



REPUBLIC OF KENYA  
ENVIRONMENT AND LAND COURT

AT KISII

APPEAL NO. 225 OF 2011

JACKLINE OMBONGI.....APPELLANT

VERSUS

AGNES NYANCHAMA.....1<sup>ST</sup> RESPONDENT

ALLOYS MOSETI.....2<sup>ND</sup> RESPONDENT

JUDGMENT

*(Arising from the ruling of K. T Kimutai – SRM delivered on 28<sup>th</sup> September, 2011 in Kisii CMCC No. 568 of 2010)*

1. The plaintiff, the appellant in the present appeal filed the suit in the subordinate court vide a plaint dated 15<sup>th</sup> November 2010 claiming a refund of kshs. 450,000/= on account of purchase price, penal damages of kshs. 200,000/= and special damages of kshs. 27,898/=. The plaint was filed together with a verifying affidavit sworn by the plaintiff on 15<sup>th</sup> November 2010.

2. Before the hearing of the suit in the subordinate court, the defendant took a preliminary objection that firstly, the court lacked the jurisdiction to hear and determine the matter on account of the value of the subject matter. Secondly, the defendant averred that the verifying affidavit was defective as it did not verify the correctness of the plaint. The learned trial magistrate overruled the preliminary objection that the court lacked the pecuniary jurisdiction but upheld the preliminary objection that the verifying affidavit was defective and proceed to order the plaint and the suit struck out with costs.

3. Being aggrieved by the ruling, the plaintiff preferred the present appeal before this court. The plaintiff lists the following grounds in support of the appeal:-

**1. THAT the learned magistrate erred in law and in fact in making a finding confirming the alleged preliminary objection which was not supported, any known law in the land and engaging in issues of technicalities.**

**2. THAT the learned trial magistrate erred in law and in fact in failing to appreciate the fact that the plaint filed before court was properly supported by a properly verifying affidavit as required by the law.**

**3. THAT the learned trial magistrate erred in law and in fact in failing to consider the plaintiff's submissions and in failing to hold that the defendants' submissions was at variance**

**with the purported point of law and wholly contradictory hence occasioning miscarriage of justice.**

**4. THAT the learned trial magistrate erred in law and in fact by striking out the appellant's verifying affidavit without giving reasons for his finding and without appreciating the new Civil Procedure Rules disregarding the said new Civil Procedure Rules without any reason was at fault thereby occasioning miscarriage of justice.**

**5. THAT the learned magistrate was determined to strike out the pleadings since the verifying affidavit was proper and the same was malicious and punitive hence occasioning miscarriage of justice.**

The appellant seeks the following orders in this court;

**1. That the ruling of the Senior Resident Magistrate's court be set aside and the suit be reinstated for hearing by any other magistrate other than Hon. K. T. Kimutai, SRM.**

**2. That the respondent do bear the costs of the appeal.**

4. The appeal having been admitted for hearing the parties agreed to argue the appeal by way of written submissions and directions were given to that effect. The appellant filed her submissions dated 5<sup>th</sup> December, 2014 on 8<sup>th</sup> December 2014 while the respondent's submissions dated 4<sup>th</sup> February 2015 were filed on 6<sup>th</sup> February 2015. I have given consideration to the preliminary objection taken by the defendant's counsel before the trial court, the grounds of appeal and the written submissions by the appellant and the respondents and the issue for determination is whether the trial court exercised its discretion judiciously in upholding the preliminary objection and proceeding to strike out the plaintiff's suit.

5. The verifying affidavit that the trial magistrate held to be defective and proceeded to strike out the suit was in the following terms:-

**1. That I am the deponent/plaintiff herein.**

**2. That the contents of the paragraphs 1 to 17 of the plaint are within my knowledge.**

**3. That there is no other suit pending between the parties concerning the same subject matter.**

**4. That what is deponed herein is true to the best of my knowledge, information and belief.**

The trial magistrate held that the verifying affidavit did not verify the correctness of the contents of the plaint and on that basis held the same defective and proceeded to strike out the plaint. The old Order VII Rule 2 of the Civil Procedure Rules provided thus:-

**(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.**

6. This is the provision that the trial magistrate found to have been breached/offended by the verifying affidavit the plaintiff swore in support of the plaint. The appellant has submitted that the trial magistrate misapprehended the applicable legal principles that a court ought to apply in a situation where a court is faced with a defective verifying affidavit resulting in the striking out of the plaint to the prejudice of the appellant. In the case of **Masefield Trading (K) Ltd -vs- Francis M. Kibui [2001] 2 EA 431** which the trial magistrate relied upon, **Hewett, J.** considered the issue of verifying affidavit and interalia held:-

