



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 94 OF 2002

EUSTELLA FRANCIS HAMISI PLAINTIFF

VERSUS

THE AGA KHAN HOSPITAL, MOMBASA DEFENDANT

RULING

The application by chamber summons is brought under the provisions of Order 7 rule 1 (3) and seeks an order striking out the amended plaint dated 25th April 2002 for reasons that it is not accompanied by a Verifying Affidavit as required under sub-rule 2 of rule 1 sub-rule (2) provides:

*“The plaint shall be accompanied by an Affidavit sworn by the plaintiff
verifying the correctness of the averments contained in the plaint.”*

While sub-rule (3) provides:

*“The court may of its own motion or on the application of the defendant
order to be struck out any plaint which does not comply with sub -rule (2) of this rule.”*

Underlining in both cases is mine.

The application is supported by an Affidavit sworn by counsel for the applicant Mr. Stephen Macharia Kimani. He argued that the failure to file together with the amended plaint a Verifying Affidavit offended the provisions of order 7 rule 1 (2). I have already reproduced the provisions therein which no doubt are mandatory.

Mr. Otieno for the Respondent submitted that the provisions of order 7 rule 1 do not extend to an amendment and he referred to Mulla’s Commentary on the Civil Procedure volume 1 page 592.

In arriving at a conclusion in this case, I consider it necessary to first examine what the effects of an amendment are and whether the same extends to the Affidavit already filed. The commentary on the effects of amendment in the supreme court practice 1997 Edition Vol. 1 at page 357 has been referred to in many other decisions touching an amendments. Paragraph 20/5:

*“----- similarly in the pleadings: “once pleadings are amended, what stood before
amendment is no longer material before the court and no longer defines the issues to be tried”*

Pleadings generally include the Affidavits filed but it has been settled that Affidavits are never subject to amendments. Once an Affidavit has been filed it remains part of the record unless and until the same is either withdrawn or in any other manner removed so as to no longer form part of the record. In the current case, there is no dispute that the amended plaint effectively rendered the originally filed one useless as far as the claim is concerned. However the Affidavit has remained as part of the court record and in my opinion had order 7 rule (1) envisaged a situation where the amendment would affect the original Verifying Affidavit. It would have been so stated. In any case, if this is not so, the omission is one that can be corrected without necessarily causing any prejudice or injustice to the party in this case. The amendment effected was as regards the defendant but the main substance of the claim remains unchanged.

Orders 7 rule 1 (3) gives the court the discretion in such a situation and if I had found that the amended plaint cannot remain in the absence of an independent Verifying Affidavit, I would not have ordered the striking out of the same.

For the reasons, the application is dismissed with costs.

Dated this 26th day of September 2002.

P.M. TUTUI

COMMISSIONER OF ASSIZE