



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

Civil Case 246 of 2008

MWANGI CHARLES MAHINDA.....1ST PLAINTIFF

**EDWARD KINGS ONYANCHA MAINA.....2ND
PLAINTIFF**

VERSUS

KENYA COMMERCIAL BANK LTD..... 1ST DEFENDANT

SUSAN OUTA MUDHUNE.....2ND DEFENDANT

SUSAN NKIROTE OMANGA.....3RD DEFENDANT

PETER WANYAGA MUTHOKA.....4TH DEFENDANT

ERNST & YOUNG.....5TH DEFENDANT

RULING

On 29.10.2008, this matter came up for hearing. The applicant who is appearing in person stated that he had received response to his application from the first Respondent, Kenya Commercial Bank Ltd. but no response had been received from 2nd, 3rd, 4th and 5th Defendants. He therefore applied for prayers against Defendants to be entered as they do not oppose application.

According to the record all Defendants are represented by one firm of Advocates namely, Sichangi & Co. Advocates who filed a joint defence and the said firm was appointed by notice of appointment dated 29th May, 2008.

Mr. Sichangi was present in Court on 29.10.2008 to argue the application on their behalf and the documents of opposition was filed jointly on behalf of all. It cannot therefore be said that the three parties were not represented and court orders cannot therefore be entered against them without hearing their Counsel.

A perusal of the Pleadings showing that the defendants 2, 3, 4, and 5 were acting under the instruction and as employee of the company, first defendant Mr. Sichangi informed the court that he is acting for them.

The other issue raised by Defendant's Counsel is that the affidavit "*Replying affidavit of 2nd*

Plaintiff/Applicant” that affidavit does not comply with the provisions of Order 18 Civil Procedure Code and it is scandalous. A perusal of Order 18 Civil Procedure Code shows that (Rule 3) an affidavit shall be confined to such facts as the deponent is able on his own knowledge to prove, provided that on interlocutory matters or by leave of court an affidavit may contain statements of information and belief showing the sources and ground thereof.

An affidavit which shall unnecessarily set forth matters of hearsay or argumentative or copies of or extracts from documents shall cause the party filing the same to pay costs. Rule 6 – a court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive.

In this affidavit, leave to file was granted by court. However matters contained in paragraph 3, 4, 5, 6, 7, 8, and 9 do comply with Order 18. The source of the information is shown by the deponent in paragraph 19, of the affidavit. Paragraph 10 of the said affidavit contains matters that are scandalous of the Advocate appearing for Defendants and others and the same is struck out of the record.

In the circumstances, the Court finds and orders that the Defendants other than the first Defendant are represented in court by their Advocate and no orders can be entered against them in default.

Regarding the Replying Affidavit, the source of information is disclosed and therefore Order 18 Civil Procedure Code is complied with. However, paragraph 10 of the said affidavit contains scandalous matters and the said is struck out. The rest of paragraphs shall remain on record.

The application shall proceed to hearing

DATED this 7th day of November 2008.

JOYCE N. KHAMINWA

JUDGE