**i. A verifying affidavit is not an interlocutory proceeding.**

ii. **If a missing or deficient verifying affidavit is an irregularity, that implies it can be waived by the defendant party taking fresh step or by an application to that effect. See Brickfield properties –vs- Newton [1971] 3 ALL EA 328.**

iii. **Curing may involve altering the time frame where the error is an irregularity only and not a nullity, and a breach of Order VII rule 1 (2) is an irregularity, which can subsequently be waived or cured.**

7. **Ringera, J.** (as he then was) in the case of **Gulam & Another –vs- Jirongo [2004] 1 KLR 158** considered the fate of a defective verifying affidavit in circumstances as were faced by the trial court where a preliminary objection had been taken and held thus:-

1. **The court has discretion not to strike out a plaint which is accompanied by a defective verifying affidavit. The affected party may make an oral application for the exercise of the court’s discretion and the court should exercise its discretion as appropriate in the light of the circumstances.**

2. **Rules of procedure should be seen as hand maidens of justice and not its mistress and, accordingly, unless procedural lapses have caused the adversely a prejudice that cannot be compensated with costs or there is clear manifestation of an intention to overreach, they should not be accorded fatal consequences.**

8. The judge in his usual clarity and eloquence expressed himself as follows:-

**“Speaking for myself, I am of the conviction that rules of procedure should be seen as hand maidens for justice and not its mistress and, accordingly, unless procedural lapses have caused the adversely a prejudice which cannot be compensated with costs or there is clear manifestation of an intention to overreach, the same should not be accorded fatal consequences. Here I cannot see what prejudice the defendant has suffered for the suit is at its very early stages and the plaintiff far from attempting to overreach has done his incompetent best to comply with the rules. I am accordingly inclined to strike out the verifying affidavit and to grant leave to the plaintiffs to file a proper and compliant affidavit within 7 days of today.”**

9. In the instant appeal the trial magistrate was faced with what he considered to be a defective affidavit and he opted to exercise his discretion to strike out the plaint. It is that exercise of the discretion that is faulted in this appeal. There is a long line of court decisions that hold the view that an error in a verifying affidavit ought not to lead to the striking out of the plaint as the defect in such a verifying affidavit can be cured by the filing of a supplementary affidavit. For my part I see no reason to depart from the well trodden path to break new ground.

In the case of **Nairobi HCCC No. 810 of 2001 (unreported) Microsoft Corporation –vs- Mitsumi Computer Garage Ltd & Another, Ringera, J.** again held that an error in a verifying affidavit where a party has attempted to comply with the rule requiring verification of a plaint and which error neither goes to the jurisdiction of the court nor prejudices the defendants should not lead to striking out of the plaint. In the case he allowed for the filing of a fresh verifying affidavit.

In the case of **Geology Investments Ltd –vs- Rogonyo Njuguna & Others Nairobi HCCC No. 1067 of 2002 (unreported) F. Azangalala, J.** (as he then was) in following the holdings in the above cited authorities observed thus:-

**“From the authorities, I see a trend to sustain suits rather than strike them out. This is as it should be as courts lean in favour of doing substantial justice to parties rather than straight jacket adherence to rules of procedure. In the present suit there is a verifying affidavit save that the advocates who drew the same did not state their names and their place of address. An omission of this nature should not lead to striking out of the plaint as such action would**

**not serve the ends of justice. I accordingly dismiss the defendant's application to strike out the plaint."**

10. I have made reference to the several judicial authorities to demonstrate that the trial magistrate in the exercise of his judicial discretion applied the wrong principles and/or considerations which resulted in him arriving and/or reaching to unjust decision in that the plaintiff's suit was struck out without the benefit of being heard on the merits. In the instant appeal, the plaintiff had infact filed a verifying affidavit in compliance with the rule except that the content of the verifying affidavit fell short of verifying the correctness of the averments in the plaint. The plaintiff may infact have honestly believed there was compliance because she had sworn a verifying affidavit that no doubt was drawn by her advocates. It is unjust to strike out the plaint merely because of an irregularity in the verifying affidavit, which defect could be cured by filing of a supplementary affidavit. It was not demonstrated that the defendants were occasioned any prejudice by reason of that defect in the verifying affidavit.

11. In the premises, I would allow this appeal and set aside the ruling of 28<sup>th</sup> September 2011 by K. T Kimutai, Senior Resident Magistrate and order the suit reinstated for hearing before any other magistrate. The plaintiff shall at least 30 days before the date fixed for the hearing of the suit file a supplementary verifying affidavit to cure the defect in original verifying affidavit. Each party will bear their own costs of this appeal.

**Judgment dated, signed and delivered at Kisii this 13<sup>th</sup> day of May, 2016.**

**J. M MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the appellant

..... for the respondent

**J. M. MUTUNGI**

**JUDGE**