IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, G.B.M. KARIUKI & AZANGALALA, JJ.A

CIVIL APPEAL NO. 91 OF 2009

BETWEEN

LUKE CHERUIYOT & 37 OTHERS…….…….APPELLANTS

AND

NATIONAL OIL CORPORATION OF KENYA……..RESPONDENT

(An appeal from the Ruling and Decree of the High Court of Kenya at Nairobi (Hon. Justice Khamoni) dated 23rd day of May, 2008

JUDGMENT OF THE COURT

This is an appeal against the ruling and order of the High Court (**J.M. Khamoni, J)** dated 23rd day of May, 2008 allowing the respondent's application dated 16th June, 2005 seeking the striking out with costs, of the appellants' suit.

By a plaint dated 17th September, 2001, the plaintiffs (now appellants) averred that the respondent who was their employer had, in breach of their employment contracts, purported to terminate their services on alleged account of redundancy for unionisable and management personnel. The appellants further averred that the said termination was wrongful, fraudulent and illegal. The appellants also pleaded that as a result of the wrongful, fraudulent and illegal termination, they had been denied their full dues thereby suffering loss and damage which they particularized as the income lost for the remaining years of service.

The reliefs they claimed were, *inter alia*, a declaration that the termination of their employment was wrongful and illegal and general damages. The verifying affidavit accompanying the plaint was sworn by one, **Richard K. Muchoki,** who swore that he was one of the plaintiffs and was competent to swear the affidavit on behalf of his co-plaintiffs.

In the written statement of defence delivered by the respondent, it denied that it was in breach of any of the contracts of employment and concluded that the plaint was bad in law. On a without prejudice basis, it averred that it was within its rights and mandate to terminate the appellants' services as the same was pursuant to a Collective Bargaining Agreement, the Trade Disputes Act, the Employment Act and that the termination was upon payment to the appellants of all their dues which it paid. The respondents further averred that the act of terminating the appellants' services was not wrongful, fraudulent or illegal as the decision to declare redundancy was sanctioned by its Board of Directors after consultation with the Ministry of Energy, the Head of the Civil Service and the Directorate of Personnel Management and it was also after sensitizing all its staff. The respondent also averred that the appellants willingly accepted,

signed and agreed to the termination of their services and the dues paid to them. The respondent admitted jurisdiction of the court in respect of appellants Nos 30 to 38 and denied that the court had jurisdiction in respect of the claims of appellants Nos. 1 to 29.

On 5th July, 2005, the respondent filed a chamber summons under the then **Order VII rule 2** and **3** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act** and the **Provisions** of the **Oaths** and **Statutory Declarations Act** for an order that the suit be struck out on the grounds that;

i. **The suit …. did not comply with Order VII rule 2 of the Civil Procedure Rules.**

ii. **….The suit was incompetent and incurably defective as the Verifying Affidavit thereto did not meet the requirements of the law.**

iii. **The verifying affidavit sworn by the 30th appellant, Richard Muchoki was a non-affidavit.**

On the question of the alleged fatal defect in the suit for lack of verifying affidavits by each of the appellants, the High Court held thus:-

"From what has been brought to my attention during the hearing of the Chamber Summons the plaint having been verified in the manner it has been done in this suit means that the plaintiffs have not only failed to comply with Order VII Rule 1(2) but have also failed to comply with Order 1 Subrules (1) and (2) of Rule 12 of the Civil Procedure Rules.

Subrule 2 of rule 12 of Order 1 is mandatory and therefore in the absence of such written and signed authority filed in this suit, as it is the position now, the 30th plaintiff's verifying affidavit having been worded in the way it is, done, the plaintiffs have no legal basis to say that Order VII rule 1(2) suggests a single affidavit and that the 30th plaintiff's verifying affidavit as filed is sufficient for the purpose of Order VII rule 1(2). There can be a single verifying affidavit only after Order 1 subrule (1) and (2) of rule 12 as well as Order VII rule 1 (2) have been complied with and in addition the said single verifying affidavit, unlike the one filed in this suit, has to be worded in precise terms showing the deponent has been authorized by the other plaintiffs to swear such affidavit on their behalf otherwise each one of the plaintiffs must personally swear his or her own verifying affidavit to comply with clear provisions of the law."

