



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU  
Civil Suit 86 of 2002**

DOUNE FARM LTD.....PLAINTIFF

VERSUS

RICHARD SOI & 4 OTHERS.....DEFENDANTS

AND

**BOROP MULTI-PURPOSE**

CO-OP. SOCIETY LTD.....INTERESTED PARTY/APPLICANT

**RULING**

This Ruling relates to a Notice of preliminary objection that was filed by the Interested Party/Applicant. The latter raised the following preliminary objections on points of law:

- (1) *THAT the verifying affidavit sworn on 4<sup>th</sup> April, 2002 is incurably defective and is **not** an affidavit as envisaged in law and as required by Order 7 Rule 1 (2) of the Civil Procedure Rules and is for expunging from the records.*
- (2) *THAT upon the expunging of the verifying affidavit the Plaint on record offends the provisions of Order 7 Rule 1 (2) of the Civil Procedure Rules as it is **not** accompanied by a verifying affidavit and is also for striking out and expunging from the records with costs.*
- (3) *THAT in law there is **no** suit capable of adjudication and the same is for striking out with attendant consequences.*

During his submissions, Mr. Arusei for the Interested Party stated that the verifying affidavit has **not** been endorsed as to who drew the same. He was of the view that the same contravened **Section 34 and 35** of the Advocate's Act. In support of his submissions, Mr. Arusei quoted the following authorities:

- **John Nduati Kariuki Vs. National Bank of Kenya**

**Nairobi HCCC No. 626 of 2003**

- **Miben (K) Ltd. Vs Mark Station**

**Kisumu HCCC No. 234 of 2001**

- **Jovezova East Africa Ltd. Vs Sylvester Onyango & Otieno**

**Milimani Commercial Courts No. 1086 of 2002**

- **Barclays Bank of Kenya Ltd. Vs Dr. Solomon Otieno Orero**

**Milimani Commercial Court HCCC No. 1736 of 2001**

Mr. Arusei submitted that in the above case the Court had warned itself that the breach was **not** of form. Besides the above, he also quoted the following case of **James Francis Kariuki & Another Vs United Insurance Co. Ltd.** in which the Court found out that the affidavit was defective, and the same was expunged. Later, the Court stated that the Plaintiff **cannot** stand alone in the file without verifying affidavit.

In conclusion, he quoted the case of **Bishop Joshua Gawo Vs Nairobi City Council - Civil Application No. Nairobi 345 of 2000** where the Court stated that the Plaintiff shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments.

On the other hand, Mr. Ogolla for the Plaintiff conceded that the verifying affidavit is defective by virtue of the fact that it is **not** in compliance with **Section 34 and 35** of the Advocate's Act. Apart from the above, Mr. Ogolla pointed out that the Plaintiff had been filed by Mr. Lawrence Mwangi, Advocate. According to him, the verifying affidavit has been annexed to the Plaintiff and hence forms part of the same. He concluded that the fact that the verifying affidavit does **not** show the name of the drawer is **not** fatal.

Besides the above, Mr. Ogolla posed the question of what the Court may do when it finds that the verifying affidavit is defective? According to him, there are two schools of thought. The first is that, the verifying affidavit should be struck out together with the Plaintiff.

The second school of thought is that the Court should strike out the affidavit - but grant the Plaintiff leave to file a fresh verifying affidavit and hence prevent the suit from being struck out. To support his submissions, Mr. Ogolla quoted the case of :-

**Pyrethrum PC Ltd. Vs Rogers Shako Ngoo**

HCCC No. 142 of 2004

where the Court relied on the case of:

**Microsoft Corporation Vs Mitsumi Computer Garage Ltd.**

According to Mr. Ogolla, the Interested Party would **not** suffer any prejudice if they are allowed to file a compliant verifying affidavit. Besides the above, he urged the Court to rise above the issue of technicalities and save the proceedings in the case. In addition to the above, Mr. Ogolla submitted that since it was the previous Advocate who had made a mistake by failing to comply with the provisions of **Chapter 15** – then the mistakes should **not** be visited on innocent litigants. In support of his subsequent submissions, Mr. Ogolla quoted the case of :-

Kajwang Vs Law Society of Kenya

Kenya Law Reports [2002]

in which the Court stated that preliminary objections should be raised at the earliest opportunity. Applying that argument to this case, he submitted that the Interested Party has slept on his rights.

