



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 266 OF 1994**

**RACCOLTA, MOLNAR & GREINER.....PLAINTIFF**

**VERSUS**

**ROYAL TRADING COMPANY LIMITED.....DEFENDANT**

**RULING**

1. Before this Honourable Court are two applications as follows:-

- 1. The Defendant's Notice of Motion Application dated 15<sup>th</sup> May 2013 and filed in Court on 16<sup>th</sup> May 2013 seeking to have the Amended Plaintiff dated 16<sup>th</sup> June 2010 to be struck out together with all previous and subsequent pleadings filed by the Plaintiff, and as such having the suit dismissed as against the Defendant together with the costs of the suit and application to be paid for by the Plaintiff. It is expressed to be brought under Order 2 rule 15 (1) (b) (c) & (d) of the Civil Procedure Rules and section 3A of the Civil Procedure Act.*
- 2. The Plaintiff's Chamber summons application dated 23<sup>rd</sup> August 2010 and filed in Court on 27<sup>th</sup> September 2010 seeking for prayers that the Plaintiff be allowed to further amend its Plaintiff dated 16<sup>th</sup> June 2010 and filed in Court on 18<sup>th</sup> June 2010. The said application is expressed to be brought under Order VIA Rule 3 (1), 5(1), 7 and 8 of the then Civil Procedure Rules.*
2. The first application is the Defendant's Notice of Motion application dated **15<sup>th</sup> May 2013** and filed in Court on **16<sup>th</sup> May 2013** which is based on the several grounds stated on the face thereof and is supported by the affidavit of **Shabbir Taherali Hassanali** sworn on **15<sup>th</sup> May 2013**.
3. The background to the application is that, by a ruling dated **30<sup>th</sup> May 2012**, Njagi J. found that the verifying affidavit sworn by Rita Rodgers was not compliant as she lacked capacity to sign the same. The said affidavit was accordingly struck out with leave to the Plaintiff to file and serve a compliant one within thirty days from the date of that ruling. The Plaintiff did not meet the deadline and as a result applied for leave before this Court to file a verifying affidavit out of time vide the Notice of Motion dated **3<sup>rd</sup> October 2012**.
4. This Court vide a ruling dated **6<sup>th</sup> February 2013** allowed the Plaintiff to file the Verifying Affidavit within 30 days from the date of the ruling. The Plaintiff has since filed a Verifying affidavit of one DR. GERTRUDE EDER dated **11<sup>th</sup> September 2012** and filed on **3<sup>rd</sup> October**

- 2012 as well as another Verifying affidavit of KURT GRULLENBERGER dated **23<sup>rd</sup> August 2010** and filed on **27<sup>th</sup> September 2010**.
5. The Defendant in its supporting affidavit sworn on **15<sup>th</sup> May 2013** has essentially laid out the background leading to the current application. It is the Defendant's case that the Verifying affidavit filed on **3<sup>rd</sup> October 2012** is still defective as it does not comply with **section 88** of the **Evidence Act** as read together with **Order XLI, rule 12** of the **Supreme Court of England Rules**. It is averred that the said verifying affidavit has been filed in flagrant disregard of the rules of filing of affidavits sworn in Countries outside the commonwealth.
  6. In response to the application the Plaintiff filed a Replying affidavit on **1<sup>st</sup> August 2013** sworn by **DR. GERTRUDE EDER** and **Mr. MAG HELMUT GRUBER** on **31<sup>st</sup> July 2013**.
  7. In the said affidavit it is deponed that the Court should embrace substantive justice in preference to strictly and rigidly following rules of procedure. In my view, the said affidavit did not even make an attempt to defend or clarify the verifying affidavits on record.
  8. The Defendant filed its written submissions on **14<sup>th</sup> November 2013** in support of its application.
  9. The second application is the Plaintiff's **Chamber Summons** application dated **23<sup>rd</sup> August 2010** seeking to further amend the Plaint dated **16<sup>th</sup> June 2010**. It's based on the grounds that the proposed amendments are intended to bring out the real matters in controversy between the parties herein and that the said amendments are necessitated by information relevant for the fair and just determination of the real questions in controversy in the suit. It is further supported by the affidavit of **KURT GRULLENBERGER** sworn on **23<sup>rd</sup> August 2010**.
  10. In opposing the said application the Defendant filed a lengthy Replying affidavit sworn by **Shabbir Taherali Hassanali** on **10<sup>th</sup> November 2010**. It is averred in the said affidavit that pleadings closed on or about the **20<sup>th</sup> July 2010**. It is the Defendant's case that the Plaintiff should not attempt to circumvent its position by rectifying and strengthening its case especially after having been served with a Defence, Request to make discovery and having failed to file a Reply to Defence. It is further the Defendant's case that it is not fair, just and in the interest of justice that the Plaintiff having had the opportunity of seeing the Defence to attempt to repair and strengthen its case as the same is prejudicial and detrimental to the Defendant's case.
  11. The applications were canvassed before me on **15<sup>th</sup> November 2013** where Ms. Muigai appeared for the Plaintiff and Mr. Khan appeared for the Defendant.
  12. Counsel for the Defendant submitted that the Plaintiff had taken the old verifying affidavit and superimposed a seal of a Notary Public and purported it to have been an affidavit sworn in compliance of the Court order.
  13. To show how a Verifying Affidavit sworn out of the Country is to be produced in this Court, Counsel referred to the following cases;
    - ***Bare & 13 others vs Maendeleo ya Wanawake Organization Civil Case No. 494 of 2009***
    - ***Pastificio Lucio Garofolo SPA vs Security and Fire Equipment Co. [2001] EA***
  14. It was further submitted by Counsel that the Verifying affidavit in question, being one from a Country that was not a commonwealth country, ought to have been proved by an affidavit taken by another Notary Public.
  15. Though the Plaintiff did not file written submissions, Counsel made oral submissions in response to the Defendant's submissions. Ms. Muigai submitted that the Verifying affidavit dated **11<sup>th</sup> September 2012** was drawn by their firm. She further submitted that the Second Secretary, Legal Division of the Ministry of Foreign affairs confirmed the notarization in Vienna. The notarization in Vienna was then interpreted here in Kenya by the Vienna embassy.
  16. Counsel relied on **Section 100** of the **Civil Procedure Act** as well as **Order 19 rule 7** of the **Civil Procedure Rules** for the proposition that the Court was allowed to receive a defective affidavit in any suit to avoid forums of technicality.
  17. Counsel also submitted on the Plaintiff's application dated **23<sup>rd</sup> of August 2010** seeking to further amend the Plaint in order to make clear the issues that the Plaintiff had brought to Court. She relied on **Order 8 rule 5** of the Civil Procedure Rules in submitting that the Court had discretion

- to allow amendments in order to determine the real issues between the parties.
18. Counsel for the Defendant opposed the application for amendment on the basis that it lacked merit because it was not supported with appropriate affidavits.

### ANALYSIS

19. I will begin with the first application. In the first instance, the deponent of the Verifying Affidavit did not have the capacity to sign the said affidavit. In the current affidavit(s) filed in Court, it is not in dispute that the deponents therein are competent to swear the verifying affidavit.
20. What is in dispute is that the said Verifying affidavit was not properly produced before this Court and is in flagrant breach of the law.
21. There are two verifying affidavits on record. One is sworn by **KURT GRULLENBERGER** at Vienna on **23<sup>rd</sup> August 2010** and filed in Court on **27<sup>th</sup> September 2010**. The other one is sworn by **DR. GETRUDE EDER** in Vienna Austria on **11<sup>th</sup> September 2012** and filed in Court on **3<sup>rd</sup> October 2012**. The former affidavit is expressed to have been drawn and filed by **S.N Gikeria & Co. Advocates** while the latter affidavit is drawn & filed by the firm of **Muigai Kemei & Associates**, the Advocates on record for the Plaintiff. I therefore take it that the latter affidavit sworn on **11<sup>th</sup> September 2012** and filed in Court on **3<sup>rd</sup> October 2012** is the one in question. Furthermore, this is the affidavit, counsel for the Plaintiff referred to in her oral submissions.
22. As earlier stated the Plaintiff had filed a Notice of Motion dated **3<sup>rd</sup> October 2012** seeking leave that they file the Verifying affidavit out of time. The other prayer was that the draft Verifying affidavit be deemed as duly filed. I have looked at the Verifying affidavit which I believe was the draft attached to the Plaintiff's application and noted that it was already filed in Court on **3<sup>rd</sup> October 2012**. Therefore, by bringing the said application what the Plaintiff was seeking to achieve was to validate the said filing having been done out of time.
23. In my view, the ruling I delivered in this Court on **6<sup>th</sup> February 2013** did just that. By allowing the Plaintiff to file the Verifying affidavit out of time, the affidavit filed on **3<sup>rd</sup> October 2012** was deemed as duly filed.
24. For the above reason, I do not find an issue with the fact that the ruling allowing the Plaintiff to file a Verifying affidavit out of time was delivered on **6<sup>th</sup> February 2013** yet the verifying affidavit in question was filed on **3<sup>rd</sup> October 2012**.
25. I will now turn to the substantive issue in this application which in my view is whether the verifying affidavit filed in court on **3<sup>rd</sup> October 2012** was properly produced before this Court.
26. The verifying affidavit was sworn in Austria and it is not in dispute that the said Country is not a commonwealth country. It is clear that the Verifying affidavit in question was taken and executed before a Notary Public known as **Dr. Sonja Tades**.
27. In **Salim Alhamed Ali and another v Emag Ag Nairobi (Milimani) HCCC No. 1806 of 2000 (OS); [2000] LLR 1552 (CCK)** (Ombija J held that:

