REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 539 of 2004

NATIONAL BANK OF KENYA LIMITED…….....……PLAINTIFF

VERSUS

E. MURIU KAMAU

NJOROGE NANI MUNGAI *both trading as*

MURIU MUNGAI & COMPANY ADVOCATES……..DEFENDANT

JUDGEMENT

The plaintiff is one of the leading banks in the Republic of Kenya while the defendant is one of the prominent firm of advocates. Before this dispute they had a client/advocate relationship which has since gone sour. The basis of this dispute arises from the relationship of client/advocate which has broken down. Sometimes in 1996 the plaintiff Bank advanced some money to **M/S Tai Jean Garments Limited**. The plaintiff enlisted the defendant to recover the debt outstanding on the account of **Tai Jean Garments Limited** which debt as at 27th January 2000 stood at over Kshs.95 million. The plaintiff sent the relevant documents concerning the debt to the defendant in order to get a proper advice on the success of its case against the said company. In a letter dated 18th May 2000 the defendant gave the plaintiff Bank the following opinion on the strength of the documents supplied to them. It is important to quote the opinion;

(1) In our considered view you will be able to establish some liability as against the debtor and also the three guarantors.

(2) The exact quantum of that liability will depend on your ability to put together a clear and comprehensive statement of accounts. This is absolutely crucial.

(3) It will not be sufficient in this case for you to merely present a statement of accounts.

The advocate went further and advised the bank that there were major irregularities in the way the transaction was conducted by the Bank. The advocate stated that the major weakness of the plaintiff's case was on documentation. And in short the advocates made the following recommendations;

(a) In our considered view and subject to the availability of the source of transactional documents, you have a fair chance of success in a suit against the debtors. The actual amount may not be as per in the statement since we expect some interest to be disallowed owing to the irregular conduct on the accounts by your staff.

(b) The Company has been placed under receivership. As such your options lie with the guarantors.

(c) If the guarantors are people of means we would recommend that suit be filed against them.

In a letter dated 20th June 2000 the Bank instructed the Advocate to proceed and issue a formal demand against the three directors who have signed the guarantee documents. On 26th June 2000 the Advocates sent out a demand letter to the three guarantors and demanded a sum of Kshs.10 million being the amount guaranteed by them on the debt due from **M/S Tai Jean Garments Limited**. After the lapse of the demand notice the Advocates in a letter dated 11th August 2000 stated as follows;

"**We refer to the above matter and advise that we have filed suit herein and are awaiting issuance of summons. Enclosed find verifying affidavit to support the claim to be signed by Mr. Mwangi. According to the new rules plaints must be accompanied by an affidavit. Return the affidavit to enable us proceed."**

Again in a letter dated 21st August 2000 the Advocate informed the bank that they had filed HCCC No.1464 of 2000 against **Hulashba N. Darbar, Bhupendra Darbar & Naresh Darbar**. In the same letter the advocates sent a copy of the plaint to the bank for information and record. In the plaint dated 24th July 2000 the bank sought for judgement against the defendant jointly and severally for;

(a) Kshs.10 million.

(b) Costs of the suit and interest at a rate of 36% per annum calculated on daily basis and applied monthly from 15th October 1996 till payment in full.

The 1st and 2nd defendant in HCCC No.1464 of 2000 instructed the firm of **Desai, Sarvia & Palla** Advocates while the 3rd defendant instructed the firm of Sharpley Barret & Co. Advocates. The matter was then set down for hearing and on several occasions the matter was adjourned. The defendants then filed a preliminary objection which was canvassed on 15th April 2002 before Mwera J. The objection was dated 16th July 2001 and basically it was that the verifying affidavit for the plaint is contrary to section 5 of Cap 15. It was the submission of the Advocates for the defendants that the Plaint be struck out since it was contrary to Order 7 rules 1 & 2 of Civil Procedure Rules and contrary to section 5 of Cap 15 Laws of Kenya.

When it came to the turn for the bank's Advocates to reply **Mr. Mungai** learned counsel for the bank submitted as follows:

"**We do agree that the verifying affidavit contravenes section 5 of Cap 15 Laws of Kenya. But court should apply its discretion and find that the affidavit is not curably defective. Section 5 of Cap 15 are obligatory on the commissioner. Here the plaintiff or its counsel did not effect that omission so that error on the part of the commissioner should not be visited on the plaintiff."**

After hearing the objection by the defendants and the reply of the plaintiff Mwera J reserved the ruling on 29th April 2002. The ruling was not delivered on that day but delivered on 6th May 2002. On that day the Advocates for the bank did not attend the delivery of the ruling. In that ruling the Judge agreed with the objections raised by the defendants and upheld the preliminary point by striking out the plaint together with the verifying affidavit with costs. In doing so the Judge held;

"**The verifying affidavit filed along with the plaint herein is invalid in the light of Section 5 of the Act which in mandatory terms says:**

"***5. Every commissioner for oaths before whom any 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"***

Both sides have agreed here and it is clear from the affidavit in issue that it did not comply with Section 5 aforesaid in that it did not state the place at which it was made. The provision of law is mandatory and non-compliance with it is fatal. The court was not told by either side the mischief Section 5 was meant to curb and so no further remarks need to be made of it. The plaintiff had the obligation to ensure that the documents placed before the court comply with the law. Section 5 of the Act cannot be superseded by the subsidiary legislation (Order 18 Rule 7 Civil Procedure Rules). This court is equally bound by Order 7 Rule 1(2) Civil Procedure Rules which in mandatory terms requires that every plaint shall be accompanied with a verifying affidavit. That affidavit must be valid. If it is defective as the one herein, then it leaves the plaint hanging. No second affidavit will save it after the initial affidavit is found invalid and struck out. With it goes the plaint.

The preliminary point is upheld. The verifying affidavit and accordingly the plaint herein are struck out with costs of this application and the suit going to the defendants. If time is still in favour of the plaintiff, it may consider bringing a fresh suit properly instituted."

After the suit was struck out the Advocates addressed a letter dated 16th May 2002 to the bank. It is important to reproduce that letter;

"***HCCC NO.1464 2000 MILIMANI***

YOURSELVES –VS- HULASHBA N. DARBAR 7 OTHERS

We refer to the above matter and advice that the defendant applied to have the suit dismissed on the grounds that the verifying affidavit thereof did not in the Jurat state where the oath was taken.

We opposed the application. The learned judge, Justice Mwera, however, agreed with the defendants and dismissed the suit. A copy of his ruling thereof is enclosed. We have lodged a notice of appeal and applied for proceedings as we propose to appeal the said ruling.

THE LAW

The point on which the suit was dismissed has been the cause of much controversy and has resulted in a sharp division on opinion in the High court. The high court has taken two divergent positions on the matter.

Justice Ringera and Justice Vishram

One school at the High Court has held that defects in the verifying affidavit are not fatal. Further that even where a verifying affidavit is struck out, the plaintiff can file a subsequent affidavit to remedy the defect. As such a suit should not be struck out on the basis of a defective verifying affidavit. Justice Ringera has gone further to hold that even if a suit was filed without a verifying affidavit it can still be remedied by filing an affidavit.

This position is best captured by the decision of Justice Ringera in the case of Microsoft

Corporation –vs- Mitsumi Computer Garage Ltd & Anor, HCCC No.810 of 2001 (unreported). It is also the position taken by Justice Vishram in Agip (K) Limited –vs- Jimmy Komo t/z Kiambu Stores HCCC No.1738 of 2000 (unreported).

Justice Onyango Otieno and the late Justice Hewett.

The contrary position is taken by Justice Onyango Otieno in James Francis Kariuki & Anor –vs- United Insurance Company Limited, HCCC 1450 of 2000 (unreported) and the late Justice Hewett in the Eastern and Southern African Development bank –vs- African Green Fields Limited HCCC 1189 of 2000 (unreported).

They hold that the provisions of the Oaths and Statutory Declarations. Act Cap 15 that the Commissioner for oaths must state where he takes the oath are mandatory.

Breach of the same in their view invalidates the verifying affidavit. Once a verifying affidavit is struck out in their view, the suit must likewise be struck out.

STALEMATE

The position at the High Court then is that suits will be either dismissed or saved pending on which judge they go to. This position will prevail until the court of appeal makes an authoritative decision on the dispute.

RECOMMEDATION

In our considered view and with respect to the dissenting judges, the position taken by Justice Ringera and Justice Vishram is the correct interpretation of the law. You will note from copies of their rulings that they take into account their rivals rulings and point out why they disagree with them.

The opposite side, the Justices Onyango Otieno/Hewett School do not give as detailed an analysis of the issues nor do they take into account arguments of the rival school.

In our considered view, the Justice Ringera/Vishram School is the proper law. We would recommend that you appeal the ruling.

We have set in motion the process by filing the notice of appeal. Confirm if we may do so.

