IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MARAGA & WARSAME, JJ.A.)

CIVIL APPEAL NO. 324 OF 2005

BETWEEN

KENYA OIL COMPANY LIMITED.....APPELLANT

AND

JAYANTILAL DHARAMSHI GOSRANI...…….....RESPONDENT

*(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (**Ransley, J.**) dated 25th October, 2005*

in

H.C.C.C. No. 39 of 2005)

****

JUDGMENT OF THE COURT

This is an appeal from the "**order**" of the High Court (**Ransley, J**.) whereby the learned Judge rejected an application to strike out the plaint and instead gave leave to the respondent herein to file a verifying affidavit within seven days.

By a plaint dated 21st January 2005, and date stamped 21st January 2005 by the High Court, the respondent claimed from the appellant shs. 101,574,900/- as anticipatory damages allegedly as a result of breach of a lease; exemplary and punitive damages; costs; and interest.

The plaint was accompanied by a verifying affidavit of the respondent allegedly sworn on 24th January 2005 before Njeri Onyango – a Commissioner of Oaths. The verifying affidavit had a date stamp of the High Court indicating that it was received on 21st January 2005.

The appellant filed a defence denying liability. In addition, the appellant averred that the plaint should be struck out as the verifying affidavit did not comply with provisions of **Order 7 Rule 3(2)** of the

Civil Procedure Rules (**CPR**) and alternatively, that the plaint and the verifying affidavit should be struck out as the Commissioner for Oaths before whom the oath was purportedly taken did not truly state in the *jurat* the date on which the oath was so taken.

The respondent filed a reply to the defence. In respect to the verifying affidavit, the respondent averred that the same was not defective as the conflict in dates was occasioned by the fact that whereas the plaint and verifying affidavit were filed on 24th January 2005, the court stamp indicated the erroneous date of 21st January 2005. The respondent referred to the cheque for payment of the filing fees and the court receipt, which were both dated 24th January 2005.

Subsequently on 17th March 2008 the appellant filed a notice of motion under **Order 7 Rule 3** of the CPR and under the inherent powers of the court and prayed that the plaint be struck out on either of the two grounds, namely;

> ***"(i) the verifying affidavit does not comply with the provisions of order 7 rule 3(2) Civil Procedure Rules, or alternatively.***
>
> ***(ii) The Commissioner of Oaths before whom the oath relating to the said affidavit as purportedly taken did not truly state in the jurat the date on which such oath was taken."***

The respondent filed grounds of opposition and a replying affidavit sworn by **Leonard Maingi,** an advocate from the firm of advocates acting for the respondent. Mr. Leonard Maingi reiterated that the date of filing indicated in the court stamp was erroneous and deposed that the error had been corrected by the court and the plaint and verifying affidavit correctly stamped as having been filed on 24th January, 2005.

At the hearing of the application before the High Court on 25th October 2005, **Mr. Esmail,** learned counsel for the appellant, was allowed to cross-examine the respondent who stated that he signed the verifying affidavit on 24th January 2005 in the offices of Mr. Leonard Maingi and in the presence of Mr. Leonard Maingi and left it there. Thereupon, Mr. Esmail asked the court to strike out the plaint and the learned Judge made the following order:

> ***"The verifying affidavit was not duly attested. In the result, I order the plaintiff to swear a verifying affidavit before a Commissioner of Oaths who should attest his signature. I do not in the exercise of my discretion strike out the plaint. The verifying affidavit to be filed within seven days."***

The learned Judge granted the appellant leave to appeal.

A proper verifying affidavit was sworn on 25th October 2005 and filed on 26th October 2006 within the stipulated seven days.

It is a common ground that the respondents ultimately prosecuted the suit and judgment was entered in his favour and that the appellant subsequently filed Civil Appeal No. 328 of 2010 against that judgment which civil appeal is pending for hearing in this Court.

The appellant states in the grounds of appeal that the learned Judge did not have any discretion to refuse to strike out the plaint and if he did, he exercised his discretion injudiciously and on wrong principles in the circumstances of the case where a false document had been deliberately filed in contempt of the court.

The appellant further states that if the learned Judge had jurisdiction to extend the time for filing a verifying affidavit, he exercised his discretion on wrong principles and or unjudiciously in the circumstances of these case.

The application for striking out the plaint was brought under old **Order VII** which provided in a subrule 1(2) and 1(3) thus:

"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 application of the defendant order to be struck out any plaint which does not comply with subrule 2 of this rule."

