



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT GARISSA**

**ELC CASE NO. 27 OF 2018**

**ABDULLAHI SHEIKH AHMED.....PLAINTIFF/APPLICANT**

**VERSUS**

**MANDERA COUNTY GOVERNMENT.....DEFENDANT/RESPONDENT**

**RULING**

**A. INTRODUCTION:**

1. Before this Court are two applications and a Preliminary Objection. The Defendant filed an Application together with a Preliminary objection dated 25<sup>th</sup> October, 2018 both seeking orders to have the Plaintiff plaint struck out on the grounds that the same is fatally defective and that the Court dismisses the Plaintiff suit against the defendant with costs. The Plaintiff on the other hand filed an Application dated 29<sup>th</sup> October, 2018 which essentially seeks to cure the defect in the Plaint; he is seeking leave to amend the Plaint.

2. The Plaintiff filed a replying affidavit on 29<sup>th</sup> October, 2018 in response to the Defendant Application and Preliminary Objection. The Defendant equally filed their replying Affidavit dated 5<sup>th</sup> February, 2019 and filed on 7<sup>th</sup> February 2019.

3. The Defendant's Notice of Motion and Preliminary Objection dated 25<sup>th</sup> October, 2018 prays that this Court proceeds to strike out the Plaintiff's Plaint for being fatally defective due to the defects in the verifying Affidavit which they allege is unsworn and Commissioned by unauthorized person and subsequently seek the court to strike out the Plaintiff's Plaint against the Defendant. The applicant also prays for the costs of the application.

**B. BACKGROUND:**

**Defendant/Applicant Case:**

4. It is the contention of the Defendant that it is a requirement of **Order 4 the Civil Procedure Rules** that every Plaint be accompanied by a Verifying Affidavit verifying the averments in the Plaint in accordance to the rules provided therein. And the instant Plaint has failed to comply with the said provisions of the Law.

5. In its written submissions dated 5<sup>th</sup> March, 2019, the Defendant argued that given the defects pointed out, the Plaintiff has failed to comply with the mandatory Provisions and requirements of the of substantive and Statutory Law. The Defendants in this regards relies on the following Provisions of the Law, **Section 4 of the Oaths and Statutory Declarations Act CAP 15, Order 3 Rule 2(a) of the Civil Procedure Rules, Order 4 Rule 1(6) of the Civil Procedure Rules, Order 51 rule 1 and Section 1A and 1B of the Civil Procedure Act.**

6. Further, the Defendant relies on the following Authorities, **Fredrick Mwangi Nyaga vs Garam Investments & Another Civil Case No. 249 of 2013, Mulusiah Land Consultants & Another vs Industrial Development Bank Ltd & 2 Others, Constitution Petition No. 605 of 2014 S.W.K & 5 Others vs Medicines San Frontiers-France & 10 other, Stanley Kamande and Another vs Mwaura Migwi & 2 Others (2010) eKLR.**

7. In respect to the Plaintiff application seeking to amend the Plaint and cure the anomalies, the defendant relying on the case of **Central Kenya Limited v Trust Bank Limited (2002) EA 365** and argues that there is undue delay on the part of the Plaintiff and that the reason given is not plausible. In addition, they argue that the same cannot be subject to amendment as it can change the character of the suit against the defendant hence prejudicing the defendant and Article 159 of the Constitution cannot aid the Plaintiff.

**Plaintiff/Respondent's Case:**

8. In response to the application and Preliminary Objection, the Plaintiffs filed a replying affidavit dated 29<sup>th</sup> October, 2018 where he admits

that indeed the verifying Affidavit in support of the Plaintiff is not signed and commissioned by the Advocate who filed the suit. In this regard he argues that he had signed several documents in respect to the suit and was surprised why his Advocate filed unsigned verifying Affidavit. In respect the Advocate Commissioning the documents he prepared, he argues that he was not aware that the same was due to the negligence of the Advocate whom he has since fired.

