



**Muli v China Road Bridge and Corporation (Civil Appeal
7 of 2020) [2024] KEHC 3104 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3104 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 7 OF 2020
MW MUIGAI, J
MARCH 7, 2024**

BETWEEN

DANIEL MULWA MULI APPELLANT

AND

CHINA ROAD BRIDGE AND CORPORATION RESPONDENT

*(An appeal from the ruling of the senior resident magistrate's
Court at Mavoko by the Honourable Magistrate J.A Agonda
delivered on 17th January 2020 in CMCC suit No. 946 Of 2017)*

RULING

Background

1. By a Notice of Motion dated 23rd October, 2019, pursuant to section 5 of the [Oaths and Statutory declaration](#), order 51 rule 1 of the [Civil Procedure Rules](#) and section 3A of the [Civil Procedure Act](#), the respondent/applicant sought orders that the verifying affidavit accompanying the plaint be struck out, that subsequently the plaint be struck out and the costs of the application be borne by the defendant.
2. The application was supported by the affidavit of Mathew K. Itonga an advocate where he stated that the plaintiff filed the suit on 21st July 2017 alleging to have been involved in an industrial accident and that the verifying affidavit was alleged to have been commissioned by John M Kimathi Advocates and the said advocate indicated that his stamp was fraudulently forged and used without his knowledge.
3. The plaintiff on his replying affidavit sworn by Omwenga Kwamboka an Advocate who contended that the defendant wrongly use the police to intimidate and harass the advocate who commissioned the documents and has since disowned his documents he commissioned.
4. The Trial Court gave its ruling on 17th January, 2020 which is the subject of the appeal herein.



Memorandum of Appeal

5. Aggrieved by the judgement, the Appellant have appealed citing the following grounds:-

- (1) That the Trial Magistrate erred in law and in fact in holding that the verifying affidavit annexed to the plaint that was filed in the subject matter was defective when there was clear and an overriding evidence to the contrary.
- (2) That the Trial Magistrate erred in law and in fact in shifting the burden of proof to the plaintiff herein without any legal and or evidential justification.
- (3) That the Trial Magistrate erred in law and in fact in failing to apply the correct standard of proof in civil matters and proceeded to try and convict the plaintiff's advocate of the criminal offence of forgery without any justification thereby exceeding her authority over the case and considering irrelevant matters thereby deriving an erroneous finding /conclusion.
- (4) That the Trial Magistrate erred in law and in fact in failing to appreciate the long established principle of stare decisis, bringing law into confusion and thereby deriving an erroneous finding/conclusion.
- (5) That the Trial Magistrate erred in law and in fact in failing to appreciate as follows: that evidence adduced in support of the defendant's case was incongruous with the pleadings, composed of hearsays, tendered by incompetent witnesses, contradictory and discreditable and that the allegations by the defendant ought to have been proved by calling the said John Kimathi Advocate for cross examination since the subject letter to the Law Society Of Kenya was not specific to the matter thereby prejudicing the plaintiff.
- (6) That the Trial Magistrate erred in law and in fact in ruling in favour of the defendant against the plaintiff in spite of the defendant's miserable failure to establish its case on a balance of probability.
- (7) That the Trial Magistrate erred in law and in fact by descending from her seat as a neutral umpire and proceeded to explain away the inconsistencies by the defendant in their application without examining the totality of the case hence condemning the plaintiff to lose his day in court despite the fact that the matters in controversy were between Ms. Omwenga Advocate and Ms John Kimathi Advocate and not the parties herein directly hence the court award is unsustainable and baseless in the circumstances.

Appellants Submissions

6. On behalf of the Appellants, it is submitted that the issues for determination are whether the verifying affidavit accompanying the plaintiff's case was defective, whether the perceived defect was curable, the position of law as regards striking out of pleadings and the upshot.
7. On whether the verifying affidavit accompanying the plaintiff's case was defective, it is submitted that the crux of the dispute is a letter dated 18.10.18 by the firm of Kimathi Wanjohi Muli & Company Advocates which letter was admitted and relied on to strike out the plaintiff's case without giving an opportunity to the plaintiff to interrogate the source of the said allegation. That admitting the said letter in evidence rendered the trial of the subject application unfair and against the tenets of Article 50 (4) of the Constitution on grounds that the said letter did not relate to this matter and that the dispute was a matter between two advocates and their regulating society in which the plaintiff and the defendant were not a party to, the background of the said letter was ignored, which background would



shed light as to the context of the subject letter, the said document does not constitute a document to be relied upon in this matter during the trial and the issue has not been raised in any of the defendant's pleadings and the said document is vexatious, malicious, calculated to stifle this claim through the backdoor since police harassment on the plaintiff and his advocate who had failed to yield compliance to the defendant's whims.

