



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE No. 24 OF 2020**

**GILBERT MAYIEKA OGATO.....PLAINTIFF**

**VERSUS**

**RAYMOND KIPLAGAT.....1<sup>ST</sup> DEFENDANT**

**NAKURU GRAINS MILLS LTD.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of defendants' Notice of Preliminary Objection dated 17<sup>th</sup> March 2020 and orally amended in court on 4<sup>th</sup> June 2020. The defendants seek striking out of the suit on the ground that the verifying affidavit is sworn by "a stranger to the proceedings."

2. In support of the objection, Mr Opar, learned counsel for the 1<sup>st</sup> defendant argued that the verifying affidavit herein which is sworn by Gladys Sarara is incompetent since the deponent is not the plaintiff and therefore a stranger to the proceedings. He added that it is only Gilbert M. Ogato, the plaintiff who can validly swear the verifying affidavit in this matter and since he has not sworn any affidavit in the matter, the court should strike out the suit. He further argued that procedural requirements should be complied with and that doing so is not contrary to **Article 159** of the **constitution**. In support, Mr Kipkenei, learned counsel for the 2<sup>nd</sup> defendant argued that the rules do not anticipate delegation of authority to swear verifying affidavit. He added that whereas on 27<sup>th</sup> May 2020 the plaintiff purported to file a verifying affidavit, the old affidavit of Gladys Sarara has not been withdrawn and no leave of the court was granted in respect of the new verifying affidavit. He too urged the court to strike out the suit.

3. In response, Mr Konosi, learned counsel for the plaintiff argued that the plaintiff gave Gladys Sarara an authority to swear the verifying affidavit pursuant to **Order 9 rule 2 (a)** of the **Civil Procedure Rules** as amended by Legal Notice No. 22 of 2020. Citing the decision of the Court of Appeal in **Luke Cheruiyot & 37 others v National Oil Corporation of Kenya [2015] eKLR**, counsel argued that the court has discretion to order filing of a compliant affidavit as opposed to striking the suit out. Counsel further argued that striking out is contrary to this overriding objective as provided under **Sections 1A and 1B** of the **Civil Procedure Act** and **Article 159** of the **Constitution** and that the defendants will not suffer any injustice if in the event that the court finds that there is no valid verifying affidavit on record, the plaintiff is allowed to comply. He suggested that the court accepts the verifying affidavit subsequently filed by the plaintiff on 27<sup>th</sup> May 2020 as adequate in the circumstances.

4. I have considered the objection and the respective submissions. The defendants' contention is that the plaintiff has not filed any verifying affidavit thereby rendering the suit fatally defective. The relevant provisions regarding the requirement of a verifying affidavit are found at **Order 4 rule 1 (1)(f), (2) and (6)** of the **Civil Procedure Rules** which provide as follows:

**1. (1) The plaint shall contain the following particulars—**

**(f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.**

**(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1) (f) above.**

**(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. [Emphasis supplied]**

5. The upshot of these provisions is that every plaint must be accompanied by a verifying affidavit sworn by the plaintiff. Pursuant to **sub rule (3)**, where there are several plaintiffs, one of them may swear the verifying affidavit on behalf of the others provided that a written

authority to that effect is filed with the verifying affidavit. In this case though, there is only one plaintiff. Consequently, the verifying affidavit must be sworn by the plaintiff himself. Regarding Mr Konosi's argument that a plaintiff can give authority to someone else to swear a verifying affidavit on his behalf pursuant to **Order 9 rule 2 (a)** of the **Civil Procedure Rules** as amended by Legal Notice No. 22 of 2020, it must be remembered that **Order 9** refers to "Recognized Agents and Advocates" for purposes of prosecution of suits once validly filed. That is clearly discernible from a reading of **Order 9 rule 1** which specifically refers to "any application to or appearance or act in any court required or authorized by the law to be made or done by a party ..." One only becomes a party to a suit once the suit is validly filed. **Order 9** deals with any party to a suit be it plaintiff, defendant, third party or even interested party. On the other hand, **Order 4** is focused on commencement of suits, particularly suits brought by way of a plaint.

6. **Rule 2 (a)** as amended by Legal Notice No. 22 of 2020 now provides as follows:

**2. The recognized agents of parties by whom such appearances, applications and acts may be made or done are—**

**(a) subject to approval by the court in any particular suit persons holding powers of attorney or an affidavit sworn by the party authorizing them to make such appearances and applications and do such acts on behalf of parties; [Emphasis supplied]**

7. It is noteworthy that the new **rule 2 (a)** specifically refers to "the party", once again emphasising that "Recognized Agents and Advocates" as referred to by **Order 9** is only with regard to prosecution of suits once validly filed. If the Rules Committee intended to remove the specific and mandatory requirement at **Order 4 rule 1 (2)** that plaints be accompanied by a verifying affidavit sworn by the plaintiff, the said rule would have also been amended. As was observed by the Court of Appeal in **Luke Cheruiyot & 37 others v National Oil Corporation of Kenya** (supra), the primary purpose of the requirement of verifying affidavits is to prevent the filing of suits on behalf of plaintiffs without their express instructions. That purpose would be defeated if all sorts of agents, real or purported, were allowed file suits on behalf of litigants. Needless to state, a holder of a valid power of attorney can validly swear a verifying affidavit not because of the provisions of **Order 9**, but due to the universal legal efficacy of a valid power of attorney which puts the recipient in the same legal position as that of the donor.

