



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CIVIL CASE NO 227 OF 2002**

**SWALEH GHEITHAN SAANUN.....APPLICANT**

**VERSUS**

**COMMISSIONER OF LANDS & 5 OTHERS .....DEFENDANTS**

**RULING**

The preliminary point of law raised here related to an affidavit sworn by one Said Swaleh Gheithan Saanun, the applicant in Chamber Summons application dated 3.6.2002 and amended on 24.6.2002. The counsel for the defendants/respondents attacked the said affidavit on the ground that the affidavit is amended. He argued that an affidavit once sworn cannot be amended. That any correction to be done to it can only be done by a further or additional or supplementary affidavit. He concluded by stating that the affidavit in question in this application must therefore be expunged from the Court record and once that is done the amended plaintiff will in accordance with order 7, rule 1(2) which requires that every plaintiff shall be accompanied by a verifying affidavit, be struck out for being unverified as per order 7 rule 1(3). Mr Kiume was supported in this stand by Miss Shah for the Attorney-General and Mr Hare for 2nd defendant.

In reply Mr Taib for the applicant/plaintiff confirmed that after his client was granted leave to amend and file an amended plaintiff, he accompanied the same with an affidavit which is titled "amended affidavit". That the amendments only covered the inclusion of the two names allowed by court to be added and the date of the verifying affidavit and nothing more. He stated, therefore, that amendment to add the two names of the new parties ordered to be added had thereafter, to be shown on every document to be filed and that that is how the verifying affidavit happened to carry them. He also argued that the affidavit in question was in no way amended except on the title to align it with the suit as aforesaid merely for identification purposes. Finally he also stated that even if the affidavit were to be held as indeed amended, and if it is true that an affidavit cannot be amended, which he appeared to disagree with, nevertheless the amended plaintiff would still stand verified by the original verifying affidavit supporting the original plaintiff and would not therefore stand unverified to be amenable to striking out. He concluded by stating that even in the absence of both affidavits, the Court should in the ends of justice, not strike the amended plaintiff out but allow the plaintiff to file a proper verifying affidavit to validate the suit rather than shut the plaintiff out by striking out the plaintiff.

I have examined and considered argument from both sides. The issues which stand to be determined are:-

- a) Whether or not an affidavit can be amended?
- b) Whether what the plaintiff did herein amounted to an amendment of the affidavit.
- c) Whether the best cause for this court to take after striking out or expunging a verifying affidavit

is also to strike out the amended plaintiff for being unverified and therefore being incompetent.

Counsel for the defendants failed to point out to court any reliable authority supporting their stand that an affidavit cannot be amended. The basis for such a view would appear to be mere common sense and/or logic arising from the fact that an affidavit mainly contains matters of fact sworn to be true upon knowledge, information or belief. Once such facts have been sworn on oath therefore, they cannot be negated or controverted by the person who deposed them. It is my view what is sworn in the body of the affidavit will thereon be clearly defined. Once it is so stated, and becomes the substance of the oath, it would indeed be against common sense and logic to amend the substantive express contents in the said affidavit. What about formal errors on the face of the affidavit? If a name or a word or a title is misquoted or misdescribed or misspelt; can such be amended? In my view and I so hold, a title like in a court document can be amended to identify it with the suit as long as it does not in any way alter the meaning and substance of the affidavit. In my further view the same logic and sense that would dictate against amending the substance of an affidavit would be the same that would dictate this Court to hold that there is little that should prevent technical amendments from being made to an affidavit. Alternatively, the title of a case which must appear in every document drawn and filed in a suit may be said not to be a substantive part of an affidavit. It is not that part of the affidavit that is actually sworn nor is it one liable to alteration by either party in the case and I would so hold.

In the case before me, the applicant filed an affidavit whose title was amended to include two more parties who had been added by the order of court. Nothing else was amended. But the respondent argued that the addition of the two names amounted to an amendment which offends an alleged principle that an affidavit cannot be amended. He did not produce any legal authority in support of the submission. The authority which was provided, the HCCC No 377 of 1999 decided by my sister, Hon. Commissioner PM Tutui, was with great respect not much of an authority and was not persuasive enough to deserve being followed. All it states on page R2 is as follows:-

“In support of this amended application is an amended affidavit to which the defendant’s counsel has objected on the grounds that there is no provision in our laws for the amendment of an affidavit. With due respect I am in total agreement. It therefore follows that the amended affidavit is expunged from the record leaving the original affidavit sworn on 24.8.1999.”

As it can be noted, that court did not show the source of the above heavy pronouncement that would be said to be persuasive. As I have said earlier, the respondent did not produce any other authority upon which the pronouncement was based. Nor have I come across any. It therefore remains upon this Court to decide to follow the authority aforementioned or not. While I have upon mere commonsense and/or logic, agreed that the substantive depositions which are the subject matter of the oath in an affidavit should not be amended, any other formal parts of it like the title should not in my view, as a general rule, be barred from being amended. This is because such parts do not appear to offend the substance of the oath upon which an affidavit is grounded. Having come to the above conclusion I do also therefore find that the amendments made in the targeted affidavit herein were merely technical to bring the same document within the identification boundaries of the suit and that they did not offend the substance of the oath upon which the affidavit is grounded. Stated in another way, if amendments they are, they did not in my view, offend the provisions of order 18 of the Civil Procedure Rules. The upshot is that the preliminary ground of objection has no merit.

There was one more aspect of this application which I must deal with. Mr Taib argued that if the Court would be inclined to strike out the amended affidavit, the Court would still find that the right course to take is not to strike out the amended plaintiff. This he said would be on the ground that the original verifying affidavit filed together with the plaintiff before the amendment, would still support the amended plaintiff. This also raises the issue as to whether or not there is a legal requirement that an amended plaintiff should also be accompanied by a verifying affidavit.

order VII, rule 1(2) states:-

“The plaintiff shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of

the averments contained in the plaint.”

This is a mandatory requirement. If it is not complied with the Court will, under rule 1(3), strike out the plaint or allow the plaintiff to rectify the situation by filing another verifying affidavit. This requirement is a recent one brought in to control legal practitioners who were filing, particularly, running down cases without instructions of the parties. The amendment was accordingly brought in by the Legislature to deal with a specific problem. The express provision therefore is that the plaint must be accompanied by a verifying affidavit. If the Legislature wanted an amended plaint to also be so accompanied, it would have provided so. In my opinion therefore, an amended plaint need not be accompanied by a verifying affidavit since the suit already exists in a given form, and any ordered or taken amendments are specified in form and extent. In my view the verifying affidavit filed with the plaint takes care of the mischief targeted by the legislature. I would therefore also hold that it is not necessary and definitely not imperative that an amended plaint should be accompanied with a verifying affidavit.

In case I am wrong in the above two issues, in which case the applicant/ plaintiff's amended affidavit is liable for striking out and in case an amended plaint would require a verifying affidavit to accompany it, I would then be faced with the issue as to whether or not I should also strike out the amended plaint on the ground that it is neither accompanied by a verifying affidavit or that the accompanying verifying affidavit has been struck out.

I was faced with the same issue in Mombasa HCCC No 175 of 2002. I would do no better than quote what I stated there on page 5 of my ruling:-

“.....I would nevertheless find it necessary to rise to the higher calling of this Court to do justice in this case, all circumstances taken into consideration. To do justice would not be to strike out an otherwise valid suit but to give the plaintiff opportunity to rectify the situation by allowing him to file a proper verifying affidavit. That would not prejudice the defendant in any fundamental way beyond the range rectifiable by compensatory costs.”

The above course is the one I would adopt in this case since I did not expunge the same, all that is left is to order that the preliminary objection is dismissed with costs to the applicant, the same to be agreed upon or assessed without waiting for the suit to be heard and finally decided.

It is so ordered.

**Dated and delivered at Mombasa this 31st day of October, 2002**

**D.A ONYANCHA**

**JUDGE**