



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELC NO 292 OF 2013

MALEWA RANCHING COMPANY LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

IDA WATIRI CHEGE.....1ST DEFENDANT/APPLICANT

NYOKABI WA NGENYE.....2ND DEFENDANT/APPLICANT

FRANCIS KAMAU CHEGE.....3RD DEFENDANT/APPLICANT

TABITHA MWANGI.....4TH DEFENDANT/APPLICANT

RULING

1. The Defendants/Applicants moved this court by way of Notice of Motion dated **3rd June, 2011** seeking the following orders:

- i. **That this court be pleased to strike out the plaint.**
- ii. **That costs of the application be provided for.**

2. The application is premised on the grounds on the face of the application and the replying affidavit of **Githui John**, the Advocate for the applicants, sworn on **3rd June, 2011**. He depones that the plaintiff's Plaint had no accompanying verifying affidavit, the first one having been struck out for being signed by a person who had no such authority. When the defective verifying affidavit was struck out the plaintiff was granted leave of 10 days to file a proper verifying affidavit but to date he has not filed one.

3. The application is not opposed.

4. Before considering the application, it is pertinent to set out the background of this case. This matter was heard by way of formal proof and judgment entered in favour of the plaintiff by **Hon. Emukule J** on **12th November, 2010**. On **30th November, 2010** by consent, the judgment was set aside. Thereafter, the defendants filed a notice of Preliminary Objection, which was heard and 10 days leave granted to the plaintiffs to file a proper replying affidavit. They did not comply, leading to the filing of the instant application.

5. **Order 4 Rule 1** of the **Civil Procedures Rules, 2010** provides the following in respect of verifying

affidavits filed together with the Plaintiff:

“(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.

(4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”

6. Most courts consider failure to file a verifying affidavit or filing a defective one as a technicality that is curable and courts will almost always grant leave to the plaintiff to file a proper verifying affidavit. This is what happened in the instant case where **Hon. Emukule J** granted the plaintiff leave of 10 days to file a proper verifying affidavit and similarly in the case of **Peter Ndeya & Others v Samuel Nyoike T/A Same Agencies [2006] eKLR**, where leave was granted.

But what then happens when the plaintiff does not comply with the orders of the court and fails to file one?

7. A plaint without a verifying affidavit has nothing to support it as observed in the case of **Mercy Kanyiri Makathimo V Francis Mburugu Makathimo [2007] eKLR**, by **Hon. Lenaola J** where he expressed himself thus:

“a defective verifying affidavit for whatever reason must be struck out and once it is struck out the plaint is standing on no legs and as it collapses must also be struck out as neither has any probative value (see also Ringera J. in Richard Karimi Kinoti t/a Happy Enterprises vs Naomi K. Githaka t/a Wagatumba Enterprises, HCCC 2176 of 2000 (Milimani)”

8. I agree with the learned Judge entirely. There are some litigants who no matter how much rope is given to them, they will still hang themselves. The plaintiff in the instant case was granted 10 days leave to file a proper verifying affidavit on **28th June, 2011** but did not comply. It is now over three years since that order was issued. I have no doubt in my mind that the plaintiff has lost interest in this matter and the reason for not taking the lifeline handed to them.

9. For that reason, I hereby allow the Notice of Motion dated **3rd June, 2011** and strike out the plaint with costs.

Dated Signed and delivered in open court at Nakuru this 3rd day of October 2014.

L N WAITHAKA

JUDGE

In the presence of:

N/A for Githui Counsel for Applicants.

N/A for Njihia Njoroge Counsel for the Respondents

(Notice was issued to both counsels)