



**Matola v Odyssey International Limited (Cause 67 of 2019)
[2023] KEELRC 2260 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2260 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 67 OF 2019
BOM MANANI, J
SEPTEMBER 29, 2023**

BETWEEN

WILLIAM MAMBO MATOLA CLAIMANT

AND

ODESSY INTERNATIONAL LIMITED RESPONDENT

RULING

1. The application before me seeks to strike out the verifying affidavit and suit by the Claimant for reasons that the affidavit was sworn before the Statement of Claim had been prepared. Therefore, it is contended that the action is not verified as required by law.
2. The Statement of Claim is dated February 4, 2019. On the other hand, the affidavit verifying it is dated January 7, 2019. Prima facie, at the time of preparing the said affidavit, the Statement of Claim was not in existence.
3. The Claimant has stated that the variance in dates on the two instruments was occasioned by an error in dating the documents by his advocate. He however owns the two documents as his.
4. Rule 4(2) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* requires a Statement of Claim that is filed in court to be accompanied by an affidavit verifying the correctness of the averments in the Statement. This requirement is similar to that contained in Rule 4(2) of the *Civil Procedure Rules*.
5. As correctly submitted by the Applicant/Respondent, where a Plaint or Statement of Claim is accompanied by a defective verifying affidavit, the affidavit must be struck off the court's record. Indeed, this has been affirmed in a series of cases. For instance, in *James Waithumbi Kimotho & 2 others v Robert Mwangi Kiberenge & another* [2004] eKLR, the court struck out a defective verifying affidavit. The same approach was adopted in *Naphutaly Kibutu Kanyoro & 302 others v Telkom Kenya Limited* [2007] eKLR.



6. What is contested is whether the court should also strike out the claim on account of the defective verifying affidavit. The general position is that courts will not strike out a claim merely because it is accompanied by a defective verifying affidavit. Instead, the court will strike out the offending affidavit but require the Claimant to file a proper verifying affidavit.
7. The rationale for this approach is understandable. The overall objective of a court of law is to facilitate substantive justice. Therefore, the court will avoid determining disputes placed before it on technicalities such as want of a competent verifying affidavit. As was indicated in *James Waitumbi Kimotho & 2 others v Robert Mwangi Kiberenge & another (supra)*, the court should aim at sustaining proceedings that are placed before it instead of terminating them on technicalities.
8. As was observed in *Microsoft Corporation v Mitsumi Computer Garage Ltd & another* [2001] eKLR, a court must appreciate that the purpose of a verifying affidavit is to merely confirm the correctness of the averments in the Statement of Claim. This purpose can be attained at any time in the proceedings by ordering a Claimant to file a compliant affidavit. Therefore, there is really no need to drive a party away from the seat of justice merely because his Statement of Claim was accompanied by a defective verifying affidavit.

Determination

9. The upshot is that the application to strike out the suit is declined.
10. Instead, I strike out the verifying affidavit dated January 7, 2019.
11. I order the Claimant to file a fresh compliant verifying affidavit within fourteen (14) days of this order.
12. Costs of the application are granted to the Applicant/Respondent.

DATED, SIGNED AND DELIVERED ON THE 29TH DAY OF SEPTEMBER, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

