



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 337 OF 2016

JAMII BORA BANK LIMITED.....PLAINTIFF

AND

ERNST & YOUNG LLP.....DEFENDANT

RULING

1. The Plaintiff has sought the leave of the court to file a Verifying Affidavit which is compliant.
2. It is the Plaintiff's request that the Verifying Affidavit sworn by **ELIUD KAGEMA** on 19th August 2016 be expunged from the record, and that it be substituted with an affidavit sworn before a practicing Commissioner for Oaths.
3. The original Verifying Affidavit was sworn before **MELANNIE P.E. KEMUNTO**, Commissioner for Oaths.
4. However, the defendant had stated in its defence that the said Melannie Kemunto did not sign the said affidavit.
5. Secondly, the defendant said that Melannie Kemunto did not have a current practicing certificate at the time when the Verifying Affidavit was allegedly sworn before her.
6. Upon receipt of the Defence, the plaintiff sought information from the Law Society of Kenya, which confirmed that at the material time Melannie P.E. Kemunto Advocate did not have a current practicing certificate.

According to the plaintiff;

“.....in the normal course of business, when one appears before an Advocate who is a Commissioner for Oaths for Commissioning of a document, one does not necessarily request to be supplied with the practicing certificate of the Advocate. Further, there was no reason to suspect that the aforesaid Melannie P.E. Kemunto, Advocate does not possess a current practicing certificate”.

7. Having become aware of the fact that the Advocate before whom the Verifying Affidavit was sworn did not have a current practicing certificate, the plaintiff brought this application.

8. It is the Plaintiff's position that it has a valid claim against the defendant. Therefore, the plaintiff submitted that their claim ought not to be frustrated by the technicality of the lack of a practicing certificate.

9. The Plaintiff invoked the provisions of Article 159 of the Constitution of Kenya, and submitted that technicalities should not be elevated to defeat substantive justice.

10. If the plaint were to be struck because it was not supported by a valid Verifying Affidavit, the plaintiff reasoned that, that would constitute a substantial injustice.

11. It was for that reason that the plaintiff asked the court to allow it to file a compliant Verifying Affidavit.

12. But the defendant noted that there is a world of difference between cases in which there was a defective Verifying Affidavit and cases in which there was simply no Verifying Affidavit.

13. It was the contention of the defendant that it was an illegality when it is not known who the person is that the affidavit was sworn before.

14. The defendant therefore sought to distinguish between an affidavit which was sworn before a Commissioner for Oaths, but which was defective; and an affidavit which was not sworn before a Commissioner for Oaths.

15. In the case of **KENYA COMMERCIAL BANK LTD & ANOTHER VS. KENYA HOTELS LTD CIVIL APPEAL NO. NAI. 40 OF 2004**, the Court of Appeal said;

“Being a practicing advocate is a condition precedent to being appointed a Commissioner for Oaths, the latter position attaches to the practice of law and cannot exist independently on its own if the condition precedent to its acquisition has disappeared.

On this authority, having found that L.W. Mwangi did not have a practicing certificate as at the time she purported to commission the verifying affidavit, I hold that what purports to be a verifying affidavit is no affidavit at all. It is null and void as having been commissioned by a person not authorized by the law to do so.”

16. Obviously, the plaintiff had taken steps to try and comply with the rule which provided that a plaint ought to be filed with a Verifying Affidavit.

17. In **MICROSOFT CORPORATION VS. MITSUMI COMPUTER GARAGE LTD & ANOTHER (2001) KLR 470, at page 481**, Ringera J. (*as then was*), noted that the plaintiff had attempted to comply with the rule requiring verification of a plaint, but he had fallen short of the prescribed standards. In those circumstances, the learned Judge said,

“It would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not to be treated as nullifying the legal instruments thus affected. In those instances the court should rise to its higher calling to do justice, by saving the proceedings in issue.”

18. The learned Judge proceeded to strike out the defective affidavit and then ordered the plaintiff to file a fresh verifying affidavit which was compliant.

