REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MILIMANI COMMERCIAL COURTS, NAIROBI

CIVIL CASE 776 OF 2003

KENYA REINSURANCE CORPORATION LTD.....PLAINTIFF

-V E R S U S

DR. JOSEPH N.K. ARAP NG'OK.....DEFENDANT

R U L I N G

On 27th April, 2005, the plaintiff/applicant filed an application by a Notice of Motion dated 18th April, 2005. To that application, the respondent gave a notice of a preliminary objection, showing that the proceedings by the said motion are bad in law, misconceived and do not lie. The objection is based on the ground that-

1. There is no suit before this Honourable Court; and

2. There being no suit, the present motion does not and cannot, in law or otherwise, lie.

The application was canvassed before me by Mr. Thangei for the defendant/objector who thereupon became the applicant, and Mr. Havi for the plaintiff who, for the purposes of this objection became the respondent. Mr. Thangei's case was that the plaint in this matter is dated 3rd December, 2003. The verifying affidavit of Ms. J.S. Otieno which is annexed to the plaint was sworn before a Commissioner on 3rd November, 2003 a month before the date of the plaint. O.VII rule 2 is mandatory that the plaint shall be accompanied by a verifying affidavit. The purpose of the affidavit is to verify the correctness of the plaint. This affidavit was therefore improper since the verifier could not have verified a plaint which was non-existent. The plaint should therefore be struck out.

Secondly, the notice of motion dated 18th April, 2005 is brought under O.XXXV rule 1 (1) which envisages the existence of a suit. Once the plaint is struck out, there will be no suit upon which the motion can stand. He therefore urged the court to strike out the suit and the motion, and cited several authorities in support of his submissions.

In response, Mr. Havi referred to O.XVIII rule 9 which provides that an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned. He argued that the objection taken relates to an irregularity as to form which is curable as it does not go to jurisdiction of the court. The objection should therefore be dismissed with costs.

In his reply, Mr. Thangei submitted that O.XVIII does not apply to verifying affidavits. The requirement of O.VII rule 2 is mandatory and a plaint must be accompanied by a verifying affidavit. Failure to do so would be a breach of an express provision of the law which should be obeyed to the letter. Breach of that requirement renders the plaint liable to be struck out, and counsel asked the court to oblige.

I have considered the application and submissions of counsel. Having done so, I note first and foremost that the language of O.VII rule 1 (2) is mandatory and that a plaint must be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint. The verifying affidavit in this matter fell foul of this requirement as it was sworn a month to the day before the drafting of the plaint and could not, at the time of being commissioned, have been referring to a plaint which was not existent. As filed, the plaint is not accompanied by a verifying affidavit in the true contemplation of O.VII rule (2). Then I ask myself, should I strike out this particular plaint and, with it, the suit?

O.VII rule 1 (3) is in the following words-

> **"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."**

In my view, the wording of O.VII rule 1(3) makes it clear beyond peradventure that the said rule does confer upon the court a discretion as to whether it should strike out a plaint which does not comply with subrule (2). I derive this view partly from my interpretation of subrule (3) itself, which I construe to mean that the operative words are "The court may order… to be struck out…". The view is also supported by the decision in **MASEFIELD TRADING (K) LTD. v. KIBUI** [2001]2 E.A. 431 (CCK) in which Hewett J. ruled that the permissive language of O.VII rule 1 (3) of the Civil Procedure Rules leads to the conclusion that despite its mandatory terms, a breach of O.VII rule 1 (2) is an irregularity which can be waived or cured. I therefore find that the court has a discretion whether to strike out or not a plaint which is not accompanied by a verifying affidavit. In so doing, the court should exercise that discretion judiciously, taking into consideration all the circumstances of the case before it. In other words, the categories of the situations in which the court may exercise its discretion one way or the other are not closed.

Among the circumstances of this case is its own history. The plaint was filed on 4th December, 2003. On 19th January, 2004, M/s Waruhiu & K'owade and Ngang'a entered appearance for the defendant. This was followed by their written statement of defence for the defendant, which was filed on 3rd February, 2004, and which admits some of the contents of some paragraphs in the plaint. On 28th June, the plaintiff filed an application for summary judgment by notice of motion under O.XXXV rules 1 and 2 of the Civil Procedure Rules. The defendant/respondent responded by a replying affidavit sworn on 21st July, 2004 and filed in court the following day. The affidavit was drawn by his advocates on record, M/s Waruhiu K'owade and Ng'ang'a. On 1st November, 2004, the defendant filed a further affidavit sworn on the same day and drawn by his said advocates on record. On the same date, the defendant filed a notice of a preliminary objection to the application for summary judgment. The objection was based on the ground that the plaintiff's supporting affidavit sworn by Jane F. Otieno before S.M. Gitonga, a Commissioner for Oaths, was commissioned on 29.6.04 but filed on 28.6.04. The defendants succeeded in their preliminary objection, and the plaintiff's application was struck out.

The plaintiff has come back to court with an application similar to the one referred to above. It is to this application that the defendants took a preliminary objection based on the irregularity of the verifying affidavit. My observation is that this affidavit was on record since the commencement of this suit. It was there when the defendant entered appearance, filed its defence, filed a replying affidavit and a further affidavit. It was still on record when the defendant took objection to the affidavit sworn by Ms. Jane F. Otieno in June, 2004. Significantly, it is almost one year later that the defendant goes with a fine tooth comb, scanning the documents on record, to unearth any technical irregularity. And their effort was rewarded, as they came across a verifying affidavit which was stale and could not support the plaint.

It is my considered view that in such circumstances as these, it would be inequitable for a court of equity to strike out the plaint. The application to strike out should have been made within a reasonable time of entering appearance. To strike it out now is like stopping a race midway, and only because there has been a false start. Delay defeats equity, and I think that the issues pertaining to irregularities of pleadings ought to be raised timeously. It is one a half years since this case was filed, and to condemn it at this stage, I think, would be unfair and prejudicial to the plaintiff. After the lapse of such a period of time, the defendant is estopped from claiming that the suit was a still birth. On the contrary, it is full of life, and the

defendant has participated in nurturing that life.

In the result, I decline to exercise my discretion to strike out the suit. However, since the plaintiff occasioned it all, it will bear the costs of the application. It is so ordered.

Dated and delivered at Nairobi this 16th day of June 2005

L. NJAGI

JUDGE