8. Reliance was placed to the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR where the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree. It is submitted that the finding of fraud and impersonation was not meritorious and the same should not have been made in the circumstances of the case.
9. On whether the perceived defect was curable, it is submitted even if the court were to find that the verifying affidavit was improperly commissioned, that was a defect that was curable and the plaintiff's plaint was not so defective that it could not be salvaged.
10. Reliance was made to the case of *Benel Development Limited v First Community Bank Limited* [2021] eKLR and the case of *Agricultural Finance Corporation & another – v Drive In Estate Development Ltd* [2006] eKLR as regards to the issue of improper verifying affidavits.
11. Reliance was made to Section 1A of the *Civil Procedure Act* which provides for the overriding objective of the *Civil Procedure Act* and that it is trite law that striking out a suit is a draconian measure one that ought to be exercised with great caution. Reliance was made to the case of *Kenya Commercial Finance Company Limited v Richard Akwesera Onditi* Nairobi Civil Application No. 329 of 2009 and in *DT Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another* [1980]KLR that courts ought to aim at retaining rather than dismissing suits.
12. Reliance was also made to the case of *Josephat Kipchirchir Sigilai v Gatal's Sanik Enterprises Ltd & 4 Others* Civil Appeal No 98 of 2003 which expressly stated that failure to comply with Order vii Rule 1(2) of the *Civil Procedure Rules* can be cured by the court allowing the default party to file a compliant verifying affidavit where the claim is neither frivolous, vexatious nor scandalous. In the case of *Trust bank Ltd v Amalo Co. Ltd* (2002) KLR, the applicant's documents were expunged from the record by the court and the appellant was denied the right to be heard in the application because of lack of diligence in the matter.
13. Reliance was made to the case of *Stephen Boro Gitiba v Family Finance Building Society & 3 others* Civil Application No. 263 of 2009 and *Kenya Commercial Bank Limited v Kenya Planters Co-operative Union* Civil Application No. 85 of 2010 on the overriding objective principle.
14. It is finally submitted that the perceived defective nature of the verifying affidavit is not fatal to the entire suit and that the court should give due consideration to Article 159(2) of the *Constitution* and that the defendant applicant has not established its application on a balance of probabilities and thus urge the appeal to be allowed with costs.

Respondent's Submissions

15. On behalf of the Respondent, it is submitted that the main issue in the appeal was that the verifying affidavit was defective and consequently struck out. Reliance was made to section 88 of the *Civil Procedure Rules* in that the plaintiff must appear before a commissioner and swear the oath which was not the case in this matter
16. Reliance was made to the case of *J.P. Machira T/A Machira & Co. Advocates v Wachira Waruru & Another* [2007] eKLR which quoted *Barclays Bank Of Kenya Limited v Dr Solomon Otieno Orero* and *Peter Kimonye & Others v Barclays Bank of Kenya Limited & 2 others*. It is submitted that the



appellant's verifying affidavit had been commissioned irregularly and subject to section 35(1) of the Advocates Act.

17. It is submitted that the plaintiff's action was criminal as it was impersonation and fraud.
18. It was finally concluded that the issue of the verifying affidavit in this matter was just not a technical error but rather a fraud and forgery case and the court cannot close its eyes or extend discretion to such a case.
19. Reliance was made to the case of Malewa Ranching Company Limited V Joseph Nyutu Ng'ang'a & 146 others [2022] eKLR and urged the court to dismiss the appeal with costs to the respondent.

