



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 97 OF 2019

EDWARD KIMANI MUNGAL.....APPELLANT

VERSUS

SYNERGY INDUSTRIAL CREDIT LTD.....1ST RESPONDENT

TITUS WANDAO KIMONDO.....2ND RESPONDENT

STEPHEN NJENGA MBUGUA.....3RD RESPONDENT

(Being an appeal from ruling and orders of Honourable C.K. Kisiangani, Resident Magistrate delivered on 11th July, 2018 in Machakos CMCC No. 776 of 2013)

BETWEEN

EDWARD KIMANI MUNGAL.....PLAINTIFF

VERSUS

SYNERGY INDUSTRIAL CREDIT LTD.....1ST DEFENDANT

TITUS WANDAO KIMONDO.....2ND DEFENDANT

STEPHEN NJENGA MBUGUA.....3RD DEFENDANT

JUDGEMENT

1. This appeal relates to dismissal of a suit vide ruling delivered on 11TH July, 2018 by Hon Kisiangani who upheld a preliminary objection dated 18.11.2016 on the grounds of non-compliance with Order 4 Rule 1 of the Civil Procedure Rules.
2. The background to this suit is that the appellant claimed to have been the owner of motor vehicle KBK 283J that was rammed into by motor vehicle KAH 283J and in the result he incurred damages quantified as Kshs 2,015,923.00/- that he claimed from the respondent. The Respondents denied the contents of the plaint and put the appellant to strict proof. They pleaded that the suit was fatally defective as the verifying affidavit was defective as it was not sworn by the appellant.
3. The memorandum of appeal comprises only five grounds, namely; -

a) That the learned magistrate erred in law in failing to consider whether the plaintiff's insurer had a right to institute a suit on his behalf under the equitable doctrine of subrogation.

b) That the learned magistrate erred in finding that the verifying affidavit sworn by Mr. Gibson Maina Kamau was defective and/or violated the provisions of Order 4 Rule 1 of the Civil Procedure Rules.

c) That the honourable trial magistrate erred in failing to make a determination whether the verifying affidavit of Mr. Gibson Maina Kamau was executed in a representative capacity pursuant to Order 4 Rule 4 of the Civil Procedure Rules, 2010.

d) *That the learned magistrate erred in failing to avail the appellant an opportunity to prove their claim and the right of subrogation at the main hearing of the suit instead of dismissing it on a preliminary objection.*

e) *That the Learned Magistrate erred in law and fact in failing to consider the appellants' submissions and in so doing arrived at an erroneous conclusion.*

4. The appellant sought that the ruling of the magistrate be set aside and that the court find that the verifying affidavit sworn by the insurer's representative under the doctrine was proper, valid and legal. It was also sought that the court reinstates the verifying affidavit of Mr Gibson Maina Kamau as well as the plaintiff's suit.

5. Submitting in support of the appeal, learned counsel for the appellant argued in addressing the equitable right of subrogation placed reliance on the case of **Akamba Public Road Services v Abdikadir Adan Galgalo (2016) eKLR** and argued that the insurer (Heritage Insurance Co. Ltd) having compensated the insured to the tune of Kshs 2,015,923/- was entitled to institute proceedings in the name of the insured and seek compensation from third parties to cover the loss incurred by the insured.

6. Learned counsel while appreciating Order 4 Rule 4 of the Civil Procedure Rules argued that a verifying affidavit could be signed in a representative capacity. It was therefore his submission that the verifying affidavit was not defective at all as it was sworn by an officer authorized by the insurer; that it verifies the contents of the plaint and it was an error to strike out the same summarily. It was the submission of counsel that the magistrate improperly exercised discretion to strike out pleadings. Reliance was placed in the case of **Mbogo & Another v Shah (1968) EA 93**. The court was invited to consider article 159(2)(d) of the Constitution as well as sections 1A and 1B of the Civil Procedure Act in arguing that the dispute be heard on its merits.

7. In reply, learned counsel for the respondent maintained that the learned trial magistrate was correctly moving under Order 4 Rules 1(1) and (6) that is couched in mandatory terms. It was pointed out that courts have been allowing plaintiffs to file proper verifying affidavits as was in the case of **Mavuno Industries Ltd & 2 Others v Keroche Industries Ltd (2012) eKLR** and that the appellant was to blame for disobeying the directions of the court to file a proper verifying affidavit. To counsel, the suit was properly dismissed by correct application of Order 4 Rule 1(6) of the Civil Procedure Rules.

8. A perusal of the record of the trial court reveals that the trial magistrate issued the following directions; -

"I find that this suit can be cured through the plaintiff filing a proper verifying affidavit"

The appellant was directed to file a proper verifying affidavit within 7 days failing which the suit stood struck out. He cited Odunga J in the case of **Mavuno Industries Ltd & 2 Others v Keroche Industries Ltd (2012) eKLR**.

9. The learned magistrate in construing Order 4 Rule 1 of the Civil Procedure Rules and section 1A and 1B of the Civil Procedure Act appears to have been considerate to the appellant and gave the appellant an opportunity to file a proper verifying affidavit. The appellant seems adamant in stating that the verifying affidavit was proper because it was deposed in a representative capacity.

10. The appellant appears to have misconstrued the Order 4 Rule 1 and the role of verifying affidavits as was aptly stated in the case of **Mitsumi Corporation v Mitsumi Computer Garage (2001) eKLR** that counsel for the appellant cited. Whereas it is undesirable to evict a party from a judgement seat, the conduct of the appellant in filing the appeal so as to short circuit the orders of the trial court are indicative of bad faith on his part. In fact, this appeal is an abuse of court process by all standards. In addition, the facts giving rise to the cause of action are well within the knowledge of the appellant as evidenced by the facts stated in the plaint and I see no difficulty in him verifying the affidavit. It is trite law that if a suit is brought in representative capacity, then it ought to be indicated in the plaint that the suit is being brought in representative capacity and therefore creating a basis for the representative to sign the verifying affidavit. See Order 4 rule 4 of the Civil Procedure Rules that states that *"where the plaintiff sues in a representative capacity the plaintiff shall state the capacity in which he sues and where the defendant is sued in a representative capacity the plaintiff shall state the capacity in which he is sued, and in both cases it shall be stated how that capacity arises*. In the instant case, the plaint does not mention anywhere that the suit is being brought in representative capacity. I therefore disagree with the appellant's argument that a representative is permitted to sign his verifying affidavit because the nature of the claim in the trial court are not relevant to warrant a representative to depone the verifying affidavit. The trial court had clearly given the appellant time to file a proper verifying affidavit but it seems he defied the said orders. The conduct of the appellant is quite baffling as he seems still bent on relying on the faulty verifying affidavit yet he could easily file one sworn by himself. Indeed, the plaint does not allude to the suit being brought in a representative manner and hence the reason the verifying affidavit was rejected. It doesn't cost the appellant an arm and a leg to just proceed and comply with the trial court's directions. Because the suit in the trial court is the appellant's case, he is free to take his sweet time, subject of course to the respondents' application of Order 17 Rule 1 and 2 of the Civil Procedure Rules, to prosecute the same in the trial court so long as there is a proper verifying affidavit deposed by the appellant. I see no reason to disagree with the finding of the trial court as I find no merit in the grounds raised by the appellant.

11. In the result, the Appellant's appeal lacks merit. The same is dismissed with costs.

It is so ordered.

Dated and delivered at **Machakos** this 3rd day of **June, 2021**.

D. K. Kemei

Judge