The learned Judge appreciated that a defective verifying affidavit will not always attract the sanction of striking out the suit. However, the learned Judge found, in this case, that he could not order the filing of a compliant verifying affidavit as no application for such an order had been made by the appellants' then legal advisors who were "*not only careless but also incompetent thereby prejudicing the administration of justice in accordance with the law"*

Ultimately, the learned Judge allowed the respondent's said Chamber Summons as 37 out of the 38 appellants "*íf not all"* had failed to comply with **Order VII rule 1(2**) as read with **subrule 3** of the then **Civil Procedure Rules**. The appellants were aggrieved and therefore lodged the appeal before us in which seven (7) grounds are cited. However, those grounds make the following complaints:

1. **That the learned Judge erred in law in failing to find that on a true construction of Order VII rule 1(2) and (3) of the Civil Procedure Rules a multicity of affidavits to accompany one plaint was not contemplated and was not provided for.**

2. **That the learned Judge misdirected himself in law when in considering the application he imported the requirements of Order 1 rule 12 of the Civil procedure Rules as disentitling the appellants the benefit of the verifying affidavit whereas the provisions of Order 1 rule 12 comes into play in the course of the conduct, and not on the lodgement of a suit.**

3. **That learned Judge erred in failing to find, on the totality of material availed to him, that no**

prejudice would be caused to the respondent by the defect in the verifying affidavit and that if any it was capable of being compensated for by way of costs.

Mr. Oduk, learned counsel for the appellants, in his written submissions which, were filed with the leave of the court, contended that the learned Judge of the High Court misinterpreted the provisions of **Order VII rule 1(2)** of the **Civil Procedure Rules**; that the learned Judge had the discretion to either waive the irregularity or order a compliant verifying affidavit to be filed, which discretion was improperly exercised,; that **Order 1 rule 12** of the **Civil Procedure Rules** was at the time of the order of the learned Judge not applicable as, according to learned counsel, it is only after a suit has been filed that the said rule comes into play; that the learned Judge failed to appreciate that the provisions of **subrule (3)** of **rule 1** of the same Order are permissive and failure to file a compliant affidavit is not fatal to the suit itself and that the learned Judge erred in visiting counsel's mistake upon the appellants.

M/s Okongo Omogeni & Company Advocates, who filed written submissions on behalf of the respondent, contended that in striking out the appellants' suit, the learned Judge of the High Court exercised judicial discretion which, according to counsel, can only be interfered with if the learned Judge misdirected himself or acted on matters he should not have acted upon or if he failed to take into consideration matters which he ought to have taken into consideration or in doing so, arrived at a wrong conclusion, or unless this court is satisfied that the learned Judge's decision is clearly wrong. Learned counsel invoked several decisions of this Court for that proposition including the case of ***Mbogo & Another -v- Shah [1968] EA 93.*** In learned counsel's view, where there are several plaintiffs, the law is settled that each of the plaintiffs should file a verifying affidavit to accompany the plaint and if some of them authorize one of them to swear a verifying affidavit to accompany the plaint, the authority must be in writing and must be filed with the plaint. For that proposition, reliance was placed on the decisions of this Court in ***Ndugu Mugoya & 273 Others -v- Stephen Wangombe & 9 Others [2005] eKLR*** and ***The Law Society of Kenya -v-*** C***ommissioner of Lands & 2 Others [2001] 1KLR (Ex L).*** Learned counsel therefore urged us to dismiss the appeal.

We have considered the record, the grounds of appeal, the submissions of learned counsel and the authorities cited to us. The origin of the requirement for a verifying affidavit to accompany the plaint can be traced to Legal Notice No. 36 of 5th May, 2000 by which **rule 1(2)** and **1(3)** of **Order VII** of the **Civil Procedure Rules** was introduced in our Rules. The rule, which has since been amended was in the following terms:

Order VII rule 1(2) & (3) ***"(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint***

3. ***The court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with sub rule (2) of this rule."***

The mischief intended to be addressed was perhaps captured in the decision of the High Court (**Ringera, J** as he then was) in ***Microsoft Corporation -v-***

Mitsumi Computer Garage Ltd & Another, [Milimani Commercial Courts HCC No. 810 of 2001] (UR) where the learned Judge, quoting a commentary by **J.V.O. Juma, J** (as he then was) in ***"Hakimu"*** magazine stated:

"It is not uncommon these days to find that a plaintiff is represented by different firms of advocates. This arises as a result of ambulance chasing. To try to put a stop to this kind of conduct, Order VII was amended by adding a new sub rule 1(2). It is hoped that the plaintiff will therefore instruct one advocate as he or she will be required to swear an affidavit….."

