



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CIVIL CASE NO.9 OF 2000**

**HESBON JUMBA SHABAN )**

**PHANICE AGEYO JUMBA ) ..... PLAINTIFFS**

**VERSUS**

**NATIONAL BANK OF KENYA .....DEFENDANT**

**R U L I N G**

The plaintiff in his preliminary objection dated 06/07/10 urges the court to strike out the affidavit of one Damaris Wanjiku Gitonga sworn on the 26/10/10 for offending the provisions of Order XLIX Rules 5,6,7 of the Civil Procedure Rules. Mr Benja for the plaintiff argued that the said affidavit is a duplicate of the earlier affidavit by the same deponent which was withdrawn from the record on 13/10/09. The Defendant is stopped under section 120 of the Civil Procedure from filing a duplicate of the same affidavit which was withdrawn. The affidavit was also filed out of the time given by the court.

Mr Omayo for the Defendant opposed the objection on grounds that the said affidavit is not a duplicate of the earlier affidavit. It was further submitted that the leave of the court was obtained to enlarge time. The affidavit is therefore properly on record.

I have perused the record of the court. It was on 13/10/09 that the affidavit of Damaris Wanjiku Gitonga was expunged from the record on application by the counsel for the Defendant. The Applicant was given seven days within which to file a fresh affidavit. The seven days were to expire on 20/10/09. The affidavit in issue now was filed on the 26/11/09 which was over one month after the time allowed by the court expired. It follows that the affidavit is incompetent for that reason. The record shows that the Defendant did not apply for extension of time.

On perusal of the contents of the two affidavits, I find that they are the same word by word and paragraph by paragraph. When the application to expunge the affidavit sworn on 29/09/09 was made, Mr Omayo said that the affidavit had the wrong date and that the Defendant wished to correct the date. The only difference I see in the two affidavits is the dates:

- (a) when the affidavit was sworn and
- (b) in paragraph 3 the date of the application

The first affidavit was sworn on 29/09/09 while the second one was sworn on the 26/10/09. In paragraph 3, the date of the application was changed from 19<sup>th</sup> May 2000 to read 19<sup>th</sup> May 2009. The Defendant was not specific on which date he intended to correct. Neither was this explained during the hearing of this objection. If it is only the date that was to be changed, then there is no harm done by duplicating the contents of the affidavit save the date. The case of **Kotak Ltd Vs Kooverji & Another** relied on by the plaintiff relates to a res judicata application. I find no relevance of the decision to the facts of this case.

To that extent the affidavit sworn on 26/10/09 was filed out of time without leave, I uphold the preliminary objection and hereby strike out the affidavit for being improperly on record. The Defendant to meet the costs of this objection.

**F.N. MUCHEMI**

**JUDGE**

Ruling dated and delivered in the presence of Mr Barasa for Gicheru for plaintiffs and Mr Makokha for Rachuonyo & Rachuonyo for defendant on the 9<sup>th</sup> March 2011.

**F.N. MUCHEMI**

**JUDGE**