

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 645 of 2008

MAHENDRA KUMAR SHAH.....APPELLANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

R U L I N G

1. A preliminary objection has been raised to the hearing of an application dated 25th November, 2008, on the grounds that it is supported by an affidavit sworn by M. Jevanjee Advocate who has no *locus standi* to depone to controversial issues of fact. It is also contended that the application is misconceived and an abuse of the court process.
2. The application dated 25th November, 2008 is a notice of motion brought under Order XLI Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, seeking to stay the ruling and order issued in RMCC No.12552 of 2003 on the 12th November, 2008 pending determination of the appeal. The deponent of the affidavit is an advocate of the High Court having conduct of the suit on behalf of the applicant, Mahendra Kumar Shah.
3. Mr. Milimo who raised the preliminary objection maintains that the advocate has deponed to controversial issues which could only be sworn by a party. In this regard, Mr. Milimo has identified paragraphs 4, 5, 9 & 10 of the affidavit sworn by M. Jevanjee. Mr. Milimo also maintains that the affidavit is defective as the advocate has not disclosed the source of his information as required under Order XVIII rule 3 of the Civil Procedure Rules. In support of his submission, Mr. Milimo relied on *HCCC No.3504 of 1993 Kisya Investments Ltd & Another vs Kenya Finance Corporation Limited & Others*. Further, Mr. Milimo maintains that the supporting affidavit does not comply with Section 10 of the Oaths and Statutory Declaration Act Cap 15, as the annexures have not been properly identified. In this regard Mr. Milimo relied on *HCCC No.1251 of 2002 Cowest Trading GMBH vs Specialized Lightings Systems Ltd* and *HCCC No.152 of 1998 Dan Jacob Nyanjom vs Kiplelei Ltd*. Further, it is maintained that the application is defective as the order it seeks to stay is an order of dismissal which is not capable of being stayed.
4. In response to the preliminary objection Mr. Adera who appeared for the applicant, maintained that the supporting affidavit does not contravene any mandatory rules. He submitted that the facts deponed to in the supporting affidavit were not contentious issues but matters on record. He argued that counsel was an agent of the client and therefore qualified to swear to matters within his knowledge. He maintained that the court has powers to ignore the defects regarding the failure to stamp the annexures.
5. In response Mr. Milimo maintained that Order XVIII Rule 7 of the Civil Procedure Rules which is a subsidiary legislation cannot override the provisions of Cap 15 which is a substantive legislation.
6. I have considered the supporting affidavit which was sworn by M. Jevanjee. I am satisfied that the matters deponed to by the counsel are matters which are all within the counsel's knowledge having participated in the matter in his capacity as the applicant's counsel. Matters deponed to in paragraph 4, 5, 8, 9, & 10 of the supporting affidavit are all matters within counsel's personal knowledge and counsel has disclosed this in paragraph 13 of the affidavit. The supporting affidavit therefore complies with Order

XVIII Rule 3 of the Civil Procedure Rules. I find further that the *jurat* in the affidavit complies with Section 5 of the Oaths and Statutory Declaration Act. The annextures to the affidavit have not been properly identified as they have been marked as a bundle. That however is a mere irregularity which cannot vitiate the whole document. For that reason, I overrule the preliminary objection and order that the hearing of the notice of motion dated 25th November, 2008 shall proceed on a date to be fixed in the registry.

Dated and delivered this 5th day of June, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Kamau H/B for Adera for the applicant

Muthomi H/B for Milimo for the respondent