



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. E402 OF 2020

(Before Hon. Justice Dr. Jacob Gakeri)

**KENYA UNION OF ENTERTAINMENT AND
MUSIC INDUSTRY EMPLOYEES.....CLAIMANT**

VERSUS

BOMAS OF KENYA.....RESPONDENT/APPLICANT

RULING

1. By a notice of preliminary objection dated 29th September 2021, the Respondent/Applicant applies to have the memorandum of claim struck out on the grounds that –

(1) The verifying affidavit sworn on 10th August 2020, verifying the memorandum of claim offend Order 19 Rule 3 of the Civil Procedure Rules

(2) The affidavit remains defective as it refers to matters pleaded in the statement of claim, which is not signed by the Claimant and Section 63(2) of the Evidence Act has a strict test

2. The Claimant/Respondent responded by a replying affidavit by Mr. Job W. Muchuha, the Secretary General of the Claimant herein dated 15th October 2021. The deponent states –

i) If the orders sought by the Respondent/Applicant are granted the Claimant and the grievant shall suffer irreparable damages and the Court should be seen to grant justice to all by allowing full hearing of the suit.

ii) In the event the application has merit, the only remedy is to allow the Claimant/Respondent to amend the verifying affidavit for justice to prevail.

3. During the mention on 21st October 2021, whose purpose was to confirm reply to the Respondent/Applicant's preliminary objection, Counsel for the Claimant confirmed having filed a response but Mr. Masese for the Respondent/Applicant stated that he had not received the response and requested Mr. Muchuha to serve him through his email address and Mr. Muchuha agreed to do so by the end of the day. Similarly, Mr Masese proposed that the preliminary objection be disposed off by way of written submissions and Mr. Muchuha had no objection.

4. The Court directed that the matter be disposed of by way of written submissions and the Respondent/Applicant had seven days to file its submissions and the Claimant had seven days after service. Ruling was slated for 15th December 2021.

5. As of 1st December 2021 when the ruling was prepared, only the Respondent/Applicant had filed its submissions.

Submissions

6. The Respondent/Applicant submits that the memorandum of claim is defective and ought to be struck out. That the Employment and Labour Relations Court (Procedure) Rules 2016 and Order 19 Rule 3 of the Civil Procedure Rules require that any claim filed in Court must be accompanied by a verifying affidavit.

7. It is submitted that the person who swore the verifying affidavit is not an authorised agent of the Claimant and cannot purport to do so as he is not privy to the matters therein and is thus a witness not a representative of the grievant.

8. Reliance is made on the decision **Korica (U) Limited & another v Kenya Ports Authority [2008] eKLR** where Maraga J. (as he then was) expressed himself as follows –

“The objective of verifying affidavits is to avoid suits being filed without the authority of the Plaintiffs themselves. That is why Order 7 Rule 1 requires that the filing of complaints should be accompanied by verifying affidavits sworn by the Plaintiffs themselves as authority that the suits are filed with their authority. I agree with Mr. Noorani that in the case of a corporation a verifying affidavit should be sworn by an officer of the corporation duly authorized to do so. In this case although the Defendant has admitted that Inchcape Shipping Services Ltd is an agent of the Plaintiffs there is nothing to show that Mr. Nyangala who swore the verifying affidavit is an authorized agent of either of the Plaintiffs. Being merely an employee of the agent is not enough. In the circumstances there is no nexus between him and the Plaintiffs. Consequently I grant prayer 1 of the application and strike out the verifying affidavit sworn by the said Nyangala on 14th September 2005.”

9. The Respondent/Applicant submits that in the circumstances the preliminary objection be upheld and the claim be struck out or in the alternative, the Court be pleased to grant such other orders that will meet the ends of justice including reversing earlier orders that were issued against the Respondent since there was no valid claim that the Court should take cognisance of hence all orders issued for purposes of meeting justice be set aside and the Claimant be allowed to rectify the anomaly by filing a proper affidavit.

