



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Suit 264 of 2005**

**SHASHIKANT C. PATEL.....PLAINTIFF**

**VERSUS**

**ORIENTAL COMMERCIAL BANK.....DEFENDANT**

**RULING**

The defendant's chamber summons dated 20<sup>th</sup> January 2006 and brought under Order 7 Rules 2 and 3 of the Civil Procedure Rules seeks the striking out of the plaint in this suit on the ground that there is no competent verifying it. On 9<sup>th</sup> May 2006 the defendant's advocates filed a Notice of Preliminary Objection of 20<sup>th</sup> April 2006 and raised the same point. Both the defendant's said application and the preliminary objection were argued before me on 10<sup>th</sup> May 2006.

Mr. Khagram, counsel for the defendant, submitted that the plaintiff's affidavit sworn on 2<sup>nd</sup> December 2005 purported to verify a plaint that had not come into existence. The plaint in this suit came into existence on 8<sup>th</sup> December 2006. Basing himself on the High Court decision in the case of **The Delphis Bank Limited – Vs – Sudi (K) Limited & Another, Nairobi Milimani Commercial Courts HCCC No. 82 of 2003 (unreported)** in which a similar situation arose Mr. Khagram urged me to follow it and strike out the plaint. He argued that though there are two schools of thought in the High Court, one being that where there is no or no competent verifying affidavit the plaint should be struck out and the other being that where there is an incompetent verifying affidavit the plaintiff should be given time to file a competent one, with the Court of Appeal decision in **Gawo & Others – Vs – Nairobi City Council & Others, Civil Application No. 345 of 2000 (unreported)** the matter is now settled. Where a plaint is not accompanied by a competent verifying affidavit as here it should be struck out, he said.

Mr. Weloba for the plaintiff had, as would be expected, a different view. He submitted that where there is a verifying affidavit, though an incompetent one, as was decided by Ringera J (as he then was) in **Gulam & Another – Vs – Jirongo [2004] KLR 153** and Onyancha J in **Saanum – Vs Commissioner of Lands & Others [2002] 2 KLR 671** the plaintiff should be given an opportunity to file a competent verifying affidavit. He said that the **Gawo case** is distinguishable as there was no verifying affidavit at all.

I have considered these rival submissions and read the judgments in the cited cases. I have no doubt in my mind that the provisions of Order 7 Rule 1 (2) of the Civil Procedure Rules are mandatory. A plaint that is not accompanied by a verifying affidavit at all is incompetent and should be struck out without any ado. That is what I understand the Court of Appeal to have decided in the **Gawo case**. However, where a plaintiff, along with the plaint, files a verifying affidavit, which for one reason or the other turns out to be incompetent he should not in my respective view be placed on the same pedestal as one who ignored the provision altogether and did not file any verifying affidavit at all. Order 7 Rule 1 (2) in my view allows the court discretion to consider the reason why the affidavit is incompetent and if excusable allow a competent one to be filed. We should never lose sight of the fact that rules of procedure, though they should be followed are hand maids of justice. They should not be given pedantic interpretations which at the end of the day denies parties justice.

I agree with Mr. Weloba that the **Gawo case** is distinguishable. In that case the plaintiff did not file any verifying affidavit at all. When faced with a striking out application, he sought to rely on an affidavit he had filed in support of an application in the same case. That argument was of course rejected.

In this case the plaintiff filed a verifying affidavit which purported to verify a plaint that had not come

into existence. So what has caused the problem is just a date. The affidavit was sworn on 2<sup>nd</sup> December 2005 while the plaint is dated 8<sup>th</sup> December 2005. That is not a reason that will make me strike out a plaint on which the plaintiff has paid about Sh. 70,000/= court fees and which has not been attacked on any other ground.

For these reasons, I dismiss the defendant's application and preliminary objection and allow the plaintiff to file a proper verifying affidavit within fifteen days. Costs in cause.

DATED and delivered this 26<sup>th</sup> day of May 2005.

**D. K. MARAGA**

**JUDGE**