REPUBLIC OF KENYA

HIGH COURT AT NAIROBI

civ case 1794 of 00

MASEFIELD TRADING (K) LTD. ……..… PLAINTIFF

VERSUS

RUSHMORE COMPANY LIMITED ……. 1ST DEFENDANT

FRANCIS M. KIBUI …… 2ND DEFENDANT

RULING

On 9.10.2000, the plaintiff Masefield Trading Kenya Limited instituted this suit against the two defendants named herein to recover the sum of Shs.38,788,603/22 plus interest thereon at commercial rates from 12.4.2000 until 9.10.2000 and thereafter at court rates until payment in full. As required by O. VII Rule 1(2) of the Civil Procedure Rules, the plaint filed by the plaintiff was accompanied by an affidavit sworn, not by the plaintiff, because it is a body corporate and cannot therefore swear any affidavit, but by one Stanslaus Wijenje who stated that he was authorised to swear the affidavit pursuant to a power of attorney given to him by the plaintiff. A copy of the purported power of attorney was annexed to the affidavit and marked “SW1”.

Unfortunately for both the plaintiff and the said Stanslaus Wijenje not to mention the hapless firm of advocates who prepared the documents, the wrong power of attorney was annexed. The annexed power of attorney gives the said Stanslaus Wijenje power to recover a debt allegedly owed to the plaintiff by a company known as Hunkar Trading Company Limited who clearly are not the defendants described in this suit.

The defendants have now seized upon that inadvertent error and have moved this court under O. VI Rule 13(1) (a) of the Civil Procedure Rules for an order to strike out the plaint, allegedly because:- 1. The plaint is incurably defective for its failure to comply with the mandatory provisions of Order VII Rule 1(2) and (3) of the Civil Procedure Rules;

2. The plaint discloses no reasonable cause of action against the defendants jointly and severally; and

3. The plaintiff is otherwise scandalous, frivolous and vexatious and an abuse of the process of the court.

This ruling will be confined to ground 1 above because it is the only ground, which was seriously canvassed during the hearing of this application. The other two grounds are deemed to have been abandoned. The provisions of O. VII Rule 1(2) of the Civil Procedure Rules which the plaintiff is accused of having failed to comply with states:- “The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.”

But sub-rule (3) of the same Rule provides:- “The court may of its own mo tion 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."

As stated above, there has been filed in this matter a verifying affidavit sworn by Stanslaus Wajenje which, save for the fact that annexed to it is the wrong power of attorney, in all other respects is in accordance with the requirements of the Rule. Does that deficiency which as aforesaid is clearly through inadvertency render the plaint so defective as to be unsustainable in law. Mr. Njuguna who argued the application for the defendant/applicant thought so. He submitted that in as much as the verifying affidavit was sworn by a person other than the plaintiff, it was to that extent defective; he

also claimed because of the same reason there was in effect no verifying affidavit. According to him, a plaint without a verifying affidavit cannot stand. It has to be struck out, he said.

The response to those submissions was made on behalf of the plaintiff/respondent by Mr. Kamau and Mr. Iseme. Basically their contention was that what had happened was not non-compliance of O. VII Rule 1(2) of the Civil Procedure Rules but rather the filing of an affidavit which was deficient in a certain manner and regarding which defect this court had a wide discretion under O. VII Rule (3) and O. XVIII Rule 7 of the Civil Procedure Rules to allow the plaintiff to rectify.

To me it appears that in arguing this application, both parties lost sight of one very crucial factor. As indicated above, this is not a situation where there is no proper verifying affidavit accompanying the plaint. That is not even the defendant's case. The complaint by the defendant is that the verifying affidavit was not sworn by the plaintiff but by someone else. However, given the circumstances of this case, the complaint lacks substance because as a body corporate, the plaintiff cannot swear the necessary affidavit. It has to be sworn on its behalf by a person with authority to do so e.g. a director or attorney. In the instant matter the affidavit was sworn by Stanslaus Wijenje who deponed that he was doing so

pursuant to a power of attorney given to him by the company. On the strength of that power of attorney, Mr. Stanslaus Wijenje states on oath that he does have the authority to institute the on behalf of the plaintiff. In my view the power to institute a suit must necessarily go with the power to swear the affidavit required by law to accompany the plaint. So if we pause here and ask the question what would have been the position if no power of attorney had at all been annexed, we may begin to see a possible solution to the problem arising from having the wrong annexture to the affidavit. Would the defendant/applicant in those circumstances have been justified in applying to strike out the plaint if the power of attorney had not been annexed to the verifying affidavit and if so on what ground? In my view there would not have been any good ground for striking out the plaint. In such a situation, the proper cause of action open to the applicant would have been to seek an order for particulars under O. VI Rule 8(2) of the Civil Procedure Rules as the verifying affidavit is in my view part of the plaint and must therefore be deemed to be part of the pleadings. Accordingly, by annexing the wrong power of attorney to the verifying affidavit the plaintiff did not commit such an error as would invalidate the verifying affidavit, which as observed above is otherwise proper in all respects. The error does not therefore justify an order for striking out the plaint.

