



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 66 OF 2013**

**KAYUM KHAN.....CLAIMANT**

**VERSUS**

**INTERNATIONAL COMMERCIAL**

**COMPANY (K) LIMITED.....RESPONDENT**

**RULING**

**Introduction**

1. This is a Ruling on two applications dated 5.6.2017 and 27.6.2017. The first is by the claimant and it seeks for the striking out of the defence dated 7.2.2013 and the accompanying Verifying Affidavit sworn on 7.2.2013. The second application is by the respondent and it seeks for the striking of the Amended Statement of Claim filed on 8.6.2017, and for extension of time for filing Amended Statement of defence. Both applications are opposed by the parties respective Replying Affidavits. The applications were disposed of by written submissions, which were highlighted in the open court.

**Claimant's Application dated 5.6.2017**

2. The claimant urged that the defence was filed after the lapse of 14 days time provided by the Court Rules and without any Memorandum of Appearance. He further urged that the verifying affidavit accompanying the defence was signed by a stranger and it contained false information. Finally, the claimant contended that the verifying affidavit was done without the authority of the respondent. He relied on *Mercy Kanyiri Makathimo Vs Francis Mburugu [2007] eKLR* and *Shirika La Kusaidia Watoto wa Kenya Faidi Kenya Vs Rhodah Rop & Others [2005] eKLR* to support his case.

3. In response the respondent urged that the Verifying Affidavit was signed by her Managing Director Mr. Farid Hamir who is also an Executive Director and who uses two signatures. She further urged that the said Director had obtained authority from her on 23.1.2013 and failure to file the authority with the verifying affidavit was not fatal. She relied on *R. V Registrar General & 13 others [2005] eKLR* and *Mavumo Industries Limited & 2 others Vs Keroche Industries Limited [2012] eKLR* among others to support the foregoing contention.

4. In addition, the respondent urged that the claimant has not met the threshold for striking out the defence. She urged that, the claimant has not demonstrated that the defence does not disclose reasonable defence, that it is frivolous and vexations, it may delay the trial or it is an abuse of the process of the Court. She contended that, under the Industrial Court Procedure Rules 2010, there was no requirement of filing a Memorandum of Appearance or Appointment before filing defence. She further urged that the said objection was adjudicated upon by this Court and determined in the Ruling dated 5.2.2014.

**Respondent's Application dated 27.6.2017**

5. The respondent urged that the claimant sought leave to amend his claim by the Notice of Motion dated 8.7.2013 and under prayer 3 of the said motion, he sought for leave to amend the claim dated 18.1.2013 as per the annexed draft marked "A" in the Supporting Affidavit to the motion. That this Court dismissed the application but on 2.6.2017 the Court of Appeal in Civil Appeal No. 3 of 2014 granted the leave as prayed under prayer 3 of the said motion. However, on 13.6.2017, the claimant filed the Amended Claim dated 8.6.2017 which was not as per the draft marked "Annexure A" in the application for leave.

6. The respondent submitted that the Amended Claim filed does not conform to the leave granted by the Court of Appeal because it has been altered by numerous additions, deletions and other amendments in paragraphs 7(b), 28, 35, 43(j), 43(h), 53(f), 98(b), 63(c), 63(d) and 98(c). She urged that the said alterations to the draft Amended Claim allowed by the Court of Appeal has been admitted by the claimant in paragraphs 10, 11, 12, 13, 14, 15 and 16 of the Replying Affidavit filed on 10.7.2017. She therefore urged that, the Amended claim was filed

without the leave of the Court as required under Rule 14(6) of this Court's Procedure Rules of 2016.

7. In addition, the respondent has contended that the Amended Claim should be struck out because it is an abuse of the process of the Court, and it is frivolous and vexatious. She relied on the **County Council of Nairobi Vs Ezekiel Kibet Rutto [ 2013] eKLR** cited in **Vivian Muia Vs Mzoori Ltd [2017] eKLR** where frivolous pleading was defined as one which lacks a legal foundation or that discloses no cause of action and serves no purpose.

8. In response the claimant has opposed the respondent's motion. He has admitted that the Amended claim filed was not identical to the draft allowed by the Court of Appeal in Civil Appeal No. 3 of 2014. He contended that the said alteration of the draft was necessary to align the pleading to the Court's new name; for clarity and ease of reference by the Court; addition of inadvertently omitted claims; align the pleading with the evidence already adduced, and to enable the Court to effectually determine the dispute. In his view, the said alterations are not mischievous and will not prejudice the respondent because she has the chance to file Amended defence because the grant of leave to file Amended Claim had the effect of re-opening the closed pleadings.