It would therefore appear that the primary purpose of **rule 1(2)** of **Order VII** of the **Civil Procedure Rules** was to prevent the filing of suits on behalf of plaintiffs without their express instructions.

In the matter before us, the verifying affidavit was, as already stated, sworn by **Richard K. Muchoki** who

was the 30th plaintiff in the High Court and we presume he is the 30th appellant in this appeal. It was a four paragraph affidavit which read as follows:

"1. THAT I am one of the plaintiffs herein, hence competent to swear this affidavit on behalf of my co-plaintiffs.

2. ***THAT the facts contained in the plaint annexed hereto and filed herewith are true to the best of my knowledge information and belief.***

3. ***THAT I swear this affidavit to verify the said facts.***

4. ***THAT this affidavit is sworn conscientiously and in accordance with the Oaths and Statutory Declarations Act Cap. 15 Laws of Kenya)."***

It is not in contention that the plaint herein was accompanied by a verifying affidavit which was sworn by only one plaintiff who claimed to have the competence to swear it on behalf of his co-plaintifffs. The learned Judge of the High Court seemed to doubt whether indeed the deponent of the verifying affidavit was the same person as plaintiff number 30 whose name in the plaint was given as **Richard Muchoki.** The learned Judge entertained that doubt because the deponent of the verifying affidavit was indicated as **Richard K. Muchoki.** We think however, that nothing should turn on that discrepancy as none of the parties raised any issue over the same. It is also not disputed that whereas the deponent of the verifying affidavit swore that he was making the affidavit on behalf of his co-plaintiffs, he did not contend that he had their authority to swear the affidavit and, of course, no written authority was filed in the suit.

So, it cannot be gainsaid that there was no compliance with the provisions of **Order 1 Rule 12(1) & (2)** of the **Civil Procudure Rules** which reads:

"12(1)Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings, and in like manner where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

2. ***The authority, shall be in writing signed by the party giving it and shall be filed in the case."***

The learned Judge of the High Court said, of the relationship between **rules 1(2)** of **Order VII** and **sub rules 1 & 2** of **rule 12 Order I,** as follows:-

"Subrule (2) of rule 12 of Order I is mandatory and therefore in absence of such written and signed authority filed in this suit, as it is the position now the 30th plaintiff's verifying affidavit having been worded in the way it is done, the plaintiffs have no legal basis to say that Order VII rule 1(2) suggests a single affidavit and that the 30th plaintiff's verifying affidavit as filed is sufficient for the purposes of Order VII rule 1(2). There can be a single verifying affidavit only after Order I sub rules 1 & 2 of rule 12 as well as Order VII Rule 1(2) have been complied with and in addition the said single verifying affidavit unlike the one filed in this suit, has to be worded in precise terms showing the deponent has been authorized by the other plaintiffs to swear such affidavit on their behalf otherwise each one of the plaintiff must personally swear his or her own verifying affidavit to comply with clear provisions of the law."

We think the learned Judge properly appreciated the applicable legal provisions on verifying affidavits. This Court had already made similar observations in the case of ***Research International East Africa Ltd. –v- Julius Arisi & 213 Others [2005] eKLR.*** *There, the Court said:*

"In our view, the true construction of rule 1(2) of Order VII Civil Procedure Rules is that even in cases where there are numerous plaintiffs, each plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them in writing and, files such authority in the case, to file a verifying affidavit on his behalf

in which case such a verifying affidavit would be sufficient compliance with the rule…."

