



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 1540 OF 1999

TREADSETTER TYRES LIMITED.....PLAINTIFF

V E R S U S

1. RASHID MBARUK.....1ST DEFENDANT

2. NASSOR SULEIMAN t/a

TAWFIQ BUS SERVICES.....2ND DEFENDANT

R U L I N G

The Defendant has raised a Preliminary Objection in his defence paragraph 10. That the Plaintiff's suit is fatally defective and the verifying affidavit incompetent for want of compliance with mandatory provisions of the law.

In argument the counsel for Defendant relied on the provisions of Order 7(1) and (2) – the requirements are:-

“do verify the correctness of the facts stated in the Plaintiff.”

The law demands that a Plaintiff be in existence when affidavit is sworn. In this case swearing was on 4/7/2003 while the Plaintiff is dated 8th July, 2003. Furthermore, the wording of affidavit “*I am able to verify the contents thereof*” is not as required but “*verifying the correctness*” of averments is what is required.

It is to be noted that Order 7(1)(3) gives court discretion “*may of its own motion or on application of the defendant order to be struck out any plaintiff which does not comply*” of the date affidavit was sworn. It is to be noted that both Plaintiff and Affidavit were filed on the same date namely 9/7/03. The requirement is that the affidavit accompany the Plaintiff at the time of filing the same. This appears to have been complied with.

There is no challenge that the affidavit is defence in any other form. It will also be noted that the Plaintiff is signed by Advocate while the Affidavit must be sworn by the party. I therefore find that the fact that both documents were dated separately does not invalidate the Plaintiff so long as both documents are filed together “*accompanied by Affidavit*” on the date of filing.

I have perused the authorities submitted by both counsel. However, it is to be noted that this is recent legislation and the court's opinion is not settled yet.

I therefore find that the court has discretion whether to strike out Plaintiff or not. In this case High Court fees have been incurred and both parties have large claims against each other.

The court is empowered to receive any affidavits for use in any suit notwithstanding any defect by misdescription or otherwise in the Title or other irregularity in form thereof.

Also I have considered that the court has discretion and the requirement to strike is not mandatory. The language used in verifying affidavit does convey what the law required – there is no prescribed form of verifying affidavit.

In the circumstances I exercise my discretion in favour of the Plaintiff and do not order the striking out of the Plaintiff.

The Preliminary Objection is really not appropriate – the rule requires the court to be moved by application which is not the case here.

I therefore dismiss the Preliminary Objection and order costs to Plaintiff.

Dated at Mombasa this 12th day of March, 2004.

JOYCE KHAMINWA

J U D G E

12/3/04

Khaminwa, J.

Chege – Court Clerk

Ruling read in presence of Mr. Mogaka.

JOYCE KHAMINWA, J.

Mr. Mogaka

We have already settled the case. We would like to record settlement on 18/3/04.

Court:-

Mention on 18/3/04.

JOYCE KHAMINWA, J.