



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CIVIL APPEAL 98 OF 2003

JOSEPHAT KIPCHIRCHIR SIGILAI APPELLANT

AND

GOTAB SANIK ENTRPRISES LTD & 4 OTHERSRESPONDENTS

**Appeal from the ruling and order of the High Court of Kenya doret, (Justice A.G. Etyang)
delivered on 20th March 2003 in H.C.C.C.No.146 of 2002**

JUDGMENT OF THE COURT

Josphat Kipchirchir Sigilai, the appellant, commenced Eldoret High Court Civil Case No.140 of 2002, by a plaint bearing the date 1st August, 2002, naming Gotab Sanik Enterprises Ltd, (1st respondent), Kiprotich Arap Chepkwony (2nd respondent), Susan Chemtai Chepkwony (3rd respondent), Henry Kipkemoi Chepkwony (4th respondent) and Clara Chepkoech Chepkwony (5th respondent) as defendants. The dispute between the parties revolves around the ownership of shares in the 1st respondent. The appellant claims 50% of shareholding in the company and also alleges that the 3rd, 4th and 5th respondents are strangers in the company. The three are respectively the wife, son and daughter of the 2nd respondent.

In purported compliance with the provisions of **O.VII rule 1(2)** of the Civil Procedure Rules, the appellant swore what has been titled as “**VERIFYING AFFIDAVIT**” in which he has deponed as follows:

“Josphat Kipchirchir Sigilai a resident of Eldoret Municipality and of P.O. Box Eldoret do hereby make oath and state as follows:

1. That I am the Plaintiff in this suit and I have authority to swear this affidavit.

2.That I have given instructions to Onyinkwa & Co. Advocates to file this suit against all the Defendants named above.

3.That I have also read the averments in the plaint and confirm that they are in accordance with my instructions to them.

4. That I confirm there is no other suit filed pending and there are no previous proceedings in any other court between me and the other parties to this suit.

5. That what is deponed above by me is true to the best of my knowledge, belief and information.”

The affidavit is shown to have been sworn by the appellant on 9th August 2002, before a Commissioner for Oaths, one Nyabochwa.

O.VII rule 1(2), aforesaid, prima facie appears to be a simple rule, but its interpretation has not been without difficulties, more so with regard to its purport. It was introduced in the **Civil Procedure Rules** by **Legal Notice No.36 of 2000**. But unlike amendments to statutory provisions, no memorandum of objects was included to give some inkling as to the mischief the introduction of the sub-rule was intended to cure. In **Microsoft Corporation v. Mitsumi Computer Garage Ltd & Another** Milimani Commercial Courts (Nairobi) No.810 of 2001 Ringera J. (as he then was) in his attempt to discern or discover the mischief the rule was intended to cure, quoted with approval the words of Juma J. on the amendment carried in a publication called **Hakimu**, in which that Judge rendered himself thus:

“The object of the amendments like any other amendments is to streamline the existing rules with the hope of improving the civil justice in our courts...”

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 and put a stop to this kind of conduct Order VII was amended by adding a new sub rule (2). This sub-rule provides that the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments in the plaint. The affidavit is to be sworn by the plaintiff NOT his advocate. It is hoped that the plaintiff will therefore, instruct one advocate as he or she will be required to swear an affidavit. I need not emphasize the consequences of filing a false affidavit.”

The aforesaid statement is clearly not exhaustive as to the mischief the amendment was intended to cure. That could be so, if we were to confine ourselves to **Order VII. Rule 1(1)(e)** which provides that a verifying affidavit shall contain an averment that there is no other suit pending and that there have been no previous proceedings in any court between the plaintiff and the defendant over the same subject matter. The statement does not, however, cover the added **sub-rule 1 (2)**, which provides:

“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.”

The sub-rule requires that every averment in the plaint be verified. The meaning of the term “*Verified*” has been the source of debate. Ringera J, (as he then was) held in the case of **Galeb Gulam & Another v. Cyrus Shakhhalaga Kwah Jirongo** NAI HCCC No. 393 of 2003, that a verifying affidavit should be confined to matters which the plaintiff can depose from his own knowledge to be correct. It must be clear from the affidavit itself that the plaintiff is deposing from his own knowledge or not at all.

Mohammed Ibrahim J. in **Harpreet Singh Lotay vs. Starlit Insurance Brokers Ltd**; Milimani Commercial Courts Civil Case No.1072 of 2000 was of the view that “*verify*” as used in **Order VII rule 1 (2)** means confirm the correctness. In his view the purpose of a verifying affidavit is to prevent litigants from bringing frivolous or vexatious suits when they do not believe in the truthfulness of their causes of action and are motivated by ulterior motives, for instance, speculation, intimidation, harassment, nuisance, annoyance or other such motive.

This appeal arose from the decision of the superior court at Eldoret (Etyang J.) given on 20th March, 2003, in which that court decreed that the appellant’s plaint was not accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint. In that court’s view the affidavit we reproduced earlier was not such an affidavit. So the principal ground of appeal is whether or not as Mr. Onyinkwa submitted, the superior court failed to appreciate that the law does not prescribe specific words to be used under **Order VII rule 1 (1)2)** of the Civil Procedure Rules. In our view,

determination of this appeal hinges on what meaning is to be ascribed to the phrase “*verifying the correctness of the averments contained in the plaint.*”

Mr. Onyinkwa for the appellant, on the main, submitted that **Order VII rule 1(2)** above, does not restrict the words to be used in the verifying affidavit, and the court should not therefore look at technicalities, but should adopt a robust approach with a view to sustaining a suit in order to do justice between the parties. In his view even where no verifying affidavit has been filed, the court may still refrain from striking out a suit in favour of hearing it on the merits.

Mr. Regeru for the respondents, urged the view that clear words having been used in the relevant sub-rule, they should be understood in their ordinary and natural meaning and should be read to mean confirm, substantiate the correctness of the averments in the plaint. In his view the requirement was not merely procedural, but goes to the validity of the claim. Accordingly, it was his prayer that if the suit is allowed to stand the court will be in away, sanctioning the flouting of rules of procedure, which are hand maidens of justice and to obviate this, the plaint should be struck out.

But why did the rules making authority consider an affidavit to be essential to accompany a plaint? An affidavit, as a general rule, is evidence. It would appear to us that the affidavit is intended to make the plaintiff own every averment in his plaint. It was intended to change the averments in the plaint from being mere averments or pleadings into evidence as is true in other modes of instituting suits and to pin down the plaintiff to them and thus make them part of evidence in support of his case; and possibly to limit room for manouvre.

The Civil Procedure Act, and Rules made thereunder, set out the manner of instituting suits. **O.IV rule 1** of the Civil Procedure Rules (the Rules) provides that every suits shall be instituted by presenting a plaint to the court, or “*in such other manner as may be prescribed.*” The manner prescribed in those rules include Summons, Originating Summons, or Motion. **O.XXXVI** provides for the institution of suits by way of Originating Summons. The procedure for doing so is that a litigant presents a summons supported by an affidavit or affidavits. Such affidavits are evidence, and the court entertaining such a suit may act solely on that affidavit and any other affidavit or affidavits that may be filed in reply thereto. In certain limited instances, oral evidence may be allowed in addition, but only where the court considers that such evidence is necessary.

O.LIII of the Rules, provides that Judicial Review proceedings are to be instituted by the filing in court of a chamber summons, ex parte, supported by an affidavit and a statement. The application is normally for leave to institute judicial review proceedings and once the leave is granted the judicial review application is then made by motion, supported by an affidavit and the same statement as the one for leave. The affidavit verifies the statement, thus making both of them evidential in nature. **O.LIII rule 1(2)** of the Rules, uses similar phraseology as **O.VII rule 1 (2)**, viz that the chamber summons “... *shall be accompanied by ... affidavits verifying*” the facts relied upon.

There are other suits, for instance matrimonial proceedings under the **Matrimonial Causes Act Cap 152 Laws of Kenya** and Election Petitions under the National Assembly And Presidential Elections Act, Cap 7 Laws of Kenya. Both these types of proceedings are commenced by petition verified by affidavit.

In view of the foregoing, it would appear to us that the Rules Committee by promulgating **O.VII rule 1 (2)** of the Rules, intended that in all suits commenced in Kenya, a uniform approach should be adopted and like in England, from where we think the provision was borrowed, to prevent a plaintiff from evasive and obscure pleadings and to prevent a multiplicity of suits on the same cause of action. It is however, quite clear that the Rules Committee did not go far enough as there was no reciprocal requirement for statements of defence and counterclaims. As the position is presently a defendant has no legal obligation to be specific in his answer to a claim against him. Nor is there any clear guidance on the approach to be adopted should a plaintiff require to amend his plaint. As we stated earlier a verification affidavit has the effect of making the averments in the plaint become evidential in nature. If one were to swear falsely in that regard he or she will be liable to criminal sanctions under **section 114** of the Penal Code and possibly under the **Oaths and Statutory Declarations Act Cap 15 Laws of Kenya**. For this and other reasons

O.VII rule 1 (2), aforesaid, raises fundamental and monumental issues, and we suggest that it should be looked at afresh.