On the other hand, Mr. Orina for the Defendants has supported the preliminary objections. Besides the above, he also submitted that preliminary objections can be raised at any stage of the proceedings. To support the above, he quoted the case of :-

**Mukhisa Biscuits Manufacturing Co. Ltd.**

Vs

**West End Distributors Civil Appeal No. 9 of 1969 [EALR]**

Apart from the above, he has also submitted that the Plaintiff has **not** closed his case. In conclusion, he submitted that the two schools of thought had been harmonized in the case of :

**Joshua Gawo & Others Vs Nairobi City Council**

where the Court stated that in case a Counsel makes a mistake - then the client may sue for negligence.

This Court has carefully perused the submissions by all the three Counsels together with the quoted authorities. *Order 7 Rule 1 (2)* states as follows:

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

***(3) – 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.”***

While faced with a similar problem, Hon. Justice A. Ringera (as he then was) stated in the case of **MICROSOFT CORPORATION VS MITSUMI COMPUTER GARAGE LTD [2001] 2 E.A.**

***“In those instances the Court should rise to its higher calling to do justice by saving the proceedings in issue.”***

In the same case, he had found the verifying affidavit to be incompetent and struck out the same. Despite the above, Ringera Judge, as he then was, granted leave to the Plaintiff to file and serve the Defendants with a fresh and compliant verifying affidavit within 15 days from the date of the Ruling. The Court declined to strike out the Suit.

Having carefully perused the case of:

**BISHOP JOSHUA GAWO & OTHERS VS NAIROBI CITY COUNCIL**

**CIVIL APPLICATION NO. NAI 345 of 2000**

that was quoted by Mr. Orina, the Court wishes to differ with him on the interpretation of the above. In that case, the Plaint was **not** accompanied by a verifying affidavit. However, in this case, it has been admitted, even by the Plaintiff’s Counsel that the verifying affidavit is defective.

From the above, it is explicit that the two cases can be distinguished. Besides the above, it should be noted that striking out a Plaint is a drastic and draconian action which should only be done in extreme cases. In this particular case, the omissions in the verifying affidavit were committed by the former Counsel to the Plaintiff viz, Mr. Lawrence Mwangi. That fact has **not** been disputed by any party. Should the Court now strike out both the verifying affidavit and the Plaint – then it would be punishing the Plaintiff for the mistakes of his Advocate. This Court is **not** inclined to punish the Plaintiff since that would escalate the costs unnecessarily.

Apart from the above, it has **not** been demonstrated that the interested party would suffer any prejudice in the matter. The Defendants themselves who had been sued earlier never complained about the verifying affidavit till the matter was raised belatedly by Mr. Arusei for the Interested Party.

In view of the above analysis, I hereby strike out the verifying affidavit dated 4<sup>th</sup> April, 2002 since the same is incompetent. In the same breadth, I hereby decline to strike out the Plaint dated 2<sup>nd</sup> April, 2002. The Plaintiff/Respondent is hereby granted 15 days within which to file and serve a compliant verifying affidavit. The Plaintiff/Respondent will have to bear the costs of the application.

Those are the Orders of the Court.

**MUGA APONDI**

**JUDGE**

Ruling read, signed and delivered in open Court in the presence of Mr. Arusei and Mr. Orina for Interested Party and Defendants respectively.

**MUGA APONDI**

**JUDGE**

**14<sup>TH</sup> JULY, 2005**