



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL DIVISION – MILIMANI**  
**CIVIL CASE NO.596 OF 2004**

**FRANCIS NJAKWE GITHIARI.....1st PLAINTIFF**

**NJAMA LIMITED.....2nd PLAINTIFF**

**VERSUS**

**HON. DANIEL TOROITICH ARAP MOI T/A**

**MOI EDUCATIONAL CENTRE.....DEFENDANT**

**RULING**

By a Plaint dated 29th October, 2004 the firm of Murage & Mwangi Advocates filed this suit against the Defendants. The Plaint is accompanied by a Verifying Affidavit sworn by one Francis Njakwe Githiari on 29th October 2004.

The Defendant filed his defence through M/S Kilonzo and Company Advocates. On 11th March 2005 the Defendant filed an Application by way of Chamber Summons seeking one primary prayer: that is that the 1st Plaintiff's suit be struck out on the grounds that the Plaint does not comply with the requirements of Order VII Rule 1 (2); that the Verifying Affidavit is incurably defective and that the suit is incompetent, bad in Law and ought to be struck out.

The Application was supported by an Affidavit sworn by Kethi D. Kilonzo Counsel for the Defendant who deponed that there is no Verifying Affidavit to the 1st Plaintiff's suit within the meaning of the Law, Order VII Rule 2 and the Oaths and Statutory Declarations Act. The Application was opposed and Grounds of Opposition have been filed by Counsel for the Plaintiffs. The Grounds of Opposition are that the Application is an abuse of the process of the Court and is intended to delay and frustrate the fair hearing of the case in which the issues raised may be resolved.

The Application was canvassed before me on 13th May 2005 by Ms Kilonzo Learned Counsel for the Defendant and Mr. Mwangi Learned Counsel for the Plaintiffs. In her oral submissions in Court Counsel for the Defendant referred me to the Verifying Affidavit which is sworn by one Francis Njakwe Githiari who describes himself in the Verifying Affidavit as the first Defendant and also as the Managing Director of the 2nd Plaintiff. Counsel submitted that on its face the Verifying Affidavit is clearly defective and in any event cannot verify the Plaint for the two Plaintiffs. In the premises, Counsel so argued the Plaint does not meet the requirements of Order VII Rule 1(2). Counsel therefore urged me to strike out the Verifying Affidavit and the suit. Reliance was placed on the case of **Gulam & Another –v- Jirongo:**

**HCCC No.393 of 2003 (UR)** in which Ringera J. as he then was struck out a Verifying Affidavit on the ground that it was sworn by only one Plaintiff.

Mr. Mwangi Learned Counsel for the Plaintiff in response to the submissions of Counsel for the Defendant, argued that, there was a mere misdescription of the 1st Plaintiff who was incorrectly referred to as a first Defendant instead of the first Plaintiff which mis-description is not fatal and is curable under Order XVIII Rule 7 of the Civil Procedure Rules. Counsel argued that the case of **Gilam & Another –v- Jirongo (supra)** dealt with different circumstances. Counsel urged me to dismiss the Defendant's Application and in the alternative, if I am minded to strike out the Verifying Affidavit, I save the suit.

The above are the rival submission. I have considered them. Having done so I take the following view of the matter. There is no doubt that on the face of it the Verifying Affidavit sworn by the said Francis Njakwe Githiari on 29th October 2005 is defective. The said Francis Njakwe Githiari depones that he is the first Defendant when in fact he is the 1st Plaintiff. He has also deponed that he is the Managing Director of the 2nd Plaintiff and has its authority to swear the Verifying Affidavit on its behalf. He does not depone that the Verifying Affidavit is also sworn on his own behalf. The impression given is that the Plaintiff is verified by the 2nd Plaintiff and not by the 1st Plaintiff. The question to determine is whether or not the defect is incurable and fatal to the plaintiff.

In **Microsoft Corporation –v- Mitsumi Computer Garage Ltd and Another: Nairobi HCCC No. 810 of 2001 (UR)** Ringer J. as he then was held that an error in a Verifying Affidavit which offended the provisions of Sections 5 of the Oaths and Statutory Declarations Act would not result in the striking out of the Plaintiff.

In **Amira (K) Ltd –v- National Irrigation board (2001) 2 EAR 333** Mwera J. held that a defect in a Verifying Affidavit omitting to state the place at which the affidavit had been sworn could be overlooked.

Order VII Rule 1 (2) reads:

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

It would appear that where there are more than one Plaintiff all the Plaintiffs have to verify the correctness of the averments contained in the Plaintiff. I would on my part not see anything wrong with one Plaintiff swearing a Verifying Affidavit if he has authority to do so from the others and depones to the fact expressly.

In this case the description of the 1st Plaintiff as the 1st Defendant is clearly a misdescription and does not mislead anyone and had certainly not caused any prejudice to the Defendant. This notwithstanding an affidavit cannot be amended. The only way the defect in the Verifying Affidavit can be rectified is by a further or a compliant affidavit.

In Microsoft Corporation –v- Mitsumi Computer Garage Ltd and Another (supra) at page 15 Ringera J. as he then was delivered himself as follows:-

***“In my opinion where it is evident that the Plaintiff has attempted to comply with the rule requiring verification of Plaintiff but he has fallen short of the prescribed standards it would be to elevate form and procedure to a fetish to strike out the suit.”***

The Learned Judge proceeded to strike out the defective affidavit but did not proceed to strike out the Plaintiff but ordered the filing of a compliant Verifying Affidavit.

In this case, the 1st Plaintiff clearly intended to make the Verifying Affidavit for himself and on the authority of the 2nd Defendant but he fell short of the prescribed standard. The 1st Plaintiff has no doubt attempted to comply with Order VII Rule 1(2) and in my view it would be to elevate form and procedure to a fetish to punish the Plaintiff by striking out the Plaintiff. Such action would not serve the ends of

justice. In the result I decline to strike out the Plaint. I grant to the 1st Plaintiff leave to file and serve a compliant Verifying Affidavit within seven (7) days from the date hereof.

The Defendant shall have the costs of the Application dated 10th March 2005. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JUNE 2005.

F. AZANGALALA

JUDGE

Read in the presence of: