



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL 235 OF 2003

ROBERT MBEVI MALUKI APPELLANT

VERSUS

KENRUB INDUSTRIES LTD RESPONDENT

JUDGMENT

Order VII Rule 1 (2) of the Civil Procedure Rules (hereinafter referred to as “the Rules”) provides that a Plaintiff filed in the institution of suits should be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averment contained in the Plaintiff. In compliance with that requirement, the Appellant instituted the suit in the lower court by filing a Plaintiff with a Verifying Affidavit. But there was a problem. The Plaintiff was drawn on 17th November, 2000 whereas the Verifying Affidavit was sworn on 1st September, 2000. The position is that when the Affidavit was sworn, the Plaintiff did not exist. The Respondent took this issue up in the lower court by way of a Preliminary Objection and sought to have the Verifying Affidavit and the Plaintiff struck out. The Magistrate in the lower court agreed with the Respondent and proceeded to strike out the Plaintiff and the Verifying Affidavit. In doing so, she delivered herself very briefly as follows:

“I agree that the Verifying Affidavit cannot verify the correctness of the averments in a Plaintiff that is drawn after the Verifying Affidavit is sworn”.

The Appellant was aggrieved by the decision of the lower court and appealed to this court. The appeal is based on four Grounds of Appeal, namely:

“1. THAT the learned Magistrate erred in law and fact by holding that the plaintiff’s verifying affidavit was not valid on the ground of the same having been dated before the plaintiff in spite of the plaintiff having stated in his affidavit about having read and verified correctness of the plaintiff.

2. THAT the learned Magistrate erred in law and fact by purporting to imply that a plaintiff’s validity assumes life on the basis of the date in total disregard of the law which does not require a plaintiff and the verifying affidavit to be signed on the same date.

3. The learned Magistrate erred in both law and fact in holding by implication that an advocate should sign and date the plaintiff even before the plaintiff has verified the correctness of its contents.

4. The learned Magistrate erred in both law and fact by failing to exercise her discretion judiciously for the interest of justice and equity in spite of the fact that the respondent

failed to prove that no prejudice was occasioned to it by the plaint and verifying affidavit in any way whatsoever.”

One can sympathise with the learned Magistrate. There is a very divided opinion on this subject. Different Judges have ruled in different ways. The Honourable Mr Justice Nyamu in dealing with exactly the same point in ***Jovenna East Africa Ltd vs Sylvester Onyango & Others Milimani HCCC No 1086 of 2002*** said as follows:

“I should also add that Order 7 Rule 1 (2) (of the Rules) clearly stipulates that the Plaint shall be accompanied by an Affidavit by the Plaintiff verifying the correctness of the averments. It is not therefore possible to verify a nonexistent Plaint. As at the date of the swearing of the affidavit there must be a Plaint in existence capable of being verified. On the facts of this case there was no Plaint in existence ... and therefore there was nothing to verify ...”

The Honourable Mr Justice Ibrahim took the same view in the ***Delphis Bank Ltd vs Asudi (K) Ltd Milimani HCCC No. 82 of 2003***. I need not name every Judge who has agreed with that view but only to say that some of the courts which have read the rule in issue strictly and found that it was not complied with have proceeded to strike out the Verifying Affidavits in issue together with the Plaint.

There has, however, developed another view. The alternative view, though not contesting the position taken by the first thinkers on the question of the validity of the Verifying Affidavit, has been less harsh in its punishment. The alternative view has reduced the penalty involved by offering the offending party a further opportunity to file a fresh Verifying Affidavit to remedy the wrong. The Judges who have taken this position have justified it on the basis that an irregularity which does not go to the jurisdiction of the court should not be met by a draconian action such as striking out an action. The Honourable Mr Justice Ringera said as follows in ***Galeb Gulam & Another vs Cyrus Jirongo Milimani HCCC No. 393 of 2003*** when he was still a member of this Court:

“Speaking for myself, I am of the conviction that rules of procedure should be seen as hand maidens of justice and not its mistress and, accordingly unless procedural lapses have caused the adversary a prejudice which cannot be compensated by costs or there is a clear manifestation of an intention to over reach, the same should not be accorded fatal consequences.”

The Honourable Mr Justice Mbaluto was himself brief in his conviction on the matter. He said as follows in ***Mobil Oil Kenya Ltd vs Weldwell Ltd Milimani HCCC No. 222 of 2001***:

“(The) interpretation ... conforms with the philosophy behind the basic purpose of the Rules of Procedure which is to aid parties as well as the courts to achieve justice and not to block them from doings so.”

The Honourable Mr Justice Anyara Emukule took a similar view in ***Agricultural Finance Corporation & Another vs Drive-In Estate Developers Ltd Milimani HCCC No. 115 of 2001***. So are we at crossroads!

For me, I believe that the primary function of a court of law is to do substantive justice in all cases where it has jurisdiction. That function is aided by rules of procedure but at no time should the rules be applied to stultify the principal function. Procedural irregularities that do not go to the jurisdiction of the court and which do not occasion prejudice to the other side may be ignored or remedied but they should not be allowed to deny a party his day in court. So my position is the one taken by the alternative view. That has been my position for a long time, and although Counsel for the Respondent strongly urged that I review my position, I have found no good reason to do so. I believe this is a matter that the Court of Appeal should determine in finality.

In the case before me, I think the learned Magistrate applied a heavy hand to the Appellant. The Appellant was shut out of the court because of a minor mistake. The only problem with his suit was that he swore the affidavit in verification of the Plaint before the Plaint had been drawn. This could have been sorted out by giving him an opportunity to swear a fresh affidavit but to strike out the suit was too drastic.

In the result, I allow the appeal and set aside the Ruling and Order of the lower court striking out the Plaintiff and substitute it with an order granting the Appellant leave to file a fresh Verifying Affidavit and with a direction that the suit in the lower court to proceed once the new Verifying Affidavit is filed as if the filed Plaintiff was initially accompanied by a valid Verifying Affidavit. The Appellant will also have the costs of the appeal.

Dated and delivered at Nairobi this 12th day of October, 2005.

ALNASHIR VISRAM

JUDGE