9. He concluded by submitting that, striking out his Amended Claim would be too harsh to him as it will chase him away from seat of justice, and especially considering the fact that the respondent herein filed Amended defence within 14 days after service of the Amended Claim. He relied on **Ecobank Vs Amreer Kutbuddin Mukadam & Another [2016] eKLR** to support the foregoing submission.

### **Analysis and Determination**

10. After careful consideration of the materials presented by the two parties, the following issues arose for determination:

- (a) Whether the Verifying Affidavit sworn on 7.2.2013 should be struck out.
- (b) Whether the defence dated 7.2.2013 should be struck out.
- (c) Whether the Amended Claim filed on 8.6.2017 should be struck out.
- (d) Whether leave should be granted for filing Amended defence.

### **Verifying Affidavit dated 7.2.2013**

11. The claimant has alleged that the Verifying Affidavit sworn on 7.2.2013 was signed without the authority from the respondent and it was not signed by the respondent's Managing Director Mr. Farid Hamir. He further alleges that the verifying affidavit contains falsehood by stating that Mr. Farid Hamir was respondent's executive director. Mr. Farid Hamir has sworn a replying affidavit contending that he indeed signed the said Verifying Affidavit using one of his two signatures which he has been using in his various positions and businesses. He further produced a resolution by the respondents Board of Directors dated 31.1.2013 by which he was given the authority to sign affidavits in this case on behalf of the respondent.

12. I have carefully considered the signature on the said verifying Affidavit and the other signature known by the claimant. They obviously look different. However, that does not necessarily mean that the signature on the Verifying Affidavit was not done by the deponent Mr. Farid Hamir. The burden of proving that the signature in dispute is not by Mr. Farid Hamir is upon the claimant who is alleging that it does not belong to the deponent. This Court finds that the said burden of proof has not been discharged on a balance of probability. Other than the mere allegations by the claimant that the signature is different from the signature he knows for Mr. Farid Hamiri there is no expert opinion to support the claimant's allegation.

13. As regards the authority to sign the Verifying Affidavit, I have considered the minutes of the respondents Board of Directors held on 31.1.2013 where it was resolved that Mr. Farid Hamir was authorized to sign affidavits on behalf of the respondent in this suit. The claimant has not proved that the said authority is not authentic. All that he seems to say is that the authority ought to have been filed together with the Verifying Affidavit. The respondent is, however, of the view that the failure to file the authority was not fatal.

14. The High Court was faced with relatively similar issues in **Mavuno Industries Limited & 2 others Vs Keroche Industries Limited [2012] eKLR** but the verifying affidavit was by the plaintiff. The Court held that:

***“under order 4 rule 1(4) of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated that the such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which common sense dictates it should.”***

I agree with the learned Judge entirely that the failure to file the authority does not render the accompanying pleading invalid but the opposing party is free to demand that it be produced. In this case, the claimant did not demand for the same before or during the time when Mr. Farid Hamir testified as defence witness. The authority is now on record and the matter should end at that.

15. In any event, even the impugned verifying affidavit was not filed, I don't think that the defence filed would be invalid. Under Rule 13 and 14(4) of the Industrial Court Procedure Rules 2010 (now repealed), filing of an affidavit to verify evidence contained in pleadings was optional. Rule 14(4) provided that:

***“Pleading may contain evidence provided that the Court may require the evidence to be verified by an affidavit as sworn or oral***

*evidence.”*

16. As regards the alleged false allegation in the verifying affidavit, I do not think that such allegation holds any water. The alleged falsehood is that Mr. Farid Hamir has described himself as the respondent's Executive Director when he is only the Managing Director. In my view both are Directors of the company with executive powers and I don't think that the said description was made with bad intention nor did the said description distort the matters deposed in the affidavit.

17. As already stated above, the issue of the authority to swear the verifying affidavit and the signature on the same were matters which ought to have been raised to during, before or at the time when Mr. Farid took the witness stand on 27.5.2013 but they were not. It is therefore my view that the present challenge of the verifying affidavit which is not a pleading, is meant to derail and deviate from the suit. This view is fortified by *Saraf Limited Vs Augusto Ardiwn [2016] eKLR* where the Court of Appeal held that:

***“This decision shows that the law treats a person dealing with a Limited Liability as entitled to assume that internal company rules are complied with even if, unknown to them they are not. At any rate, in the instant appeal, the substantive issue before the court was whether the appellant who is the defendant in the suit pending in the High Court is liable. The points raised by the appellant on procedure were a deviation and had the effect of derailing the suit. They did not impact on the jurisdiction of the Court to hear the matter, much less prejudice the appellant. It is not a matter that could be addressed at the full hearing.”***

