



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
MILIMANI COMMERCIAL COURTS, NAIROBI
HCCC NO. 657 OF 2003**

ABDI ALI NUR.....PLAINTIFF

- V E R S U S

TRANSAMI (KENYA) LTD.....DEFENDANT

R U L I N G

Before the court are two applications in one, praying for similar orders. The first one is dated 5th August, 2004 and filed in court by the third party on 9th August, 2004. It seeks orders-

1. THAT the plaint herein be struck out.
2. THAT the costs of this application and that of the third party proceedings be paid to the third party by the defendant.

The second application is dated 14th September, 2004 and filed by the defendant on the same date. It seeks orders-

1. THAT the plaintiff's plaint filed herein be struck out.
2. THAT the costs of this application and of the suit be paid to the defendant by the plaintiff.

Both applications are made by way of chamber summons and are expressed to be brought under O.VII rules 1 (3) of the Civil Procedure Rules, sections 34 and 35 of the Advocates Act, and the inherent powers of the Court.

The grounds upon which the applications are made are that the plaint is not accompanied by an affidavit in terms of O.VII rule 1 (2) of the Civil Procedure Rules, and or that the relevant affidavit cannot be accepted by this Honourable Court as it does not comply with the requirements of sections 34 and 35 of the Advocates Act.

Opposing the application, the plaintiff, through its advocates, filed grounds of opposition dated 13th August, 2004. These are that-

- (a) The application is frivolous, vexatious, an abuse of Court process and meant to delay the trial of this suit.
- (b) The application is incompetent, lacks merit and there exists no grounds to justify the grant of the orders sought.
- (c) The application lacks bona fides.

Mr. Peter Opondo Kaluma, an advocate in the firm of Lumumba, Mumma & Kaluma, Advocates, who have the conduct of this matter on behalf of the plaintiff, also swore a replying affidavit on 29th September, 2004, which was filed in Court on 30th September, 2004. The highlights of that affidavit are that the similarity between the two applications filed by the applicants herein is incontrovertible evidence of blatant conspiracy and collusion between the defendant and the third party to delay and or defeat the cause of justice between the parties herein. He further avers that the verifying affidavit accompanying the plaint filed herein is a sufficient and competent affidavit in the contemplation of O.VII of the Civil Procedure Rules. He also goes on to aver that the affidavit in question was prepared by the plaintiff himself and not by its advocates. Accordingly his advocates could not and would not be required in law to endorse it. He adds that a verifying affidavit is in any event a pleading, document or instrument prescribed in sections 34 and 35 of the Advocates Act and requiring endorsement of the advocate acting for the plaintiff. Even if the verifying affidavit were to have offended O.VII of the Civil Procedure Rules and sections 34 and 35 of the Advocates Act, such an offence would not be a fundamental or fatal defect.

In his replying affidavit on behalf of the defendant, Mr. Warui Mwangi, an advocate employed as the defendant's Chief Legal Officer, avers that the alleged similarity between the defendant's application and that of the third party was merely coincidental. He also avers that if the verifying affidavit was prepared by the plaintiff himself, then it was prepared by an unqualified person contrary to S.34 of the Advocates Act, and the affidavit is bad in law, incompetent and misconceived as it does not bear the endorsement of who has drawn it in violation of S.35(1) of the Advocates Act.

At the oral hearing of the applications, Mr. Esmail appeared for the third party/applicant while Mr. Kaluma and Mr. Gachuhi appeared for the plaintiff and the defendant respondents respectively. Mr. Esmail submitted that there have been numerous cases in which the Courts have struck out affidavits which failed to comply with sections 34 and 35 of the Advocates Act. He then referred the court to **BARCLAYS BANK OF KENYA LTD., v. DR. SOLOMON OTIENO ORERO**, HC (Milimani) CC No. 1736 of 2001, and **LOTAY v. STARLIT INSURANCE BROKERS LTD.** [2003] 2 E.A. 551. In the absence of a verifying affidavit, counsel submitted that the plaint must be struck out. He then cited **JAMES FRANCIS KARIUKI v. UNITED INSURANCE CO. LTD.**, HCCC No.1450 of 2000. He finally submitted that the court has no discretion but strike out the plaint, and that even if the court had a discretion, there is nothing placed before it on which the discretion could be exercised, and even if there was the contents of paragraph 11 of Mr. Kaluma's affidavit are so offensive that anyone who can make such claims is not deserving.