We enclose herewith copies of the rulings referred to above that set out the conflicting positions. We referred Justice Mwera to these but he did not analyse or distinguish the same in his ruling.

The alternative to an appeal is that you can re-file the suit as it was not thrown out on substantive grounds. We await your substantive instructions herein."

In reply the letter dated 16th May 2002 the bank stated;

"***We refer to your letter dated 16th May 2002 and the meeting held in our offices on 12th June, 2002 between your Mr. Mungai and the undersigned.***

You have given us two options in this matter. One is to appeal against the ruling which dismissed our plaint and the other is to file a fresh suit. Urgently let us know the most efficient option to take and one which will be cost effective and time saving.

Yours faithfully

Z. K. MOGAKA (Mrs)

MANAGER – LEGAL SERVICES."

It appears after the exchange of correspondences the advocates filed a notice of appeal dated 16th May 2002. The said notice was filed in court on 21st May 2002. In that notice, the Notice of appeal was in respect of the decision by Mwera J given at Nairobi on 29th day of April, 2002. In a letter dated 16th May 2002 to the Deputy Registrar of the High Court Nairobi, the advocates requested to be furnished with certified copies of the proceedings and ruling delivered on 29th April 2002 by Mwera J to enable them to file an appeal against the said ruling.

In a letter dated 13th June 2002 the advocates wrote to the bank to give further opinion on the mode and procedure to be adopted in rectifying the ruling delivered by Mwera J and which struck out the plaintiff's suit. It is important to reproduce the contents of that letter;

"***We refer to the above matter, our letter dated 16th May, 2002 and the meeting held at your offices on 12th June, 2002.***

As advised you have two options in this matter;

1. ***To file a fresh suit,***

2. ***to file an appeal***

APPEAL

As stated in our opinion of 16th May, 2002 the issue raised has not been determined by the court of appeal. In our considered view the position as set out by Justice Ringera is the correct law. However, we cannot say authoritatively what position the court of appeal will take.

There is therefore the chance (however remote) that the appeal may fail. If it does then you would have to file a fresh suit after the appeal is determined. The danger there is that if the appeal takes too long to be heard then you may find that you are barred by limitation from filing a fresh suit.

It would therefore be prudent to file a fresh suit to avoid uncertainties of an appeal. If you file a fresh suit you shall have to pay court filing fees of Kshs.70,150/=.

Confirm the course of action we should adopt. If you agree with our recommendation then forward your cheque for the court filing fees of Kshs.70,150/=."

In a letter dated 17th June 2002 the bank instructed the advocates to urgently proceed to file a fresh suit to avoid the claim being time-barred in the event the bank loses the appeal. That letter was followed by a letter dated 17th June 2002 from the advocates to the bank informing the bank that the defendant's bill of costs for the dismissed suit was taxed on 14th June 2002 and the ruling would be delivered on 18th June 2002. The advocates again wrote a letter dated 21st June 2002 advising the bank that the bill of costs was taxed as follows:

(i) 1st and 2nd defendants were awarded Kshs.343,648/= each for a total of Kshs.687,296/=

(ii) The 3rd defendant was awarded Kshs.352,420/=

Kindly make out cheques in the names of Desai, Sarvia & Pallan Advocates for Kshs.687,296/= for the 1st and 2nd defendant and Sharpley Barret & Co. Advocates for Kshs.352,420/= for the 3rd defendants to avoid execution.

We shall forward the plaint and verifying affidavits under separate cover."

The bank replied through a letter dated 24th June 2002 and expressed its displeasure at the amount it was required to pay as costs to the defendants for the suit which was struck out. The letter states as follows;

"***We acknowledge receipt of your letter dated 21st June, 2002 and have noted the contents therein.***

We are dismayed at the amount of money the Bank is required to pay as costs in this matter. Please confirm that you attended the taxation and the amount is correct as assessed.

In the meantime, we note that the reason our case was struck out is because of an omission in the affidavit which was caused by yourselves. In the circumstances, we hold you liable for the loss we have incurred in this matter including court filing fees and the taxed costs.

If you think you have a good chance of success in the appeal, we instruct you to proceed with the same without any further delay. Should you however find that you do not have sufficient ground for appeal, we suggest that you compensate us the loss incurred including the taxed costs and court filing fees. We expect your response as soon as possible but not later than 7 days from the date hereof.

In the meantime, once you confirm that the taxed costs are correctly assessed, we shall effect payment to avoid execution."

The above letter is an expression of the first fall out between the bank and the advocates and it is also the foundation of what would be a long and protracted dispute over the suit which was struck out. From then the parties removed the kidgloves from their hands in order to be ready for the battle that would be the subject of this determination. The advocates in a letter dated 25th June 2002 tried to inform the bank that they were not liable for what happened to the suit and the incidental costs incurred by the bank. The letter says as follows:

"***We set out at length in our letter of 16th May, 2002 our considered view of the learned judge's dismissal of the suit.***

As stated in our opinion it is our considered view that the learned judge was wrong in dismissing the suit. We are fortified in our view, as stated by the rulings of Justices Ringera and Vishram referred to in our letter.

In our respectful view, we are not liable for the costs and filing fees incurred here which flow in our view, from a wrong decision in law. Liability is therefore denied. In our view there are good grounds to appeal the learned judge's ruling.

We however note that you have decided to move the file herein to another firm of advocates with instructions to file a fresh suit.

By filing a fresh suit, you will lose the opportunity to correct the learned judge's ruling on appeal.

Be that as it may we note your instructions to pass on the file to Rachuonyo & Rachuonyo Advocates. We shall forward our final fee note tomorrow and release the file to them upon payment of our fees."

The above letter is a second indication that all was not well between the bank and the advocates and that the relationship was about to be thrown to the dogs. This was followed by a letter dated 27th June 2002 from the bank to the advocates in which the bank enclosed cheques in respect of the costs awarded by court and taxed against them by the Deputy Registrar. The letter says in part;

"***As indicated in our letter dated 24th June 2002 you should proceed with the appeal if you have sufficient grounds to support your case. We have discussed and agreed with M/S Rachuonyo & Rachuonyo advocates on how to handle the fresh suit. In the meantime we forward herewith our cheque No.007141 for Kshs.352420/= payable to Sharpley Barret & Co. Advocates and cheque No.007142 for Kshs.687296/= payable to Desai, Savia & Pallan Advocates. "***

At this time there was another advocate who had come into the picture and in a letter dated 26th June 2002 **M/S Rachuonyo & Rachuonyo** enquired from **M/S Muriu Mungai & Co.** Advocates as to when limitation in the case set in. The advocates incidentally did not reply to that letter and **M/S Rachuonyo & Rachuonyo** advocates followed it in a letter dated 8th July 2002 seeking response from the earlier letter. The bank in a letter dated 29th July 2002 enquired from the Advocates what was holding the release of the file to M/S Rachuonyo & Rachuonyo as earlier been instructed. The advocates reply came in a letter dated 29th October 2002 asking for settlement of their costs to enable them to forward the file to **M/S Rachuonyo & Rachuonyo** Advocates. The advocates sent a fee note of Kshs.2,838,899/=. This was followed by another letter from the Advocates again asking for settlement of their fee note and threatened that they may be forced to tax their bill and thereafter execute against the bank.

In a letter dated 17th December 2002 the bank wrote to the advocates and stated as hereunder;

"***Your Mr. Mungai last informed the undersigned that you were awaiting for typed proceedings to enable you file the appeal. Urgently let us know whether you have now filed the appeal. As indicated to you earlier you should proceed with the appeal if you have sufficient grounds to support your case. Kindly confirm the position to us at the earliest."***

In a letter dated 6th January 2003 **M/S Rachuonyo & Rachuonyo** Advocates wrote to the bank and stated;

"***We need your clear instructions on our letter dated 3rd December 2002 to enable us proceed with speed. We do not wish to file a defective plaint, and request to see all existing pleadings to consider fully the contents of the intended new plaint and all relevant issues including limitation and cause of action."***

When the bank got the above letter, it proceeded to write a letter dated 17th January 2003 to **M/S Muriu Mungai & Co.** Advocates. And in that letter the bank stated as follows;

"***We refer to past communication on the above matter.***

We are anxious to know whether you have filed the appeal as instructed. Kindly note that we expect you to conclude the appeal as our decision on your potential liability to us will depend on the outcome of the appeal. We therefore, urge you to pursue the issue

vigorously and conclusively. Failure to pursue the appeal will be deemed as an admission of liability in which case we can discuss the issue of quantum. Kindly letter us hear from you at the earliest."

This was the third warning shot fired by the bank towards the advocates but it appears it did not illicit a quick and comprehensive answer from the advocates.

In a letter dated 18th February 2003 the bank again addressed the advocates as hereunder;

"***We are unable to understand your silence in this matter despite its urgency. Do we take it that you are admitting liability?***

Kindly note that if you fail to respond within seven days from the date hereof we shall instruct our lawyers to make formal demand."

