REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suti 202 of 2007

ALBANY TAYLOR…….....1ST PLAINTIFF

WENDY TAYLOR……...…....……2ND PLAINTIFF

VERSUS

STELLA NAFULA KHISA……..……..1ST DEFENDANT

CHRISTOPHER TAYLOR…….....2ND DEFENDANT

R U L I N G

The plaintiffs, who are husband and wife and British citizens by nationality, filed suit against the defendants (*the 2nd defendant is a son to the plaintiffs*) seeking to be paid the sum of KShs.2,720,000/= which they claimed was advanced to the defendants to purchase a property at Nairobi, namely **LR No.1/446 Ngong Road/Kilimani**. The defendants filed separate defences to the suit. On 7th September, 2007, the plaintiffs filed an application under the provisions of **Order XXXV Rules 1** & **2** and **Order VI Rule 13** of the **Civil Procedure Rules**. The plaintiffs sought the statement of defence filed by the defendants be struck out and Judgment be entered for the plaintiffs for the said sum of KShs.2,720,000/= plus interest as prayed in the plaint. The application was supported by the affidavit of the plaintiffs' advocate, Tony Waiguru Njuguna.

The application was opposed. The 1st defendant filed a lengthy replying affidavit in opposition to the application. The 1st defendant filed a notice of preliminary objection objecting to certain paragraphs in the affidavit of the said Tony Waiguru Njuguna. The 1st defendant contended that the said paragraphs of the supporting affidavits offended the provisions of **Order XVIII Rule 3(1)** of the **Civil Procedure Rules**. She further stated that the deponent of the said affidavit was not competent to swear to matters which were contested and were further not within his personal knowledge. She took issue with the fact that the deponent had not disclosed the sources of the facts contained in the disputed paragraphs of the affidavit.

At the hearing of the preliminary objection, Mr. Eboso learned counsel for the 1st defendant urged this court to expunge paragraphs 5, 6, 11, 12 and 13 of the affidavit. He submitted that Tony Waiguru Njuguna, the advocate for the plaintiffs had sworn to highly contentious matters which were not within his knowledge. He maintained that the said advocate had not disclosed the source of his information, neither had he disclosed the source of authority to swear the said affidavit. He submitted that the plaintiffs themselves should have sworn to the facts deponed in the said affidavit instead of their advocate because it is only the plaintiffs who had the knowledge of the said facts in support of the matters in

dispute. Mr. Waiguru for the plaintiffs conceded that paragraphs 11, 12 and 14 of his affidavit failed to disclose the source of information. He however submitted that the other paragraphs of the affidavit should remain in view of the fact that he had made a disclosure of the sources of information deponed to therein.

Order XVIII of the **Civil Procedure Rules** provides as follows:

"*(1) Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:*

Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

3 (1) Affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and the grounds thereof.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same."

It is clear from the above quoted rules of procedure that a court may allow a party to swear an affidavit and depone to matters only which are confined to the knowledge of such deponent. It is only in interlocutory proceedings that the court may allow a party to swear an affidavit on the basis of information and belief provided that such a deponent discloses his source and the grounds of belief thereof. In **Pattni –vs- Ali [2005] KLR 269,** the Court of Appeal held that an affidavit was sworn testimony on matters of facts. Hearsay evidence and legal opinions may not be included in an affidavit. In the above case, the Court of Appeal held that in interlocutory applications, the court may allow an affidavit even in the circumstances where a party had failed to disclose whether such facts are based on knowledge or on information and belief provided that it would serve the substantive ends of justice. The court however is required to verify the source of such information, and if such source is not disclosed, the offending portions of affidavit would be rejected.

In the present application, Tony Waiguru Njuguna swore an affidavit in support of an application for summary judgment. If the said application were to be canvassed and is successful, judgment would be entered in favour of the plaintiffs. It is therefore evident that the affidavit sworn by the said Tony Waiguru Njuguna potentially would result in the determination of this suit. The application before the court therefore cannot be said to be strictly an interlocutory application. The advocate for the plaintiffs swore to facts which are disputed and which would require clarification by cross examination if the case were ordered to go to full trial. It is evident that the said Tony Waiguru Njuguna, as an advocate for the plaintiffs, is possessed of knowledge which he acquired in his capacity as the advocate for the plaintiffs. He is not competent to adduce any evidence on the basis of information that he acquired in his capacity as an advocate acting on behalf of the plaintiffs. Several decisions have been made by various courts deprecating the practice by advocates to swear affidavits on behalf of their clients particularly where the contents deponed thereto are contentious and are based on hearsay. In **East African Foundry Works (K) Ltd –vs- Kenya Commercial Bank Ltd [2002] 1KLR 443** at page 446, Ringera J held that:

"*I also accept the further submission of Mr. Akiwumi that indeed they consist of contentious averments of fact which an advocate should not be allowed to depose to in a case where he is appearing as such. I have always deprecated depositions by advocates on contentious matters of fact in suits or applications which they canvass before the courts and I have never had any hesitation in striking out such depositions as a matter of good practice in our courts. The unseemly prospect of counsel being called upon to be cross-examined in matters in which they appear as counsel must be avoided by striking out such*

affidavits as a matter of good practice."

In the present application, the advocate for the plaintiffs swore to facts which are contentious. The 1st defendant contested the averments which the advocate swore in support of the said application. The advocate annexed copies of e-mails which allegedly evidenced communication between the 1st defendant and the plaintiffs in relation to the subject matter of the suit. It is evident to this court that, if a trial were to be held, the advocate of the plaintiffs would not be a competent witness to produce the said e-mails. Further, it is clear that the advocate for the plaintiffs descended into the arena of conflict by purporting to make averments in support of an application whose ultimate aim is the entry of judgment against the defendants. That cannot be. The role of an advocate does not include being a witness in a suit where such an advocate is representing a litigant. The preliminary objection raised by the 1st defendant has merit.

It is hereby upheld. The affidavit sworn by Tony Waiguru Njuguna on the 6th September, 2007 in support of the application of the same date and which was filed in court on 7th September, 2007 is hereby struck out in its entirety as it is incompetent and was filed in contravention of the **Civil Procedure Rules**. The 1st defendant shall have the costs of the application.

DATED at **NAIROBI** this **9th** day of **APRIL, 2008.**

L. KIMARU

JUDGE