In **Research International East Africa Limited v. Arisi and Others [2007] (1) EA 248** this Court explained the purpose of subrule 1(2) and at page 363 para f where it stated thus:

"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 plaintiff another opportunity to comply with the rule 11."

The requirement that the plaint should be accompanied by an affidavit is retained in the renamed **Order 4 Rule (1) (2)** of the **Civil Procedure Rules 2010**. However, the new rule does not require the affidavit to verify all the contents of the plaint. The only particulars to be verified by the affidavit are averments that there is no other suit pending; that there have been no previous proceedings in any court between the plaintiff and defendant; and that the cause of action relates to the plaintiff named in the plaint. The provisions of Rule 1(6) of Order 4, like the old Rule 1(3), 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 the **Arisi** case (supra). (The submission of Mr. Esmail that the court had no discretion is with respect therefore erroneous.

The broad principle, reiterated by this Court in **D.T. Dobie & Company (K) Ltd. v. Muchina [1982] KLR 1)** is in essence 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 judgment seat unless the case is unarguable, apply with more force to discretion to strike out a plaint for want of a verifying affidavit. We say with more force because the omission to file a compliant verifying affidavit does not go to the root of the claim.

The admission by the respondent when he was cross-examined by Mr. Esmail that he did not appear before a Commissioner of Oaths for attesting of the affidavit is that the plaint was not accompanied by an affidavit as required. That was a procedural error which the court could, in exercise of its discretion, correct at any time before this suit was heard.

The confusion of the date of filing the suit was sufficiently explained although it is not a ground of the application. We are satisfied that the learned Judge exercised his discretion judicially.

Further, which is so fundamental to this appeal is that it arises from an interlocutory decision. It is clear that during the pendency of this appeal, the matter proceeded to full hearing and determined. The present appellant has already filed an appeal against the decision. What the present appeal intends to achieve as per the submission of Mr. Esmail advocate is to upset and/or set aside the decision of the High Court and subsequent appeal pending before this Court. In our understanding, the present appeal which is based on an interlocutory appeal is a direct assault on the decision of the High Court which is subject of pending appeal. It is also a collateral attack on the administration of justice.

In our humble view, to allow the appeal is to circumvent the determination of the matter on merit and to render the pending appeal futile. A court of law cannot allow such a route to be used to defeat the matured rights of the respondent.

Another important factor that persuades us to conclude that the present appeal is an abuse of the court process is that the appellant took its sweet time to prosecute the appeal from 2005. That is a manifest indication that the sole object of which the present appeal was filed is to convolute and complicate issues

for the court and other parties directly affected in the outcome of this appeal. The only irresistible conclusion to arrive at from the conduct of the appellant in not prosecuting the appeal before the matter was determined in the High Court on merit, means that the appellant had no quarrel at all with the ruling of 25th October, 2005, particularly when at no stage of the proceedings at the trial court, it did not seek and obtain a stay pending the hearing and determination of the present appeal. The appellant willingly and without any force participated in the trial before he High Court and after the decision which is adverse to it was rendered, devised a two prong assault strategy, namely file an appeal and resuscitate its forgotten appeal.

The question now is if the appellant was apparently happy with proceedings to full hearing before the trial court while the alleged defect was subsisting, why is it now prosecuting an appeal filed in 2005, which could overturn and determine the matter fully. To make worse, the appellant has filed an appeal against the decision of the trial Judge. We have not been told whether any application was made to arrest the said judgment pending the outcome of the present appeal. The answer is indeed not far from the conduct of the appellant who decided to stay away from this appeal, which was filed in 2005, only to start a belated journey to upset the trial Judge's decision through the back door. To say the least such a conduct is not only reprehensible but unimpressed in the mind of an attentive judicial officer. It is unjust, inequitable and a waste of judicial time and resources. To sustain the present appeal would jeopardise the long and tedious time the trial Judge put in hearing and determining the dispute. It would also render futile the appeal preferred against the said decision. Therefore, in the circumstances of this case, we think the appeal was filed and prosecuted in bad faith and in a manner to abuse the administration of Justice. We decline such a demonstration.

For those reasons, we find no merit in this appeal and we accordingly dismiss it with costs to the respondent.

Dated and delivered at Nairobi this 11th day of July, 2014.

E.M. GITHINJI

……

JUDGE OF APPEAL

D. K. MARAGA

……

JUDGE OF APPEAL

M. WARSAME

……

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR