



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS**

**COURT AT BUNGOMA**

**CAUSE NO.3 OF 2019**

**DENNIS LEAK OJUOK.....CLAIMANT**

**VERSUS**

**POPULATION SERVICES KENYA.....RESPONDENT**

**RULING**

1. The Claimant's application by way of Notice of Motion is dated 13<sup>th</sup> October 2021 and brought under the provisions of section 1A and 3A of the Civil Procedure Act, Order 7 Rule 5 of the Civil Procedure Rules, Article 159(2)(d) of the Constitution and all enabling provisions of the law sought the following reliefs: -

- a. That the Applicant/ Claimant be granted leave to file the verifying affidavits to the Memorandum of Claim dated 26<sup>th</sup> March 2018 and Amended Memorandum of Claim amended on 15<sup>th</sup> April 2019.
- b. That the verifying affidavits to the Memorandum of Claim and Amended Memorandum of Claim filed herewith be deemed properly filed.
- c. Costs be provided for.

2. The Application was canvassed by way of written submissions as directed by court on the 26<sup>th</sup> October 2021. Only the Claimant /Applicant filed written submission dated 1<sup>st</sup> November 2021. The court considered the pleadings and submissions on record and the law in its ruling on the application dated 13<sup>th</sup> October 2021.

3. The application is based on the grounds that:-

The Claimant / Applicant's Memorandum of Claim and the amended Memorandum of Claim are not supported by a verifying affidavit as prescribed by the civil procedure, that the omission is a result of an honest mistake by the Counsel for the Claimant / Applicant , that the failure by the Claimant 's Counsel did not prejudice the Respondent's case in any way, that the omission is curable by filing respective verifying affidavits, that the mistake by Counsel should not be visited upon an innocent litigant and that it is in the interest of justice that the application be allowed.

The application is supported by affidavit of the Counsel on record in the matter Hammerton Jesbiab Maloba sworn on 13<sup>th</sup> October 2021 and in summary avers that on the 26<sup>th</sup> March 2019 they filed a Memorandum of Claim on behalf of the Claimant / Applicant in this suit, that prior to the time of filing he had sent a verifying affidavit to the defendant(sic)(should read Claimant) for signature which was duly signed and sent back to his office, that unfortunately the verifying affidavit was not commissioned and that he did not realize the mistake until only recently after the hearing and that he also realized the Memorandum of Claim amended on the 15<sup>th</sup> April 2019 was not accompanied by a verifying affidavit as required by rules of the court. The Counsel avers that the claim raises triable issues and is not frivolous and in the absence of the verifying affidavits puts the Claimant's /Applicant's Memorandum of Claim and amended Memorandum of Claim at risk of being struck out. The Counsel annexed copies of duly signed verifying affidavits to the Memorandum of claim and the amended Memorandum of Claim. The Counsel avers that the omission was an honest mistake on their part of which mistake ought not be visited on the client, that it is in the interest of justice that the Claimant / Applicant be granted leave to file respective verifying affidavits to the Memorandum of Claim and the amended Memorandum of Claim. The deponent avers that if the application is granted it will not prejudice the Respondent in the suit.

4. The Respondent filed affidavit in response to the application sworn by Allan Ngunze on the 21<sup>st</sup> October 2021. The deponent avers he is the Human Resources Director of the Respondent and opposes the application seeking to file verifying affidavits after both parties have

closed their respective cases and states that the prayers should have been made before the matter proceeded for hearing. That the Applicant/Advocate indolence should not be entertained by the court as justice is only for the vigilant not the indolent and that the application should be struck out with costs.

5. In his submissions the Applicant relies on the 6 grounds in the application and the supporting affidavit of Hammerton Jesbiab Maloba whose content is outlined above and on the cited provisions of the law. To buttress his claim the Applicant cites Rule (4) and (2) of the Employment and Labour Relations Court Rules being that the a verifying affidavit shall accompany a statement of claim verifying the facts therein and that the Claimant did not comply in both the Memorandum of Claim and the amended one. The Claimant /Applicant relies on section 1A of the civil procedure Act overriding objective and section 1B of the Act which provides the duty of the court in furthering the objectives of the overriding objectives in section 1A of the same Act. The Claimant /Applicant further relies on the decision of Madan JA in **D.T.Dobie & Company(Kenya) Limited v Joseph Mbaria Muchina & Another (1980) eKLR** of which this court adopts with approval to apply in the instant application where in part the Judge held, ‘ **a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal... no suit ought to be summarily dismissed unless it appears so hopeless that it plainly obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.**’

The Claimant / Applicant further submits that the court in exercising such discretion on whether or not to order striking out of any pleadings that is non-compliant with the rules ought to be alive to its obligations under article 159 of the Constitution to see to it justice is administered without undue regard to procedural technicalities.

The application was brought after conclusion of hearing of the case and the Respondent states that the application should be dismissed as justice aids the vigilant and not the indolent. In terms of hierarchy of laws the Constitution is supreme over common-law principles of equity. What is the purpose of a verifying affidavit? Justice Ringera In **Microsoft Corporation v Mitsumi Computer Garage Ltd & Another (2001)eKLR** held at page 6 ‘the broad purpose of a verifying affidavit is thus to verify the contents of the plaint.’ In that case the Judge struck out an offending verifying affidavit and ordered a fresh one be filed.

The Respondent has not disclosed to the court the prejudice it will suffer if the application is allowed after the hearing of the case is closed. The Respondent did not raise any issue with the pleadings during trial and the case proceeded on merit with the Claimant adopting the pleadings and being cross examined on the same by the Counsel for the Respondent. In all ways the Claimant verified and adopted the contents of his claim at the hearing. It would be thus be unreasonable, draconian and unfair to strike out the claim for lack of compliance with procedural rules after the hearing. The Claimant / Applicant filed the application before the court issued a judgment date. The court finds that there is no prejudice that can be suffered by the Respondent if the application is granted as the case will be determined on merits. The court has confirmed the annexed verifying affidavits have been sworn by the Claimant / Applicant at Boston/Massachusetts and commissioned and notarized to verify the contents of the Memorandum of Claim and of the amended Memorandum of Claim. Article 159(2) (d) of the Constitution and section 20(1) of the Employment and Labour Relations Court Act behoves this court to dispense justice without undue regard to procedural technicalities. Having found no prejudice that can be suffered by the Respondent if the application is allowed and in pursuit of substantive justice, I do grant leave to the Claimant / Applicant to file the verifying affidavits to the Memorandum of Claim dated 26<sup>th</sup> March 2018 and to the Memorandum of Claim amended on 15<sup>th</sup> April 2019. The verifying affidavits by the Claimant sworn on 2<sup>nd</sup> October 2021 and filed on the 15<sup>th</sup> October 2021 and annexed to this Application be and are hereby deemed as properly filed.

Costs of the application in the cause.

**DATED, SIGNED AND DELIVERED THIS 15TH DAY OF NOVEMBER 2021 AT BUNGOMA.**

**J.W KELI**

**JUDGE**

**In the Presence**

**Court Assistant – Brenda**

**For Claimant/ Applicant**

**For Respondent**