8. A perusal of the record herein shows that this suit was filed on 13<sup>th</sup> March 2020 by Gilbert Mayioka Ogato, the sole plaintiff. The plaint is accompanied by a verifying affidavit sworn by one Gladys Sarara who obviously is not the plaintiff. She deposed in the said affidavit that she is the wife of the plaintiff and that she had his authority to swear the affidavit. As proof of the said authority, she annexed a copy of an affidavit sworn by the plaintiff in which he states that he is residing in the United States of America and that he has authorised her to act for him and sign the necessary documents in the case on his behalf. In view of the discussion above, it is clear that no valid verifying affidavit accompanied the plaint herein at its filing on 13<sup>th</sup> March 2020. Clearly, there was a breach of **Order 4 rule 1 (2)**.

9. The foregoing notwithstanding, I note that there is on record a copy of a verifying affidavit sworn by the plaintiff on 19<sup>th</sup> May 2020 and filed herein on 27<sup>th</sup> May 2020. The defendants have in fact acknowledged its existence although they maintain that it is invalid since it was filed after institution of the suit, and without leave.

10. The defendants have invited the court to strike out the suit under **Order 4 rule 1 (6)**. That provision is not couched in mandatory terms. Thus, the court has a discretion on whether or not to strike out a suit that fails to comply with **Order 4 rule 1 (2)**. In exercising that discretion, I am alive to the draconian nature of striking out. Additionally, I take into account that when dealing with procedural technicalities, this court has a duty under **section 3 of the Environment and Land Court Act**, Sections **1A** and **1B** of the **Civil Procedure Act** and **Article 159 (2) (d)** of the **Constitution** to see to it that the just, expeditious, proportionate and accessible resolution of disputes is attained and that substantive justice prevails. While dealing with a similar situation in **Coast Development Authority v Adam Kazungu Mzamba & 49 others** [2016] eKLR, the Court of Appeal stated:

**... Article 159 (2) (d) demands that justice shall be administered without undue regard to technicalities. In Salat v. IEBC & 7 Others, Petition No. 23 of 2014, the Supreme Court reiterated that the above constitutional provision accords precedence to substance, over form and in Lamanken Aramat v. Harun Maitamei Lempaka, Petition No 5 of 2014 the same Court observed that a court dealing with a question of procedure, where jurisdiction is not expressly limited in scope, may exercise discretion to ensure that any procedural failing that lends itself to cure under Article 159, is indeed cured. The Court concluded thus:**

**"The Court's authority under Article 159 of the Constitution remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice."**

**As regards the overriding objective, the ELC Act provides that its principle objective is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes and enjoins the court to discharge its functions so as to give effect to the overriding objective. ...**

11. There are many authorities which support the position that failure to file a valid verifying affidavit is a curable procedural technicality which should not result in striking out of a suit. A party should always be given an opportunity to comply. See **Luke Cheruiyot & 37 others v National Oil Corporation of Kenya** (supra). In the particular circumstances of this case where there is already on record a copy of a verifying affidavit sworn by the plaintiff on 19<sup>th</sup> May 2020 and filed herein on 27<sup>th</sup> May 2020, the plaintiff has demonstrated willingness to comply with the procedure even if belatedly. While I have not seen any original of the verifying affidavit on record, I take it that such absence may in fact be due to the prevailing COVID-19 pandemic which has limited the ability of the court to receive hard copy documents. All that is now needed is to regularize the situation by admitting on record the said verifying affidavit. I do not see how the defendants will be prejudiced by such an outcome.

12. In the end, I make the following orders:

**a) The Preliminary Objection dated 17<sup>th</sup> March 2020 is dismissed. Costs in the cause.**

**b) The verifying affidavit sworn by the plaintiff on 19<sup>th</sup> May 2020 and filed herein on 27<sup>th</sup> May 2020 is hereby admitted as the verifying affidavit in respect of the plaint herein.**

**c) The plaintiff to file and serve the original of the said verifying affidavit once normalcy in court operations return and in any event before the hearing of this suit.**

13. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17<sup>th</sup> April, 2020).

**Dated, signed and delivered at Nakuru this 1<sup>st</sup> day of July 2020.**

**D. O. OHUNGO**

**JUDGE**