



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO 363 OF 2003

JAMES WAITHUMBI KIMOTHO APPELLANT

MARGARET NYAMBURA KARIUKI APPELLANT

FELISTA WABORO KIBE APPELLANT

VERSUS

ROBERT MWANGI KIBERENGE 1ST RESPONDENT

PATRICK MWANGI 2ND RESPONDENT

JUDGMENT

**(An appeal from the Ruling and Order of Hon. G. M. Njuguna, SRM
in Kiambu SPMCC No 187 of 2002 consolidated with SPMCC Nos. 188
of 2002 and 189 of 2002 delivered on 22nd May, 2003).**

The facts in this case are straight forwarded and not in dispute.

The Appellant commenced three actions in the lower court by way of Plaints (SPMCC Nos. 187, 188 and 189 of 2002), which were all consolidated. The Plaints were all dated 17th July, 2002, while the accompanying Verifying Affidavits were sworn 27th May, 2002, almost two months **before** the suits were filed. At the hearing of the suits, the Respondent's Counsel raised a Preliminary Objection on a point of law arguing that the Verifying Affidavits accompanying the Plaintiff were sworn **before** the Plaints were filed; that this contravened the mandatory requirements of Order 7 Rule 1 (2); and that the Plaints be accordingly struck out. In a brief Ruling, the lower court agreed with Counsel for the Respondents, and struck out the Plaints. The lower court delivered itself, in material part, as follows:

“Though the dates in both documents should not bear the same date always, they should be reasonably close which is not the case as regards the plaintiffs and the verifying affidavits relating to these three matters. That being the case all the three plaintiffs are struck off with cost for non compliance with Order 7 Rule 1 (2)”.

It is against that Ruling that the Appellants (Plaintiffs in the lower court) have appealed.

The appeal is based on 4 grounds, but the central issue is simple: Can the Verifying Affidavit in support

of the Complaint [under Order 7 Rule 1 (2)] be sworn **before** the date of the Complaint?

Mr Machira, Counsel for the Appellants, argued that the Verifying Affidavits here, sworn some 2 months before the Complaints were signed, constituted an irregularity of form which could be cured by Order 18 Rule 7 which states as follows:

“Order 18 Rule 7: The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof”.

He cited my own decision in ***Agip (K) Ltd vs Jimmy Komo (Nairobi HCCC No 1738 of 2000)*** in which I had held that **“irregularities as to form which do not go to jurisdiction and which do not cause prejudice to the other side are not sufficient to invalidate proceedings before the court.”** In that case the jurat in the accompanying affidavit did not indicate where it had been sworn as required by Section 5 of the Oaths and Statutory Declarations Act (Cap 15). In finding that this was an irregularity of form, I had applied the provisions of Order 18 Rule 7 (supra) to cure the defect.

On the other hand, Mr Nyangicha, Counsel for the Respondents, submitted that the swearing of the affidavit before the Complaint had been prepared and signed was not an irregularity of form, but a substantive defect. I agree with him. The facts in this case do not constitute an irregularity of form such as a misdescription of the parties, or title or the indication of place in the jurat. The defect here is substantive. Let us examine the provisions of Order 7 Rule 1 (2) which states as follows:

1 (2) “The complaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the complaint”.

This is a relatively new rule which was added to the Civil Procedure Rules in the year 2001 by L. N. 128 of 2001. Its purpose was to require of litigants to swear to the correctness of the averments in the Complaint, and take responsibility for the statements made in the Complaint. In other words, what is to be verified is the correctness of the averments in the Complaint and not necessarily the truth.

Order 7 Rule 1 (2) provides in no uncertain terms that the Complaint **shall** be accompanied by an Affidavit by the Plaintiff verifying the correctness of the averments. This necessarily means that there is a Complaint in existence. One cannot verify the correctness of a nonexistent Complaint. Therefore, the affidavits sworn on 27th May, 2002 could not have possibly “verified the correctness of the averments” in “future” Complaints, in this case in Complaints dated 17th July, 2002. At the time the depositions were made, these were nonexistent Complaints, and therefore there was nothing to verify at that time.

Accordingly, I must find, as I hereby do, that the three affidavits sworn by the Plaintiffs on 27th May, 2002 purporting to verify the Complaints dated 17th July, 2002, in fact verified nothing as the Complaints were not in existence. All the three Verifying Affidavits are therefore struck out. However, the error made by the Plaintiffs here do not go to the jurisdiction of the Court, nor is this likely to occasion such prejudice to the Respondents that cannot be redressed by an award of costs. It would, therefore, not be in the best interests of justice that I strike out the suits because of this error. I believe every court wherever possible should attempt to sustain, rather than summarily dismiss, litigation.

Accordingly, I decline to strike out the suits, and order that fresh Verifying Affidavits as required by Order 7 Rule 1 (2) be filed and served within the next 10 days, failing which the Complaints herein shall stand struck out.

The costs of this appeal and of the Preliminary Objection in the lower court are awarded to the Respondents/Defendants in any event.

Dated and delivered at Nairobi this 10th day of December, 2004.

ALNASHIR VISRAM

JUDGE