Mr. Gachuhi for the defendant associated himself with the submissions of Mr. Esmail and submitted that a verifying affidavit relates to legal proceedings and should therefore be drawn by an advocate under S.34(1) of the Advocates Act, and the verifying affidavit in issue is not so drawn. It should therefore be struck out. Mr. Gachuhi also referred the court to **LOTAY v. STARLIT INSURANCE BROKERS LTD.** (supra) at p.555. He further submitted that once the affidavit is struck out, it will render the suit incompetent as the plaint will not be accompanied by a verifying affidavit and should also be struck out.

In response to the above arguments, Mr. Kaluma for the plaintiff adopted the plaintiffs grounds of opposition dated 13th August, 2004 and his replying affidavit. He submitted that a verifying affidavit is not an instrument or document within the contemplation of Ss.34 and 35 of the Advocates Act. Furthermore, he submitted, S.34 (1) (f) relates to pleadings, and a verifying affidavit within O.VII rule 2 is not a pleading and therefore need not comply with S.35 of the Advocates Act. In any event, the law does not prohibit a litigant from drawing its own documents. Mr. Kaluma thereupon cited **GREENHILLS INVESTMENTS LTD. v CHINA CORPORATION & ANOR.** for the proposition that a verifying affidavit within O.VII rule 2 is not a pleading. It is not necessary, therefore that it should be endorsed with the name and address of the firm which drew it. He further submitted that if there is any legal requirement that a verifying affidavit be endorsed in terms of S.35 of the Advocates Act, failure to do so does not render it fatal, nor is it fatal to proceedings. O.VII rule 3 permits the court to consider whether the defect goes to the substance of the suit or whether it prejudices any party before the court. Counsel then submitted that the alleged failure to endorse in this case does not go to the root of the suit, nor does it prejudice either the defendant or the third party. At any rate, they have not indicated what prejudice, if any, they have suffered or are likely to suffer. Mr. Kaluma then referred to **PASTIFICIO**

LUCIO GAROFALO S.P.A. v. SECURITY & FIRE EQUIPMENT CO. & ANOR., HC (Milimani) CC NO. 966 of 2000, as authority for that proposition.

Finally, Mr. Kaluma submitted that in all cases where a verifying affidavit has been under attack, the plaintiff has been allowed to file another affidavit. If the court concludes that there is a defect, then the plaintiff should be granted leave to deal with the defect. On that point he referred to **MICROSOFT CORPORATION v. MITSUMI COMPUTER GARAGE LTD.**, HC (Milimani) CC. No. 810 of 2001 in which leave to file a fresh affidavit was granted. He also said that the defendant and third party were acting in collusion and that this application was intended to delay the disposal of this case. Mr. Kaluma then sought to distinguish the authorities relied on by Mr. Esmail and Mr. Gachuhi. He submitted that HCCC No. 1587 of 2003 and HCCC No. 1736 of 2001 dealt with supporting affidavits and not verifying affidavits, and that in HCCC NO.1450 of 2000 the affidavit in question had so many errors that the court found that there was no affidavit at all. **LOTAY v. STARLIT INSURANCE BROKERS LTD.** (supra) the court was dealing with the total lack of a verifying affidavit. Counsel urged the court not to rely on these decisions. As a parting shot, he said that the verifying affidavit was prepared by his firm, and that paragraph 11 of his replying affidavit was a typographical error for which he apologised.

In reply, Mr. Esmail submitted that **JAMES FRANCIS KARIUKI & ANOR v. UNITED INSURANCE CO. LTD.**, was not referred in any of the cases in which the plaintiffs were allowed to file fresh verifying affidavits, and further that there is nothing in the Civil Procedure Rules or Act doing power on the court to allow the filing of another verifying affidavit. O.VII rule 2 is very clear that if a verifying affidavit is filed subsequent to the filing of the plaint, it cannot be said to have accompanied the plaint. He urged the court not to follow those authorities, and said that counsel for the plaintiff/respondent had conceded that his affidavit was defective. On his part, Mr. Gachuhi submitted that every affidavit has to be drawn by an advocate as per sections 34 and 35 of the Advocates Act, which are statutory and not mere rules. He also submitted that in **GREENHILLS INVESTMENTS LTD.** (supra) the issues of ss.34 and 35 were not brought to the court's attention. He finally submitted that the court has no jurisdiction to order that a fresh verifying affidavit be filed in respect of a suit which was filed way back on 17th February, 2003 without a valid one. He prayed that the suit be struck out with costs to the defendant and the 3rd party.

