



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 38 OF 2018

ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

PETER MARETEH MUGINGA.....1ST DEFENDANT

WILSON GACHANJA.....2ND DEFENDANT

AND

STANLEY THIRIMA.....1ST INTERESTED PARTY

STEPHEN MICHUKI KIUNGA &

THERESIA KIUNGA.....2ND INTERESTED PARTY

RAJESH VALJI HIRANI.....3RD INTERESTED PARTY

RULING

1. The 1st interested party objects to both the amended plaint and its verifying affidavit sworn on **13.9.2019** as defective and bad in law.

BACKGROUND

2. Following the filing and service of the amended plaint, the 1st interested party filed his list of witnesses and witnesses statement dated **12.3.2019** on top of the defence dated **29.3.2018**. The 1st defendant also filed a list of witnesses and statements dated **14.3.2019**. The 3rd interested party also filed a statement of defence dated **12.2.2019**.

3. Further the 1st interested party filed a case summary dated **10.2.2020** together with issues for determination and pretrial questionnaires. Parties were ordered to file paginated bundles. The plaintiff complied on **16.7.2020**, the 1st defendant on **11.8.2020** but the 1st and 3rd interested parties are yet to comply.

4. As can be seen from the foregoing the 1st interested party and by extension the rest of the parties have not been prejudiced at all by the alleged verifying affidavit.

5. The 1st interested is objecting to the words amended verifying affidavit, which is merely objecting to the form but not on the substance.

6. The law governing affidavits is the **Oaths and Statutory Declaration Act Cap 15 Laws of Kenya** and **Order 19 of the Civil Procedure Rules**.

7. Order 19 Rule 7 grants the court discretion to receive an affidavit notwithstanding its defect on misdescription, irregularity or any other technicality.

8. **Order 4 Rule (1) (1) (f)** of the **Civil Procedure Rules** requires a plaint be accompanied by a verifying affidavit which as per **Order 4 rule (2)** verifies the correctness and the contents of the plaint.

9. I have looked at the amended plaint together with the amended verifying affidavit sworn by **David Naibei Sangula** on **13.3.2019**. It is true

the same bears the words amended verifying affidavit and in the view of Mr. Wambua an affidavit cannot be amended in law. The question is whether such a defect is curable under Order 19 rule 7. Put another way is whether the said irregularity goes to the root of a plaint.

10. In *Gideon Sitelu Konchella –vs- Julius Lekakeny Ole Sunkuli & 2 Others [2018] eKLR* the Supreme Court held an affidavit which is unsigned, undated and commissioned could be cured by the court, while in *Premchand Raichard & Another Ltd. –vs- Quarry Services and Others [1969] E.A the court* held matters of evidential burden in an affidavit go to the essential value of the affidavit hence are not curable.

11. In *Maureen Nyambura Ngigi Warui –vs- Board of Directors Kenya Power & Lighting Co. Ltd & 2 Others [2020] eKLR* the court held commissioning an affidavit by the advocate who drew it was curable under **Section 4 of the Oaths and Statutory Declaration Act Cap 15 Laws of Kenya**, in *Francis A. Mbalanya –vs- Cecilia N. Waema [2017] eKLR*, the court allowed a supplementary affidavit to be filed after it held the same fatally defective.

12. So what is coming out from the above authorities is that an error in a verifying affidavit does not always lead to striking out the plaint as the defect is curable through filing another affidavit.

13. In the instant case, Mr. Wambua is of the view there can be no amendment of an affidavit. In *Peeraj General Trading & Contracting Co. Ltd, Kenya & Another –vs- Mumias Sugar Co. Ltd. [2016] eKLR* the court was called upon to strike out the plaintiff's plaint accompanied by undated verifying affidavit which was not in compliance with **Order 4 rule 1 (1) (f) and Rule 2**. The court declined to strike out the verifying affidavit for want of form.

14. On the issue of whether an affidavit can be amended. In *David Jonathan Grantham & Another –vs- National Social Security Fund [2007] eKLR* the plaintiff had sought leave to file an amended plaint and an amended verifying affidavit under **Order VIA rules 3, 5 and 8, Order VII rule 2 Order XVIII – Rule 1, 4 and 7** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**.

15. The court quoting Njagi J stated

“The plaint and the verifying affidavit are entirely different documents altogether and leave to amend the plaint does not incorporate leave to amend the verifying affidavit. The court went ahead to hold the view that a verifying affidavit was not covered by Section 35 of the Advocates Act since verifying affidavits were introduced by LN 36/2000. The court held by granting leave to amend a plaint, the verifying affidavit by necessity needed to be amended.”

The court however gave the plaintiff leave to file a compliant verifying affidavit to cover the amendments in the further amended plaint.

16. In *Teclah Jepkirui Wilson Tuwei (Administrators of the Estate of the late Malakweu Arap Cheruiyot –vs- Kimaiyo Chirchir [2021] eKLR* the court granted leave to file and serve a verifying affidavit in support of an amended counterclaim which had been filed contrary to **Order 7 rule 5**.

17. Given the foregoing case law, I am inclined therefore to find the defect herein is not fatal to the plaint. The plaintiff is hereby granted leave to rectify the defect within 7 days from the date hereof. Parties are ordered to comply with **Order 11** and set down the matter for hearing **within 45 days** from the date hereof.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 10TH DAY OF NOVEMBER, 2021

In presence of:

Miss Rimita for the 1st interested party

Kiogora Arithi for 1st defendant

Mukanguru for 1st defendant

HON. C.K. NZILI

ELC JUDGE