



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO. 418 OF 2017

KANJI HARJI.....PLAINTIFF

-VERSUS-

CHRISTOPHER NGATIA WANJOHI.....DEFENDANT

RULING

1. The Application before court is the Notice of Motion dated 25th May 2018 brought by the Plaintiff under Article 159 (2)(d) of the Constitution, Section 1A, 3A, 63 and 100 of the Civil Procedure Act and Order 8 Rule 3 and 5 of the Civil Procedure Rules. The Plaintiff is seeking leave to file a verifying affidavit.

2. The Application is premised on the grounds that the Plaint filed herein is not supported by a verifying affidavit and that the omission was as a result of an honest mistake on the part of the Plaintiff's advocate which should not be visited upon the innocent litigant.

3. In response to the Application, the Defendant filed Grounds of Opposition dated 13th March 2019. It is contended that the suit having been filed without a verifying affidavit as mandatorily required is a nullity and cannot be cured by filing of the same, and that the Application has been anchored under irrelevant provisions of the law.

4. Mr. Mutugi Counsel for the Plaintiff submitted that in the receipt for the payment made at the time of filing the Plaint, the verifying affidavit was paid for but by inadvertence it was not attached. He urged the court to invoke Article 159 of the Constitution and allow the Application.

5. On his part, Mr. Ondego for the Defendant submitted that Article 159 cannot come to the aid of the Plaintiff. He relied on the case of **Craig –v- Kanseen (1943) Vol. 1 ALL ER 108** and **Macfoy –v- United Africa Co. Ltd (1996) Vol III ALL ER 1169**.

6. I have carefully considered the Application, the affidavit on record, the Grounds of Opposition filed, the submissions of counsel and the authorities relied on. There is one issue to be determined with regard to this Application, namely whether the Plaintiff should be granted leave to file the verifying affidavit as sought. I have perused the receipt issued to the Plaintiff at the time of filing the suit on 16th November 2017. I note that among the items charged for is a verifying affidavit. Of course the Plaintiff in making this Application has conceded that the Plaint was not accompanied by a verifying affidavit as required by the provisions of Order 4 Rule 1(2) of the Civil Procedure Rules.

7. In the case of **Microft Corporation –v- Mitsumi Computer Garage (Milimani) HCCC NO. 810 of 2001 (2001) KLR 470**, Ringera J (as he was then) expressed himself thus:

“Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the Plaintiff has attempted to comply with the rule requiring verification of a Plaint but he has fallen short of the prescribed standard, it would be to elevate form and procedure to a fetish to strike out the suit. Deviation from or lapses in form or procedure, which do not go the jurisdiction of the court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the court should rise to its higher calling to do justice by saving the proceedings in issue...The purpose for verifying the contents of the Plaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record.”

8. I am in total agreement with the reasoning of Ringera J (as he then was) and I do adopt the same herein. In the premises, I take the view that even where the verifying affidavit was not filed alongside the Plaint as is the case herein, such omission cannot and should not warrant the striking out of the suit as sought by the Defendant.

9. The second objection raised by the Defendant is that the Application is anchored under the wrong provisions of the law. The overriding objective of the Civil Procedure Act as enshrined in Section 1A thereof is to facilitate the just expeditious, proportionate and affordable

resolution of civil disputes governed by the Act. This court is mandated by Article 159(2)(d) of the Constitution of Kenya to administer justice without undue regard to procedural technicalities. I do not think that the Application should fail for having been brought under the wrong provisions of the law. See **Thomas Ratemo Ongeru & 2 Others –v- Zacharia Isaboke Nyaata & Another (2014) eKLR** and **Nancy Nyamira & Another –v- Archer Aramond Morgan Ltd (2012)eKLR**. The Defendant’s argument that the Application should fail for having cited the wrong provisions must therefore be rejected.

10. In the result, I would grant the Application and direct that the Plaintiff files and serves a verifying affidavit within 7 days from the date of delivery of this ruling. Costs of this application shall be in the cause.

DATED, SIGNED and DELIVERED at MOMBASA this 24th day of July 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Kaguri holding brief for Mutugi for Plaintiff

Ms. Bakari holding for Odonga for Defendant

Yumna Court Assistant

C.K. YANO

JUDGE