19. In the case of **PASTIFICIO LUCIO GAROFALO SPA VS. SECURITY & FIRE EQUIPMENT CO. & ANOTHER (2001) KLR 483**, Ringera J. struck out the verifying affidavit. However, he did not strike out the plaint. Instead, he exercised his discretion, and ordered the plaintiff to file a new affidavit.

The learned Judge emphasized that the principles of Justice demand that unless procedural lapses, omissions and irregularities go to the jurisdiction of the court, the court should not nullify the proceedings affected, unless they do prejudice the adversary in a fundamental respect.

20. In the case of **FLYSTAR LIMITED VS. THE DELPHIS BANK LIMITED (Under Statutory Management) Civil Appeal NO. 58 of 2006**, the Court of Appeal, upheld the decision of Azangalala J. (*as he then was*), when he struck out the verifying affidavit, but declined to strike out the plaint.

21. It is to be noted that in that case, the verifying affidavit had been commissioned by an advocate who did not hold a current practicing certificate.

22. The appellant told the Court of Appeal that the Plaint which was verified by the affidavit which was a nullity, was incompetent. The learned Judges of Appeal rejected that submission. Not only is that decision binding upon the High Court, but I also believe that it is spot on.

23. The competence of the plaint is not determinable by the presence of a valid Verifying Affidavit. Whilst a Plaint may be supported with a valid Verifying Affidavit, it could still be incompetent or liable to striking out for other reasons. The converse is also possible, that there was a defective Verifying Affidavit or an affidavit which was a nullity, purporting to support a competent plaint. If the court found the verifying affidavit to be defective or a nullity, that, of itself, would not render the plaint a nullity.

24. When the court has held that the verifying affidavit was a nullity, that implies that there was as good as there being no affidavit at all.

25. But even in cases where the plaint was not supported at all, with a verifying affidavit, Order 4 rule 1 (6) of the Civil Procedure Rules gives discretion to the court whether or not to strike the plaint or the counter-claim.

26. In **LUKE CHERUIYOT & 37 OTHERS VS. NATIONAL OIL CORPORATION OF KENYA, CIVIL APPEAL NO. 91 OF 2009**, the Court of Appeal addressed the situation in which the High Court had struck out a plaint which had been supported with a defective affidavit.

27. First, the Court of Appeal faulted the Judge for failing to disclose any special circumstances which made him depart from the normal practice of not visiting the mistake of counsel upon his client. Secondly, the Court of Appeal noted that the Judge had not adverted;

“.....to any fundamental prejudice the respondent would suffer if the suit was maintained.”

28. I understand the Court of Appeal to have been saying that when the court found that a verifying affidavit was defective or a nullity, it should ordinarily give to the plaintiff a chance to file a fresh verifying affidavit, which was compliant. When called upon to strike out a plaint on the grounds that the verifying affidavit was defective or was a nullity, the court should exercise its discretion on the basis of the following considerations;

(a) Would the maintenance of the suit occasion prejudice to the defendant that cannot be compensated by an award of costs? or

(b) If it is maintained would that fact go to jurisdiction? or

(c) If it is maintained would that fact otherwise have a fundamental effect or impact upon the adversary?

29. If the answer to any one of those questions is in the affirmative, the court may strike out the plaint.

30. In this case, I have come to the conclusion that the answers to all the three questions above is in the

negative.

31. The defendant will not be prejudiced; the question of jurisdiction does not arise; and there is no fundamental effect or impact upon the defendant, if the suit is sustained.

32. Accordingly, I now grant leave to the plaintiff to file a fresh verifying affidavit within the next 7 days.

33. Nonetheless, the plaintiff will meet the costs of the application dated 14th November 2016. I so order because the need to seek leave of the court to file a complaint affidavit arose from factors not attributable to the defendant. Although the plaintiff may not have been aware that the Commissioner for Oaths before whom the verifying affidavit was being sworn, was not holding a current practicing certificate: It is unfortunate that it has turned out that way, but justice demands that the defendant cannot be burdened with the costs of having to remedy the situation.

DATED, SIGNED and DELIVERED at NAIROBI this 1st day of March 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Macharia for Ngatia for the Plaintiff

Ochieng Oduol for the Defendant

Collins Odhiambo – Court clerk.