The English approach is slightly different. Instead of a verifying affidavit they introduced a certification that the averments in the statement of claim are true. It is a certification based on belief and it is not made on Oath. Besides, it may be made by legal counsel on behalf of the claimant or the defendant unlike in Kenya, where only the plaintiff may swear the verifying affidavit. The form of the certification, according to the practice direction for the guidance of practitioners and the courts reads thus:

“[I believe] [the (claimant or as may be) believes] that the facts stated in this [name document being verified] are true.”

The editorial commentary on the Practice Direction states that in certain circumstances a false statement made in the document verified by the statement of truth may lead to liability for contempt of court. Likewise any statement verified may in certain circumstances be relied on as evidence.

The procedure of requiring certification of the Statement of Claim was aimed at restricting issues. Part 22.0.2., page 453 of the White Book (2003) states on this aspect as follows:-

“Under the old pleadings practice, often pleaders strove to keep their options open and to avoid restricting issues, leaving room for manoeuvre as the case developed ... to an extent, the pleader’s scope for prevarication and obfuscation, and for pleading alternative positions that may come perilously close to flat contradictions, is restricted by the verification requirement in rule 22.1. The rule falls short of requiring the claimant to verify his statement of case by affidavit.”

In view of what we have stated above, does the appellant’s verifying affidavit comply with the provisions of **O.VII rule (1) (2)**, of the Rules? To the extent that the appellant did not depose to the truth of every averment in the plaint, we answer the question in the negative. A verifying affidavit as envisaged by the rule, is meant to assert or vouch to the truth of what is stated therein. That is not what the appellant intended or even swore to in the verifying affidavit. Rather he vouched to the correctness of what he told his counsel, which is different from the truth of each averment in the plaint and thus falls short of what **O.VII rule 1 (2)** requires.

The issue which then follows is whether the omission by the appellant to swear to the truth of the averments in the plaint rendered his suit invalid or a nullity.

There are conflicting decisions of the superior court on this issue. We do not consider it necessary to go into them because of the view we have taken that the intention of the Rules Committee appears to us to have been to prevent plaintiffs from evasive and obscure pleadings, to prevent parties filing frivolous suits and also to obviate a multiplicity of suits. We think an omission to fully comply with the provision is a mere irregularity which, except in very clear cases, may be cured. We agree with Mr. Onyinkwa for the appellant that striking out a suit is a draconian and extreme measure which should only be resorted to in the clearest of cases, where the court, after considering all the facts and circumstances of the case comes to the inescapable conclusion that the plaintiff is abusing the court process or his claim is frivolous or vexatious or scandalous or does not lie. It is on these same grounds that a court may strike out a pleading under **O.VI rule 13** of the Rules.

In **The White Book 2003 Vol. 1** at **P.461** appears the following passage:

“The lack of verification is an irregularity which may be cured (r 3:10) Under r.3:4(2)(C) the court may strike out a statement of case (or part of a statement of case) on the ground that there has been a failure to comply with a rule and by implication this would include a failure to comply with r.22.1:”

The appellant’s plaint cannot be said to be frivolous, vexatious or scandalous or that it discloses no reasonable cause of action. Mr. Regeru submitted that the appellant should not be allowed to benefit from

his own default. Having not sought the Court's indulgence to file a proper affidavit to regularize his plaint the appellant should not be assisted, Mr. Regeru so urged us.

The power of the court to strike out a plaint for non-compliance with **O.VII rule 1 (3)**, is discretionary considering the language of the sub-rule. The sub-rule provides:

“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 sub-rule uses the phrase “*the court may*” implying that the court has to consider aspects for instance, firstly, the prejudice the failure to comply with **sub-rule (2)** will cause the defendant. Secondly, whether such prejudice may be appropriately compensated. Thirdly whether or not the plaintiff's case has some merit, in addition to the other grounds contained in **O.VI rule 13(1)** of the Rules for striking out a pleading.

We have considered the appellant's plaint. As we stated earlier, his claim is neither frivolous, vexatious or scandalous. Subject to a suitable order on costs being made the omission by the appellant in his verification affidavit is curable by the filing of an affidavit satisfactorily complying with **O.VII rule 1 (2)** above.

In the result, we allow the appellant's appeal, set aside the superior court order dated 20th March 2003, striking out the appellant's plaint dated 1st August 2002, and direct that the appellant swear a verifying affidavit complying with the provisions of **O.VII rule 1(2)** of the Civil Procedure Rules and file it in the Superior Court within seven days of the date hereof. The appellant shall also bear the respondents' thrown away costs of the preliminary objection before the superior court.

As regards costs of the appeal, we have agonized over what order to make. The normal practice is that costs follow the event. However, the appellant was to blame for the predicament he found himself in. In the result the order which commends itself to us is that each party shall bear own costs of the appeal.

Dated and delivered at Eldoret this 30th day of March 2007.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR