



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Appeal 47 of 2002

MUTULA KILONZO t/a

NAKU MODERN FEEDS APPELLANT

VERSUS

WILLAM NJOROGE RESPONDENT

JUDGMENT

The appellant herein **Mutula Kilonzo** is the defendant in RMCC Nakuru No.1026 of 2000 wherein **William Njoroje t/a Nakuru Modern Feeds** instituted a suit against him. The suit was filed on 11th May 2000 and the plaint is dated 5th May 2000. The appellant raised a preliminary objection challenging the legality of the suit on the basis that the plaint was not accompanied by a verifying affidavit in contravention of the provisions of **Order 7 Rules 1, 2 and 3** as amended by Legal Notice number 36 of 2000.

By a ruling dated 15th March 2002, the learned Senior Principal Magistrate dismissed the preliminary objection and allowed the plaintiff to file a verifying affidavit. Being dissatisfied with the said ruling the appellant has appealed against the said ruling. In his memorandum of appeal, the appellant has raised 11 grounds of appeal. During the hearing of the appeal, all the grounds were argued together as most of them are a repetition. Counsel for the appellant, **Mr. Mongeri**, argued that the magistrate erred in law and in fact in failing to appreciate the mandatory provisions of the law as provided for under **Order 7 rule 1 (2) of the Civil Procedure Rules**.

By refusing to strike out the plaint, the court exceeded its jurisdiction and similarly by allowing the plaintiff to file a verifying affidavit when there was none.

The plaint filed by the plaintiff in the subordinate court was not accompanied by a verifying affidavit which is contrary to the provisions of **Order 7 Rule 2 (1)** and this being a mandatory provisions it leaves no room for interpretation or discretion but to strike the plaint. Counsel put forward the case of **Bishop Joshua Gawo & others –Vs- Nairobi City Council CA No. Nairobi 345 of 2000** where the Court of Appeal held that **Order VII Rule 1 (2) of the Civil Procedure Rules** clearly states *that the plaint shall be accompanied by a verifying affidavit and it leaves no room for such an interpretation*.

In response to the above arguments, Counsel for the respondent **Miss Nancy Njoroje**, set out to distinguish the above authority on the basis that this matter is different. The Legal Notice number 36 of 2000 was published on 5th May 2000, the same date when the plaint was filed. **Miss Njoroje** submitted

that the court stays on the plaint was placed when the payment cheque was cleared as it is the practice of the court registry to stamp pleadings after the cheque has been cleared. Thus, failure to include a verifying affidavit was not a mistake, but simply that the plaintiff was not aware of the legal notice and therefore the decision of the trial magistrate allowing the verifying affidavit to be filed is within the law. Counsel for the respondent relied on a decision in the case of **Microsoft Corporation –Vs- Mitsumi Computer Garage Ltd and Mitsuminet (K) Ltd Milimani HCCC Case No.810 of 2001.**

It was held that the provisions of **Sub rule 3 of the Rule (1) of Order VII** seems by usage of the word ‘*may*’ to grant the court the discretion to strike out the plaint where there is no verifying affidavit.

I have carefully considered the rival arguments herein against the broad principles in a Administration of Justice as provided for under the **Section 3 (2) of the Judicature Act** that cases

”Shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

The other consideration to bear in mind is that the plaint in dispute is dated on 5th May 2000, the same day the legal notice was gazetted, in this regard, it would be unconceivable to strike out the plaint and lock out the plaintiff from accusing justice and ventilating his claim. I am in agreement with the decision by the learned magistrate that the ends of justice would best be served by sustaining the proceedings by declining to strike out the suit and by allowing the plaintiff to file a verifying affidavit, the applicant has not suffered any prejudice.

I am in agreement with the decision of the case of Microsoft Corporation Supra that

“Rules of procedure are the hand maidens and not the mistresses of justice. They should not be elevated to a fetish. Their is to facilitate the administration of justice in a fair orderly and predictable manner, not to fetter or choke it.”

I am also in agreement that the circumstances of this case warrant the exercise of this discretion more so considering the mischief that the amendment under Legal Notice number 36 of 2000 intended to cure, that is the multiplicity of suits that were being filed in running down claims.

In view of the above analysis, and the circumstances of the case, I dismiss the appeal with costs to the respondent.

It is so ordered

Judgment read and signed at Nakuru on 3rd November 2006.

MARTHA KOOME

JUDGE