REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: BOSIRE, WAKI & ONYANGO OTIENO, JJ.A)
CIVIL APPEAL NO. 221 OF 2006
BETWEEN
ORIENTAL COMMERCIAL BANK LIMITED .....APPELLANT
AND
SHASHIKANT CHANDUBHAI PATEL .....RESPONDENT
(An Appeal from a ruling of the High Court of Kenya at Mombasa (Maraga, J.) dated 26th May, 2005
in
H.C.C.C. No. 264 OF 2005)
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JUDGMENT OF THE COURT

There is only one issue for determination in the appeal before us: whether a plaint filed subsequent to an affidavit which purports to verify it, is competent and compliant with ***Order VII rule 1 (2)*** of the Civil Procedure Rules (now ***Order 4 rule 2***) ("*the Rules*"). The rule states as follows: -
"The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint."

The consequence of non-compliance with that rule, as stated in ***sub-rule 3*** is that the plaint is liable to be struck out either by the court on its own motion or on application of the defendant.

What is the background to the appeal?

The appellant herein, ***M/S. Oriental Commercial Bank*** ("*the Bank*") was, on 8th December, 2005 sued by ***Shashikant Chandubhai Patel*** (Patel) who claimed he was an employee of the bank through various written contracts since 1992, but on 30th March, 2005, the bank unlawfully terminated his employment. As a consequence, Patel claimed various entitlements amounting to Shs.6,327,063/= plus general damages and interest thereon. The plaint was drawn, dated and filed in the court's registry on 8th December, 2005, through M/S. Ouma Weloba & Co. Advocates. Together with the plaint and filed on the same day and time, was an affidavit verifying the truth of the averments made in the plaint. That affidavit, however, was sworn by Patel before Victoria Namtosi Simiyu, Commissioner for Oaths, on 2nd December, 2005. The two documents were nonetheless accepted at the court registry and date-stamped accordingly.

Upon being served with the summons to enter appearance as well as the plaint and the verifying affidavit, the bank through its advocate, M/S. A.B. Patel & Patel, filed a defence not only denying the main claim but also taking up the legal objection that the verifying affidavit was invalid and incapable of verifying the plaint as required under the provisions of ***Order VII*** of the Rules. It went further and took out a Chamber Summons under ***Order VII rule 3*** seeking an order that the plaint be struck out. Patel also filed an application on 29th March, 2005 (amended on 20th April, 2006) seeking security for the sum claimed in the plaint on the basis that the bank was financially unstable and was preparing to close down. Shortly

thereafter on 6th May, 2006, Patel filed another "*verifying affidavit*" sworn on 6th May, 2006 before one A.C. Mrima, Commissioner for Oaths, verifying the original plaint dated and filed on 8th December, 2005. That was in apparent challenge to the averment in the defence that the original verifying affidavit was a nullity.

The bank then filed a notice of preliminary objection to the application seeking security reiterating that the plaint itself was a nullity and therefore no subsequent application could be validly predicated thereon. That is the objection argued before Maraga J. on 10th of May, 2006 and on 26th May, 2006, (erroneously typed 26th May, 2005), the court delivered its ruling dismissing the preliminary objection and thereby provoking the appeal before us. In considering the submissions of counsel, the learned Judge distinguished various conflicting decisions of the High Court cited before him and delivered himself thus:

"I have no doubt in my mind that the provisions of Order 7 Rule 1 (2) of the Civil Procedure Rules are mandatory. A plaint that is not accompanied by a verifying affidavit at all is incompetent and should be struck out without any ado. That is what I understand the Court of Appeal to have decided in the Gawo case. However, where a plaintiff, along with the plaint, files a verifying affidavit, which for one reason or the other turns out to be incompetent he should not in my respective view be placed on the same pedestal as one who ignored the provision altogether and did not file any verifying affidavit at all. Order 7 Rule 1 (2) in my view allows the court discretion to consider the reason why the affidavit is incompetent and if excusable allow a competent one to be filed. We should never lose sight of the fact that rules of procedure, though they should be followed are hand maids of justice. They should not be given pedantic interpretations which at the end of the day denies parties justice."

