



**REPUBLIC OF KENYA**  
**IN THE KADHI'S COURT AT NAIROBI**  
**KIBERA LAW COURTS**  
**SUCCESSION CAUSE 10 OF 2014**  
**IN THE MATTER OF THE ESTATE OF ABDALLA ATEIB(DECEASED)**  
**HUSSEIN ABDALLA ATEIB..... PLAINTIFF**  
**VERSUS**  
**JOSEPHINE MWIKALI MWANGANGI.....DEFENDANT**  
**RULING**

The background information to this ruling is that the plaintiff moved to this court, by way of a plaint dated 23rd day of June 2014 and filed on 25 th day of June 2014.

Simultaneously filed with the plaint was a verifying affidavit. Summons were taken out and served on the defendant who entered appearance dated 1st July 2014 and filed the same date.

On the 3rd day of November 2014 the defendant filed a notice of preliminary objection. It seeks one prayer namely:-

*1. That the plaint dated 23rd June 2014 be struck out.*

The application is supported on the grounds set out in the body of the defendant's written submissions filed on 12th day of January 2015.

The major grounds are that:-

1. The Plaintiff's verifying affidavit purported to have been sworn by the plaintiff on the 23rd June 2014 is not attested and or commissioned by a Commissioner for Oaths as per the law .
2. The Plaintiff's suit is incurably defective, bad in law and out to be struck out.

The Plaintiff neither filed a response nor articulated his position orally vis a vis the application of the Defendant.

However the Plaintiff through his counsel moved the court orally on 26th day of January 2015 seeking for a leave to amend plaint filed on 26th June 2014.

In addition to the grounds of preliminary objection, the learned counsel for the Defendant submitted in the written statement arguments as follows:-

The validity of the Plaintiff's plaint is on the basis of the provision of Order VII, rule 2 of Civil Procedure Rules is in question since the plaint is purport to be accompanied by a verifying affidavit sworn by the plaintiff himself on 23rd June 2014, the said affidavit contravenes the provisions of s.5 of the Oaths and Statutory Declarations (Cap.15) because "it does not identify the person or firm who commissioned it, no stamp nor signature of Commissioner for oaths as required by law."

As a result, the verifying affidavit cannot stand in law; and so as the suit is defective for failing afoul of Order VII, rule 2 of Civil procedure Rules.

By reason of what has been stated above, the court is urged to struck out the plaint.

On case law the applicants' counsel relied on the case of *The Delphis Bank Limited v. Asudi (K) Limited & Another*, HCCC No. 82 of 2003, decided by Ibrahim, J as he then was; where the court held that:

***"Once a verifying affidavit has been struck out and the defendant applies to have the plaint struck out then the court must strike out the plaint....."***

The learned Judge further stated that:

***"In the aforesaid circumstances, this Court has two options; it can allow the plaint to remain on record, and leave it to the defendants to formally apply to strike it out....."***

The case of *BISHOP GAWO AND OTHERS VERSUS NAIROBI CA NO. NAI 345 OF 2000* decided by the CA on the 9th day of March 2001. It was an appeal which had arisen out of an objection raised in the superior court, on the ground that the plaint as presented infringed on the provision of order VII rule 3 (2). The argument put forward was to the effect that since the plaint was not accompanied by an affidavit, the same was incompetent and ought to be struck out and it was accordingly struck out.

It was held that: ***the requirement that a plaint must be accompanied with a verifying affidavit, is mandatory and leaves no room for interpretation.***

Having given due consideration to the submissions by the parties in light of law, and material presented before the courts, the question which, therefore, falls for my consideration is:

***1. Whether the plaint is liable to be struck out should the verifying affidavit be found to be faulty.***

In *Microsoft Corporation v. Mitsumi Computer Garage LTD and Mitsumnet (K) LTD* HCCC No. 810 of 2001

On the purport and necessity of a verifying affidavit the learned judge held that: -