Going back to O. VII Rules 1(2) and (3), as far as I can see, the construction of those provisions, which as we all know are recent amendments to the Rules introduced by Legal Notice No. 36 of 2000, have been the subject of at least 3 rulings by 3 different High Court Judges. In the case of James Francis Kariuki & Another V. United Insurance Co. Ltd. (Milimani H.C.C.C. No. 1450/2000), Onyango Otieno, J. held that a plaint which was not accompanied by a verifying affidavit had to be struck out because it offended sub-rule (2). But in the more recent case of Dwijendra Kurma Varma V. National Union of Kenya Muslims Trust Fund (Mombasa H.C.C.C. No. 93 of 2001), Waki, J. held that the absence of a verifying affidavit did not automatically invalidate a plaint. In arriving at that decision, Waki, J. stated that sub-rule (3) gave the court the discretion to either save or strike out a plaint which was not accompanied by a verifying affidavit. He further observed that if that were not the position, sub-rule (3) would simply have provided that a plaint filed without a verifying affidavit shall be struck out. For those reasons, he felt obliged to differ with his learned brother Onyango Otieno, J. The other decision on these amendments was by Hewett, J. in the case of Masefield Trading (K) Limited V. Francis M. Kibui (H.C.C.C. No. 1796 of 2000). After going through numerous authorities on the matter, Hewett, J. held that despite the seemingly

mandatory nature of O. VII Rule 1(2) the permissive sanction provided for by sub-rule (3) of the same Rule suggested that a breach of sub-rule (2) was not fatal but was an irregularity that could be cured. The learned judge accordingly allowed the filing of a supplementary affidavit to cure a deficiency in a previous affidavit. The decision of the Court of Appeal in the case of Kedowa Sawmills Limited & Another V. Mogaka Ombiro & Another (Court of Appeal, Civil Appeal No. 8 of 1989) which was cited by Mr. Iseme for the plaintiff in the course of his submissions before me appears to be apt. The case involved the construction of O. XXXI Rules 1 and 2 of the Civil Procedure Rules which have a striking similarity to O. VII Rule 1(2) and (3). The former Rules provide:-

"O. XXXI r. 1 (1) Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. (2) Before the name of any person shall be used in any action as next friend of any infant where the suit is instituted by an advocate, such person shall sign a written authority to the advocate for that purpose, and the authority shall be filed. (emphasis mine)

2. (1) Where a suit is instituted by or on behalf of a minor without a next friend and the defendant may apply to h ave the suit dismissed with costs to be paid by the advocate or other person by whom it was presented. (emphasis mine) (2) Notice of such application shall be given to such person, and the court, after hearing his objections (if any), may make such order in the matter as it thinks fit."

On the basis of the above provisions, an application had been made in the High Court to dismiss a plaint for non compliance with O. XXXI Rule 1 and 2 in that the suit was filed by the next friend of a minor without any written authority by the next friend having been filed. When the High Court (Tunoi, J. as he then was) dismissed the application, the defendant appealed to the Court of Appeal. The Court of Appeal in dismissing the appeal stated:-

"In our respectful view wh ereas Order 31 rule 1 appears to be mandatory it really is not so, for Rule 2 says "the defendant may apply to have the suit dismissed with costs etc and notice of such application is required to be given to the plaintiff. The Court is therefore required to hear any objections and "may make such order in the matter as it thinks fit".

In my view O. VII Rule 1(2) and (3) should be construed in a similar fashion. Thus though sub-rule (2) appears to be in mandatory terms, subwww. rule 3 clearly indicates that the court has a discretion in suitable cases to save a plaint which does not comply with sub-rule (2) of Rule 1. If the court did not have any such discretion, then sub-rule (2) would surely be meaningless and unnecessary. As observed by Waki, J. in the case of Dwijendra K. Varma (above) the Rules Committee would in such an event have simply provided without more, that a plaint filed without an accompanying verifying affidavit shall be struck out. By providing that "the court may … order to be struck out an y plaint which does not comply with sub-rule (2) of this rule" the Rules Committee clearly indicated its intention to confer upon the court, a discretion either to strike out or save a plaint where sub-rule (2) was not fully complied with. Accordingly, the provisions of O. VII Rule 1(2) are not mandatory and the court has a discretion under sub-rule (3) to allow the plaintiff to rectify any errors that may arise. For all those reasons, I find that the annexing of the wrong power of attorney to the verifying affidavit does not render the plaint a nullity and the deficiency in the verifying affidavit can be cured by the filing of a supplementary affidavit with the leave of the court. The application to strike out the plaint is accordingly dismissed.

With regard to costs, I recognise that this application would not have been necessary if the verifying affidavit had been properly done. The plaintiff should therefore bear the burden of the costs that have been occasioned by this application. There will be orders in those terms. Dated at Nairobi this 6th day of April, 2001.

T. MBALUTO

JUDGE