



appeal or review (see order 111 of the Civil Procedure Rules).

On behalf of the applicant it was argued, that the application was served on the firm of G.R. Otieno & Co. advocates on 16<sup>th</sup> September, 2008. The replying affidavit sworn on 19<sup>th</sup> November, 2008 and filed on 24<sup>th</sup> November, 2008 was served out of time, courtesy of the provisions of order L Rule 16 (3). I was thus urged to strike out the replying affidavit and to allow the application to proceed ex-parte.

On behalf of the respondent, it was conceded that the replying affidavit was filed out of time. I then struck out the replying affidavit aforesaid but, in my discretion, allowed the respondent leave to reply to the application only on points of law.

Mr. Yano for the applicant urged me to find that on the evidence, the objector is the wife of the plaintiff, who is the judgment debtor. The trust deed dated 4<sup>th</sup> August, 2006 and marked as exhibit "MFK 1" is signed by the plaintiff, objector and a stranger by the name of Yano Kipkech. That said Trust Deed is not registered under the Stamp Duty Act (Cap 481) Laws of Kenya as enjoined by relevant provisions of the said statute. Hence the Trust Deed lacks the requisite evidential value.

The objector is not a party to this suit. She only has an interest in the attached herd of cattle on the basis of the Trust Deed, which has no evidential value, by reason of matters aforesaid. There is thus no evidence to sustain the objection.

Mr. Otieno, on behalf of the respondent argued that, in law, the objector has not annexed consent of Yano Kipkech hence an affidavit in support is without authority and hence has no evidential value.

It was conceded, however, that the Trust Deed is not registered but is in law supposed to be registered hence of no evidential value. In any event the Trust Deed being a gift, it should be complete. The said Trust Deed as worded is reprobative and approbative all at the same time. In effect its contents is contradictory and the court should not give effect to it being in that state.

I have carefully analysed the evidence in support and against the application. I have agonized over the same. I have also looked up the relevant law, Section 19 of the Stamp Duty Act (Cap 480) Laws of Kenya provides as follows:-

**19. " (1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except –**

**(a) in criminal proceedings; and**

**(b) in civil proceedings by a collector to recover stamp duty.**

**Unless it is duly stamped**

**2. No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped."**

In the premises since. it is conceded that the trust deed is not registered, in law, it has no evidential value. That trust deed being the cradle upon which the objection is based, the objection has no basis therefor.

The foregoing apart, the said trust deed is reprobative and approbative all at the same time. Being contradictory, it is not an instrument upon which a court of law would base its finding. I discount it. That being the case, there is accordingly no evidence upon which the application is based.

Those are the reasons why I dismissed the chamber summons dated 15<sup>th</sup> September, 2008.

Dated and delivered at Kitale 18th day of September 2009.

**N.R.O. OMBIJA.**

**JUDGE.**