Determination

20. I have considered the written submissions filed on behalf of respective parties.
21. In this appeal, the Issue that arise for determination is whether the verifying Affidavit accompanying the plaintiff's case was defective
22. Once Order 4 Rules 1(2) and (6) of the Civil Procedure Rules 2010 provides as follows:-
 - “ 4. The Plaintiff shall be accompanied by an affidavit sworn by the Plaintiff verifying
 - (2) the correctness of the averments contained in Rule 1(1)(f) above.
 - (3) ...
 - (4) ...
 - (5) ...
 - (6) The Court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule.”
23. In this case, the dispute emanated from a letter dated October 18, 2018 by the firm of Kimathi Wanjohi Muli & Company Advocates where the advocated alleged that there were suspect documents that had allegedly been commissioned using his commission for oaths impression stamp and allegedly signed him and that upon perusing the documents, he realized they were forgery and that he never commissioned or signed the same.
24. The counsel for the Appellant Kwamboka Omwenga response to the letter indicated that the complainant Advocate Kimathi John was one of her closest professional colleague having worked in the same law firm before and that their relationship had entailed commissioning of documents and sharing legal opinions around issues we handle on behalf of the respective clients.
25. The effect of a verifying affidavit as provided under Order 4 Rule (2) is to verify the correctness of the averments in the plaint which it did in this case. There is proof that the verifying affidavit was commissioned and the stamp of John Kimathi affixed on it thus authenticates it. The issue that arises is that the commissioner for oath is claiming that he never commissioned the verifying affidavit.
26. In Microsoft Corporation v. Mitsumi Computer Garage Ltd and Mitsumnet (K) Ltd HCCC No. 810 of 2001



On the purport and necessity of a verifying affidavit the learned judge held that: -

“However the rule having been framed in broad terms verification of the plaint is now necessary in every type of action originated by a plaintiff. The broad purpose of the verifying affidavit is thus to verify the content of the plaint. That purpose may be attained by rejecting defective affidavits and ordering that a fresh and complying one be made and filed. On the record I would accordingly order that the verifying affidavit of Marylyn Lesley Pearman be struck out but the plaintiff be at liberty to file a fresh verifying affidavit within 15 days of today.”

27. In *Agricultural Finance Corporation & Another –v- Drive-In Estate Development Ltd* [2006]eKLR Hon. Justice Azangalala (as he then was) held as follows:-

“So the only issue for determination is whether or not failure to file the compliant verifying affidavit within the period allowed by the Court is fatal and should result in the striking out of the Plaintiff. The requirement for a Verifying Affidavit is contained in Order VII rule 1(2) of the *Civil Procedure Rules*. Sub-rule (3) of the same rule reads:-

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

28. In the same case the Hon. Judge went on to expound upon the exercise of discretion by a Court in deciding upon an application brought under Order 4 Rule 1(6) of the *Civil Procedure Rules* as follows:-

“As it has been said by several eminent judges before me, in exercising the discretion given in sub-rule (3) of rule 1 of Order VII of the *Civil Procedure Rules* the court should be alive to the principle of justice that procedural lapses, omissions and irregularities unless they go to the jurisdiction of the court or prejudice the adversary in a fundamental respect which cannot be atoned for by an award of costs are not to be taken as nullifying the proceedings affected.”

29. Thus although the Court does have discretion to strike out defective pleadings, such defective affidavits are not necessarily fatal and the Court is at liberty to grant a party the opportunity to file a compliant Affidavit within a specified time.

30. In this case, the dispute seems to be between the two advocates according to the letter dated October 18, 2018, the advocate alleged that there were many documents which had been commissioned and signed using his stamp yet he did not do it himself and alleged there was a forgery. This seems to be one of them and I find it unfair to strike out the verifying affidavit and consequently the plaint without giving the plaintiff (appellant) a chance to rectify the issue.

31. I find that the defective nature of the Verifying Affidavit to this suit is not fatal to the entire suit. I am fortified in this finding by the provisions of Article 159(2) Constitution of Kenya which exhorts Courts to administer substantive justice without undue regard to technicalities.

Disposition

32. In the premises, the Appeal partly succeeds in that I direct the Plaintiff/Appellant to file and serve a fresh compliant Verifying Affidavit within fifteen (15) days of the date of this Ruling.

RULING DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS ON 7TH MARCH, 2024 (VIRTUAL/PHYSICAL CONFERENCE).



M.W.MUIGAI

JUDGE

In the presence/absence of:

Mr. Omwenga - for the Appellant

Mr. Kitonga - for the Respondent

Geoffrey/Patrick - Court Assitant(s)

(Judge Bereaved)

Judgment Released To Registry On 26/3/2024.

M.W.MUIGAI

JUDGE

