



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Civil Case 20 of 2003

ALLESANDRO PICCIO

CHIMEO S.R.L.....PLAINTIFFS

VERSUS

GIULIO GIRO.....DEFENDANTS

RULING

In a plaint filed in this suit the plaintiffs' claim against the defendant is for special damages in Italian Lira 220 m, general damages, interest on the special damages and costs of the suit.

The defendants filed their defence and thereafter the plaintiffs applied that judgment be entered in their favour against the defendant arguing that the defence filed by the defendant was a mere sham as the same did not raise any triable issues. Before that application could be heard, the defendant through his counsel, Mr.Mouko raised point of preliminary objection, to which this ruling is in respect of. There are six grounds listed in the Notice of Preliminary objection. Grounds (i) and (ii) were argued together. It was argued that both the suit and the application for judgment were fatally defective by reason that they do not comply with Order 7 rule (2) of the Civil Procedure Rules. The verifying affidavit accompanying the plaint is sworn by a single plaintiff in a suit filed by two plaintiffs. It was also argued that the verifying affidavit does not disclose the physical address of the deponent contrary to Order 18 rule 4 of the Rules. It is further contended that the affidavit does not show who has drawn it or filed it against the provisions of Section 35 of the Advocates Act.

The third ground was that the suit being a representative suit was filed without leave of the Court. The other point raised was that the suit offends Section 86 of the Civil Procedure Act as it contains documents in an unofficial language of the High Court.

Finally with regard to grounds 4 and 6, it was argued that the claim as contained in the plaint is a departure from that in the request for judgment.

In reply, Mr.Mwadilo for the plaintiffs saw the raising of preliminary objection after nearly one year as a more to delay the determination of the suit on merit.

On the grounds of preliminary objection he argued that the defects or omissions, if any, in the verifying affidavit are merely technical and procedural and are curable under Order 18 rule 7 of the Rules. He also relied on Order 6 rule 12 of the Civil Procedure Rules that no technical objection may be taken in any

pleading on the ground of any want of form. It was submitted that the suit was not a representative suit hence no leave was required. On the documents annexed to the affidavit and which are not in the official language of the Court, it was contended that the documents were translated and translation filed in Court. I have considered these arguments. First and foremost, in considering the points raised in this preliminary objection, the Court must subject these points to the test laid down in the case of **Mukisa Biscuit Manufacturing Co. Ltd. V West End Distributors Ltd.** 1969 EA 696, namely

“.....a preliminary objection consists of point of law which has been pleaded, or which arises by clear implications out of the pleadings, and which if argued as a preliminary objection may dispose of the suit.....”

It was further held that a preliminary point of objection would normally be argued on the assumption that all the facts pleaded by the other side are correct and cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

Applying these tests to the grounds contained in the preliminary objection, are the points raised pure points of law, are they points that are capable of disposing of the suit or application? have these points been pleaded or can they be gleaned from the pleadings; Is it assumed that the facts as pleaded by the plaintiffs are correct and the Court need not ascertain any fact?

To begin with, there is an averment in the statement of defence intimating that the defendant would be raising points of preliminary objection to the suit as being bad in law. This satisfies the requirement that the point of law to be raised must be pleaded or implied from the pleadings. The first ground deals with verifying affidavit. It was argued that in a suit where there are two plaintiffs there must be two verifying affidavits.

With respect, Order 7 rule 2 of the Civil Procedure Rules only requires a verifying affidavit sworn by the plaintiff as to correctness of the averments in the pleadings. In my view this can be done by any one plaintiff as to the correctness of the statements contained in the pleadings which are within the knowledge of that plaintiff.

The second matter relates to the omissions in the affidavit to include the physical address of the plaintiff. This is a requirement under Order 18 rule 4 of the Civil Procedure Rules and is couched in mandatory terms. However, it is a technical requirement curable under Rule 7 of the very order requiring its compliance. This is therefore a point not capable of disposing of the suit.

The next point is that the affidavit does not indicate by whom it was prepared and upon whom it was to be served as required by Section 35 (1) of the Advocates Act. Mr.Mwadilo retorted that these are only technicalities and that since the pleadings were signed by the advocate for the plaintiff as required by Order 6 rule 14 of the Civil Procedure Rules, the requirement that a verifying affidavit must be endorsed to show by whom it was drawn was a merely technicality. He also argued that Section 35(1) of the Advocates Act only applies to unqualified persons.

Section 35 of the Advocates Act is in mandatory language that the person who draws or prepares any document or instrument referred to in Section 34, which includes, documents or instruments relating to any other legal proceedings, shall on the instrument or document endorse his name and address or the name and address of his firm. It is, in fact, under the said Section 35, an offence to fail to comply with these requirements. It is common ground that failure to comply with substantive provisions of an Act of Parliament such as in this case can not be described simply as failure to comply with form. It is not a mere irregularity – and order 18 rule 7 of the Civil Procedure Rules is not available to cure the failure. Order 6 rule 12 cannot also be cited to counter the objection.

It was argued that Section 35 of the Advocates Act was enacted to deal with unqualified persons masquerading as advocates That may be so. But a closer look at the Section will show it was meant for that as well as for the advocates who fail to adhere to certain requirements of the Act. Part VIII of the Act under which the provision under consideration is contained is head **PROVISIONS WITH RESPECT**

TO UNQUALIFIED PERSONS ACTING AS ADVOCATES AND OFFENCES BY ADVOCATES (emphasis added). Section 35 specifically refers to endorsement on the documents or instruments with the name and address of the drawer or name and address of the firm of which the drawer is a partner. Parliament could not have intended that an unqualified person would be required to draw and endorse documents and a situation was not certainly foreseen when an unqualified person would have a partnership in a firm of advocates.

For these reasons objection on this point is sustained and the verifying affidavit to the plaint is hereby struck out. Having struck the verifying affidavit the plaint has no legs to stand on as it is not verified. The suit is similarly struck out with costs.

I find no point in proceedings with the other grounds raised in the preliminary objection.

Dated and delivered at Malindi this 20th day of July 2005.

W. OUKO

JUDGE

Delivered in the presence of

Mr.Mwadilo for plaintiff.

Mr.Gekanana for Mr.Mouko

Court Clerk – Mr.Matu.

W.OUKO

JUDGE