**Kabebe v Makau and another**

[2004] 2 EA 83 (HCK)

**Division:** High Court of Kenya at Nairobi

**Date of ruling:** 22 April 2004

**Case Number:** 1222/99

**Before:** Ochieng AJ

**Sourced by:** LawAfrica

**Summarised by:** M Kibanga

*[1] Affidavit – Jurat – Jurat not stating where affidavit sworn – Whether omission fatal – Section 5 –*

*Oaths and Statutory Declarations Act (Chapter 15) – Rule 10 – Oaths and Statutory Declarations Rules.*

*[2] Amendment – Leave to amend –Plaint amended without leave – Whether entire suit liable to be*

*struck out.*

**Editor’s Summary**

Before the commencement of the trial of the suits the first and third defendants raised preliminary

objections to the suits on grounds, *inter alia*, that one of the suits was based on a plaint that was amended

without leave of the Court and that the affidavit in support of the plaintiff’s originating summons was

incurably defective because the jurat did not state where the affidavit was sworn. They asked the Court to

strike out the two suits.

**Held** – Although the plaintiff amended his plaint in the first suit without leave of the Court the main suit

would remain alive and only the amendments would be struck out. Section 5 of the Oaths and Statutory

Declarations Act and rule 10 of the Oaths and Statutory Declarations Rules requires that the place where

an affidavit is sworn be indicated in the jurat.

The embossment of a commissioner for oath’s rubber stamp showing “Nairobi” is not in compliance

with rule 10 because that only shows the commissioner’s postal address.

The omission in the jurat to state where the affidavit was sworn is not fatal and the Court has a

discretion to allow an affidavit notwithstanding the omission. The Court may in some instances direct

that the affidavit be re-sworn*. DB Shapriya and Company Ltd v Bish International BV* [2002] 1 EA 47

considered, *Amira (K) Ltd v National Irrigation Board* [2001] 2 EA 333 approved, *Odongo v National*

*Social Security* [1999] LLR 1024 (CCK).

The preliminary objections were dismissed.

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**Cases referred to in ruling**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Amira (K) Ltd v National Irrigation Board* [2001] 2 EA 333 – **APP**

*DB Shapriya and Co Ltd v Bish International BV* [2002] 1 EA 47 – **C**

*Narok Transit Hotel Limited and another v Barclays Bank of Kenya Ltd* [2001] LLR 852 (CCK) – **C**

*Odongo v National Social Security* [1999] LLR 1024 (CCK) – **AP**

**Ruling**

**OCHIENG AJ:** The hearing of the consolidated suit was listed before me on 10 March 2004. However,

before the trial commenced, the parties agreed that it would be logical for the first and third defendants,

(the applicants) to first canvass their preliminary objection.

By a notice of preliminary objection dated 10 December 2003, the said first and third defendants had

put the plaintiff on notice about preliminary objection. This decision is thus in relation to the preliminary

objection, which was in the following terms;

“Take notice that the first and third defendants herein will raise a preliminary objection to the hearing of these

two consolidated suits and pray that same be struck out or dismissed with costs on the following grounds:

1. T hat the first suit namely High Court civil case number 963 of 1997 is based on a plaint that was

amended without leave of the Court.

2. T hat the land which is the subject matter of the claim in the first suit does not exist.

3. T hat the second suit namely High Court civil case number 1222 of 1999 (OS) is based on a lie as can

easily be gleaned from Exhibits LK3 and LK4 annexed to the plaintiff’s affidavit dated 15 June 1999

in support of the originating summons, and secondly from Exhibits NM4 and NM5 annexed to the first

defendant’s affidavit in reply thereto dated 27 September 1999.

4. T hat in any event the plaintiff’s said affidavit dated 15 June 1999 in support of his originating

summons is incompetent, null and void in that it is incurably defective as it does not comply with the

requirements of the Oaths and Statutory Declarations Act (Chapter 15) of the Laws of Kenya”.

I will consider each of the grounds of the preliminary objection, in turn.

1. *Lazaro Kabebe v Ndege Makau and Silas Njogu Mariano* High Court civil case number 963 of 1977

was filed on 4 May 1977. The Court records also have an amended plaint which was filed in court on

16 May 1991.

The applicants contend that the plaintiff did not obtain the leave of the Court to amend the plaint. The

plaintiff concedes that the amendment was effected without the leave of the Court.

Pursuant to the provisions of Order VIA, rule 1(1), the plaint could have been amended without leave

before the pleadings were closed. Once the pleadings were closed, the plaint could only be amended with

leave of the Court. As

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the amendments were effected without the requisite leave of the Court, the same are hereby struck off the

record. However, the striking out of the amended plaint does not have any adverse impact on the plaint

which was filed on 4 May 1977. In other words, the plaint is still validly in place, and the plaintiff would

be entitled to prosecute it. The only time when the striking out of an amended plaint would dispose of the

suit is when the said amended plaint was valid; In other words, if the amended plaint was either filed

before close of pleadings, or otherwise if it was filed with leave of the Court. This preliminary objection

is overruled.

