

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CIVIL CASE NO. E009 OF 2025

MARGARET WAWUDA

.....**PLAINTIFF**

-VERSUS-

GEORGE MWAKILULU MAGHANGA.....

DEFENDANT

RULING

1. The defendant filed a Notice of Preliminary Objection to the plaintiff suit dated 27/11/2025 as follows;
 - (i) That this court lacks the requisite and necessary jurisdiction to hear and determine this case.
 - (ii) That That the courts lacks jurisdiction pursuant to non compliance with Order 4 Rule 1(f),Rule 1(2) and Rule1(6) of the Civil Procedure Rules 2010.
 - (iii) That the suit is incompetent and should be struck out with costs.

2. The parties filed written submissions as follows; The Defendant's submissions are in support of a preliminary objection challenging the competence of the Plaintiff's suit.
3. The Defendant argues that the Plaintiff's verifying affidavit fails to comply with the mandatory requirements of Order 4 of the Civil Procedure Rules, specifically the need to verify that no other suit is pending between the parties and that the cause of action relates to the Plaintiff.
4. The Defendant submits that this defect is not a mere technicality but goes to the root of the suit's validity, and as such, the suit is incurably defective and should be struck out with costs.
5. The Defendant emphasizes that a verifying affidavit that does not meet the statutory requirements renders the entire suit incompetent, and the court cannot exercise jurisdiction over a matter that was not properly instituted.
6. The Plaintiff's submissions oppose the Defendant's Preliminary Objection dated 27th November 2025.
7. The Plaintiff begins by urging that the objection does not raise a pure point of law, citing the established definition in

Mukisa Biscuits Manufacturing Co. Ltd v West End Distribution Ltd, where a preliminary objection was described as a point of law arising from the pleadings which, if argued successfully, could dispose of the suit entirely.

8. The Plaintiff further reinforces this position with reference to **Ororo v Mbaja** case, emphasizing that a preliminary objection must not be blurred with factual details that require proof through evidence.
9. Turning to the substance of the objection, counsel draws upon the recent decision in **Simba v Tulu**, where the court found that a defective Verifying Affidavit does not automatically invalidate a suit, as doing so would be oppressive.
10. It is submitted that the court retains discretion to excuse such defects in the interest of justice. In the present case, counsel argues that the Defendant's objection has only targeted the Verifying Affidavit and not the merits of the Plaintiff's case, and therefore the suit should not be struck out.

11. The objection is described as lacking in both legal and factual foundation and is urged to be dismissed at this stage to allow the matter to proceed to hearing.
12. On the issue of costs, the plaintiff submits that costs are always at the discretion of the court and should follow the event, as provided under Section 27(1) of the Civil Procedure Act.
13. Citing *Hussein Muhamed Sirat v Attorney General*, it is argued that the successful party should ordinarily be awarded costs, depending on the nature and complexity of the dispute, and based on the evidence and arguments presented.
14. Upon careful consideration of the Notice of Preliminary Objection dated 27th November 2025, the rival submissions by the parties, and the relevant jurisprudence, this court finds that the foundation of any preliminary objection rests on the well-established principle articulated in the locus classicus case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**. As cited with approval in numerous subsequent decisions.

15. A preliminary objection must consist of a pure point of law. It must arise from the pleadings and be argued on the assumption that all facts pleaded by the other side are correct.
16. If any fact requires to be ascertained, or if the court is called upon to exercise its judicial discretion, the matter cannot be raised as a valid preliminary objection.
17. The improper raising of such points only serves to increase costs and confuse the issues, a practice the courts have consistently discouraged.
18. The defendant's preliminary objection is predicated on an alleged non-compliance with Order 4 Rule 1(f), Rule 1(2), and Rule 1(6) of the Civil Procedure Rules, 2010. Order 4 Rule 1(2) requires that a plaint be accompanied by a verifying affidavit sworn by the plaintiff attesting to the correctness of the averments in Rule 1(1)(f).
19. The defendant's objection challenges the competency of this verifying affidavit.

20. However, as the Court of Appeal firmly established in **Mukisa Biscuits (supra)**, a point that requires the court to investigate and ascertain facts is not a pure point of law.
21. The validity or sufficiency of an affidavit can, in certain circumstances, involve a factual inquiry, particularly where the challenge is not to its existence but to its form or the capacity of the deponent.
22. This is not akin to an objection to jurisdiction or a plea of limitation, which are classic examples of pure points of law that can dispose of a suit without ascertainment of facts.
23. Furthermore, even if the verifying affidavit were found to have a technical defect, the jurisprudence emanating from our courts leans towards sustaining substantive justice rather than striking out suits on technical grounds.
24. The Courts have held that where an amended plaint is filed, it becomes the operative pleading, and defects in previous pleadings are cured.
25. There are two schools of thought on the issue: one that advocates for striking out, and another that permits the court to allow a party an opportunity to remedy an omission.

26. The court can direct the plaintiff to file a fresh verifying affidavit, demonstrating that such a defect is not automatically fatal.
27. Striking out an affidavit commissioned in contravention of the Oaths and Statutory Declarations Act, acknowledges that the operative word in Order 4 Rule 1(6) is "may," which grants the court discretion.
28. Striking out a suit is a draconian measure that should only be resorted to in the clearest of cases, usually where the suit is an abuse of the court process. The instant objection does not present such a case.
29. The plaintiff's submissions correctly invoke the constitutional imperative under Article 159(2)(d) of the Constitution of Kenya, 2010, which commands this court to administer justice without undue regard to procedural technicalities.
30. While this provision is not a panacea for all procedural lapses, it reinforces the court's discretion to avoid striking out pleadings where a less drastic remedy, such as an opportunity to amend or file a fresh document, is available and would not prejudice the opposing party.

- 31. In the result, the preliminary objection dated 27th November 2025 is found to be without merit.
- 32. It does not raise a pure point of law capable of disposing of the suit without the need for this court to ascertain facts or exercise its discretion in a manner that goes beyond a straightforward application of a legal principle.
- 33. The objection is accordingly dismissed. Since the defendant has filed a statement of defence, the suit to proceed to full hearing.
- 34. Costs of this preliminary objection shall be in the cause.

**Dated, Signed and Delivered online via Microsoft Teams at
Voi this 18th day of March, 2026.**

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A. N. ONGERI
JUDGE

In the presence of:

Court Assistant: Mabishi/Millicent

..... **for the Plaintiff**

..... for the Respondent

ORIGINAL