#### **Defence dated 7.2.2013**

18. The claimant has alleged that the defence should be struck out because it was filed after the lapse of the 14 days period provided by the rules and without a notice of Appearance or Appointment. Rule 13 of the Industrial Court Procedure Rules 2010 (repealed) provided as follows:

***“If a party served with a statement of claim or Memorandum of Appeal intent to respond the claim or appeal, the party shall, within fourteen days from the date of service file and serve a response to the claim or appeal.***

***(4) The Court may, on application by a party to any proceedings, extend or reduce the time within which a responding party may respond to a pleading.”***

19. The foregoing provisions did not require that a respondent must file notice of appearance or appointment but only file a defence. It also never stated the consequences for default by the responding party to file his response within the stipulated time. In my view, the responding party had the right to file the defence out of time provided that no precipitate action had been taken like, entry of an interlocutory judgment or direction given that the suit will proceed as undefended or that the claimant's case has been heard and closed.

20. In this case, the defence was filed and served on 7.2.2013 before any of the aforesaid precipitate actions being done. Thereafter the claimant slept on his right to object and even condoned the said default by inviting the respondent to fix hearing date, exchange documentary evidence and allowed defence witness to testified and even cross-examined him. That conduct on the part of the claimant then, is different from his current position, which I can only infer to be an afterthought. In my view, where it not for respondent's objection to his application to amend his claim dated 8.7.2013, the suit would have been heard and concluded long time and the current objection to the defence would not have been raised. Consequently the court finds that no good ground has been shown to warrant striking out of the defence dated 7.2.2013, and after such a long delay to apply.

#### **Amended Claim filed on 8.6.2017**

21. The respondent has prayed for the striking out of the Amended Claim filed on 8.6.2017 because the amendments exceeded the leave granted. I have carefully perused and considered the said Amendments vis-à-vis the judgment by the Court of Appeal in Civil Appeal No. 3 of 2014, which granted the leave to amend the claim. The Court of Appeal judgment stated as follows:

***“Bearing the totality of the above assessment in mind, we find merits in this appeal and do allow the same. We dismiss the cross – Appeal, set aside the impugned orders of 11th October, 2013 and substitute in lieu thereof an order, allowing the appellant's application dated 8th July, 2013 in terms of Prayer 3, with thrown away costs of the application to the respondent.”***

22. I have perused prayer 3 of the said application dated 8.7.2013 and I have copied it herein verbatim:

***“3) THAT leave be granted to the claimant to amend the Memorandum of Claim as per the attached draft marked “A” in the Supporting Affidavit.”***

23. Contrary to the said express Judgment granting leave in terms of prayer 3 of the said application dated 8.7.2013, the claimant made alterations on the draft Amended Claim authorized by the leave order. The alterations were made by deleting parts of paragraph 7(b) and 28; by additions to paragraph 35 and 43(j); by rephrasing paragraph 43(h), 53(f) and 98(b); and finally by adding new paragraph 63(c), 63(d) and 98(c). The said paragraphs were not the subject of the leave granted by the Court of Appeal and were significant and included introduction of new claims after the claimant had testified and closed his case and the respondent's key witness had also closed his testimony. According to the claimant, the amendment of the pleadings had the effect of re-opening the pleading. That may be so but the leave to amend pleadings is not necessarily leave to re-start trial.

24. The said alteration to the draft Amended Claim has been admitted by the claimant who alleged that he did so among others, to clarify the issues and align it with his evidence. That may be so, however the same was not authorized by the leave order made by Court of Appeal.

The Claimant presented a draft of what he wanted to file and after it was allowed he had no legal authority to alter it for whatever reason.

Consequently, I allow the respondents application by striking out the Amended claim filed on 8.6.2017 but direct the claimant to file and serve another amended claim in terms of the leave order granted by Court of Appeal on 2.6.2017 within 14 days of today. Thereafter the respondent will have 14 days after service with the Amended Claim to file and serve amended defence if necessary. These directions are given with a view to fast tracking the conclusion of this case which is now more than 5 years old.

**Disposition**

25. For the reasons stated above:

- (a) The Claimant's application dated 5.6.2017 is dismissed.
- (b) The respondents application dated 27.6.2017 is allowed subject to the said directions.
- (c) Costs of the applications are awarded to the respondent to be agreed or taxed.
- (d) The suit to be heard by Court 6 where it was partly heard. Parties to mention the matter before the said Court on 26.6.2018.

**Dated, Signed and Delivered in Open Court at Nairobi this 8th day of June, 2018**

**ONESMUS N. MAKAU**

**JUDGE**