



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI COMMERCIAL COURTS**

**Civil Case 1651 of 2001**

**SHAMAS CHARANA.....PLAINTIFF**

**VERSUS**

**HARIT SHETH t/a HARIT SHETH ADVOCATES.....DEFENDANT**

**R U L I N G**

The Defendant had filed an application for the striking out of the following pleadings which had been filed by the Plaintiff:-

- (i) The Plaintiff's Complaint filed on 29.10.01,
- (ii) Amended Plaintiff filed on 23.7.04,
- (iii) Amended Plaintiff filed on 26.7.04, and
- (iv) The Plaintiff's Notice of Motion dated 26<sup>th</sup> November 2004.

The application filed by the Defendant is dated 14<sup>th</sup> December 2004, and was scheduled to be heard on 26<sup>th</sup> September 2005. However, before the Defendant could commence his submissions, the Plaintiff sought leave of the court to raise an issue. According to Mr. K'OWADE, advocate for the Plaintiff, the best course of action was for the court to allow him to first withdraw the Amended Plaintiff dated 26<sup>th</sup> July 2004. He explained that the Plaintiff had sought and obtained leave to amend his plaintiff. The court records show that the Hon. H.P.G. Waweru J. delivered his Ruling on 15<sup>th</sup> July 2004, granting leave to the Plaintiff to file and serve an Amended Plaintiff within ten days.

On 23<sup>rd</sup> July 2004, the Plaintiff filed an Amended Plaintiff. However, that Amended Plaintiff was not accompanied with a verifying affidavit. Three days later, on 26<sup>th</sup> July 2004, the Plaintiff filed another Amended Plaintiff, which was then accompanied with the Plaintiff's Verifying Affidavit.

Thereafter, the Plaintiff filed an application dated 26<sup>th</sup> November 2004, seeking to strike out the Amended Statement of Defence, which had been filed on 6<sup>th</sup> August 2004.

The Defendant now seeks the striking out of the Plaintiff, the two Amended Plaintiffs, as well as the application dated 26<sup>th</sup> November 2004. However, the Plaintiff says that the interests of justice would be served if he were allowed to withdraw the Amended Plaintiff dated 26<sup>th</sup> July 2004.

In my considered view, if the Plaintiff were simply allowed to withdraw one of the pleadings which the

Defendant was seeking to have struck-off, the Plaintiff would have pre-empted the Defendant's application.

The Defendant submits that the Plaintiff's intention, for the suggested withdrawal of the Amended Plaintiff dated 26<sup>th</sup> July 2004, is to avoid censure, as the said amendment was obtained on the strength of a forged signature. I hold the view that it would not be right for me to delve into the substance of the application, at this stage, as the parties have not yet addressed me on the same. But, I do venture to say that if the Plaintiff has no answer to the challenge mounted by the Defendant against the Amended Plaintiff dated 26<sup>th</sup> July 2004, he should readily concede the point, rather than seek to withdraw a pleading which the Defendant seeks to have struck out.

Similarly, as regards the Amended Plaintiff dated 23<sup>rd</sup> July 2004, the Plaintiff seems to be conceding that the Amended Plaintiff was not accompanied with a Verifying Affidavit. That is the very ground upon which the Defendant was relying, in his endeavour to strike out the said Amended Plaintiff, dated 23<sup>rd</sup> July 2004.

But, at the same time, the Plaintiff has sought an adjournment so as to enable him file a substantive application for leave to file a formal application, for leave to file a Verifying Affidavit. To my mind, if there was an avenue which would enable the Plaintiff salvage its Amended Plaintiff dated 23<sup>rd</sup> July 2004, that would ultimately enable the parties to canvass their respective substantive cases before the court. By so saying, I do not imply that if the Plaintiff were to seek leave to file a Verifying Affidavit, the court would necessarily grant his application. It is very possible that the court may dismiss that application, whereupon the Amended Plaintiff would simply fall away.

Furthermore, I hold the view that by allowing the Plaintiff that small window of opportunity, the Defendant would not be prejudiced. I say so because if there have been forgeries, those will remain in place, regardless of whether or not the Plaintiff managed to get leave to file a Verifying Affidavit. And again, by the very act of making an application for leave to file a Verifying Affidavit, the Plaintiff would have to readily admit that without the Verifying Affidavit, his Amended Plaintiff was a non-starter. Accordingly, the Plaintiff would have to concede that the Defendant's application to strike out the Amended Plaintiff dated 23<sup>rd</sup> July 2004 was well-founded. In other words, there is no doubt that the course of action suggested by the Plaintiff would be pre-empting the Defendant's application. But, that fact notwithstanding, I believe that if the court can ultimately adjudicate on the real issues between the parties, we would have played the role of enhancing substantive justice.

Accordingly, I do now grant leave to the Plaintiff to file and serve a formal application for leave to file a Verifying Affidavit. The said application is to be filed and served within the next seven (7) days. I further direct that the intended application by the Plaintiff will thereafter be heard simultaneously with the Defendant's application dated 14<sup>th</sup> December 2004.

The Plaintiff is directed to pay to the Defendant the costs for the court attendance on 26<sup>th</sup> September 2005. The Plaintiff shall also pay the Court Adjournment Fee.

Dated and Delivered at Nairobi this 24<sup>th</sup> day of October 2005.

FRED A. OCHIENG

JUDGE