After hearing and considering these rival arguments of all the counsel, it seems to me that there are two main issues for determination in this matter. The first one is whether a verifying affidavit is subject to the provisions of sections 34 and 35 of the Advocates Act, and if so, whether failure to comply is excusable under O.VII rule 1 (3) 1 of the Civil Procedure Rules. The affidavit which is the subject of this application is faulted for not being endorsed by the person who drew it. The applicants take the view that failure to do so offends the express provisions of S.35(1) of the Advocates Act which requires that certain instruments be endorsed with the name and address of the drawer. That section is in the following words-

“Every person who draws or prepares, or causes to be drawn or prepared any document or instrument referred to in section 34(1) shall at the same time endorse or cause to be endorsed thereon his name and address...”

The only issue arising out of this section is whether or not the affidavit in question falls under the category of any “document or instrument” referred to in section 34(1). That sub-section states in so far as is relevant to this application-

“No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument-

(a)...

(b)...

(c)...

(d)...

(e)...

(f) relating to any other legal proceedings.”

In my view, a verifying affidavit is a document relating to legal proceedings. The Oxford Advanced Learner’s Dictionary of current English, fifth edition, defines “proceedings” at page 922 as follows-

“The process of using a lawcourt or other official body to settle a dispute or disagreement.”

Examples of the use of that word are given after the definition as follows- “institute divorce/bankruptcy/extradition proceedings. The firm has started legal proceedings to protect its name. She threatened to bring proceedings against him.” Against that back ground, it cannot be doubted that a verifying affidavit, such as the one in dispute is filed in legal proceedings and should therefore comply with the requirements of S.35(1) as to endorsement with the name and address of the drawer. Such endorsement makes it easier to ascertain whether or not the drawer of such a document is a qualified person. The verifying affidavit in dispute in this matter is not endorsed as required under S.35(1) of the Advocates Act. The invalidity of such a document is simply demonstrated in S.35(2) under which the Registrar is mandated to “refuse to accept or recognize any document or instrument referred to S.34(1) unless such document or instrument is endorsed in accordance with this section.” The verifying affidavit in this matter is therefore invalid and it’s invalidity attracts only one sanction – to be struck out. I accordingly strike it out.

O.VII rule 1 (2) of the Civil Procedure Rules states-

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

This requirement is mandatory. A plaint which is not accompanied by a verifying affidavit cannot stand. That was indeed partly the reason why the verifying affidavit was introduced. Having struck out the verifying affidavit in this matter, the plaint is left exposed as it is unaccompanied by a verifying affidavit according to the dictates of O.VII rule 1 (2). Prima facie, that means that the plaint should also be struck out for failing to comply with the mandatory requirements of O.VII rule 1 (2). In his submissions, however, Mr. Kaluma for the defendant said that in all the cases where a verifying affidavit has been struck out, the courts have always granted the plaintiff leave to file and serve a compliant affidavit. He urged the court to follow suit in this matter should it find that the affidavit is defective. The first issue arising out of this contention is, in my humble view, whether the court has jurisdiction to refrain from striking out a plaint which is not accompanied by a verifying affidavit.

