



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO.211 OF 2004

1. MULUSIAH LAND CONSULTANTS

2. COLOURGEMS LIMITED PLAINTIFFS

VERSUS

1. INDUSTRIAL DEVELOPMENT BANK LTD.

2. LAWRENCE ODORI NABWANA

3. TACT CONSULTANCY SERVICES DEFENDANTS

R U L I N G

This ruling is confined to the Preliminary Objection by the Defendants dated 13/5/04 on the validity, competence or propriety of the Plaintiffs Affidavits which the Defendant alleges are in violation of the Statutory Declaration Act, Cap.15 of the Laws of Kenya.

Specifically the Verifying and Supporting Affidavits are undated, and for that the Defendant/Respondent avers that they are fatally defective and should be struck out and/or expunged from the Court Record.

In opposition to the Preliminary Objection by the Defendants, the Plaintiffs' Counsel Mr. Kituku, admitted that it was true the Affidavits – Verifying and Supporting – were not dated, but the dates could be gathered from the annexed documents; and further that whatever defects they were curable under Order 6A of the Civil Procedure Rules and S.100 of the Civil Procedure Act, Cap.21 Laws of Kenya.

To dispose of the Preliminary Objection by the Plaintiffs, it is imperative to appreciate the legal provisions, and authorities, on the issues raised.

We begin with Section 5 of the Oaths and Statutory Declarations Act, which provides as under:-

“Every Commissioner of Oaths before whom any oath or affidavit is taken

or made under this Act shall state truly in jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

I don't have to expend unnecessary energy and time on factual situations and that is that the Verifying Affidavit verifying the correctness of the averments in the Plaint; the Supporting Affidavit in support of the Chamber Summons herein; the Affidavit in support of the Further Supplementary Affidavit by the Plaintiff/applicant do not comply with the mandatory provisions above.

The Commissioner for Oaths before whom the above affidavits were made, M.N. Nyaga, failed to comply with the provisions of the above Act. And on this point alone, the Affidavits are null and of no legal value to either the Plaint or the application – the Chamber Summons.

There is an even worse situation that both the Verifying Affidavit and the Supporting Affidavit are actually and literally, undated, apart from the provisions of the Oaths and Statutory Declarations Act. Whereas, the affidavits says they were sworn on 21st day of April at Nairobi, there is no year given. In such situation I hold that the Affidavits are null and void.

Dating of such documents is not a cosmetic requirement. The purpose for such requirement is very clear. Situations and circumstances do change leading to different legal positions. In the absence of such dates, the court is left to guess as to when the Affidavits were made, and hence their worthlessness in both law and fact. Counsel for the applicant/plaintiffs submitted, with vigour, that the errors could be cured and amended under Order 6A of the Civil Procedure Rules.

With all due respect to the learned counsel, there appears to be a misconception here. We begin with the Plaint itself.

Under Order 7 rule 1(2) of the Civil Procedure Rules, **“the Plaint shall be accompanied by an Affidavit sworn by the Plaintiff Verifying the correctness of the averments contained in the Plaint.”**

Once the Verifying Affidavit is, for whatever reason, defective – either because it is either not annexed to the Plaint or if it is defective, as in the current case, then the Plaint can't stand. See **JAMES FRANCIS KARIUK V. UNITED INSURANCE CO. LTD., HCCC NO.1450 of 2000 at p.5**, where Onyango Otieno, J. as he then was, stated that:-

“the plaint cannot stand alone in the file without Verifying Affidavit. As the Verifying Affidavit has been expunged from the record, the Plaint must also be struck out as its being on record without Verifying Affidavit is not in compliance with Order 7 Rule 1(2).”

Pausing at this point for now, I have already held that the Verifying Affidavit was fatally defective for failure to comply with the provisions of S.5 of Cap.15, Laws of Kenya. On that score, that Affidavit is hereby struck out, and with that it follows that the Plaint too must be struck out as it cannot stand alone in the absence of the Verifying Affidavit as mandatorily required by Order 7 rule 1(2).

I would have liked to address the other issues raised by the Learned Counsels for both sides. But in my view that is embarking on purely academic exercise and futility.

If the Plaint is struck out, that is the end of the rest of the legal games in any suit or case. If there is no Plaint, there cannot be a suit, and hence there cannot be any application based on a vacuum. The Chamber Summons herein is only a branch of the suit initiated by the Plaint that has been struck out. The branch cannot exist without the trunk or stem. Consequently, to talk about curability, of the supporting affidavits to the current application, or amendments to the same, assuming such affidavits could be amended (which is not legally feasible as such documents are on matters of fact) is futile.

It is trite to add that there is no cure, as of today, to a nullity.

The upshot of all the foregoing is that: I uphold the Preliminary Objection by the Defendants. The effects of these are that:-

(a) all the Affidavits – Verifying and Supporting – are expunged from the record. (b) Pursuant to (a) above, the Plaintiff is also struck out as it cannot stand without the Verifying Affidavit, and with that goes the suit.

(c) Arising from (b) above, there can be no application – Chamber Summons or Notice of Motion – in the absence of a suit.

Accordingly, the Chamber Summons herein is dismissed as a misfit under the circumstances.

DATED and delivered in Nairobi, this 29th day of April, 2005.

O.K. MUTUNGI

JUDGE