9. Vide his written submission dated 5<sup>th</sup> January, 2019 the Plaintiff argues that he is a lay person and that he was wholly dependent on his Advocate and the mistake of his counsel should not be visited upon him. Further, he argues that the Court should not strike out the suit as such would be draconian yet the aspect of procedural technicalities including the instant one can be corrected. The Plaintiff relies on the authority of **Luke Cheruiyot & 27 Others vs National Oil Corporation Kenya (2015) eKLR**.

10. In regard to their application to amend the Plaintiff, the Plaintiff argues that the same is merited under Order 8 Rule 3 of the Civil Procedure Rules as it allows the Court at any time during the proceedings to allow a party to amend their pleadings. They rely on the case of **Barnabas Kariuki vs Nyeri Water & Sewerage Company Limited (2016) eKLR**.

### C. ISSUES AND ANALYSIS:

11. Having carefully considered the Pleadings, Affidavits on record, the written submissions of both parties and the authorities relied on. There is one issue to be determined with regard to both applications and Preliminary objection, namely: whether the verifying affidavit should be struck out for want of form and subsequently the Plaintiff Plaintiff.

12. The subject affidavit has been attacked from two fronts. The first front is that the verifying affidavit was not executed by the Plaintiff and secondly that the Advocate who Commissioned the Affidavit is the same one who prepared the same thus making it defective under the provisions of the Civil Procedure Act.

13. Therefore, before this Court are two applications on record, one seeking to summarily terminate the proceedings while the other attempting to keep the proceedings alive, in the circumstance it is trite to start with the one seeking to breathe life into the suit.

14. **Justice G.V. Odunga** in **Mavuno Industries Limited & 2 Others vs Keroche Industries Limited [2012] eKLR**, noted as follows in regard to where two application like the case before court as follows where one application seeks to extinguish the suit and another to breathe life into it:-

**‘...the court, when faced with such contradictory and mutually inconsistent applications may well be advised to deal with the application seeking to breathe life into the suit and thereafter deal with the one for bringing the proceedings to an end. This position is in consonance with a long line of decisions that pleadings should only be struck out when they are so hopeless that life cannot be breathed into them by way of amendment.’**

15. Further, in the case of **Salesio M’aribu vs Meru County Council Civil Appeal No. 183 of 2002** the Court of Appeal stated that:-

**“There was an application before the superior court seeking leave to amend the plaintiff which application was filed before the preliminary objection was filed. That application was seeking to inject some life into the suit. The learned Judge should have first heard and should have first determined that application before hearing the preliminary objection against the entire suit. That application was trying to bring on board matters that could have been relevant to the claim and was thus seeking to breathe life into the claim. The court in hearing the preliminary objection shut out the amended plaintiff which could have possibly revealed a different aspect of the case and in doing so, the court threw out the entire case without knowing what it was all about as it left the application seeking to amend the plaintiff unheard. Had that application been heard and determined before the objection was heard, the objection might have not been entertained in case that application was determined in favour of the appellant. In short, what might have appeared a weak pleading might have had some life injected into it through amendment. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it...The procedure where a court is faced with an application for summary dismissal or striking out a pleading or faced with a preliminary objection to a pleading which seeks to dispose of that pleading, which the other party seeking to amend, is to have the application seeking leave to amend heard first and determined before hearing the application for summary dismissal or for striking out or an objection seeking disposal of the pleading. In that way, the court will ensure that all aspects of the matter are before it before the application for summary dismissal or striking out or the objection seeking to dispose of the pleading is heard and determined”.**

16. Consequently, this Court will first deal with the Application by the Plaintiff seeking to amend the Plaintiff and the Verifying Affidavit. I have considered the application, the affidavits both in support of and in reply to the application, the submissions of parties and the authorities cited. As rightly submitted on behalf of the defendant under Order 4 rules (2), (3) and (4) of the Civil Procedure Rules, 2010 a verifying affidavit shall accompany the plaintiff verifying the correctness of the plaintiff and where there are several plaintiffs, one of them with written authority filed with the verifying affidavit may swear the affidavit.

