

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

Civil Case 93 of 2001

**MOHAMMED OLUNGA ODUORI
PLAINTIFF**

V E R S U S

**THE MUMIAS OUTGROWERS CO. LTD. 1ST
DEFENDANT**

**THE HON. THE ATTORNEY GENERAL 2ND
DEFENDANT**

R U L I N G

When the suit herein came up for hearing on 20-6-2005, Mr. Akwala, learned counsel for the Defendant raised a Preliminary Objection that the suit was incompetent because the affidavit was defective in that it was not titled, dated or shown by whom it was drawn. Sections 34 and 35 of the Advocates Act Cap 16 require that affidavits be shown by whom they are drawn and must also conform to the Oaths and Statutory Declarations Act Cap 15 of the Laws of Kenya.

Although no specific Notice of Preliminary Objection had been served, paragraph 10 of the defence had raised this point of law. It is for this reason that I allowed it to be argued as the Plaintiff had had notice of that averment in the Defence.

Mr. Kasamani, learned counsel for the Plaintiff contended that the affidavit was filed with the plaint and therefore it was understood to be the verifying affidavit although it was not so titled. Although it was also not shown by whom it was drawn, by dint of the fact that it accompanied the plaint which showed by whom the pleading was drawn, it was understood, he said, that the affidavit was drawn by the firm that had also drawn the plaint. He conceded it was not dated but submitted that the defect was not fatal.

I have given due consideration to the submissions of both counsel. The issue is whether the Plaint was accompanied by a competent affidavit as required by Rule 1(2) of Order VII of the Civil Procedure Rules. I do not consider the omission of the word "verifying" in the heading of the affidavit to be fatal as the affidavit was understood to be a verifying affidavit accompanying the plaint at the point of institution of the suit.

However, the fact that it was not dated and did not indicate by whom it was drawn went against express provisions of the Advocates Act Cap 16 and the Statutory Declarations Act Cap 15. The combined effect of these defects was to render it incurably defective. It is my finding that the affidavit was fatally defective and therefore the plaint was not accompanied by a competent affidavit as required by Rule 1(2) of Order VII.

I have discretionary power to extend time for the filing of a verifying affidavit where sufficient cause is shown. I do not think the ends of justice will be defeated by the exercise of this discretion. This is a case where the Plaintiff made attempt to comply with the Rules but made blunders. Blunders will always be there as long as people remain human. The blunders in this case could have been rectified earlier but I do not think the Defendant will suffer irremedial damage if I extend time for the Plaintiff to file a verifying affidavit.

As the Defence had raised the point early enough but the Plaintiff took no steps to remedy the position,

the plaintiff shall pay to the Defendant full costs for 20/6/05 and 22/7/05. A proper verifying affidavit shall be filed and served within 21 days from the date hereof failing which the suit shall stand struck out for want of compliance in the Rule 1(2) of Order VII. It is so ordered.

Dated at Kakamega this 22nd day of July, 2005.

G. B. M. KARIUKI

J U D G E