



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 896 OF 2000

THANDEAPPLICANT

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD..... DEFENDANT

RULING

This application is brought under order 7 rule 1(1) (e) 2, 3 and 10 of the Civil Procedure Rules, section 3A of the Civil Procedure Act. It is seeking an order that the plaint herein be struck out on grounds that it does not have the mandatory averments as required by law and that the verifying affidavit does not comply with the relevant provisions of the law. It is supported by an affidavit sworn by Jacinta Wambua, the defendant's legal officer in which two exhibits are annexed namely a copy of the plaint and a copy of affidavit which is meant to be the verifying affidavit.

The respondent/plaintiff opposed the application maintaining that Court has no power under order 7 to strike out pleading on the basis stated in the application, that failure to comply with order 7 rule 1(1) (e) is capable of cure by amendment and that verifying affidavit is in substance a verifying affidavit notwithstanding that it does not contain the words "verify" and "correctness."

I have considered the application, the affidavit in support, the plaint, the alleged verifying affidavit and the able submissions by the learned counsels. The respondent/plaintiff admits that the plaint lacks an averment that there is no other suit proceeding, and that there have been no previous proceedings, in any Court between the plaintiff and the defendant over the same subject matter as is required by order 7 rule 1(1) (e) of the Civil Procedure Rules which is a mandatory rule. It also admits that what it calls verifying affidavit which accompanied the plaint does not verify the correctness of the averments contained in the plaint. All the respondent/ plaintiff says is that these are not enough grounds for striking out the plaint.

For reasons that I am yet to know, the only indication made as to what the Court may do when a party does not comply with the provisions of order VII is only in relation to non-compliance with order 7 rule 1(2) where order 7 rule 1(3) says the Court may of its own motion or on the application by the defendant order to be struck out any plaint which does not comply with subrule 2. In that respect, although subrule 2 of order 7 rule 1 is also mandatory, yet the Court is by the word "may" in sub rule 3 allowed to use its discretion. If that was the intention in respect of non compliance with the other rules including non compliance with order 7 rule 1(1) (e) it would have been stated. It was not stated and as such the mandatory nature of that rule is not (like in case of order 7 rule 1 (2)) "watered" down in any way. I have considered the case of *R vs Immigration Appeal Tribunal Ex parte Jeyeanthen Ravichandran vs Secretary of State of House Affairs* (1999) 3 All ER. I have considered the matters raised therein which I find very important but it does appear to me that the intention of including order 7 rule 1(1) (e) was to ensure that

there would be no duplication of cases and that was why that rule was made mandatory. I have also perused and considered the case of *D T Dobie & Company (Kenya) Ltd vs Joseph Mbaria Muchina*. That case was mainly dealing with an application under order 6 rule 13 (1) (a). It is true it did bring out a general principle in law that: -

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment.”

That was before the amendment to order VII which now requires that at the time a suit is filed it should state clearly in the plaint whether or not there has been any previous proceedings in any Court between the parties over the same subject matter. If that is not done, then the plaint simply is not there and there is nothing to be cured by an amendment. Further in this case matters do not end there. The verifying affidavit does not state that the averments contained in the plaint are correct. Court of Appeal had this to say on the importance of verifying affidavit in the case of *Bishop Joshua Gawo & Others vs Nairobi City Council & Others* Civil Application No Nai 345 of 2000

“In this dispute the issue of verifying affidavit as per order VII r 1 (2) of the Civil Procedure Rule is very important. The rule clearly states that the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.”

And the Court proceeded to decline injunction and upheld the order of the superior court striking out the plaint on the basis of lack of verifying affidavit.

On my part, if I were faced in this matter with only one problem namely failure to comply with order 7 rule 1(2) ie failure to have a proper verifying affidavit, then depending on the circumstances of the case (which I have not been told) I would have considered whether to exercise my discretion or not as order 7 rule 1(3) allows me to use my discretion by use of the word “may”. However, in this matter, there is also the non compliance with order 7 rule (1)(1)(e) which does not seem to allow the Court any use of discretion for order 7 rule 1(3) only refers to order 7 rule 1(2) and no more. Even if I were to be minded to use my inherent powers, still I would have found it difficult to exercise my discretion in this matter because the plaintiff/respondent has not told me anything beyond the submission that the Court has no power to strike out pleadings under order 7 and that failure to comply with order 7 rule 1(1)(e) is capable of cure by amendment. It has not adduced sufficient reasons upon which I can exercise my discretion. It has not shown me circumstances that led to the same non compliance so as to enable me weigh my options and see whether I can exercise my discretion in this matter.

I do feel that under the above circumstances, I have no alternative but to allow this application. The plaint is struck out with costs to the applicant/ defendant.

Dated and delivered at Nairobi this 8th day of November, 2001

J.W. ONYANGO OTIENO

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JUDGE