2. *Lazaro Kabebe v Ndege Makau and Anjelo Naibu Mugo* High Court civil case number 1222 of 1999

(OS).

It is the defendants submission that this suit was filed with an incurably defective supporting affidavit.

The said affidavit is said to have failed to meet the requirements of the Oaths and Statutory Declarations

Act (Chapter 15) of the Laws of Kenya. In particular, it is faulted for failing to conform to the form of

jurat, set out in the third schedule of that statute.

Rule 10 of the Oaths and Statutory Declarations Rules stipulates that the forms of jurat shall be those

set out in the third schedule. Thereafter, the third schedule sets out the form, as follows:

“Sworn before me

Declared

This ………………. day of …19 … at ………………………….

Commissioner for Oaths”.

The plaintiff’s affidavit in this suit has the following form of jurat:

“Sworn by Lazaro Kabebe on the 15 June 1999, in the presence of”.

The jurat is then embossed by the rubber stamp of the Commissioner for Oaths, Kirti Chunilal Shah,

whose postal address is shown as PO Box 45839, Nairobi.

There is no doubt that the affidavit does not have the form of jurat set out in the third schedule, and

for that reason, the defendants pray that it be struck out.

I note that the main flaw in the jurat is the failure to disclose the place at which the affidavit was

made. It is to be emphasised that whilst it is embossed with a “rubber stamp” which bears the name

“Nairobi” on it, that merely defines the postal address of the Commissioner for Oaths. The said reference

does not in any way indicate that the affidavit itself was sworn before the Commissioner for Oaths, when

he was at Nairobi. Even if the affidavit had been sworn before the same Commissioner for Oaths when he

was at Thika or Mombasa, the address of the Commissioner for Oaths would have remained the same.

The provisions of section 5 of the Oaths and Statutory Declarations Act stipulates that:

“Every commissioner for Oaths before whom an oath or affidavit is taken or made under this Act shall state

truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made”.

Thus by failing to state in the jurat where the plaintiff’s affidavit was made, the said affidavit offends the

provisions of section 5. For that reason, the defendants have asked the Court to strike it out. On the other

hand, the plaintiff asks me to treat the omission as a mere procedural defect, which does not invalidate

the affidavit.

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In the case of *DB Shapriya and Company Ltd v Bish International BV* [2002] 1 EA 47 at 49

Ramadhani JA expressed himself thus:

“I have surveyed the affidavit of Kishor Shapriya and it is glaringly evident that the jurat does not disclose the

place where the affidavit was made. Admittedly, there is a rubber stamp impression of Mr EI Moamry,

learned advocate, which has ‘Dar-es-Salaam’ on it. The rubber-stamp impression reads; ‘said HEI Moamry

Advocate Notary Public and Commissioner for Oaths, Dar-es-Salaam’.

This is on all fours with the *Narok Transit Hotel Limited and another v Barclays Bank of Kenya Ltd* [2001]

LLR 852 (CCK). The Learned Judge, Otieno J found the affidavit to contravene section 5 which is in *pari*

*materia* with our section 8 Professor Fimbo invited me not to be persuaded by that authority which he

regarded to be bad law because it omitted to discuss the purpose of section 5. He submitted that the purpose is

authenticity that the deponent was actually sworn. According to Professor Fimbo authenticity could be

achieved by the rubber stamp impression. So, to him the omission is trivial.

But as I have said above the requirements to be contained in an affidavit have all to be observed to make it

authentic. Here that has not been the case. It is not for the deponent to pick and choose what is and what is not

important”.

On my part, I do not think that the yardstick for determining the fate of the deficient affidavit is whether

the omission is trivial or important. I also believe that it is sufficient for the Court to take cognisance of

the fact that it is a requirement of the substantive statute. Parties ought therefore to accept it as such,

whether they deem it to be trivial or important.

In the *DB Shapriya* case (*supra*), Ramadhani JA upheld the preliminary objection against the use of

the defective affidavit. The law report did however not indicate whether the application itself was either

struck out or dismissed by Ramadhani JA.

In the case of *Amira (K) Ltd v National Irrigation Board* [2001] 2 EA 333, Mwera J declined to strike

out a plaint that was supported by a verifying affidavit which did not state, in the jurat, where the

affidavit had been sworn. He granted leave to the plaintiff to rectify the verifying affidavit.