The above letter is a clear manifestation that the advocates/client relationship had broken down and on the same breadth the bank clearly intimated to the advocates that all was not well in their relationship. The bank in a letter dated 14th July 2003 addressed the advocates as hereunder;

"***We refer to the above matter and telephone discussion this morning between your Mr. Mungai and the undersigned.***

Mr. Mungai advised that you have not yet obtained the typed proceedings to enable you file the appeal. Note that it is one year since our case was dismissed and we are of the view that by now you should have filed the appeal. What is holding the proceedings?

If the delay is caused by the court, kindly let us know if it would be in order for us to write directly to court to protest the delay.

In the meantime, as discussed and agreed, kindly release copies of all the documents required by M/S Rachuonyo & Rachuonyo Advocates. Our Mr. G. Rutto of Harambee Avenue branch will call on you to identify the relevant documents."

What followed that is a demand letter to the advocates where the advocates were being asked to admit liability for the events that had caused the bank to lose its case and failure of the advocates to file an appeal and at the same time to release the documents to M/S Rachuonyo & Rachuonyo Advocates. The plaintiff then filed the present suit on 5th October 2004. And in paragraph 6 of the plaint, the plaintiff contends as hereunder;

"**By the said retainer, it was agreed or contemplated between the parties that the Defendants in the performance and/or execution of the Plaintiff's instructions, shall, inter alia:**

(a) Carry out the Plaintiff's instructions by all proper means;

(b) Follow the correct procedure in pursuing the Plaintiff's case;

(c) Exercise reasonable care and skill;

(d) Adopt recognized methods of Legal drafting;

(e) Observe statutory requirements in drafting and presenting cases to Court;

(f) Protect the Plaintiff's interests by all proper means;

(g) Keep the Plaintiff informed of the progress of the matters;

(h) At all times make available to the Plaintiff all documents relating to its matters and;

(i) Promptly respond to the Plaintiff's inquiries.

And in paragraph 7 the plaintiff contends;

"**In execution of the Plaintiff's instructions, the Defendants drew pleadings and filed a suit namely H. C.C.C. No.1464 of 2000 at Milimani Commercial Court between the Plaintiff herein (as Plaintiff therein) and the Guarantors (as the Defendants therein) for recovery of Kshs.10,000,000.00 with interest at 36% per annum from 15.10.96 and cost. The Plaintiff shall at the hearing refer to the Plaint and verifying affidavit for their full tenor meaning an purport."**

The cause of action against the defendant has been defined and/or stated in paragraph 12 of the Plaint;

"**The Defendants have therefore breached the express, implied or contemplated terms of the retainer agreement.**

Particulars of breach of contract.

(a) Drawing and filing defective pleadings;

(b) Failing to carry out the instructions of the Plaintiff by proper means;

(c) Failing to observe statutory requirements in drafting the Plaint and verifying affidavit;

(d) Failing to disclose where the verifying affidavit was drawn;

(e) Failing to take remedial measures or other steps to prevent the striking out of the suit;

(f) Failing to lodge or file appeal as instructed;

(g) Failing to inform and keep the Plaintiff informed of the progress of the matters;

(h) Failing to avail to the Plaintiff necessary documents relating to the matter including files, rulings and orders;

(i) Withholding documents and information relating to the matter and

(j) Failing to attend to the Plaintiff's instructions with reasonable care and skill.

In paragraph 14 & 15 of the Plaint the plaintiff avers as follows;

14. In the alternative and without prejudice to the aforegoing, the Plaintiff avers that the Defendants were negligent in drafting, filing and prosecuting the claim, and in failing to file the appeal.

Particulars of negligence

(a) Filing a defective suit;

(b) Failing to exercise reasonable care and skill;

(c) Failing to observe mandatory rules and regulations;

(d) Failing to disclose where the verifying Affidavit was drawn;

(e) Failing to take action as to prevent the striking out of the suit;

(f) Failing to observe common professional practice;

(g) Failing to notice the defect in the Verifying Affidavit;

(h) Failing to remedy the defect in the Verifying Affidavit in good time or at all;

(i) Allowing the suit to be struck out;

(j) Failing to file the intended appeal; and

(k) Failing to inform client of the progress of suit.

15. As a consequence, the Plaintiff has suffered loss and damage.

Particulars of loss and damage

(a) Kshs.1,039,716.00 being costs awarded to Defendants in HCCC No.1464/2000

(b) Kshs.2,838,899.98 being costs paid to the Defendants herein.

(c) Kshs.10,000,000.00 with interest at 36% per annum from 15.10.96 until full settlement.

(d) Kshs.71,000.00 being filing charges of HCCC No.1464/2000.

In their defence dated 10th November 2004 the advocates contend that it is true that sometimes between January and February 2000 they were requested to peruse various files relating to a debt of Kshs.95839627.60 allegedly owing to the plaintiffs by a company known as **Tai Jean Garments Limited** and guaranteed by some of its directors. It was then that **Mr. Njoroge Nani Mungai** Advocate visited the Plaintiff's offices and held meetings with its officials in order to peruse the files and advise the bank on the contents. It is alleged that the records availed to the 2nd defendant revealed that the plaintiff had the opportunity to recovery of its outlay to **Tai Jean Garments Limited** from proceeds of letters of credit that had secured the advances thereof but had failed to do so. It is also contended that there had been deliberate suppression of internal bank vouchers that would have enabled the bank to recover the money advanced to **Tai Jean Garments Limited**. The bank was also asked by the advocates whether it had reconciled its statement of accounts and made adjustments to reverse and write bank interest charged for late credits that had arisen from suppression of vouchers. The advocate also found that payment instructions effected by the plaintiff to **Tai Jean Garments** account had been done or were signed by persons who did not have the legitimate instructions or mandate. There were also discrepancies in the documentation creating and evidencing the facilities. The advocate then advised the bank and expressed reservation on success of the claim of Kshs.95 million against **Tai Jean Garments Limited**.

It was then that the decision to pursue the directors and/or guarantors was arrived at since the principal debtor had gone under. It is the contention of the defendant that the decision by the plaintiff to file suit was made in full knowledge of the inherent weakness of their case. However, the advocates allegedly carried out the instructions to file suit properly, professionally

and exercised due care and conformed to the common practice of lawyers in Kenya in drawing up the plaintiff and the affidavit in question.

In paragraph 9 the defendants contend that;

i) They informed the plaintiffs promptly of the striking out of the verifying affidavit in question, gave them their professional opinion on the ruling and set out the options available to the plaintiffs.

ii) Specifically the defendant adviced the plaintiffs that the ruling was contrary to existing High court decisions and was in the defendants considered view wrong in law.

iii) Further that the plaintiffs had the option of either appealing the said ruling or in the alternative filing a fresh suit.

iv) That as a pre-caution the defendants filed a notice of appeal on time and requested for typed proceedings to facilitate an appeal.

v) That the plaintiff elected to file a fresh suit despite the defendant's express opinion that filing a fresh suit would disentitle them to an appeal.

vi) The plaintiffs requested the defendants to release requisite documents to M/S Rachuonyo to enable them file a fresh suit which was done.

And in paragraph 11 and 12 the defendants contend;

11. The defendant further deny that they were negligent as alleged in paragraph 14 of the plaint or at all and repeat paragraph 3-9 of the defence. In particular the defendant;

i) Deny that they filed a defective suit as alleged.

ii) Aver that they exercised proper care and skill and conformed to the practice of drafting that was common in Kenya.

iii) Aver that they made spirited arguments in defence of the striking out of the affidavit.

iv) Aver that they commenced the required actions to file an appeal but the plaintiffs elected to file a fresh suit instead.

12. The defendants deny that the plaintiffs suffered the loss and damage set out in paragraph 15 and further aver that by electing to file a fresh suit the plaintiffs opted to forego their right and the opportunity to mitigate any loss. Further the defendants;

i) Aver that costs paid to the defendant in HCCC 1464 of 2000 would have been reversed on appeal. The plaintiffs opted to forego this option by filing a fresh suit.

ii) Aver that the defendants have not been paid their fees for acting in that suit.

iii) Aver that the plaintiffs cannot claim the principal amount due in HCCC 1464 of 2000 from the defendant since they elected to file a fresh suit thereof as that would amount to unjust enrichment.

iv) Aver that the plaintiff's claim in HCCC 1464 of 2000 was in any event not certain in light of the discrepancies in the Plaintiff's records and the deliberate actions of its staff detailed above.

v) Aver that HCCC 1464 of 2000 was a speculative suit filed by the Plaintiff in spite of the defendant's advice. And the defendants plead the doctrine of volenti non fit injuria.

vi) The defendants repeat (i) – (v) above in respect of the claim for filing fees.

The plaintiff called one witness who heavily relied on documentary evidence that were produced before court on consent of both sides. In her evidence she stated that the defendant was instructed pursuant to a retainer to file suit HCCC No.1464 of 2000 in Milimani Commercial Courts. That suit was struck out on 6th May 2002 with costs to the defendants on the ground that the verifying affidavit was defective. She stated that the defect leading to the striking out of the suit was identified as non compliance of section 5 of Cap 15 Laws of Kenya. More particularly that the jurat did not indicate the place of his commissioning.

In her evidence she contended that the affidavit together with the plaint was drawn by the defendant herein. She also contended that the advocate **Mr. Nani Mungai** who is the 2nd defendant in his submission before court conceded that the verifying affidavit did not comply with section 5 of Cap 15 Laws of Kenya therefore, the position taken by the plaintiff in this matter is that the defendant ought to have drawn a proper affidavit and in failing to do so they were negligent. It is also the position of the plaintiff that the advocates knew of the provisions of law requiring them to disclose the place where the affidavit is sworn and in proceeding to prepare and file an affidavit which was improper, they acted without reasonable care which they owe to the plaintiff. It is further contended that the defendants failed to notice the defect in the affidavit in good time despite a preliminary objection having been raised by the defendants in that suit. It is the position of the plaintiff that the defendants took no steps to remedy or correct the defect.

It is also the evidence of the plaintiff that upon striking out of the suit the defendant gave an opinion to the plaintiff in which opinion they said that the plaintiff had a good chance on appeal and required the bank to pursue an appeal and also file a fresh suit, which fresh suit was to lay dormant pending the hearing and determination of the intended appeal. The plaintiff contends that it gave the defendants full and proper instructions in order to remedy the situation. In conclusion it is the case of the plaintiff that the defendants had not filed appeal and has subsequently refused to release its documents and files to another advocate for perusal and further action. And that since no appeal was filed and that since the defendants had refused to reply to correspondences from the plaintiff, they are responsible for the losses incurred being the costs of the suit dismissed, the sum claimed in the earlier suit plus the costs of this suit.

The defendants on their part called one witness **Mr. Njoroge Nani Mungai** Advocate and who was personally dealing with the plaintiff's matter from the start to the end. He stated that after filing the plaint in HCCC No.1464 of 2000, he received a notice of preliminary objection by the defendants in that suit. He stated that it is true that they did not notify the bank of the filing of the preliminary objection because it raised a purely point of law. However, he prepared adequately for the preliminary objection and argued in opposition to it substantively before **Justice Mwera**. He relied on legal authorities and distinguished the ones relied upon by the defendant's advocates. The preliminary objection was upheld by the learned Judge that the verifying affidavit in support of the plaint was defective for failure to disclose the place the oath was taken as required by section 5 of cap 15 Laws of Kenya.

The evidence of **Mr. Njoroge Nani Mungai** before this court is that the omission was not on the part of the present defendant but on the part of commissioner for oaths. He contended that section 5 of Cap 15 places obligation of stating the place where the oath is taken on the commissioner. i.e. the date and the time the affidavit was sworn. It was also his evidence that the ruling was delivered on 29th April 2002 and he informed the bank through a letter dated 16th May 2002. In that letter he gave the bank two options to appeal or to file a fresh suit since the striking out was on technicality. He also stated that as a precaution he had filed a Notice of Appeal dated 16th May 2002 before getting substantive instructions from the bank. And that he

also contended that no ruling was delivered on 6th May 2002 as alleged by the plaintiff.

After the close of the respective cases the parties filed written skeleton submissions adequately supported by various authorities. The submissions were made by **Mr. Ojiambo** for the plaintiff and **Mr. Billing** for the defendants.

It is clear that the plaintiff enlisted the services of the defendant to recover a huge debt from **M/S Tai Jean Garments Limited**. At the time the debt stood at over Kshs.95 million. The defendants having perused the relevant documents and the law applicable advised the plaintiff herein to limit its claim to the sum of Kshs.10 million given by the directors of the said company plus interest at 36% per annum being the interest in the facility letter. The defendant advised the plaintiff bank to file suit and ask for filing fees and the necessary charges. No doubt the plaintiff accepted the advice and instructed the defendant's advocates to sue for Kshs.10 million as proposed. Based on that instruction the advocates through a plaint dated 24th July 2002 with a verifying affidavit and filed the same at Milimani as HCCC No.1464 of 2000 against the three directors of **Tai Jean Garments Limited**. The defendant in that suit instructed two firms of advocates and after various false starts the matter was set down for hearing on 15th April 2002.

Before the hearing date, the defendants in that suit filed a preliminary objection on a point of law dated 16th July 2001 seeking to strike out the plaint that the verifying affidavit did not comply with section 5 of Cap 15 Laws of Kenya. After hearing the rival submissions of both sides, the trial judge struck out the plaint with costs to the defendants. The basis of the current dispute can be rightly attributed to the preliminary objection dated 16th July 2001 and which was upheld by the trial court.

The question that arises is the legal position of a defective verifying affidavit filed on behalf of a party and who subsequently loses his claim by virtue of that defect. Section 5 of Cap 15 states;

"**Every commissioner for oaths before whom any 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."**

It is clear that the defendants were instructed to protect the interest of the bank in HCC No.1464 of 2000. The plaint and the supporting verifying affidavit was duly prepared by the defendants herein. The objection to the verifying affidavit came to the knowledge of the defendants herein through a notice dated 16th July 2001.

The objection was canvassed before the trial court on 15th April 2002. **Mr. Njoroge Nani Mungai** advocate in his submission readily conceded that the verifying affidavit contravenes section 5 of Cap 15 Laws of Kenya. The Defendants admit having drawn the verifying affidavit and **Mr. Njoroge Nani Mungai** also confirmed having checked it before filing it in court. In paragraph 8 of their defence the defendant maintained that in drawing the plaint and the affidavit in question they confronted the practice common in Kenya and that they were professional and exercised due care. They also contend that admission that the verifying affidavit was defective is qualified or conditional in that the verifying affidavit is not fatally defective and it was the duty of the commissioner of oaths under section 5 of Cap 15 Laws of Kenya to certify that the affidavit was in order. They also deny that they were negligent but admit that there was a mistake.

The question that falls for my determination in such circumstance is whether first it was the responsibility of the commissioner for oaths to detect and certify the affidavit was in correct form. And secondly whether the failure to conform to section 5 of Cap 15 is an ordinary mistake. It is also important for me to determine whether ignorance of a statute constantly being invoked constitutes to negligence. It has long been established principle that every

person who enters into the legal profession impliedly agrees to bring himself to a reasonable degree of care and skill, thus what is required of an advocate is a fair, reasonable and competent degree of skill. Therefore, there is plainly a duty on all advocates to exercise exceptional care in handling matters on behalf of their clients. However, the standard of care depends on the circumstances in each particular case. So long as there is an assumption of responsibility by the professional men, he owes a duty of care to all those relying on his skills and judgement.

I wish to state that it is impossible to find the correct answer on the facts to the plaintiff's claim until the relevant criteria for ascertaining whether or not there was a duty to take care has been clearly established. This court is aware of the dangers of imposing upon advocates or upon professional men in other spheres, duties which go beyond the scope of what they are requested to undertake. It is often true, that a particularly meticulous and conscientious practitioner would in his client's general interests, take it upon himself, to pursue a line of inquiry beyond the strict limits comprehended by his instructions. Under such situations the test is what a reasonable and competent practitioner would do having regard to the standards and limits normally and/or usually adopted in his profession. i.e. to deal with any hazards of the kind which should be obvious at the material time when the dance is in progress at the dance floor. In my view a party cannot be allowed to correct an error committed when the dance is over and the horse has bolted.

The point I am making is that a doctor who forgets his surgical materials inside the stomach of his client after closing the wound would be liable for negligence unless he can show that the surgical room was attacked by the illegal gang who endangered his life or that he found himself in an extraordinary or unusual circumstances at the time he was closing the wound. The law places a responsibility on all professionals to exercise prudent and reasonable care for the safety, security and protection and preservation of the property/life entrusted on them. One cannot escape liability by asking for half payment or for saying that what he/she did was reasonable. The test is not what he endeavours or undertakes to do but that which can meet the test of reasonability.

It is also important to note that an action by a client against an advocate alleging negligence in the conduct of the client's affairs is an action of breach of contract. It is also the law that where at the time of making a contract it is within the contemplation of the contracting parties that a foreseeable result of a breach of the contract will be to cause loss or damages then if a breach occurs which does bring about that result, damages are reasonable under that heading. In this case the bank instructed the advocate to take the proceedings at law to protect and return monies lost by the bank and as a result HCCC No.1464 of 2000 was commenced. The advocates in law were under a duty by contract to use reasonable care and to avoid putting the bank in a situation that would result in want of care. It must have been in the contemplation of the parties herein that if the advocates failed on their duty the bank would be susceptible to grave loss and damages.

The case of the defendant is that the plaintiff has not proved that they were grossly negligent and they relied on several authorities on that proposition. In **Champion Motor Spares Limited vs Phadke & others (1969) E.A. 42**, the Court of Appeal held;

"**An Advocate is not liable for any reasonable error of Judgement or for ignorance of some obscure point of Law, but is liable for an act of gross negligence or ignorance of elementary matters of law consistently arising in practice. ….on an advocate's liability for negligence, the English cases are not, I think, of great assistance, because the law in England relating to barristers is different from that relating to solicitors, while in East Africa we have a unified profession. In regard to negligence, as in all other matters, I think all advocates must be treated alike. It is clear from s. 72 of the Advocates Act (Cap.258), that advocates in Uganda may be liable for negligence and cannot divest themselves of that liability, and it would seem, from Barry v. Keharchand (1919), 8**

E.A.L.R. 102, that that liability extends to instituting proceedings on the instructions of a client, without informing the client that those proceedings were bound to fail. That seems to me analogous to the present position, where the respondents were, in the words of the plaint "instructed by the Plaintiff… to defend the Plaintiff and to take all steps necessary to protect the Plaintiff's interests in the said suit" and where they failed to advise their client that the third party proceedings could and should be resisted.

It is probable that the failure of the respondents to adopt this course was at least in part, due to the fact that there were three other suits arising out of the same accident, where the third party procedure was appropriate. While that might explain, it cannot, I think, excuse the mistake.

It was, I think, agreed by counsel, and I would agree, that an advocate cannot be liable for any reasonable error of judgement or for ignorance of some obscure point of law. He may, however, be liable for an act of gross negligence or ignorance of elementary matters of law constantly arising in practice. It is impossible to draw any precise line: ultimately, every case will be one of degree."

In the same judgement **DUFFUS, Ag. V.P**. of the court had this to say;

"**The extent of an advocate's liability to his client for negligence has been considered at various times by this Court. I would refer to the case of Stephens & co. v Allen (1918), 7 E.A.L.R. 197. This case went to the Privy Council (1921), 8 E.A.L.R. 211. The following extract from the judgement of the Privy Council is of some assistance:**

"***The question of negligence with regard to the performance of a solicitor's duty must to some extent be affected by the local conditions and the local circumstances, as to which their Lordships might not be perfectly informed. In the present case the negligence is alleged to be due to the ignorance of the provisions of an Act of Parliament. It may well be that in Nairobi this Act of Parliament has practically never been heard of in judicial proceedings; it is impossible for their Lordships to know; but the question as to whether a solicitor is negligent or not in omitting to give effect to a statutory provision cannot be disentangled from the consideration of whether the statute that is involved is one which is of constant and common occurrence in practice or whether it is one unfamiliar and remote. With those circumstances their Lordships are unable to deal".***

RUSSEL, J., in his judgement on appeal considered this question very fully and with respect has in my view, correctly set out the degree of care required by an advocate practicing in Uganda. He quoted from the following passages from the judgment of LORD DENNING, in the recent English decision of Rondel v Worsley, (1967) 3 All E.R. 993:

"***Finally it must be remembered that counsel is not liable in negligence merely because he expresses an opinion which ultimately turns out to be wrong nor merely because he overlooks one of a number of relevant authorities. Further, in spite of the expression of LYNSKEY, J., in Pentecost v London District auditor, (1951) 2 All E. R. 330 that so far as civil proceedings are concerned gross negligence is not known to the English Common Law, I remain of the opinion that counsel will only be guilty of crass negligentia or gross negligence by some really elementary blunder, see Purves v Landelll (1845), 12 Cl. & Fn. 91".***

I agree with RUSSEL, J., that the liability of an advocate to his client for negligence in performing his professional duties must generally arise from some really elementary mistake and not be an error of judgement on some complicated point or one of doubtful construction. Each case must depend on its own particular facts, and as SCRUTTEN, L. J., said in Fletcher & Son v Jubb Booth & Helliwell, (1920) 1 K.B. 275 at p. 280:

"***And moreover I accept the opinion of TINDAL, C.J., in Godefroy v Dalton, 6 Bing. 460, that it would be extremely difficult to define the exact limit by which the skill and diligence which a solicitor undertakes to furnish between that reasonable skill and diligence which appears to satisfy his undertaking, and that crassa negligentia, or lata culpa mentioned in some of the cases, for which he is undoubtedly responsible. It is a question of degree and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed"."***

The first question for me to determine is whether or not the defendant made any mistake or error in their handling of the plaintiff's case. The law is that an advocate is not guilty of negligence if he merely committed an error of judgement whether on matters of discretion or law. It is alleged that the plaintiff has not proved that the defendants were ignorant of law constantly arising in practice. And that the submission made by **Mr. Nani** before **Justice Mwera** shows that the issue of verifying affidavit is not elementary because there are conflicting decisions of the High Court. The defendant relied on the case of **Insurance Company of North America case [1960]EA page 993** where it was held;

"**What is necessary to maintain such an action? Most undoubtedly, that the professional adviser should be guilty of some misconduct, some fraudulent proceeding, or should be chargeable with gross negligence or with gross ignorance. It is only upon one or other of those grounds that the client can maintain an action against the professional adviser".....it would be extremely difficult to define the exact limit by which the skill and diligence….it is a question of degree and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed".**

In my understanding of the defendant's case is that an advocate is only responsible in negligence to his client for gross ignorance or gross negligence in the performance of his professional services. And that the advocates herein did what was expected of them in the circumstances of the case. It is also contended by the defendants that an advocate is not responsible for the failure of a case entrusted to his management when he pursues the ordinary and accustomed course in the conduct of it, except for gross negligence or ignorance. In essence to make an advocate liable there must be evidence to show there was a manifest want of skill or great negligence. And that you can only expect from an advocate that he will be honest and diligent and if there is no fault to be found either with his integrity or diligence, then he is not answerable. It is clear that it would be utterly impossible that you will ever find a class of men who would give a guarantee, binding themselves, in giving legal advice and conducting suits to be always in the right. In general an advocate owes a duty to his client to take reasonable care not only to protect his client against committing a breach of the law but also to protect him against a risk being in a litigation which is hopeless. However, it may not be part of the duty of an advocate to know the success or guarantee, a success in a litigation, yet it is his duty to take care, not to draw wrong or defective documents on behalf of his client.

The gist of the plaintiff's claim is that the defendants are solely responsible for filing the defective verifying affidavit. And that having conceded that the one filed did not conform with the requirements of section 5 of Cap 15 they ought to have taken remedial measures to correct the situation. It is clear that the verifying affidavit was filed by the defendants together with the plaint, therefore, in drawing the plaint and the affidavit in question they were required to conform to a practice common in Kenya since they were professional advocates engaged in the business of litigation. The drawing of an affidavit and more particularly the style and mode of a jurat is a matter that has to be within the requirement of section 5 of Cap 15. In my view Cap 15 is a common and well known Act and a lawyer of ordinary experience is taken to know its provisions. In any case an advocate is bound to acquaint himself with the machinery by which the practice of a particular court is regulated and to see that it is adequate to the carrying out of the objects of the suit, he intends to undertake on behalf of his client. Before filing a suit an advocate should or is expected to take care to identify the proper parties, the correct cause of action, the pleadings are in order and above all, all documents are proper and/or legitimate to

appear before court. It is also contended by the plaintiff that the drawing of an affidavit is not an obscure point of law. The jurat is provided under rule 10 of the Oaths and Statutory rules. The form of the jurat and identification of exhibits must be as as set out in the third schedule.

In ordinary parlance drawing of an affidavit is an elementary matter of law constantly arising in practice and advocates who are engaged in litigation are expected to know the requirements of section 5 and rule 10 of Cap 15. As a result the plaint and the verifying affidavit is required to be checked by the advocate who is engaged by the client before it is filed in court. As human beings, we can and we should be expected to make errors however, it is important to show steps taken which eliminates the existence of a common error of judgement.

In this case, the defendants did not contest that the affidavit as drawn and filed contravene the law. DW1 readily accepted that the affidavit was defective in not disclosing where it was sworn. However, he contended that the defect and omission in that affidavit can only be attributed to the commissioner. The advocate who commissioned the verifying affidavit was not instructed by the bank but by the defendants who took the affidavit for commissioning. It can therefore be safely concluded that there was no privity of contract or relationship between the bank and **Mr. L. Njoroge** who commissioned the affidavit on 24th July 2002. In essence there is no sufficient cause of action that flows from the failure by **Mr. L. Njoroge** to conform with the requirement of section 5 of Cap 15 that can be pursued by the bank.

The bank in this case instructed the defendants and it was incumbent upon them to sustain a proper documentation before court. The duty of the defendants was to ensure pleadings and/or documents filed before court are within the requirement of ordinary and known law and procedure. Any failure that would result from that omission or action can only be attributed to the advocates on record for the client. It was submitted by **Mr. Ojiambo** advocate that by drawing the affidavit in question, the defendants failed to observe elementary statutory requirement under section 5 of Cap 15. And that the defendants' fault constitutes negligence and therefore, they are liable to the plaintiff.

In deciding whether the defendants committed an act which constitutes negligence, it is important to address the degree and the circumstances surrounding the whole issue. The starting point is there is no specific provision in the Advocates Act setting out the standard of duty required by an advocate in the discharge of his professional duties but generally the law recognizes that an advocate may be liable to his client for negligence. The extent of an advocate's liability to his client for negligence has been a mute point for judicial consideration.
In my view it is not enough to prove that the advocate had made an error of judgement or ignorance of some particular point of law. But the error must be one that ordinarily a competent and skilled advocate exercising due care would not have made or shown it. It would be extremely difficult to define exact limit by which the skill and diligence which an advocate undertakes to furnish in conduct of a case is founded. It is also difficult to define precisely the dividing line between what is reasonable skill and diligence which appears to satisfy his undertaking for which he is undoubtedly responsible.

It is well known that litigation is always hazardous, therefore, an advocate must always realize that most questions have more than one aspect or interpretation. It is not possible to lay down any hard and fast rule that an advocate would be required to follow in the discharge of his duties/mandate. It suffices to say, that the variety of matters with which an advocate has to have some familiarity increases by the day due to the emerging trend of litigation which involves a lot of special skills, sophistication and modern ingenuity. I must add, that the conduct of litigation is pre-eminently an art, which requires exceptional ingenuity or foresight to avoid ordinary perils to a client. The facts found by a court after hearing evidence and considering the law on both sides may be far greatly from the facts pleaded at the outset. It is also clear that, in the application of the law to the facts and with exercise of discretion, the approach/route of one judge may possibly be far from that of another. In such circumstances an advocate is required to display reasonable skill and care to avoid perils to his client. He must show that he

fully and properly performed his instructions and that he faithfully carries out the clients instructions to the letter.

The defendants were instructed to file a proper case with all the relevant documents before court on behalf of the plaintiff herein. In undertaking that instruction, it is not open to the advocates to say any defects in the documents filed before court is attributable to a third party who had no relationship with the bank. In deed therefore, that the advocates were required to file a proper verifying affidavit and ensure that the same was proper within the requirements of section 5 of Cap 15. The failure to observe elementary statutory requirements and take the necessary steps to remedy the defects can only be placed at the door steps of the party who was instructed the bank. The commissioner for oaths had not prepared the verifying affidavit but his role was only limited to commissioning the same. It means therefore, that the fault to file a proper affidavit before court was the responsibility of the advocates who took instructions from the bank.

The defendants in HCC No.1464 of 2000 filed a preliminary objection on a point of law dated 16th July 2001 seeking to strike out the plaint that the verifying affidavit did not comply with section 5 of Cap 15. The matter was set down for hearing on 15th April 2002. There is no indication that the advocates filed an application seeking leave to be allowed to file a proper affidavit which conforms with the necessary requirement of the law. In their submission before court, the advocates readily conceded to court that the verifying affidavit contrived section 5 of Cap 15. They also admit that having drawn the verifying affidavit, hence they were required to check it before filing it in court. The defendants at paragraph 8 of the defence maintain that in drawing the plaint and the affidavit in question they conformed to a practice in Kenya and that they were professional and exercised due care.

In my understanding the requirements under Cap 15 is a common and elementary requirement well known to all competent and practicing advocates. A lawyer of ordinary practice is taken to know the provisions concerning the drawing of an affidavit and more particularly the way the jurat is supposed to appear in the affidavit. In my determination the question that arises is whether the requirement under section 5 is an obscure point of law. In my view drawing of an affidavit is an elementary matter of law constantly arising in practice and the defendants were expected to know the same. The defendants were aware and alive that there was an obvious danger that a different view might be taken by the Judge who would hear or who was bound to hear the preliminary objection since the question had not been settled. The advocates knew, that matters which are contentious like the issue of verifying affidavit frequently involve or require a higher degree of judgement.

I agree that an advocate is not liable for any reasonable error of judgement or for ignorance of some obscure point of law however, he can be held liable for any act of gross negligence or ignorance of elementary matters of law constantly arising in practice. The defendants were well aware of the two schools of thoughts that existed in the High Court. Where an advocate is in dilemma which is not of his making and he is forced to chose between two or more evils and/or routes, the court would be slow to castigate his actual decision as negligent. In fact where the issue at stake is a difficult point of law then he is not liable in negligence so long as the opinion which expresses or the route which he takes is a reasonable one. Nevertheless, it is always prudent for an advocate to take the safe route and also qualify his advice when he is not sure of the outcome.

In a letter dated 16th May 2002 to the bank, the advocates analyzed the sharp divisions or opinions in the High Court on the issue of the verifying affidavit that did not in the jurat state where the oath was taken. From the analysis of that letter, the advocates were aware of the stalemate and the position taken by different judges. They also gave a detailed analysis on the arguments of the rival schools of thought taken by the judges of the High Court. In the opinion of the advocates the proper law was that as advanced by **Ringera** and **Visram JJ** in the decision of **Microsoft Corporation** and **Agip Kenya Limited** respectively. In giving that

proposition after the bank's suit was struck out the advocates were well aware of the divergent and contradictory positions taken by different judges of the High court on the issue that was at stake.

In such circumstances, the advocate had a duty to consider the situation with great care and skill. They were aware or had knowledge of the two conflicting or potentially conflicting opinions/decisions taken by different judges of High Court. The advocates were not exposed to somewhat difficult question of law but one of the most prolific but simple disagreements amongst Judges on the route to be taken when the jurat of a verifying affidavit did not conform with section 5 Cap 15 Laws of Kenya. The position taken by most Judges in High Court is that where the plaintiff has attempted to comply with the law requiring verification of a plaint but has fallen short of prescribed standards, the court would not elevate form and procedure to a fetish position to strike out the suit. In essence the failure to state the place where an affidavit was taken in the jurat does not ipso facto make such an affidavit fatally defective and that discretion of the court should be exercised in the case of an omission or defect of the verifying affidavit which did not go to the jurisdiction of the court or does not prejudice the opposite party in any fundamental aspect. The opposing side is the one expressed by **Mwera J** in his ruling dated 6th May 2002. In my respective view the advocates were in a position to salvage the case of the client before it was heard on 15th April 2002.

The issue in dispute was not some obscure point of law but was an elementary matter of law constantly arising before advocates practicing in the High Court. The issue of the jurat was a point of common occurrence. It was not difficult but a fairly straightforward issue that would ordinarily arise in a common litigation in the High Court. The advocates did not file an application seeking leave to be allowed to file a proper verifying affidavit. It is clear that in their legal opinion dated 16th May 2002, the advocates observed that where a verifying affidavit was defective or was struck out, the court could allow the offending party to file a replacement or substitute affidavit to remedy the defect.

The law is that an advocate who holds himself out to his client as having adequate skills and knowledge to conduct the case he is instructed owes a duty to his client both in contract and tort. Where the advocates is in breach of his contractual duty to his client or where he fails to use proper care towards the fulfillment of the instructions he was given, he is liable in damages in so far as the client suffers the loss. However, when the obligation becomes impossible of performance not because of lack of skill or care, then the advocate is not liable. What the advocate is required where he has been entrusted with the management of a client's case is to follow or pursue ordinary and accustomed course in the conduct of that case. To make him liable, it is essential to show that there was either a manifest want of skill or great negligence. What is expected of an advocate is that he would be honest, faithful and diligent in the discharge of his instructions. As they say it would be utterly impossible that you could ever have a class of men who would give a guarantee binding themselves in giving legal advice and conducting suits at law to be always in the right. In essence an advocate is only liable where it has been shown that in his dealings or conduct there is an element of want of reasonable skill or that he has been guilty of gross negligence.

In **Civil Appeal No.53 of 2003 Moses Kipkolum Kogo vs Nyamogo & Nyamogo Advocates** the Court of Appeal had this to say in cases involving negligence of an advocate;

"**As regards the preparation of the memorandum of appeal, it was the appellant's contention that the respondent was negligent. It transpired that after the judgement of Juma, J, in H.C.C.C. No.4925 of 1989, it was the appellant who brought pressure on the respondent to file the appeal which was dismissed and we have already set out elsewhere in this judgement what this Court said in that appeal.**

On the contentious issue of an advocate's negligence towards his client and the basis for liability, we wish to point out that in CHAMPION MOTOR SPARES LTD. V. PHADKE

AND OTHERS [1969] E.A. 42 the predecessor of this Court held, among other things, that an advocate is not liable for any reasonable error of judgement or for ignorance of some obscure point of law, but is liable for an act of gross negligence or ignorance of elementary matters of law constantly arising in practice.

We have considered very carefully the conduct of the respondent in handling the appellant's case before Juma J. up to the filing and handling of Civil Appeal No.74 of 1998 and it is our considered opinion that we decipher nothing close to professional negligence. It was not the duty of the advocates to help the appellant in gathering the evidence with which to prove his case. He himself said he was not receiving pay-slips and when cross-examined he did not say that the pay-roll through which he received his salary was still available and could be produced. So that even if the respondent had told him to bring his pay-slips, the appellant could not have done so because they were not there. We find no fault in the judgement of Githinji, J. and it follows that the appellant's appeal must fail."

One of the principal areas in which the client looks to his advocate for guidance is the explanation of legal documents. It is normally in reliance of the advocates advice that the client signs such documents or permits them to be signed on his behalf. The advocate therefore, owes a general duty to explain such documents to the client or at least to ensure that he understands the material and contents of that document. An advocate is required always to make sure that his client is distinctly acquainted with any legal step he may take. In essence a shoe maker who agrees to make a pair of shoes cannot offer the owner of the shoes one shoe and ask him to pay one half the price since the other shoe has been lost.

The point I am trying to make is that when a client goes to an advocate, it is a reasonably foreseeable consequence that if anything goes wrong to the litigation, owing to the advocate's negligence, there will be a liability that would arise or accrue. It is also clear that a charge of negligence against an advocate is a serious matter and must be strictly and distinctly proved. However, the issue of negligence should be approached with the greatest care and caution. It is an established principle that advocates should not be harassed or intimidated by claims of negligence years after the event. On the other hand, as the courts are often at pains to emphasize, not every mistake amounting to professional negligence is deserving of some moral censure. Therefore liability will always depend upon the nature and description of mistake and want of skill which has been shown.

The matter that brought about this dispute concerns the provisions of section 5 of Cap 15. In my view this was a matter with which advocates ought to have been familiar or if not with which they should have familiarized themselves with. And their failure to advise their client properly or to file a proper affidavit amounted to a clear lapse of responsibility. The point was not a difficult one and there was no error of judgement to say that the advocates were able to bring out another dimension to the issue. It has been alleged that, it is probable that the failure of the defendants to adopt a proper course were due to the fact that there were divergent views and verdicts given by High Court on the issue of verifying affidavit and in particular the provisions of section 5 of Cap 15. The point was novel but it was not difficult and it had been repeatedly canvassed before the High Court, therefore, the advocates were duty bound to take remedial measures that would not prejudice the case of the bank.

With respect, the defendants' handling of the High Court action the following criticisms can be put at the doorstep of the defendants;

(1) The advocates were throughout very ambivalent in their attitudes on their responsibility and obligation towards the bank.

(2) It was reasonably contemplated that they were required to perform the instructions given to them by the bank and to take proceedings at law to protect and return monies lost to the

defendant in HCCC 1464 of 2000. The advocates were under duty by contract to use reasonable care and to avoid instances that would result in want of care. It must have been in their contemplation that if they failed on their duty the bank would be skeptical to grave loss and damage. It was obvious that carelessness on their part would likely to cause loss and damages.

(3) The advocates were expected to have knowledge where the question was one of practical procedure not involving any special difficulty. In essence ignorance or non observance of the rules of practice, want of care in the preparation of action for trial or failure to attend during hearings and delivery of rulings would be a foreseeable result of negligence.

(4) An advocate is usually liable for negligence where before bringing the action he fails to make proper investigations into the cause of action, preparing wrong or defective pleadings or failure to check documents in order to establish whether they conform with the law, practice and procedure commonly used within the corridors of the High Court and Court of Appeal. Where an advocate advises a party to commence proceedings for a particular sum and where he advises the client to enter into litigation even though success is improbable, where he proceeds under wrong statutes or where he fails to remedy the situation in time to prevent limitation, where there is inexcusable delay in the prosecution of the claim or where he fails to inform his client the details and progress achieved in his case or where he fails to prepare the case properly for trial or where he advises a hopeless appeal which could not benefit the client, or where he fails to register a pending action, the implication or the law stipulates negligence on the part of the advocate.

(5) The advocate should not have filed the verifying affidavit without checking whether it was within the requirements of the law. By failing to take adequate or precautionary step after the objection was filed is a clear indication that the advocates were guilty of negligence.

(6) The advocates failed to appear for the ruling on the day when it was scheduled to be delivered. They also did not send any person or advocate to hold their brief.

In my view if the advocates had time to peruse the pleadings and in particular the verifying affidavit before it was filed in court, they would have discovered that it was improper or irregular document. They did not do so. And even after the defendants raised an objection they did not take any remedial steps by making any application to court to enable them file another verifying affidavit in place of the defective one. They did not seek leave of the court to withdraw the offending affidavit and file a proper and compliant verifying affidavit. In my opinion the defendants failed to take any remedial measures or steps to prevent the striking out of the verifying affidavit after the objection was brought to their attention sometimes in July 2001. A plain reading of section 5 of Cap 15 Laws of Kenya makes it abundantly clear that the verifying affidavit was defective. In my view therefore, the High Court Judges were in agreement on the requirement of section 5 of Cap 15 but the divergence/departure is whether to strike out the whole suit or not, when the plaint is accompanied by a defective verifying affidavit. In those decisions or determinations what the judges were not in agreement is the way the ultimate discretion after the event or defect should be exercised. And you cannot fault a Judge in exercise of his discretion so long as the yardstick is established which is judicially and to the best interest of justice. The advocates had the obligation to ensure that the documents placed before court complied with the law in particular section 5 of Cap 15. The verifying affidavit must be valid and if it is defective the blame is on the shoulders of the party who took the same before court.

Again the advocates were negligent and failed to meet the standard of care and skill demanded of a reasonably competent and diligent advocate. Their action and conduct is a clear case of gross negligence and gross ignorance. As stated they did not appear on the day when the ruling was delivered and that even after the delivery of the ruling, the steps they took shows lack of skill and knowledge. The suit having been struck out, they allegedly filed notice of appeal

dated 16th May 2002. The notice of appeal is against the decision of **Mwera J** given at Nairobi on 29th April 2002. They also wrote a letter dated 16th May 2002 to the Deputy Registrar High Court of Kenya asking for certified copies of proceedings and ruling delivered on 29th April 2002 for them to undertake an appeal against the said ruling. It is clear from the record that the ruling by **Mwera J** on the issue of the verifying affidavit was to be delivered on 29th April 2002 but it was not delivered on that day. The record and the ruling itself show that it was delivered on 6th May 2002 in the absence of bank's advocates.

It is therefore, beyond doubt that there was no ruling that was delivered on 29th April 2002 but the actual position is that the ruling was delivered on 6th May 2002. It means the notice of appeal as framed is utterly misconceived and defective. In any case the advocates did not seriously pursue the avenue of appeal for they were quick to advise the bank to pay huge taxed costs to the advocates of the defendants in HCCC No.1464 of 2000. If they had the interest of the bank at heart they should have attended court for the delivery of the ruling and take the necessary steps to pursue the appeal in which they were instructed to undertake. They were quick to ask the bank to pay costs to parties they intended to overturn their case in an appeal.

Seriously the advocates did not make any known efforts to perfect the instructions given to them by way of seriously pursuing the appeal. No letter of a reminder to the court registry and no other evidence of follow up for proceedings. It is not true as alleged by the defendants that the proceedings were never ready. And there is ample evidence to show that certified proceedings were ready for collection as at 28th November 2003. It shows that the defendant either received the proceedings or with some due diligence could have received them as at 28th November 2003. I am in agreement with the plaintiff's advocates that the defendant did not attend to the plaintiff's instructions with diligence, reasonable care and skill expected of a prudent and reasonable advocate.

Further the advocates informed the bank of the order dismissing the suit in the letter dated 16th May 2002 but in that letter they did not mention the actual date when the ruling or order was made. The plaintiff was made to believe that a ruling had been made on 29th April 2002 striking out their suit. Even at the time of filing this suit, the plaintiff was in the dark and false premise that their suit had been dismissed on the date mentioned in the letter dated 16th May 2002. The record of proceedings produced before me clearly shows that no ruling was delivered on 29th April 2002 but the ruling was delivered on 6th May 2002. It is my view that by failing to inform the bank the date when the ruling was delivered and by failing to attend court at the time when the ruling was delivered, is a proper case that the advocates failed to carry out the bank's instructions by proper means, hence jeopardized the rights and interests of the bank. Further it is clear beyond doubt that the notice of appeal filed by the advocates is defective since it is the order of 6th May 2002 striking out the suit that aggrieved the bank, therefore, no proper notice of appeal was filed on behalf of the bank by the advocates.