Although for reasons which are not relevant, in that case the court ultimately allowed the appeal of the defendant who had sought, at the High Court, the striking out of the verifying affidavit for failure to comply with the provisions of **rule 1(2)** of **Order VII** of the **Civil Procedure Rules**, the Court made the following observations:

"The superior court however had a discretion. It had jurisdiction instead of striking out the plaint to make any other appropriate orders such as giving the plaintiffs another opportunity to comply with the rule."

As recently as 11th July, 2014 the position taken by the Court in **Research International East Africa Ltd. –v- Julius Arisi & 213 Others (supra),** was reiterated in the case of **Kenya Oil Company Limited -v- Javantilal Dharamshi Gosrami [Nairobi Civil Appeal No. 324 of 2005] (UR).** There, we said:

"The provisions of Rule 1(6) of Order 4 (formerly rule 1(3) of Order VII), gives the court power to strike out a plaint which is not accompanied by a verifying affidavit containing the stipulated particulars.

The power to strike out the plaint or [counterclaim] under the Rule is not mandatory but permissive. The phrase "the court may….' in Order 1(3) and in the new Order 1(6) gives the court discretion whether or not to strike out a plaint as the court held in Arisi case (supra)"

In the end the court dismissed the appeal which was against an order of the High Court refusing an application to strike out the plaint and instead giving leave to the respondent to file a compliant verifying affidavit. In dismissing the appeal, the Court reiterated the principle stated in ***D.T. Dobie & Company (K) Ltd. –v-Muchina [1982] KLR,1*** that the discretion of the court to strike out pleadings for various reasons such as failure to disclose a reasonable cause of action should be used very sparingly and that a plaintiff should not be driven from the judgment seat unless the case is hopeless.

This Court also considered the consequences of a defective verifying affidavit in the recent case of **Flystar Limited -v- The Delphis Bank Limited [Civil Appeal No. 58 of 2006] (UR).** There, the verifying affidavit had been sworn before a Commissioner for Oaths who did not have a current Advocate's practicing certificate. The High Court had struck out that affidavit and granted leave to the respondent to file a compliant verifying affidavit. In dismissing the appeal against the order, the Court cited with approval the persuasive authority of ***Microsoft Corporation -v- Mitsumi Computer Garage Ltd. & Another [2001] KLR 470 thus:-***

"Rules of procedure are the hand maidens and not mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair, orderly and predicable manner, not to fetter or choke it. In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected."

Former **Order VII rule 1 (2)** of the **Civil Procedure Rules** has now been renumbered in the revised version of the **Civil Procedure Rules 2010**. It is now **Order 4 rule 1 (2).** Two new **subrules 3, 4** and **5** have been introduced and former **subrule 3** has been renumbered as **subrule 6.**

Pertinent to the matter before us is **subrule (3)** which reads as follows:-

"(3) where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others."

So, this Court's decisions in **Arisi (Supra)** and **Gosrami (supra)** have received legislative sanction.

In view of our above decisions we have come to the conclusion that the order striking out the appellants' suit should be interfered with. We have come to that conclusion particularly because the appellants' suit was founded on contract and the limitation period in respect of their claims has expired. The appellants would therefore not be able to mount a fresh suit if the order striking out their suit remains. We have also observed that the leaned Judge of the High Court attributed the defect in the verifying affidavit to the appellants' legal advisors and not the appellants themselves but was of the view that the court should not encourage negligence, carelessness or incompetence of advocates by not striking out the plaint.

Our consideration of the proceedings does not disclose any special circumstances which made the learned Judge depart from the normal practice of not visiting counsel's mistake upon his client nor did the learned Judge advert to any fundamental prejudice the respondent would suffer if the suit was maintained. As has been said before, the function of the Courts is not to instill discipline to erring counsel but to administer justice to litigants and others who seek their services and as **Madan JA**, as he then was, said in the **D.T. Dobie case (supra**) at page 9 of the report;

"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."

In the end result, we allow this appeal. The order of the High Court dated 23rd May, 2008 allowing the respondent's application dated 16th June, 2000 and striking out the appellants' suit is set aside and is substituted with an order dismissing the said application with no order as to costs. The appellants' suit is ordered reinstated. The appellants are hereby granted leave to file and serve compliant verifying affidavit or affidavits within thirty (30) days of today. The appellants shall have the costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 3rd DAY OF JULY 2015

W. KARANJA

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

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