***"However the rule having been framed in broad terms verification of the plaint is now necessary in every type of action originated by a plaint. The broad purpose of the verifying affidavit is thus to verify the content of the plaint. That purpose may be attained by rejecting defective affidavits and ordering that a fresh and complying one be made and filed. On the record I would accordingly order that the verifying affidavit of Marylyn Lesley Pearman be struck out but the plaintiff be at liberty to file a fresh verifying affidavit within 15 days of today.***

In *J.M. Mugo Investment Company limited v. Jackson Mathu t/a gatugu Farm Coffee Board of Kenya* Case No. 1092 of 2000

The case which concerned an application to strike out a plaint on account of it being supported by a defective verifying affidavit the learned judge set out the content of order 7 rule 1 (2) thus:-

***"The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint"***

The learned judge further went on and stated that:-

***"All that order 7 rule 1(2) requires is that the plaint be accompanied by a verifying affidavit and unless it can be shown that the verifying affidavit is in law not an affidavit at all, the court, cannot strike the plaint out as a part from the court, satisfying itself that the same affidavit verifies the correctness of the averments contained in the plaint, the court, should not unduly concern itself with the other contents of the affidavit.***

At page 10 line 6 from the top the learned law lords of the CA went on to state thus:-

***"How ever having said so, I will next ask the one question. If the plaint has a verifying affidavit which is declared un acceptable must that plaint be struck out?. My answer is it depends. And that is where a consideration of order 7 rule 1 (2) and order 7 rule 1 (3) come into play.....order 7 rule 1 (2) is mandatory, but that mandatory effect is watered down to some extent by order 7 rule 1 (3) which gives the court, the discretion to strike out such a plaint or not. That rule i.e. order 7 rule 1 (3) gives the discretion to the court, in cases where there is no compliance with order 7 rule 1(2) which to me means that even in cases where there is no verifying affidavit, at all accompanying the plaint, such a plaint would still not be automatically struck out. The court, can still look at the circumstances and decide whether or not to struck out such a plaint i.e see whether there are aggravating circumstances.....I think the court, would in its inherent powers allow the plaintiff to file a verifying affidavit to be in the file with a plaint although this time not accompanying the plaint, but it will be there with the leave of the court. This is just like in cases where further affidavits would be filed or any act would be done if the leave of the court, is obtained. Such an act would then be valid. In the same day even though the plaint may have had no verifying affidavit or may have had a defective verifying affidavit, as order 7 rule (3) gives the court, discretion over the striking out of such plaint, so would the court in allowing such a plaint to remain in the file allow the plaintiff to file a proper verifying affidavit".***

I totally agree with the Defendant contention that the Plaintiff's verifying affidavit faulty and has no legs to stand.

In ***Rajput v. Barclays Bank of Kenya and 3 others {2004} 2 KLR 393.***

It was held that:

***"Failure to comply with the Oaths and Statutory Declaration Act Cap.15 and the rules made there under is a matter of substance and not form. It is not a matter which is curable or about which a court should take lenient view but rather strike out.***

There are no law which bar a court of law from granting a leave to amend in order to regularize a fault. the heydays of relying on technicality are now gone and gone for good.

The court of law is more interested in doing substantive justice , justice is a virtue that transcends all barriers, reliance to technicality defeats morality and leads to injustice.

The judicial process malfunctions and is discredited when it is bogged down by undue technicalities and thrives on technicality.

At all times therefore, technicalities should be eschewed and the determination to do substantial justice should remain the only option.

It is trite as has been repeated various times that a court is obliged to assist an applicant who has a pleading which is capable of breathing life into an incompetent process.

In premises, I decline to strike out the suit in its entirety but order that the verifying affidavit of the Plaintiff be and is hereby struck out of the record. I fully grant liberty to the Plaintiff to amend the plaint and file and serve the defendant with a fresh compliant within 7 days of the giving of this order.

No order as to cost

**DATED, READ AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE 2015.**

**Hon. A. I. Hussein**

**Kadhi II/RM**