**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NUMBER 226 OF 2010**

**SHAFINA MAGRE. ……..……..…… 1ST PLAINTIFF/RESPONDENT**

**KHURRUM MAGRE. ……..……..… 2ND PLAINTIFF/RESPONDENT**

**VERSUS**

**AGA KHAN HEALTH SERVICES (K) LIMITED**

**T/A AGA KHAN UNIVERSITY HOSPITAL.....1ST DEFENDANT/APPELLANT**

**DR MARIA CARVALHO. ……..…..… 2ND DEFENDANT/APPELLANT**

**R U L I N G**

The 1st Defendant by a Notice of Preliminary Objection dated the 19th January, 2011, sought the strike out and dismisses the plaint and the verifying affidavit.

The grounds upon which the application is based are that each of the plaint and the verifying affidavit, are defective, bad in law and an abuse of court process and that they contravene Orders 2 Rule 3(1) and 19 Rule 4 of the Civil Procedure Rules. The Plaintiff's argued that the plaint in paragraphs 9 -21 are unnecessarily full of narrative of events with details of evidence which should only come forth during full trial. The Plaintiff's also argued that the verifying affidavit was jointly sworn by more than one person is not sworn in the first person as required by the rules.

The application is contested by the Plaintiff who asserts that they have applied only enough facts and material to draw the plaint, and that even if the verifying affidavit is jointly sworn, that does not break the rules of procedure.

The Plaintiffs in the alternative state that if joint oath may not be procedural and is defective, the defect would only be technical and does not go to the root of the validity of the affidavit. They concluded that the court's purpose is not to strike out a pleading and thus oust a party from the seat of justice, but to save the suit even if a party may need to seek amendment to remove technical defects.

I have carefully perused the plaint and its details. There is no denying the fact that it is a lengthy plaint and could have been made a little shorter and more compact. A careful reading of the facts on it and a consideration of the nature of the suit, might however, have required those details in the plaint as they are presently. The feeling I got from the perusal thereof is that very few of the facts and details on the plaint could be termed to be too unnecessary or verbose, as to require tending or amendment.

As to the second point of joint swearing of the verifying affidavit, the Plaintiffs would have been tidier

and less clumsy if each would have sworn a separate affidavit which this court would encourage in the future. However, the joint verifying affidavit is brief and to the point and raised no confusion to the Defendant. If it is imperfect, it would only be so in form. In the circumstances of this case accordingly I would have no valid reason to rule it invalid or defective; I would not even seek an amendment to it.

This position that the court has taken should not surprise the Defendants who had filed this application to strike out. Every practicing advocate who has or reads the Civil Procedure Rules as they exist today and also reads the provision of the Constitution, is aware that the purpose of court will always be to save and/or sustain a suit and not to apply draconian rules to strike it out, to remove a party from the seat of justice. As stated by the Court of Appeal **in Nicholas Kiptoo Arap Korir Jalat Vs Independent Electoral and Boundaries Commission & 6 other [2013] eKLR**: -

> ***"Deviations from and lapses in form and procedures which do not got to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion, prejudice or cause miscarriage of justice to the opposite party, ought not be elevated to the level of a criminal offence, attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead in such instances the court should rise to the highest calling to do justice by sparing the parties the draconian approach of striking out pleadings….."***

What is stated above is the law and practice in this country. The Defendant is taken to know it. If he was the one whose suit was targeted for striking out, he would look up to the court to save his pleadings, not to strike it out. More so in a case such as this where the technical mistakes are very minor and unlikely to cause any injustice. However, in this case the Defendant in the court's view, must in filing this Preliminary Objection, not have been moved by any good intention to keep the suits pleadings tidy and proper, but to bring the court process and progress, into a halt. Indeed, it cannot be denied that little progress has been achieved in this suit since January 2011 when this so called preliminary objection was filed.

As earlier stated the Defendant or his advocate, knows the proper or correct law and practice. He chose to file this Preliminary Objection, in the court views, without good cause or with intention to delay the progress of the suit, which he has succeeded to achieve. A party who deliberately or negligently raises unnecessary points of Objection and thereby wastes court's or the other party's valuable time and probably resource, should not be left to go unsanctioned. Lord Denning was quite clear in respect to such.

So was Sir Charles Newbold, P. **in Mukisa Biscuit Co. Vs West End Distributors [1969] EA, 701** when he stated thus: -

> **"A preliminary objection in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised of any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse the issues. This improper practice should stop."** Stress is mine**.**

In this case as already expressed, the Preliminary Objection by the Defendant was unnecessary and probably not too genuine and in the minimum, was negligent or careless. It must, therefore, be sanctioned in the manner of Lord Denning's calling which courts in this country have followed from time to time.

The end result is that this application is hereby dismissed with costs which should be assessed at double the present relevant Advocates Remuneration Scale fees and to be paid personally by the Advocates who filed the application or by his firm. Orders are made accordingly.

Dated and delivered at Nairobi this 5th day of March, 2015.

**……..**

**D A ONYANCHA**

**JUDGE**