



REPUBLIC OF KENYA



African Floralush (PTY) Ltd t/a Iluba & another v Marcel & another (Commercial Case E115 of 2020) [2025] KEHC 12051 (KLR) (Commercial and Tax) (14 August 2025) (Ruling)

Neutral citation: [2025] KEHC 12051 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E115 OF 2020**

PM MULWA, J

AUGUST 14, 2025

BETWEEN

AFRICAN FLORALUSH (PTY) LTD T/A ILUBA 1ST PLAINTIFF

ILUBA EAST AFRICA (EPZ) LIMITED 2ND PLAINTIFF

AND

GERARD ETIENNE MARCEL 1ST DEFENDANT

VERMOT FLOWERS (EPZ) LIMITED 2ND DEFENDANT

RULING

1. Before this Court is a Notice of Motion dated 31st October 2023 brought under Sections 1A, 1B, and 3A of the *Civil Procedure Act*, as well as Order 4 Rule 1(2) and (6) of the Civil Procedure Rules and all other enabling provisions of the law. The Defendant/Applicant seeks an order striking out the plaint and that the costs of the suit be borne by the Plaintiffs/Respondents.
2. The application is premised on the grounds on its face and is supported by an affidavit sworn by Gerrard Etienne Marcel Bernanzano. The crux of the Applicant's argument is that the verifying affidavit sworn by Mr. Jacobus Johannes Vijoer on 29th April 2020 is defective, since it purports to verify a plaint dated 30th April 2020. According to the Applicant, the verifying affidavit could not have verified the contents of a plaint that was non-existent at the time, rendering the suit fatally defective and liable to be struck out.
3. In opposition to the application, the Plaintiff filed a Replying Affidavit sworn by Jacobus Johannes Vijoer on 18th February 2025, together with Grounds of Opposition. The Plaintiff concedes that there is a discrepancy in the dates but attributes it to an inadvertent and excusable human error committed by counsel. He urges that the said discrepancy is a technical irregularity that does not go to the substance



of the cause of action and is therefore curable by way of amendment. The Plaintiff further argues that the overriding objective under Sections 1A and 1B of the *Civil Procedure Act* enjoins the court to facilitate the just, expeditious, and proportionate resolution of disputes and to avoid undue regard to procedural technicalities.

4. I have carefully considered the application, the affidavits on record, the rival submissions by counsel, and the applicable legal framework. The issue for determination is whether the discrepancy in the dates of the plaint and the verifying affidavit renders the suit fatally defective and liable to be struck out.
5. Order 4 Rule 1(2) of the Civil Procedure Rules provides:

“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.”
6. The purpose of a verifying affidavit is to confirm that the Plaintiff is affirming the truth of the contents of the plaint and to discourage frivolous litigation. However, Order 4 Rule 1(6) further provides:

“The court may of its own motion or on the application of a party strike out a pleading which is not accompanied by a verifying affidavit.”
7. In the present case, while there is a chronological inconsistency, the verifying affidavit predating the plaint by one day, this does not necessarily mean the affidavit is invalid. In my view, the discrepancy between the date of the verifying affidavit and the plaint, though irregular, is not fatal. The error does not prejudice the Defendant in any significant manner nor does it go to the substance of the cause of action. The verifying affidavit was clearly intended to support the accompanying plaint and there is no suggestion of fraud, deceit, or bad faith. This is the kind of technical defect that is curable by amendment or correction. There is no suggestion that the affidavit did not relate to the plaint eventually filed, nor has the Defendant alleged any prejudice suffered due to the discrepancy.
8. Courts have, over time, taken the position that procedural defects or technical irregularities that do not go to the root of the claim should not be allowed to defeat substantive justice. The Supreme Court in *Railway Corporation of Kenya v Transport Licensing Appeal Tribunal & 5 others* [2014] eKLR emphasized that substantive justice should not be sacrificed at the altar of procedural technicalities, stating:

“Procedural lapses that do not go to the root of the matter or cause prejudice to the other party should not defeat the course of justice.”
9. Similarly, the Court of Appeal in *Microsoft Corporation v Mitsumi Computer Garage Ltd & Another* [2001] KLR 470 held that:

“A defect in a verifying affidavit is not fatal and can be cured by filing a proper affidavit with leave of court.”
10. Further, in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, the Court of Appeal restated the obligation of courts under Article 159(2)(d) of *the Constitution* to disregard procedural technicalities in the interest of substantive justice.
5. Section 1A and 1B of the *Civil Procedure Act* emphasizes the overriding objective (the “oxygen principles”), aimed at facilitating the just, expeditious, proportionate, and affordable resolution of civil disputes.



6. In my view, the discrepancy between the date of the verifying affidavit and the plaint, though irregular, is not fatal. The error does not prejudice the Defendant in any significant manner nor does it go to the substance of the cause of action. The verifying affidavit was clearly intended to support the accompanying plaint and there is no suggestion of fraud, deceit, or bad faith. This is the kind of technical defect that is curable by amendment or correction.
7. Striking out a suit is a draconian step, and courts have consistently held that it should be resorted to sparingly and only in the clearest of cases (*DT Dobie & Company (Kenya) Ltd v Joseph Mbaria Muchina* [1980] eKLR).
8. In the result, I find no merit in the application dated 31st October 2023. The same is dismissed.
9. The costs will be in the cause.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 14TH DAY OF AUGUST 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Kioko h/b for Mr. Omondi for Plaintiffs

Mr. Kinyanjui & Ms. Akinyi for Defendants

Court Assistant: Godfrey

