaju does not disclose the authority upon which it is made. That is a substantial defect which renders the said affidavit incompetent. I order that the same be and is hereby struck out. The plaint does not therefore comply with Order VII Rule 1(2) of the Civil Procedure Rules which reads:-

Order VII Rule 1(2):

“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint”.

And Rule 1 (3) reads as follows:

“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.”

By dint of the provisions of subrule (3) it is plain that notwithstanding the apparent mandatory language of subrule (2) the failure to comply with the subrule is an irregularity which can be cured by the filing of a compliant affidavit. In the interest of justice I exercise my discretion in favour of the plaintiff and order that the plaintiff has leave to file and serve the defendants within seven (7) days with a fresh verifying affidavit. The application cannot however be saved as it derives life from the plaint which now does not comply with Order VII Rule 1 (2) of the Civil Procedure Rules. The application is incompetent and I strike it out with costs to the defendant.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 7TH day of NOVEMBER, 2006.

F. AZANGALALA

JUDGE

7/11/2006

Read in the presence of:-