



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL SUIT 47 OF 2003

EUSTACE MWANIKI NGINGAPLAINTIFF

VERSUS

PHILIP KOSKEI BIEGO.....1ST DEFENDANT

DAVID K. A. KOECH.....2ND DEFENDANT

RAYMOND KIPKORIR RONO.....3RD DEFENDANT

ALEXANDER KIPSIELE RUTO.....4TH DEFENDANT

EMMY CHIPNGETICH.....5TH DEFENDANT

EUNICE CHELAGAT MARINDANY.....6TH DEFENDANT

ROSE CHEMTAI KORIR.....7TH DEFENDANT

JOHN MARINDANY CHEPKWONY.....8TH DEFENDANT

WILLIAM KIPNGETICH CHERUIYOT.....9TH DEFENDANT

KIPROTICH YEGON.....10TH DEFENDANT

RULING

The Plaintiff's application dated 19/11/2003 was listed down for hearing on 1/10/04. However, before it was heard, the defence counsel raised a preliminary objection. He stated that whereas the Plaintiff was named as Eustance Mwaniki Nginga as per the plaint, the verifying affidavit to the plaint was by Eustance Mwangi Nginga and therefore the affidavit was sworn by a stranger to the suit and did not comply with the requirements of Order VII Rule 1(2).

Mr. Kahiga for the Plaintiff submitted that the above was a pure typographical error and the same was curable. He urged the court to exercise its discretion and allow the Plaintiff to file another affidavit which was in accordance with the law, saying that striking out of pleadings was a draconian measure which ought to be used sparingly. In Civil Suit No. 142 of 2004 PYRETHRUM PROCESSING CO. LTD VS KITCH AGRICULTURAL CO. LTD I held that the permissive wording of Order VII Rule 1(3) grants

the court some discretion and it is not enjoined to strike out each and every plaint whose verifying affidavit is found to be defective. The court can consider the nature of the defect and see whether it goes to the jurisdiction of the court or whether the defect prejudices the adverse party.

I agree with Mr. Kahiga that the Plaintiff's middle name was mistyped as Mwangi instead of Mwaniki and that the error is curable. I decline to strike out the plaint but order the verifying affidavit be struck out and a fresh compliant verifying affidavit be filed and served upon the Defendant within the next 10 days from the date hereof.

DATED at Nakuru this 13th day of October, 2004.

DANIEL MUSINGA

AG. JUDGE

13/10/2004