Another issue that has been contested between the parties is that alleged failure of the advocates to act on the express and urgent instructions to file the appeal. The correspondence between the parties is a clear manifestation that the advocates did not respond to the bank's repeated correspondence on the matter of appeal starting from 27th June 2002 to 14th July 2003. The basis cited by the advocates is that they consider instructions had been withdrawn when the bank elected to assign the filing of a fresh suit to **M/S Rachuonyo & Rachuonyo** advocates sometimes in June 2002. The contention of the bank is that the instructions to file the appeal was left to the present defendant and as late as 14th July 2003 the defendants witness **Mr. Njoroge Nani Mungai** Advocate informed the plaintiff's PW1 that he was awaiting typed proceedings and that he cannot now argue that instructions had been withdrawn.

I have gone through the correspondence that was exchanged between the advocates and the bank and in my mind the bank had not withdrawn instructions on the issue of appeal from the

advocates. The correspondence gives a clear indication that the advocates did not wish to proceed with filing the appeal as instructed by the bank. In my view they had an obligation to file an appeal against the decision that struck out the suit. They did not do so and they willfully and negligently represented to the Bank that they were pursuing an appeal when the evidence shows otherwise.

The defendants contend that their instructions to file the intended appeal were withdrawn by the plaintiff through a letter dated 24th June 2002. And whether or not the typed proceedings were ready on 28th November 2003 was irrelevant as the plaintiff had elected to file a new suit and that instructions had been withdrawn. In the letter dated 24th June 2002 the bank informed the advocates that the reason why the case was struck out was because of an omission in the affidavit which was caused by them. And as a result the bank was holding the advocates liable for the loss they have incurred in the matter including court filing fees and taxed costs. The letter in the last paragraph states as follows;

"**If you think you have a good chance of success in the appeal, we instruct you to proceed with the same without any further delay."**

The bank made it crystal clear to the advocates that if the appeal had a good chance of success, they had full instructions to proceed with the same. In the same letter the bank wrote as hereunder;

"**Should you however find that you do not have sufficient grounds for appeal, we suggest that you compensate us the loss incurred including the taxed costs and court filing fees."**

It is not therefore, true as alleged by the advocates that instructions had been withdrawn through that letter. In deed the bank gave the advocates two options which were;

(1) To proceed with the appeal if it had a good chance of success and if not

(2) To compensate them for the loss incurred including the taxed costs and court filing fees.

I therefore hold that the failure of the advocates to file and proceed with the appeal is a clear testimony that they had not intended to salvage the error committed by them. From the evidence on record, there is a clear indication that there was failure on the part of the advocates in replying to correspondences, keeping the plaintiff informed of the progress and advising on the law and option open to them. In short the defendants failed to prosecute the intended appeal and elected not to correspond or deal with the bank any further. In my view the advocates did not act reasonably with fairness and openness towards the bank. They failed to answer telephone correspondence and breached the terms of the retainer as enshrined in the letter of 8th February 2001.

I make a finding that there was a retainer agreement between the plaintiff and the defendant which was breached and/or violated by the defendant. It is not true as alleged by the advocate that the retainer agreement dated 8th February 2001 expired after 12 months since there is evidence that the parties had dealt together and exchanged correspondences. As late as 14th July 2003 the defendant informed the plaintiff that they were awaiting typed proceedings, therefore, the allegations that instructions had been withdrawn and that there was no retainer is a merely preposterous proposition on the part of the advocates. If the advocates had no intention to file an appeal, they had an obligation to inform the bank but nevertheless they failed to give a false hope and failed to respond to correspondences and communicate their decision not to appeal to the bank.

In my view the failure to communicate their decision not to appeal amounts to negligence of

duty on the part of the advocates. I also make a determination that the defendants were under duty to reply to the bank and answer inquiries raised in the repeated correspondences. The defendant therefore, breached their retainer for failing to act with strict diligence and due care. In the letter dated 8th February 2001 on terms and conditions of service the defendants undertook to submit comprehensive feed back report on matters handled by them. They did not do so and it is clear from the numerous correspondences by the plaintiff to them that the same was not answered and no progress report was given as agreed in that letter.

In the same letter the advocates also waived any right of lien over the files on matters allocated to them by the bank and undertook upon demand to submit the files. The bank requested the advocates to release the relevant files to the firm of **M/S Rachuonyo & Rachuonyo** advocates to undertake further instructions but they failed to act and in a letter dated 29th October 2002 they stated that they had a lien over the file.

In my view the advocates had no powers and in attempting to exercise a non-existent lien over the documents of the plaintiff, they committed a further breach which resulted in grave loss to the rights and interest of the bank. The release of the ofirinal documents or file would have enabled the firm of **M/S Rachuonyo & Rachuonyo** advocates to see all the existing pleadings, consider fully the contents of the intended new plaint and all relevant issues including limitation of the cause of action. By refusing to provide the original file and by saying in their defence that there was nothing useful in the file, they committed another breach which was incompatible with the care expected of an advocate to his client. I am therefore in agreement with the plaintiff's advocate that the defendants knowingly and with intent to injure the plaintiff's interest refused to file the appeal and further refused to inform the client of the progress or lack of progress in the matter. They also refused to release documents concerning HCCC No.1464 of 2000 and even refused to produce copies to the plaintiff or its advocates for action hence the defendants are guilty of professional negligence.

The measure of damages is a compensation for consequences which follow as a natural and probable consequence of the breach or in other words which could reasonably be foreseen. It was obvious that carelessness or lack of exercise of proper skill and care on the part of the advocates would likely to cause loss and damages to the bank. It is also foreseen that for their ignorance and non observance of the rules and practice, for want of care in preparation of the plaintiff's case for trial or for their failure to attend at the time when the ruling was delivered and generally for their mismanagement of the plaintiff's case, is an indication of gross negligence on the part advocates. An advocate who conducts himself improperly advises a hopeless appeal or where he files wrong documents which could not benefit the client, the inevitable result is that he is negligent/liable for any loss that occurs. In my view the loss or damages suffered must be sufficiently proximate to the advocates' breach of duty, the breach of duty must have caused the loss or damage and that the damage or loss in question was foreseeable. It is essential to determine whether the advocates' breach of duty was the cause of the damage complained of. Clearly it is not the cause if the damage would have occurred in any event. Where the claim is brought in contract or tort, the fundamental principle governing the measure of damages/loss is that the plaintiff should be put so far as the money can do it in position he would have occupied if the advocates would have discharged his duty. In my judgement the inconvenience or loss in this case suffered by the plaintiff was caused directly from the advocates' negligence. The only way to compensate the plaintiff for the loss incurred is;

(1) By paying him the monetary equivalent of any benefit of which he has been deprived and

(2) By indemnifying the plaintiff against any expense of liability which he has incurred had the advocate performed his duty.

The plaintiff prays for a sum of Kshs.1,039,716/= with interest at 29% per annum from 27th June 2002 until payment in full. This money was incurred by the plaintiff as party and party costs as a result of the suit namely HCCC 1464 of 2002 being struck out. The plaintiff also

prays for Kshs.71,000/= being the filing fees incurred in HCCC No.1464 of 2000 being monies paid in consideration which had wholly failed. The plaintiff further claims a sum of Kshs.10 million with interest thereon at 36% per annum from 15th October 1996 until payment in full. This claim was a subject matter of the suit HCCC No.1464 of 2000 which was struck out on the account of negligence by the defendant. The defendant failure to appeal despite being of that persuasion clearly denied the bank a chance to recover that sum.

In my view if the case would not have been struck out by virtue of defective verifying affidavit, the bank would not have incurred the above sums claimed in this plaint. That was reasonably foreseen cause of action in respect of the negligence attitude manifested by the advocates towards their client. The prospect of a successful outcome had the case gone for full trial was a matter to be determined by the trial court but that prospect was prematurely and wrongly determined by the negligence of the defendants. The bank therefore, lost an opportunity to present its case on merit and have its claim considered by court. On the same breadth it was the opinion or advice of the advocates that the plaintiff stood a good or reasonable chance of success or recovery in their pursuit of that claim. Once again that hope or prospect was cut short by fragrant and reckless negligence of the defendant. The redress of the plaintiff is squarely against the advocates who put them in the current position. The plaintiff is therefore entitled to damages for the loss of the chance of a favourable outcome and the damage ought to be the sums prayed for in the plaint. The only issue is whether interest should be as claimed in the plaint. In my view interest should be at court rate and not as prayed by the plaintiff in their plaint. The suit against the defendant succeeds to that extent.

In the premises I enter judgement for the plaintiff against the defendant as prayed in the plaint with costs and interests as hereinabove held.

Dated, signed and delivered at Nairobi this 13th day of May 2009.

M. WARSAME

JUDGE