17. It is clear from the foregoing that the said affidavit, does not strictly comply with the provisions of Order 4 rule 1(2) of the Civil Procedure Rules. It is no doubt clear that the plaintiffs fell afoul of the foregoing rules. The only issue is the effect of such non-compliance.

18. **Section 1A** of the Civil Procedure Act provides for the overriding objective of the Civil Procedure Act and the rules made thereunder and provides as follows:

**1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**

**(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).**

**(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.**

19. **Section 1B** of the same Act, on the other hand provides for the duty of court and states:

**(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims —**

**(a) the just determination of the proceedings;**

**(b) the efficient disposal of the business of the Court;**

**(c) the efficient use of the available judicial and administrative resources;**

**(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and**

**(e) the use of suitable technology.**

20. Section 4(1) of the Oaths and Statutory Declarations Act provides:-

**“A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:**

**Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.”**

21. Order 4 Rule 2 of the Civil Procedure Rules, 2010 provide that 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. Rule 6 further provides that 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.

22. Considering the defendant preliminary objection and application, it is clear that defendant in sum seeks striking out of the suit. Bearing in mind that striking out is a draconian remedy that should only be resorted to in the clearest of cases. Madan JA in **D.T. Dobie & Company (Kenya) Limited vs Joseph Mbaria Muchina & another [1980] eKLR** in this regard noted thus:

**“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.**

**No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”**

23. Additionally, the court in exercising such discretion on whether or not to order striking out of any pleading that is non-compliant with the rules ought to be alive to its obligations under **Article 159** of the **Constitution of Kenya, 2010** to see to it that justice is administered without undue regard to procedural technicalities.

24. Further, the Court of Appeal in **Kenya Commercial Finance Company Limited vs Richard Akwesera Onditi Nairobi Civil Application No. 329 of 2009** stated in this regard that:-

**“The Court now has wider powers and will not automatically strike out proceedings but will before doing so, look at available alternatives. According to the defendant, a verifying affidavit must be filed with the plaint and not subsequently. Order 4 rule 1(6), however, gives the court discretion when it comes to striking out based on such omission. The defendant is, however, incorrect in submitting that the omission to file one verifying affidavit would necessarily lead to the striking out of the suit. In my view, the only suit that would be affected by such omission in the present case is that of the 3<sup>rd</sup> plaintiff. In exercising this discretion, the most important consideration, in my view, is that of justice and unless the**

omission has occasioned the defendant prejudice, the court, as always, should lean towards sustaining a suit. The only prejudice alleged herein is that the effect of validating the plaint and the suit would be to pull the rag from the feet of the defendant as it were since it would have the effect of rendering a portion of the defendant's application filed earlier on superfluous. That may be so; however, it does not, in my view justify resort to the draconian option of striking out a suit, especially where the defect would only affect the suit by one of the several plaintiffs. The issue of the place of abode, in my view, is no longer a matter of life and death in light of the provisions of Order 19 rule 7 of the Civil Procedure Rules, 2010 which empower the court to receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.

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

a) The plaintiff shall within 30 (thirty) days from the date of delivery of this ruling, file and serve a fresh verifying affidavit which complies with Order 4 rule 1(4) of the Civil Procedure Rules, 2010.

b) In default of compliance with (a) above, the suit shall stand struck out with costs to the defendants.

c) The costs of this application assessed at Kshs.10,000/= to be paid by the Plaintiff/Respondent within 10 days from today.

**READ AND SIGNED IN THE OPEN COURT THIS 9<sup>TH</sup> DAY OF MAY, 2019.**

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**E. C. CHERONO**

**ELC JUDGE**

In the presence of:

1. Mr. Muthoga: I appear for Defendant
2. Abdullahi Sheikh Ahmed – Plaintiff in person – present
3. Amina Court Clerk