

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 37 OF 2001.

MASEFIELD TRADING KENYA LIMITED PLAINTIFF

VERSUS

CROWN BAKERIES LTD. 1ST DEFENDANT

KITALE WHOLESALERS 2ND DEFENDANT

RULING

The plaintiff Masefield Trading Kenya Ltd. has brought this application by way of a Notice of Motion under Section 3A of the Civil Procedure Act and Order L Rule 1 of the Civil Procedure Rules for leave to file a supplementary affidavit to the verifying affidavit sworn on 11.1.2001 and filed in court with the plaint on 15.1.2001. The application is based on the ground that a clerical mistake was committed when affixing the annexure to the verifying affidavit which said error resulted in the wrong power of attorney being annexed. The purpose of the application is to permit another affidavit to be filed in which the correct power of attorney will be exhibited.

The defendants oppose the application on the ground that the plaintiff has come to court under the wrong provisions of the Civil Procedure Rules; the defendant also asserts that the suit is incurably defective and that the power of attorney annexed to the application does not conform with the law.

Since the application seeks leave of this court to file a supplementary verifying affidavit, it should have been brought under O. VII Rule 1 which clearly is the correct provision of the Civil Procedure Rules dealing with verifying affidavits. And further, since Rule 10 of the same Order provides that applications under that Order shall be by summons in chambers, the application now before me is under the wrong provisions of the law. Despite all those errors, I do not consider that it will be in the interests of justice to dismiss the application just because the applicant has come to court through the wrong Rule. As the error was occasioned through inadvertence and the court has the power to allow the filing of a supplementary affidavit to cure that error (see *Les Fils Dreyfus V. Clarke* (1958) 1 All E.R. 459), I think the correct decision to make in this matter is to allow the plaintiff to correct the mistake.

It was also argued on behalf of the defendant that the affidavit in support of the application was defective in that it was sworn by the plaintiff's advocate. That contention is in my view unsound because there is no law which bars advocates from swearing affidavits on behalf of their clients in suitable cases. The facts which the advocates depones to in this matter are exclusively within the advocates knowledge. For instance, he knows the circumstances under which the wrong annexure came to be affixed to the verifying affidavit and he is clearly the correct person to swear an affidavit regarding those matters. It would clearly be improper for any other person to depone as to those matters which occurred within the advocate's offices. There is therefore no substance in the complaint that the affidavit is not in accordance with the O. XVIII of the Civil Procedure Rules.

For the above reasons, I am satisfied that the applicant is entitled to the order it seeks. The application is accordingly allowed and leave granted to the plaintiff to file a supplementary affidavit, such affidavit to be filed within 7 days of the date hereof. Since the application has been occasioned by a mistake made by the plaintiff's advocates, the plaintiff will bear the defendants' costs of this application.

Dated at Nairobi this 6th day of April, 2001.

T. MBALUTO

JUDGE