



Gilby Construction Company Ltd & another v Wrigley Company (East Africa) Ltd; Civicon Limited (Third party) (Environment and Land Case 36 of 2020) [2024] KEELC 5525 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5525 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE 36 OF 2020**

**A NYUKURI, J
JULY 25, 2024**

BETWEEN

GILBY CONSTRUCTION COMPANY LTD 1ST PLAINTIFF

GILBI BUSINESS PARK MANAGEMENT LTD 2ND PLAINTIFF

AND

WRIGLEY COMPANY (EAST AFRICA) LTD DEFENDANT

AND

CIVICON LIMITED THIRD PARTY

RULING

1. On 18th March 2024, after the plaintiff's testimony, the plaintiff's counsel sought leave of court to file a verifying affidavit to their amended plaint, when it emerged during trial that there was no verifying affidavit to the amended plaint. Counsel was of the view that the defendant and 3rd party would not be prejudiced in any way since the affidavit is just to confirm the averments in the plaint, which the plaintiff had done orally and that if need be, the witness could be recalled to confirm the truth. She opined that the court has discretion to allow any party to file any document at any time and that it was in the interest of justice to allow the plaintiff to file a verifying affidavit.
2. The application was opposed by counsel for the defendant. He averred that he had raised the issue of the affidavit in cross examination and the witness had been released, hence allowing the application would prejudice the defence case.
3. Counsel for the 3rd party also opposed the application, placing reliance on the *Civil Procedure Rules*, that the amended plaint ought to be filed together with a verifying affidavit. It was his view that the law does not provide for filing such a document after hearing has taken place. He also opined that should



the affidavit be filed, the plaintiff witnesses should return to the witness box and that in the interest of justice, the suit should proceed. He averred that counsel could withdraw the suit and file a correct suit.

Analysis and Determination

4. The court has considered the plaintiff's application and submissions made by the parties and the issue for determination is whether the plaintiff should be granted leave to file a verifying affidavit to the amended plaint.
5. Order 3 Rule 2 provides that all suits by plaint shall be accompanied with an affidavit referred to in Order 4 Rule 1 (2). The latter provides that the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint. Order 4 Rule 1 (6) grants the court power to strike out the plaint that is not accompanied by a verifying affidavit.
6. Therefore, a plaint or amended plaint ought to be accompanied by a verifying affidavit. In this case, the plaintiff filed a plaint accompanied with a verifying affidavit, but on amendment of the plaint, no verifying affidavit accompanied the amended plaint. As the name states, a verifying affidavit is meant to verify the correctness of the averments in the plaint. While parties should comply with procedural provisions of the law which is the handmaid of substantive law, this court takes the view that it is enjoined by Article 159 of the *Constitution* of Kenya to facilitate substantive justice. The defendant and interested party opposed the application and stated that if a verifying affidavit is filed at this point, the same will be prejudicial to them. However, no particulars of the nature and extent of the prejudice to be suffered were provided, when all the plaintiff is filing is an affidavit stating that the averments in the amended plaint are correct.
7. Considering that the plaintiff is the only witness who has testified before the verifying affidavit is filed, the prejudice suffered by the defendant, in my view can be compensated by an award of costs. In the premises, I allow the application for leave to file verifying affidavit to the amended plaint. The plaintiff is ordered to file and serve its verifying affidavit in 14 days of this ruling. As the testimony of PW1 was given before filing of the verifying affidavit, the proceedings in regard to the said evidence are set aside. The plaintiff's case shall start de novo. In the result, as the defendant has suffered costs, I award it thrown away costs in the sum of Kshs. 20, 000/= to be paid in 14 days of this ruling. No costs are awarded to the interested party, as it had not prepared to proceed with the hearing as it only filed its witness statement on the hearing date of 18th March 2024.
8. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25TH DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms. Muyoka holding brief for Mr. Mutubwa for Plaintiff

Mr. Mbeche holding brief for Mr. Obura for Defendant

Ms. Kitoo for Third Party

Court assistant – Josephine

