



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Case 201 of 2005

SHIRIKA LA KUSAIDIA WATOTO WA KENYA

FAIDI KENYA.....1ST PLAINTIFF

VERSUS

RHODAH ROP.....1ST DEFENDANT

ALEX JUMA.....2ND DEFENDANT

JOSEPH NDUNGU.....3RD DEFENDANT

SAMSON MUSIERE.....4TH DEFENDANT

EDWARD KITUR.....5TH DEFENDANT

RULING

The plaintiff, a non-governmental organization, filed suit against the defendants herein seeking several orders against the said defendants for passing off as officials of the plaintiff at its Kitale Branch. At the time of filing suit, the plaintiff also filed an application for injunction seeking to restrain the defendants by themselves or their agents from interfering with the management of the plaintiff’s Kitale branch or removing the records or equipment kept at the offices of the plaintiff’s Kitale branch. The defendants have filed a defence to the plaintiff’s suit. They have denied the plaintiff’s claim. They have also filed replying affidavits opposing the application for injunction sought by the plaintiff. At the hearing of the application for injunction, the defendants raised a preliminary objection to the entire suit filed by the plaintiff on the ground that:

“The affidavit filed to verify the plaint is manifestly false and it should be struck out and expunged from the record, leaving a plaint which has no verifying affidavit and the said plaint should also be struck out.”

In the submissions made by Mr Kiarie, Learned Counsel for the defendants it emerged that the plaintiff had filed another suit against the defendants, namely **Nakuru HCCC No. 155 of 2005 Shirika la kusaidia watoto alias Faidi Kenya & two others –vs- Roda Rop.** The said suit had been struck out by my Learned brother *Musinga J* on the grounds that Ben Gathongo and Naomi Wanjiru Wambu had no *locus standi* to be enjoined as plaintiffs in the suit filed by the current plaintiff. He further held that

“The second and third plaintiffs had no capacity in joining themselves as plaintiffs in this suit irrespective of whatever position they held in the first plaintiff organization unless they had

their own justiciable claims against the defendant as well. The third plaintiff did not sign the verifying affidavit that accompanied the original plaint as person duly authorized by the first plaintiff to sign the same for and on its behalf but he signed in his capacity as a plaintiff. Since the second and the third plaintiffs had no locus standi to institute the suit, a stranger could not validly swear a verifying affidavit ... in view of my above findings, I do not even need to consider the other grounds because I am convinced that the entire suit is fatally defective and cannot stand. I strike it out with costs to the defendants.”

After the said suit had been struck out, the plaintiff filed the current suit. In paragraph 10 on the plaint, the plaintiff averred that;

“There was no previous suit pending between the parties herein which was struck out there is not suit pending before any other court in respect of the issues raised herein.”

In the affidavit verifying the plaintiff, Ben Gathongo, who refers himself as the National Chairman and the Chief Executive of the plaintiff swore at paragraph 3 & 4 as follows:-

“3. THAT there is no other suit pending and that there have been no previous proceedings in any court between us and the defendants over this subject matter.

4. THAT I swear this affidavit in compliance with Order VII rule 1(2) of the Civil Procedure (Amendment) rules 2000.”

The defendants have complained that the averment in the plaint and the verifying affidavit sworn by Ben Gathongo were patently false. Learned Counsel submitted that the plaintiff deliberately failed to disclose the existence of the previous suit which had been struck out by the court (*i.e.* **Nakuru HCCC No. 155 of 2005**). The defendants therefore argued that the entire suit filed by the plaintiff ought to be struck out as it was verified by a false affidavit. Mr Kiarie submitted that this omission by the plaintiff is fatal and goes to the root of the entire case and could not therefore be remedied or rescued by amendment. He referred the court to various decided cases in support of his submissions.

In response Mr Onyango, Learned Counsel for the plaintiff submitted that it was true that there was no pending suit as between the plaintiff and the defendants. He submitted that the suit which had been struck out by *Musinga J* had been filed by Ben Gathongo and Naomi Wanjiru Wambu in their personal capacities and not by the plaintiff. He argued that the reason why the said suit was struck out is because the plaintiff in the current suit had not filed or sworn a verifying affidavit to the suit. It was his submission that the anomaly complained of by the defendant could be rectified by the plaintiff being allowed to file a fresh verifying affidavit to conform to the requirement of the rules. He urged the court to disallow the preliminary objection.

I have carefully considered the arguments made by counsels for the defendant and plaintiff respectively in this preliminary objection. The issues for determination by this court are two fold; Did the plaintiff swear a false verifying affidavit that failed to disclose the existence of the previous suit as required by the rules? If the answer to the above question is in the affirmative, should this court strike out the plaintiff’s suit in its entirety or allow the plaintiff to rectify the mistake by filing another affidavit clarifying the matter complained of?

The facts in contention are not in dispute. The plaintiff did file suit number **Nakuru HCCC No. 155 of 2005** against one of the defendants in this suit. In the said suit, the plaintiff was one of the three plaintiffs. *Musinga J* struck out the said suit on the grounds that the plaintiff in the current suit had not sworn an affidavit in verification of the plaint. It is after the said suit was struck out that the plaintiff filed the current suit. The plaintiff has averred in paragraph 10 of the plaint herein that there were no previous proceedings pending between the plaintiff and the defendants over the same subject matter. In paragraph 3 and 4 of the verifying affidavit, Ben Gathongo, the National Chairman and the Chief Executive Officer of the plaintiff swore that there were no previous proceedings pending between the plaintiff and the defendant. The said Ben Gathongo specifically referred to **Order VII rule 1(2) of the Civil Procedure**

(Amendment) rules, 2000 signifying that he was aware of the law that required him to swear the said affidavit to verifying the averments made in the plaint. The said provision required the plaintiff to swear a verifying affidavit that the contents of the averments made in the plaint were correct.

In this instance, the plaintiff was clearly not swearing to the truth. The plaintiff was aware that there existed another suit between itself and one of the defendants over the same subject matter which had been struck out. The plaintiff cannot give an excuse that it forgot the fact of the existence of the said suit, because it filed the current suit one day after the previous suit had been struck out. The plaintiff deliberately swore a false affidavit to conceal the existence of the previous suit. I agree with the submission by Mr Kiarie that an affidavit being evidence in written form cannot be amended or retracted. In the circumstances therefore the plaintiff consciously and deliberately made false averment in his plaint that there existed no previous suit. It compounded its mischief by swearing a false affidavit stating that such previous suit did not exist. The plaintiff knew this fact to be incorrect. For the reasons stated I therefore find merit with the preliminary objection raised by the defendants. I consequently strike out the false affidavit filed by the plaintiff in verification of the plaint. The plaint filed by the plaintiff thus remains naked without a verifying affidavit.

Mr Onyango has submitted that this court should allow the plaintiff to file another affidavit to verify the averments made in the plaint filed herein. He pleaded with this court to exercise its discretion and allow the plaintiff's suit to be sustained so that the issues in dispute could be heard and determined on merits. Having carefully considered the arguments made, I respectfully beg to disagree with Mr Onyango. When the plaintiff embarked on the path of litigation, it had to play by the rules of the game. One critical rule of the game is that "*thou shall abide by the rules of the game.*" In this instance, the plaintiff has deliberately breached the mandatory provisions of the law. It deliberately chose to swear falsehoods in its verifying affidavit. The affidavit being written evidence cannot be amended. The plaintiff has been caught with its hand in the till. It cannot plead that it should be allowed to retrace its step and do the right thing. The plaint having not been verified by an affidavit as required by **Order VII rule 1(2) of the Civil Procedure Rules** is incompetent and therefore incurably defective. The said plaint is therefore ordered struck out with costs to the defendants.

DATED at NAKURU this 2nd day of November 2005.

L. KIMARU

JUDGE