



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMRCIAL COURTS**  
**CIVIL CASE 1439 OF 2001**

**JANMOHAMED VERJEE** )  
**POLYCULTURE (KENYA) LTD** )..... **PLAINTIFFS**  
**KAYAHWE PROPERTY (A & D)** )  
**LTD.** )

**VERSUS**

**SAMAKI LIMITED** )  
**JAHANGIR TEJANI** ) ..... **DEFENDANTS**  
**STANDARD CHARTERED BANK** )  
**(K) LTD.** )

**R U L I N G**

On 26th October 2001, the application dated 18th September 2001 which was originally to be heard on 11th December 2001 came up for hearing as there were other matters that made the application urgent such that it could not be heard on 11th December 2001. Before the hearing could commence, the Respondents raised Preliminary points which were first that Plaintiffs have failed to comply with the mandatory provision of Order 7 Rule 2 of the Civil Procedure Rules and secondly that the Chamber Summons application dated 18th September 2001 is incurably defective for non-compliance with mandatory provisions of Order 50 Rule 15(2) of the Civil Procedure Rules.

This Ruling is therefore on the Preliminary Objection raised by the Respondents.

On the first point of Objection, the Plaint was filed by three Plaintiffs, namely Janmohamed Verjee, Polyculture (Kenya) Limited, and Kayahwe Property (A&D) Limited. The same Plaint has only one verifying Affidavit which is sworn by the First Plaintiff. The same First Plaintiff has not indicated anywhere in that Affidavit that he did swear it on behalf of any other Plaintiff. That in effect means that the other Plaintiffs have not sworn any verifying Affidavit in respect of the Plaint on record. The second point is that the Chamber Summons dated 18th September 2001 does not comply with the Provisions of Order 50 Rule 15(2) in that it does not bear at the foot of it words:

“If any party served does not appear at the time and place above mentioned such order will be made and proceeding taken as the court may think just and expedient”.

On the first preliminary point Order 7 Rule 1 (2) states as follows:

“The Complaint shall be accompanied by an Affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the Complaint”.

It is not clear from the above provision whether in case of many Plaintiffs filing a Complaint each must swear an Affidavit verifying the correctness of the averments contained in that one complaint. It is also not clear what would happen to the Complaint when only one or any member of Plaintiffs less than the entire number of Plaintiffs file verifying Affidavits while some do not. Further it is not clear whether one Plaintiff whose claim may very well be different from the others can swear such a verifying affidavit on behalf of the others. For example, a Plaintiff who is filing a Complaint together with others and who is coming into the court for the first time when others had filed other suits and who swears that the contents of the Complaint are correct whereas the contents do not state that other suits had been filed earlier on. He would be saying the truth as far as he is concerned but what about as far as the others on whose behalf he has sworn the Verifying Affidavit?

Be those as they may, the fact in this case is that there is one Verifying Affidavit to the Complaint, but that verifying Affidavit is not sworn on behalf of the other two Plaintiffs which are Limited liability companies, and as such it is clearly correct to say that there is only partial compliance with the requirements of Order 7 Rule 1 (2). The Applicants do not dispute this.

The Respondents have urged me to strike out the Complaint upon that ground and have referred me to the case of *James Francis Kariuki & Another –vs- United Insurance Co, Ltd HCCC No 1450 of 2000*, and to the case of *Eastern & Southern African Development Bank –vs- African Greenfields Ltd and Others*. In my humble opinion, the case of *James Francis Kariuki & Another –vs- United Insurance Co Ltd* was dealing with a situation where an Advocate acting for a party did commission verifying Affidavit in flagrant non compliance with the provisions of Section 4(1) of the Oaths & Statutory Declarations Act and further the same Verifying Affidavit did not reveal the place where it was sworn in the jurat as is required by Section 5 of the Oaths and Statutory Declaration Act. These were two violations of the provisions of an Act of Parliament. The defects were irredeemable. The situation in that case is clearly different from what I have before me in this matter. Again in the case of *The Eastern and Southern African Development Bank - vs African Greenfields Ltd & Others*, Hon. Justice Hewett was dealing with a violation of an Act of Parliament namely non compliance with Section 5 of Chapter 15 Laws of Kenya. In this case, what is violated is a Civil Procedure Rule albeit an important rule. I need to consider whether such a violation should lead to my taking the draconian action of striking out the Complaint in its entirety. I feel Order 7 Rule 1 (3) gives me discretion in deciding to strike out the Complaint or not for it says:

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

The word “may” is used as opposed to the word “shall” and this in my opinion means that I can use my discretion in the matter. In using my discretion, I need to consider the circumstances and these will vary from one case to another.

In this case, as I have stated the Complaint partially complied with the requirements of Order 7 Rule 1 (2) so that even if I have to strike out the Complaint, it would not be fair to strike out the same complaint in as far as First Plaintiff is concerned for he filed a valid, verifying Affidavit. On reading the entire file, I find that the same First Plaintiff is the Director of the second and third Plaintiffs. Is it possible that he felt he was swearing for all when he did file his verifying Affidavit? I cannot under these circumstances come to any conclusion that the omission to file verifying affidavits in respect of 2nd and 3rd Plaintiffs was deliberate or represented gross negligence on the part of the Plaintiffs and their counsel. I do note also that statements of Defence have not been filed so that no party has been prejudiced. I will in the circumstances while sustaining the Objection on that aspect allow the Plaintiffs seven days from the date hereof to file Verifying Affidavits in respect of the 2nd & 3rd Plaintiffs.

As to the default in respect of the Chamber Summons, it is no doubt offending Order 50 Rule 15(2). However the irregularity has not prejudiced the Defendants who were all in court. I will treat it as an irregularity which in this matter has not gone to the root of the court’s jurisdiction and is therefore not

enough to warrant my striking out the Chamber Summons.

In conclusion while I do accept that the Respondents had genuine points in law, I do feel that the ends of justice will be met by the above orders. The Applicant will pay the cost of the objection proceedings.

Orders accordingly.

Dated and delivered at Nairobi this 1st day of November 2001.

**ONYANGO OTIENO**

**JUDGE**