***“Affidavits taken in Countries other than commonwealth countries require proof by affidavit or otherwise to have been taken by a notary public, of the stamp and seal or the official position of the person taking the affidavit as opposed to affidavits taken in commonwealth countries. Otherwise such affidavit is defective and struck out.  
(Underlining mine)***

Though the above authority is persuasive and not binding upon this Court, I am guided by the same as I find it logical and applicable in the circumstances. From the above holding it would appear that the proof is not limited to affidavits only. It is my considered view that by imposing her Notarial seal in the *jurat*, the said **Jane Wangu**, Notary public, in her authority and capacity affirmed that the verifying affidavit was indeed attested before a Notary Public in Vienna. If she were to swear an affidavit she would state the same and impose her notarial seal. Both actions in my view would serve the same purpose and consequently have the same legal effect.

28. It is also my view that the contention herein with regard to how the Verifying affidavit should be produced is an issue of procedure and does not go to the substance of the suit. In the case of

**Microsoft Corporation vs Mitsumi Computer Garage Limited & Another (2001) KLR 470** at 482 Ringera J. stated as follows:-

***“Deviations from or lapses in form and procedure which do not go into 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 the higher calling to do justice by saving the proceedings in issue.”***

In the current matter, the issue of the Courts jurisdiction was already settled and the procedure in producing the affidavits will not in any way prejudice the Defendant. The defect if any does not go to the substance of the suit.

29. The above notwithstanding, it has not been disputed that the said affidavit was properly attested to by Dr. Sonja Tades, a Notary Public in Vienna.
30. Now to the second application. The Plaintiff is seeking to further amend its Plaintiff dated **16<sup>th</sup> June 2010**. The general principle is that amendments sought before the hearing should be freely allowed if they can be made without injustice to the other party and there is no injustice if the other party can be compensated by costs. See **Eastern Bakery vs Castelino (1958) E.A 46**. Further, **Order 8 Rule 3 (1)** of the **Civil Procedure Rules** allows this court a wide discretion on application to amend pleadings. The court has a duty to ensure that the pleadings identify the real matters in controversy and to ensure that substantial justice is done.
31. Having perused the Draft Further amended Plaintiff I do not foresee the Defendant suffering any prejudice. In any case the Defendant is at liberty to file a Reply to the same.
32. As I have stated before in this Court, it does not seem to me that the Plaintiff is diligent in prosecuting this case. Otherwise, some of the applications herein would have not been necessary. There is need for the Plaintiff to put its house in order. This Court has indulged the Plaintiff on various occasions.
33. In the upshot, the Defendant’s Notice of Motion Application dated **15<sup>th</sup> May 2013** is hereby dismissed with no order as to costs. On the other hand, the Plaintiff’s Chamber Summons application dated **23<sup>rd</sup> August 2010** is allowed in the following terms:-
  - a. ***The Plaintiff to file and serve the Further Amended Plaintiff within 10 days from the date of this ruling. Time shall be of essence.***
  - b. ***The Defendant will be at liberty to file and serve its Reply within fourteen days of service of the Further Amended Plaintiff.***
  - c. ***The Plaintiff will bear the costs of the Defendant for this application.***

**DATED, READ AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF FEBRUARY 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

**Mary Mungai for Plaintiff**

**Dar for Defendant**

**Teresia – Court Clerk**