In this case, the plaintiff relied heavily on the decision by Ringera J, in *Odongo v National Social*

*Security* [1999] LLR 1024 (CCK). In that case the Court expressed itself thus:

“Speaking for myself, I am in respectful agreement with Commissioner Visram, that by virtue of Order XVIII,

rule 7 of the Civil Procedure Rules, the Court has discretion to overlook any irregularity in the form of jurat

of an affidavit filed in any proceedings before it.

The words of the rule are plain enough. This view of the matter is fortified, if fortification is necessary, by

what the learned editors of Halsbury’s Laws of England (3 ed) Volume 14, state in paragraph 847. Citing

authority, they propounded that:

‘The parties cannot waive irregularities in the form of a jurat, but where the place of swearing is

omitted, the Court may possibly assume that the place was within the area in which the notary before

whom it was taken was certified to have jurisdiction and the irregularity, may be overlooked’.

From the above commentary, it would appear as if the mischief sought to be cured by the rule in England was

the need to state the place where an affidavit was taken, was the possibility of taking of affidavits by

commissioners or notaries outside their area of jurisdiction. That sort of mischief would not appear to be real

in a case such as the present one where the affidavit is clearly taken in Kenya by a Kenyan Commissioner of

Oaths, for the reason that section 4(1) of the Oaths and Statutory Declarations Act

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empowers a Commissioner for Oaths to administer an Oath or taken an affidavit in any part of Kenya”.

I find the reasoning of Ringera J to be wholly sound, and I do adopt it herein. I therefore conclude that

whereas the omission in the jurat is obvious, the same is not fatal. I do accept the affidavit pursuant to the

discretionary power donated to this Court by the provisions of Order XVIII, rule 7. Thus,

notwithstanding the defect in the jurat, I do receive the affidavit of the plaintiff, for use in this suit. I have

decided to exercise my discretion in this manner as I hold the considered view that the acceptance of the

affidavit does not occasion any prejudice to the defendants. And whereas, I may in some instances be

more inclined to direct that the affidavit be re-sworn and filed within a stipulated period of time, I think

that in the circumstances of these old cases, in which the defendants only raised the preliminary objection

at the eleventh hour, it is best that no more time be lost. One case was filed in 1977, and the second one

in 1999, and after the parties had agreed on the statement of issues to be placed before the trial court, and

when the trial was set to commence in December 2003, the defendants raised this preliminary objection. I

do not think that the timing of the said preliminary objection speaks favourably of the defendants’ desire

to have the cases proceed expeditiously. This preliminary objection is overruled.

3. Subject matter non-existent (?) The defendants have asserted that the land which is the subject matter

in *Lazaro and Silas Njogu v Ndege Makau and Silas Njogu Mariano* High Court civil case number

963 of 1977 does not exist.

However, much as that preliminary objection was cited by the defendants, they did not canvass the point

before the Court. The said preliminary objection is thus overruled.

4. *Lazaro Kabebe v Ndege Makau and Anjelo N Mugo* High Court civil case number 1222 of 1999 (OS)

“is based on a lie”.

In order to advance his submissions to support this preliminary objection, the defendants counsel, Mr

Ngare, said that the plaintiff had not been on the suit property for an uninterrupted period of 12 years. He

then started narrating the history of the plaintiff’s occupation, in an endeavour to make his point.

However, Mr *Ndege*, advocate for the plaintiff raised an objection to that line of submissions. He said

that the defendant’s advocate was precluded from adducing evidence from the bar. He emphasised that it

was not permissible for evidence to be led on an issue that was raised as a preliminary objection, because

the proper place at which evidence ought to be given was at the trial.

The defendants advocate insisted that he was entitled to put forth, before the Court, such material as

was necessary. He contended that his right to put forward such material was founded upon the fact that

he was an officer of the Court.

At that point in time, I did make a ruling on the following terms:

“A preliminary objection ought to be founded strictly on the law or material which is apparent on the face of

the record. It would be improper for any party raising a preliminary objection to seek to adduce evidence

before the Court. Therefore the objection by the plaintiff is upheld.

The defendants are directed to limit their preliminary objection accordingly.”

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I then invited the defendants advocate to proceed with his preliminary objection, within the limits set out

in my ruling. However, he then indicated that he had finalised his said preliminary objection.

In my considered opinion, the defendants did not make out any substantive material upon which the

Court could determine whether or not this originating summons was based on a lie. Therefore this

preliminary objection is overruled.

Accordingly, I have overruled all the four (4) grounds of preliminary objection that were raised by the

defendants. The plaintiff shall have the costs of the said preliminary objections.

The parties are hereby directed to make haste in setting down for trial, these consolidated suits. And

the registry is requested to facilitate an expeditious disposal of the suits, by allocating hearing dates on a

priority basis.

For the plaintiff:

*Mr Ndege* instructed by *S Ndege & Co*

For the defendants:

*Information not available*