The memorandum of appeal raises five grounds but they basically reiterate the submissions made before the High Court and rehashed before us by learned counsel Mr. Kassim Shah that ***Order VII r 2*** was mandatory and that an affidavit sworn before the plaint was drawn was incompetent to verify such plaint. Mr. Shah further submitted that neither the purported filing of another verifying affidavit six months later nor the overriding objective which was enacted six years later and was not therefore retrospective, could cure the defect. In making those submissions Mr. Shah cited before us, as he did before the High Court, this Court's decision in **Gawo v Nairobi City Council [2001] EALR 69**, and a High Court decision in **Delphis Bank Limited vs**. **Asudi (K) Ltd & Anor**; **HCCC 82/03 (UR)**. In the ***Gawo*** case there was absolutely no verifying affidavit filed with the plaint and it was held:

"Order VII, rule 3 (2) (sic) **of the Civil Procedure Rules clearly states that a plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments in the plaint. The condition is mandatory and leaves no room for an interpretation that would allow an affidavit in support of an application by chamber summons to serve the same purpose."**

In the ***Delphis Bank*** case, as in the appeal before us, the verifying affidavit was sworn before the plaint was drawn, and it was the view of the court (Mohammed Ibrahim J. as he then was) that one cannot aver to or swear to facts in a plaint or document which does not exist at the time the affidavit was sworn. The learned Judge delivered himself thus:

"I think that what happened here is that the plaintiff may have read or seen the plaint in "draft form" before it was dated and executed. The Plaintiff's manager was sworn in respect of the verifying affidavit at a time the plaint was undated and unexecuted. The counsel then dated and executed the plaint a day before filing in court. This would appear to be a simple technical issue, however, making an affidavit and testifying on oath is an extremely serious matter. I, therefore, find that the verifying affidavit is invalid and defective. There was no plaint in existence on 8th January, 2003 for the deponent to aver to or verify the contents of. A verifying affidavit can be made only after a plaint comes into existence, whether on the same day or subsequently."

For his part, learned counsel for the respondent, Mr. Samuel Ouma contended that the appeal revolved around the exercise of judicial discretion by the High Court and there was no basis for interfering with it. He submitted that striking out was a draconian remedy which even before the enactment of the

overriding objective was sparingly applied by courts in preference for substantial justice. In the instant case, he submitted, there was a verifying affidavit, unlike in the ***Gawo*** case, filed together with the plaint, and the court had the discretion to accept it on record or not. As there was no prejudice caused to the bank, the discretion of the court should not be disturbed. Mr. Ouma further informed us, and was not contradicted, that the matter in the High Court has proceeded to hearing and was partly heard even as the appeal was being heard.

We have anxiously considered the appeal, the authorities cited and the submissions of counsel. In the end, however, we have come to the conclusion that this appeal is for dismissal.

The starting point is the affirmation of the statement by this Court in the ***Gawo*** case that the filing of a plaint together with a verifying affidavit is a mandatory requirement. The procedure was introduced in the year 2000 by **Legal Notice 36/00** in order to address the mischief, prevalent at the time, of suits being filed without instructions, making false averments, or filing a multiplicity of suits in different courts on the same cause of action without any care about the consequences. An affirmation of such matters on oath would at least expose the plaintiff to a charge of perjury and the punishment that goes with it. Hopefully the deterrent effect of that provision brought some sanity in civil litigation. In our view, the amendment was not intended to take away the discretion that always existed under ***Order XVIII rule 7*** of the Rules to excuse the form of an affidavit if it was wanting so long as it was filed with the plaint. Nor did it dispense with the provisions of ***Order XVIII rule 9*** (now ***Order 19 rule 8***) which stated thus:

" 9. Unless otherwise directed by the court an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned."

So that, there was an affidavit filed together with the plaint as required by the rules in this matter. But the affidavit was sworn and dated earlier than the date the plaint was drawn and dated. In our view, that was a situation envisaged under the rules which is amenable to the exercise of the court's discretion to admit or reject the affidavit. In this case the affidavit was accepted on record when it was filed together with the plaint and stated specifically in paragraph 2: "T*hat I wish to state the averments of* ***this plaint*** *are true.*" That could only be reference to the plaint filed with the verifying affidavit. In the circumstances, we agree with Maraga J. that ***Order VII rule 1 (2)*** was not violated. The subsequent verifying affidavit filed six months later purporting to serve the same purpose was superfluous and of no effect. Having so found, we doubt the legal reasoning in the Delphis Bank case (supra) as it made no reference to the provisions under ***Order XVIII*** of the rules. We are persuaded that the High Court properly exercised its discretion in this matter and we have no reason to interfere therewith.

For those reasons we find no merit in the appeal and we order that it be and is hereby dismissed with costs.

Dated and delivered at Mombasa this 7th day of October,2011.

S.E.O. BOSIRE

.....
JUDGE OF APPEAL

P.N. WAKI
.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR