REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO 175 OF 2002

STEPHEN BERNARD ODUOR.....PLAINTIFF

VERSUS

AFRO FREIGHT FORWARDERS .....DEFENDANT

RULING

The application before the Court is dated 12.5.2002 and is brought by the defendant who prays the Court to strike out the plaint dated 4.12.2001 and filed on 24.1.2002. The grounds upon which the striking out is sought to be done are:

(a) That the plaint discloses no reasonable cause of action.

(b) That the accompanying verifying affidavit should be struck out for showing that it was sworn at Mombasa 3,12.2002 when infact is was sworn by a Nairobi Commissioner for Oaths.

(c) That the contradiction in (b) above renders the suit totally defective and amenable for striking it out as a matter of law.

The facts in brief are that the plaintiff filed his claim for Kshs 285,793/= on 24.1.2002 with costs and interest. Accompanying the plaint as required under order VII rule 1 (2) was a verifying affidavit which clearly shows that it was sworn by the plaintiff, Stephen Bernard Oduor at Mombasa on 3rd December, 2002 before M I Esilaba Advocate and Commissioner for Oaths of Box 55104, Nairobi. This contradiction provoked the defendant into arguing that the affidavit amounted to no affidavit. He therefore sought to have it struck out, and once it would be so struck out, the plaint would remain unverified as mandatorily required under order VII rule 1 (2) and would also face the same fate of being struck out. The defendant in his argument stated that the affidavit could not have been sworn in Mombasa when it clearly shows that it was sworn before a Commissioner for Oaths at Nairobi. The plaintiff in reply admitted that the affidavit has that confusion on its face, but added that Mr Esilaba visited Mombasa where he was requested to commission the prepared affidavit in the plaintiff's advocate's office after indicating that he was carrying his rubber stamp in his bag. The question which then arose is whether this explanation is tenable and if so, or otherwise, with what results.

As indicated above the plaintiff explained that the affidavit in question was commissioned in Mombasa by Mr Esilaba whose office is in Nairobi. That he was carrying his rubber-stamp in his suitcase as he visited Mombasa for work and on being requested to do so, he went ahead and commissioned the affidavit. Although this clearly is not a common practice with many advocates who are Commissioners for Oaths, and is unorthodox, it nevertheless is, in my opinion, quite possible. I find that the explanation given by the plaintiff is likely to be true and I accept it. Furthermore an advocate granted such a commission in Kenya has jurisdiction to practice it all over Kenya. If Mr Esilaba had his rubber seal in

his suitcase as I have accepted and he commissioned the relevant verifying affidavit at Mombasa, it is my view that he was entitled to do so. I have no doubt that the affidavit in the form it is now makes it to appear odd and probably irregular on the face of it. Order XVIII rule 7 provides:

> "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.

It would therefore appear that this court will in the exercise of its discretion accept an affidavit in evidence or proceeding notwithstanding some irregularities on the face of the same provided that such irregularity is not fundamental. Expressing the same view, *Halsbury's Laws of England* Vol 15, 3rd Edition at page 469 states thus:

> "Unless a Commissioner to administer oaths expresses the time when, and the place where, he takes an affidavit, it will not be permitted to be filed or enrolled without the leave of the Court or judge. The parties cannot waive irregularities in the form of a jurat, but in a case where the place of swearing is omitted, the court may possibly assume that the place was within the area in which the notary before whom it was taken was certified to have jurisdiction, and the irregularity may be overlooked." (The underlining is mine).

The guiding principle in my understanding of this principle, therefore, is that the exercise of the Court's discretion will be guided on the basis of what is best in the ends of justice and that the irregularity being excused in no way prejudices the opposite party. In my view this position would remain the best one to adopt even on the face of section 5 of the Oaths and Statutory Declaration Act, (Cap 15), which states:

> "5. Every Commissioner of Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

Applying these principles to the facts of this case, I find that the irregularity on the relevant verifying affidavit does not go to its root. The same was sworn before a person whose commission is not questioned even by the defendant in this case. The fact that he swore it in Mombasa using his rubber stamp which holds a Nairobi address does not detract from the substance of the proper commissioning of the affidavit or from the proper qualification of the commissioner, or even his jurisdiction. I accordingly find no sufficient grounds for striking the affidavit out. I hasten to state that even if I could reach the conclusion that the irregularity complained of was fundamental and be led to strike it out I would still have to determine whether or not I have to strike out the plaint, or save it by allowing the plaintiff to file a fresh proper verifying affidavit.

The defendant argued that if this court strikes out the affidavit, it has also got to strike out the plaint as the same must mandatorily be filed together at the time of filing it with a valid verifying affidavit. I have considered that argument on the authorities before me. I would on my part find the position taken by my brother A G Ringera, J, in the case of *Microsoft Corporation vs Mitsumi Computer Garage Ltd & Another,* Nairobi Civil Suit No 810 of 2001 at pg15 to be very persuasive and the correct one to adopt. I would do no better than just quote what he stated:

> "The next matter for consideration is whether I should consequently strike out the suit itself. Rules of Procedure are the hand-maidens and not the mistresses of justices. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not to fetter or choke it. In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from, or lapses in form and procedure which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances the court should rise to its higher calling to do justice by saving the proceedings in issue."

I cannot agree more.

I have already found that the error manifested on the relevant affidavit is minor and that it is not adverse to the other party. The error only goes to the form of the affidavit. However, even if it were such that could oblige me to strike it out, 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 such 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.

Having come to the above conclusion, the only other issue for the Court to consider is whether or not the plaint is one which discloses no cause for action as argued by the defendant. I have examined the plaint. It certainly contains a cause of action. It shows a claim for terminal dues due and owing to the plaintiff on termination of his employment with the defendant, which dues are given out in specific details. Nor did the defendant who argued that the plaint shows no cause of action attempt to explain the allegation even a little. The ground has no merit and must fail as well.

Before making final orders however, this court must note with dismay that the replying affidavit was drawn and sworn by one Oruko Nyawida advocate who is the counsel for the plaintiff in conduct of this case. The mere fact that the acts for the plaintiff in no way gave him authority to swear the affidavit. Nor does he on the affidavit claim to have been specifically given authority by the plaintiff to swear the said affidavit. In my opinion therefore, the replying affidavit was sworn by a stranger in view of the fact that the deponent fails to reveal his source of authority to swear it. The failure in my view, is substantial defect which renders the said affidavit incompetent and therefore amenable to striking out. I accordingly hereby strike it out. Having struck out the said affidavit I would proceed to hold that the defendant's application would as a result stand unopposed. However, the plaintiff had filed grounds of opposition which in my view do save the situation.

In conclusion, learned advocates have again and again been advised by this court to avoid placing themselves in the position of their clients by swearing affidavits which ought to be sworn by the parties themselves. Unfortunately, they appear to have not ceased from this despicable practice which is contemptuous and in my opinion amounts to an abuse of court process. It should stop. To bring the point home, this court will in future go out of its way to discourage the practice. While there are special occasions when an advocate may be called upon to swear an affidavit in a case he is conducting and will be excused or allowed to do so, the swearing of the affidavit in this case is in my judgment, not excusable.

My final orders therefore, are to dismiss this application. No costs due to the plaintiff are awarded due to the misconduct of Mr D Oruko Nyawida, advocate.

Dated and delivered at Mombasa this 23rd day of October, 2002

D.A ONYANCHA

JUDGE