



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 1067 OF 2002

GEOLOGY INVESTMENTS LTD PLAINTIFF

VERSUS

ROGONYO NJUGUNA

DAVID NJUGUNA

PETER MWANGI all T/A TURUTI SERVICE STATION DEFENDANTS

RULING

On 16th September, 2002 M/s Onesmus Githinji and Company Advocates on behalf of the Plaintiff filed this suit. The Plaint itself is dated 29th August, 2002. It is accompanied by a verifying affidavit sworn by one ANTONY WANJOHI KAMOTHO on 29th August, 2002.

The defendants filed their pleadings through L Wahome & Company Advocates. On 30th May, 2003 M/s Iseme Kamau & Maema Advocates filed a Notice of Change of Advocates, taking over the case for the Plaintiff. After the usual preliminaries this case was fixed for hearing on 5th February, 2004. On 2nd February, 2004, L Wahome & Company Advocates for the defendant filed a Notice of Preliminary Objection which was argued first on 5th February, 2004 before the hearing of the suit could commence. Mr Wahome argued the preliminary objection on behalf of the defendant and Mr Muchiki opposed the same for the Plaintiff.

Mr Wahome submitted that his objection was based on the provisions of Section 35 (1) of the Advocates Act. The attack was directed against the verifying affidavit sworn by the said Antony Wanjohi Kamotho on 29th August, 2002 on the ground that it does not show who drew the same and his or her address. Accordingly Section 35 (1) of the Advocates Act is not complied with. Mr Wahome argued that failure to comply with this Section invites two sanctions:

- 1. The document becomes un acceptable in any proceeding***
- 2. A criminal offence is committed punishable by a fine not exceeding Kshs.5,000/=.***

Mr Wahome urged that the verifying affidavit should therefore be expunged from the record. He relied on ***NAIROBI CA No 345 of 2000 (Unreported) BISHOP JOSHUA GAWO & OTHERS VS NAIROBI CITY COUNCIL & OTHERS***. In this case the Plaint had not been accompanied by a verifying affidavit and the same was struck out.

Mr Muchiki in his reply distinguished the authority of Bishop Joshua Gawo and others referred to above arguing that in that case there was no verifying affidavit at all. That case does not address the situation in the present case.

He further argued that under Section 35 (2) of the Advocates Act the registrar is barred from accepting a document that is defective. In the present case the verifying affidavit has already been accepted.

Mr Muchiki further submitted that under Order 6 Rule 12 no technical objection may be raised to any pleading on the ground of want of form. The defendant's objection is technical and should not be allowed. He also referred to Order 18 Rule 7 under which a defect in form by misdescription or other formal irregularity is not fatal. In his view the defendant's objection is in respect of form and should not be allowed.

Mr Muchiki further argued that under Order 7 Rule 1 (2) a plaint and a verifying affidavit are treated as one document and since the plaint herein shows who drew the same the objection raised is not valid.

He relied on ***NAIROBI HCCC NO 1794 of 2000 (Unreported) MASEFIELD TRADING (K) LTD VS RUSHMORE CO LTD & ANOR .*** In this case a verifying affidavit had annexed thereto a wrong power of attorney. The court, (Mbaluto J), held that this error alone did not render the Plaint a nullity and the deficiency in the verifying affidavit could be cured by the filing of a supplementary affidavit with the leave of the court.

Mr Muchiki also relied on ***NAIROBI HCCC No 810 of 2001 (Unreported) MICROSOFT CORPORATION VS MITSUMI COMPUTER GARAGE LTD & ANOTHER .*** In this case my brother Ringera J held that an error in a verifying affidavit where a party has attempted to comply with the rule requiring verification of a Plaint and which error neither goes to the jurisdiction of the court nor prejudices the defendants should not lead to striking out of the Plaint. The learned Judge struck out a verifying affidavit but ordered filing of a fresh verifying affidavit.

Mr Muchiki further relied on ***NAIROBI HCCC No 550 of 2003 (Unreported) KENYA SHELL LTD VS JAMES NJERU WILSON & OTHERS .*** In this case my brother Njagi J allowed the Plaintiff to file a fresh verifying affidavit.

Finally Mr Muchiki referred to ***NAIROBI HCCC No 1796 of 2000 (Unreported) MASEFIELD TRADING CO (K) LTD VS FRANCIS M KIBUI.*** In this case Hewett J held that an invalid verifying affidavit can be cured by a supplementary affidavit to correct the deficiency. Mr Muchiki prayed that the preliminary objection be dismissed or leave be granted to file a fresh affidavit.

In a brief reply Mr Wahome dismissed all the authorities quoted as irrelevant. In his view the irregularity in the verifying affidavit in this case is not in form it is in fact contrary to law and attracts a penal sanction. Having stated the rival submissions, I have to decide whether or not the verifying affidavit in this case is defective and if so whether the defect is incurable and should lead to the striking out of the Plaint. From the outset Nairobi Court of Appeal Civil Application No 345 of 2000 between Bishop Joshua Gawo & Others and Nairobi City Council & Others (supra) is not relevant as in it the Plaintiff who was the applicant had not filed a verifying affidavit at all and the Plaint was properly struck out. In the present case the Plaintiff has filed a verifying affidavit and the defendant objects to the same on the basis that it offends Section 35 (1) of the Advocates Act as it does not show who drew or prepared it and his or her address. The documents envisaged by Section 35 (1) are given under Section 34 (1) of the same Act and include 34 (1) (f) documents or instruments relating to any other legal proceedings. I hold that a verifying affidavit is the type of document or instrument covered by Section 34 (1) (f). On the face of it therefore, it would appear that the verifying affidavit in this case offends Section 35 (1). But what is the mischief Section 35 (1) as read with Section 34 1 (f) intended to prevent? The side note to Section 34 reads "unqualified person not to prepare certain documents or instruments". It is obvious therefore that the Sections quoted above protect mainly advocates. The Sections were not in my view intended to invalidate documents or instruments by advocates who had omitted to endorse their names and addresses.

The verifying affidavit in this case save for the said omission qualifies as a verifying affidavit. It is not wanting in any other form or content. It does not offend the provisions of Order 18 of the Oaths and Statutory Declarations Act (Cap 15) Laws of Kenya.

In *Nairobi HCCC No 810 of 2001 – Microsoft Corporation vs Mitsumi Computer Garage Ltd (Supra)*, Ringera J held that an affidavit which did not state the place where the affidavit had been sworn although offending the mandatory provisions of Section 5 of the Oaths and Statutory Declarations Act would be admissible. Mwera J in *Amira (K) Ltd vs National Irrigation Board (2001) 2 E A R 333* agreed with Ringera J and held that a defect in a verifying affidavit omitting to state the place at which it was sworn could be overlooked.

Order 7 Rule 1 (2) provides that a plaint be accompanied by an affidavit verifying the correctness of the averments contained in the plaint. Rule 3 of Order 7 gives the court a discretion to strike out the plaint which does not comply with sub rule (2). From my reading of Order 7 Rules 1, 2 and 3 it is clear that a Plaint must always be accompanied by a verifying affidavit. However, sub rule 3 is also clearly permissive and the court has a discretion to either strike out a plaint or not if sub rule 2 is not complied with.

In this case there is an affidavit verifying the correctness of the averments in the Plaint. All that is missing is the drawer's name and address. Here is a party who has nearly complied with the requirement of Order 7 Rule 1 (2). He is the kind of Litigant Ringera J had in mind in *NAIROBI HCCC No 810 of 2001: MICROSOFT CORPORATION VS MITSUMI COMPUTER GARAGE LTD AND ANOTHER (SUPRA)* at page 15 when he said –

“In my opinio n, where it is evident that the Plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards it would be to elevate form and procedure to a fetish to strike out the suit.”

Ringera J struck out the defective affidavit but did not proceed to strike out the Plaint but ordered the filing of a compliant verifying affidavit.

From the authorities I see a trend to sustain suits rather than strike them out. This is as it should be as courts should lean in favour of doing substantial justice to the parties rather than straight jacket adherence to rules of procedure. In the present suit there is a verifying affidavit save that the Advocates who drew the same did not state their names and their place of address. An omission of this nature should not lead to striking out of the Plaint as such an action would not serve the ends of justice. I accordingly dismiss the defendant's application to strike out the Plaint. To avoid further delay in this matter I grant leave to the Plaintiff to file a supplementary affidavit to comply with Section 35 (1) of the Advocates Act. The affidavit to be filed and served within seven (7) days from the date hereof. As the defendant has succeeded in part, I award costs to it.

Dated and delivered this 3rd day of March, 2004.

F. AZANGALALA

JUDGE

3.3.2004