Determination

10. The issue for determination is whether the notice of preliminary objection is merited. The Respondent/Applicant states that the memorandum of claim dated 10th August 2020 should be struck out on the two grounds stated above. Both grounds implicate the memorandum of claim indirectly.

11. Counsel relies on **Order 19 Rule 3(1) of the Civil Procedures Rules 2010** which provides that –

3. Matters to which affidavits shall be confined [Order 19, rule 3.]

(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same.

12. Reliance is also made on **Rule 4(2) of the Employment and Labour Relations Court (Procedure) Rules 2016** which provides that –

(2) A statement of claim filed under paragraph (1) shall be accompanied by an affidavit verifying the facts relied on.

13. The Respondent/Applicant's contention is that the affidavit is sworn by a person who is not an authorised agent and purports to swear an affidavit deposing matters he is not privy to.

14. On the other hand, the deponent argue that he swore the verifying affidavit as the Secretary General of the Claimant union as authorised by law and there was no need for authorisation since the member's authority is automatic after signing the check off forms (copies attached). Section 73 of the Labour Relations Act is relied upon to buttress the averment.

15. Both Order 19 Rule 3(1) of the Civil Procedure Rule and Rule 4(2) of the Employment and Labour Relations Court (Procedure) Rules 2016 are couched in mandatory terms and must be complied with.

16. It is not in dispute that the verifying affidavit dated 10th August 2020 was sworn by Mr. Job W. Mucuha, the Secretary General of the Kenya Union of Entertainment and Music Industry Employees. Granted that he is authorised by law to represent the grievant since the grievant was a member of the Union, by swearing the verifying affidavit, he become a witness in the matter as sopped to a representative as submitted by the Respondent/Applicant.

17. In **Galeb Gulam & another v Cyrus Shakhhalaga Kwa Jirongo**, Ringera J. held 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.

18. The holding of Maraga J. (as he then was) in **Korica (U) Limited & another v Kenya Ports Authority (supra)** is also instructive. The Learned Judge stated that –

“The objective of verifying affidavits is to avoid suits being filed without the authority of the Plaintiffs themselves. That is why Order 7 Rule 1 requires that the filing of complaints should be accompanied by verifying affidavits sworn by the Plaintiffs themselves ...”

19. In that case, the Judge granted the prayer and struck out the verifying affidavit.

20. The essence of a verifying affidavit and the consequences of its striking out were explained by the Court of Appeal in **Josephat Kipchirchir Sigilai v Gotab Sanik Enterprises Ltd & 4 others [2007] eKLR** as follows:

“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 pleadings. It was intended to change the averments in the pleadings 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 manoeuvre... A verifying affidavit as envisaged by the rule, is meant to assert or vouch to the truth of what is stated therein.”

21. The Court further expressed itself as follows –

“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.”

22. The Court is in agreement with the sentiments of the Learned Judges.

23. In this case, the Court of Appeal was satisfied that the Appellant’s pleadings were neither frivolous nor vexatious or scandalous or did not disclose a reasonable cause of action. The Court allowed the appeal, set aside the striking out of the pleadings and directed the Appellant to swear a verifying affidavit.

24. Finally, the Court was emphatic that *“The power of the court to strike out a pleading for non-compliance with the requirement of a verifying affidavit is discretionary”*. The Court may strike out the pleading or statement of claim or give the party at fault opportunity to file a proper verifying affidavit.

25. Applying the above principles to the instant application, the Court is far from convinced that substantive justice will be served by striking out the memorandum of claim. More significantly, the Respondent/Applicant has not demonstrated that the memorandum of claim is frivolous or vexatious or scandalous or discloses reasonable cause of action.

26. Consequently, the Court makes the following orders –

a) The verifying affidavit dated with August 2020 is struck out for noncompliance with Order 19 Rule 3 of the Civil Procedure Rules

b) The Claimant to file and serve a proper verifying affidavit within 14 days from the date of delivery of this ruling.

c) Costs in the cause.

27. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF DECEMBER 2021

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE