



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 347 OF 2003**

**DON WOODS COMPANY LTD ::::::::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**CHEMUSIAN COMPANY LTD ::::::::::::::::::::::::::::::::::: DEFENDANT**

**RULING**

The Plaintiff filed this suit against the Defendant on 12th June 2003. The Plaintiff is accompanied by a verifying affidavit sworn on June 2003 by one Paul Muli the Plaintiff's Accountant/Manager. A defence was delivered on 30th September, 2003. On 17th October, 2003 the Plaintiff filed its Reply.

On 14th January 2004 the Plaintiff filed a Notice of Motion seeking Summary Judgment under Order 35 Rule 1, 2 and 8 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act. On 25th May 2004 the Defendant filed a Notice of Preliminary Objection which was argued before me on 28th May 2004.

The objection was raised against the three affidavits of the said Paul Muli sworn on 11th June, 2003, 16th December, 2003 and 9th March 2004 on the ground that the same are defective as they offend the provisions of Order III Rule 2 since the said Paul Muli did not state his authority to swear the said affidavits on behalf of the Plaintiff Company, and further that he did not state and/or disclose his sources of information.

Mr. Adhuok Counsel for the Defendant placed reliance on the decisions in the cases of Microsoft Corporation – v- Mitsumi Computer Garage Ltd and Another: Nairobi HCCC No.810 of 2001 and Pastifico Lucio Garofalo S.P.A. –v- Security & Fire Equipment Co and Another (both unreported). In the former a verifying affidavit was found to be defective for failure to state that the deponent made the affidavit with the authority of the Plaintiff Company and in the latter the verifying affidavit was found inadmissible, as it was not notarized. Ringera J. as he then was struck out the verifying affidavits and granted leave to file compliant affidavits. The suits were maintained.

Counsel for the Defendant however, urged me to strike out the Plaintiff and the Notice of Motion.

Counsel for the Plaintiff opposed the Preliminary Objection and submitted that the three affidavits under attack are in order. He urged me not to strike out the Plaintiff and motion should I find that the 3 affidavits are defective. Counsel relied on the following:

- 1. Mulla on the Code of Civil Procedure 14 th Edition Volume II at page 1000 where it is stated: "It has been pointed out by the Supreme Court that where the verification of a Plaintiff**

or petition is defective, that should not normally be rejected but an order should be made for its amendments.

2. Microsoft Corporation Mitsumi Computer Garage Ltd.(supra)

3. Mobil Oil Kenya Ltd –v- Weldwell Ltd: Nairobi HCCC NO.2222 of 2001 (unreported).

In this case a verifying affidavit did not verify the correctness of the averments in the Plaintiff. The Plaintiff was granted leave to file a supplementary affidavit verifying the correctness of the averments in the plaintiff.

4. Jovenna East Africa Ltd –v- Sylvester Onyango & 4 others: HCCC No.1086 of 2002. (unreported). In this case one of the objections against a verifying affidavit was that the deponent had not indicated that he had authority to swear the affidavit. The affidavit was struck out and an order was made giving leave to the Plaintiff to file a compliant verifying affidavit .

The above cases seem to have settled that where an affidavit is sworn on behalf of a Corporation the same can only be made by an officer who is duly authorized by the Corporation to do so. It is irrelevant that the officer is conversant with the averments in the affidavit or plaintiff. The officer must depone to the fact that he or she indeed has been authorized to make the affidavit. The three affidavits in this case namely; the verifying affidavit, the supporting affidavit and the supplementary affidavit do not depone to the fact that Paul Muli was authorized by the Plaintiff Company to make the affidavits. This is a substantial defect in the affidavits which renders the affidavits incompetent. I accordingly strike out all the three affidavits. What happens to the plaintiff and the Notice of Motion? From the authorities the inclination is to sustain suits rather than strike them out. I have a discretion under Order 7 Rule 3. I exercise the discretion in favour of the Plaintiff and refuse to strike out the Plaintiff. I order that a fresh and compliant verifying affidavit be made and filed within ten (10) days from today. I also grant to the applicant leave to file a fresh and complying supporting affidavit to the said Notice of Motion. I grant corresponding leave to the Defendant to file a replying affidavit if necessary. The fresh supporting affidavit to be filed within ten (10) days of today. As the Plaintiff is to blame, I award costs to the Defendant. These orders are made to serve the ends of justice and do not prejudice the Defendant.

**Orders accordingly.**

**DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2004.**

**F. AZANGALALA**

**AG. JUDGE**