O.VII rule 1 (3) provides 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 sub-rule (2) of this rule”

Subrule (2) has already been referred to herein above. There are two schools of thought regarding the interpretation of this subrule. The first school is of the view that the subrule is mandatory and that whenever a plaint does not comply with subrule 2 the court has no discretion in the matter and such a plaint must be struck out. This view is buoyed by the decision in **THE DELPHIS BANK LTD. v. ASUDI (K) LTD. & ANOR**, (Milimani) HCCC No. 82 of 2003 in which the Court ruled that the word “may” in O.VII rule 1(3) does not vest any discretion in court not to strike out a plaint which does not comply with subrule (2) of that rule. In that case, the court also held that the word “may” in subrule 3 only introduces the circumstances in which the court may exercise the power to strike out the plaint, and that the court should exercise that power either of its own motion or on the application of the defendant. The second school of thought is that striking out a plaint under O.VII r 1(3) is only discretionary but not mandatory. In the case of **KANTI CONSTRUCTION v. KENYA PIPELINE COMPANY LIMITED**,

(Milimani) HCCC No. 686 of 2004, I took the view that the wording of subrule (3) leaves no doubt that the court has a discretion whether or not to strike out a plaint which is not accompanied by a verifying affidavit. Unknown to me then, the late Hon. Justice Hewett had taken a similar view in **MASEFIELD TRADING (K) LTD. v. FRANCIS M. KIBUI** (Milimani) HCCC No. 1796 of 2000. The learned judge took step further and said that the permissive sanction of O.VII rule 1 (3) leads him to the conclusion that despite the mandatory words in O.VII rule 1 (2), a breach thereof is an irregularity that can subsequently be waived or cured. In order to deserve this remedy, the applicant must do equity and come to court with clean hands. Does the applicant in this matter satisfy this condition?

In paragraph 11 of his replying affidavit, Mr. Kaluma stated-

“THAT further, the instant verifying affidavit was, as required in law, prepared by the plaintiff, not jour firm. Accordingly, we could not and would not be required in law to endorse it.”

In support of this statement, Mr. Kaluma told the court during the oral submissions that the law does not prohibit a litigant from drawing its own documents. At the end of his submissions, Mr. Kaluma got a brainwave made an about turn, and admitted that the verifying affidavit was actually prepared by their firm, and that paragraph 11 was a typographical error, for which he apologised. It is clear beyond peradventure that there was no typing error in that paragraph. Every word of it was crafted purposefully in a bid to hoodwink the court into believing that the affidavit was not prepared by the plaintiff's advocates. It was nothing short of a deliberate effort to mislead the court. In such circumstances, the plaintiff and his counsel have not been candid. They have not come to court with clean hands, and clearly do not deserve discretionary relief. The court takes a very serious view of any attempt to mislead it and, for that reason alone, the least it can do would be to demonstrate its displeasure by declining to exercise its discretion in favour of any party attempting to mislead it.

In any event, the verifying affidavit has already been struck out. That leaves the plaint exposed and unaccompanied by a verifying affidavit in terms of O.VII rule 1 (2). This subrule requires that the plaint “shall be accompanied by an affidavit...” Once the verifying affidavit is struck out, and another affidavit introduced to replace the one struck out, can the new affidavit be said to have accompanied the plaint as required under the rules? In **JAMES FRANCIS KARIUKI & ANOR. v. UNITED INSURANCE CO. LTD.**, Milimani HCCC No. 1450 of 2000, Justice Onyango Otieno addressed that issue in the following words-

“...the law ... requires that the plaint be accompanied by an affidavit verifying the correctness of the averments contained in it. It does not provide for the verifying affidavit to follow the plaint. In my humble opinion, the phrase ‘shall be accompanied’ means that at the time of filing the plaint the verifying affidavit should be there together with the plaint. It does not mean that the verifying affidavit can be filed first and then later the plaint nor does it mean that the plaint is to be filed first and later the verifying affidavit. It means that whoever is receiving the plaint at the registry has to ensure that the verifying affidavit is with the plaint at the time of filing it.”

I find these words both intellectually and practically stimulating. To follow in the footsteps of Justice Onyango Otieno, “the plaint cannot stand in the file without a verifying affidavit.” As the verifying affidavit has been struck out, the plaint must also be struck out as it is no longer accompanied by a verifying affidavit.

The applications by way of chamber summons dated 5th August, 2005 and 14th September, 2004 accordingly succeed and the plaint filed herein is struck out with costs to the defendant and the third party. The plaintiff will also pay the costs of the suit and the third party proceedings to the defendant and the third party respectively.

Dated and delivered at Nairobi this 12th day of May 2005

L. NJAGI

JUDGE