**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 2002 OF 2000**

**J.P. MACHIRA T/a**

**MACHIRA & CO. ADVOCATES….....PLAINTIFF/APPLICANT**

**-VERSUS-**

**WACHIRA WARURU….....1ST DEFENDANT/RESPONDENT**

**THE STANDARD LIMITED……..…2ND DEFENDANT/RESPONDENT**

**RULING**

## A. PLAINTIFF FILES DEFAMATION SUIT, DEFENDANTS FILE DEFENCE, PLAINTIFF FILES REPLY-TO-DEFENCE AND THEN SEEKS STRIKING-OUT OF DEFENCE AS BEARING NO TRIABLE ISSUE: THE BACKGROUND TO THE PRELIMINARY OBJECTION

The main cause is lodged in a plaint dated *30th November, 2000*, and filed on the plaintiff's behalf by M/s. S.K. Ritho & Co. Advocates, on *1st Dec ember, 2000*. M/s. Onyango, Ohaga & Co. Advocates filed the defendants' memorandum of appearance and their statement of defence on *20th December, 2000* and *15th January, 2001* respectively, whereupon M/s. Ritho & Co. Advocates filed a reply to defence on *22nd January, 2001*.

Some five weeks after the last pleadings, the plaintiff, through his advocates, filed (on *1st March, 2001*) a Chamber Summons dated *26th February, 2001*. By this interlocutory application, the plaintiff was seeking orders that the defendants' statement of defence be struck out; that his suit be admitted to the expedited stage of *formal pr*oof; that the defendants be shouldered with the costs of the application; and that the plaintiff be granted such further reliefs as the Court may deem fit.

As a curtain-raiser to the struggle for and against interlocutory redress, the enlarged firm of Ochieng Oduol, Onyango & Ohaga gave due notice (14th May, 2002) and took over the conduct of the defendants' case; and on 2nd November, 2004 a still more enlarged law firm, M/s. Ochieng', Onyango, Kibet & Ohaga served notice and took over the conduct of the defendants' case; and on 16th May, 2005 the plaintiff in the main suit, ***Mr. J.P. Machira*** of Machira & Co. Advocates, also filed a notice of change in representation; he would henceforth be acting in person.

On *2nd November, 2004* the defendants' advocates filed a notice of *preliminary objection* to the plaintiff's suit and the Chamber Summons which sought the striking-out of the statement of defence and,

consequently, the resolution of the claim as a pure formality.

Today's ruling is on the said *preliminary objection*, which was strenuously canvassed, with effect from *2nd November, 2004* and was only concluded on *4th December, 2006*.

The content of the preliminary objection, as filed, was brief: (i) that, the plaint was not supported by a verifying affidavit as required by law; (ii) that, in the alternative, there was no competent affidavit in verification of the plaint; (iii) that, the plaint as drawn and filed was incompetent and fatally defective.

**B. RULES REQUIRE VERIFICATION OF PLAINT BY AFFIDAVIT, PLAINTIFF'S AFFIDAVIT OFFENDS A STATUTE AND SO IS VOID, PLAINT BE STRUCK OUT AS A NULLITY: DEFENDANTS' PRELIMINARY OBJECTION**

On the first occasion of hearing, on 2nd November, 2004 the plaintiff appeared with learned counsel ***Mr. Mwenesi*** and ***Mr. Kamau,*** while ***Mr. Ohaga*** appeared for the defendants.

Learned counsel ***Mr. Ohaga*** contested the validity of the plaintiff's plaint on the basis of the provision of *Order VII, rule 2* of the Civil Procedure Rules:

> ***"The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint."***

Counsel contended that the plaintiff's plaint, although it purports to be accompanied by a verifying affidavit sworn by the plaintiff himself on 30th November, 2000, the said affidavit contravenes the provisions of s.35 of the *Advocates Act (Cap.16).* Section 35 of the Advocates Act requires that every person who draws a document shall *endorse his name and address,* or the identifying particulars of his or her firm ? and it is an offence for anyone to fail so to do. Counsel submitted that the plaintiff's purported verifying affidavit was in contravention of s.35 of the Advocates Act, because "it does not identify the person or firm who or which drew or filed it." Consequently, ***Mr. Ohaga*** urged, the verifying affidavit was inadmissible; and, therefore, the plaintiff's plaint was ***not*** accompanied by a verifying affidavit as required; and so the suit was defective for falling afoul of Order VII, rule 2 of the Civil Procedure Rules.

To lend weight to his argument, learned counsel cited the High Court (***Nyamu, J.)*** decision in ***Johann Distelberger v. Joshua Kivinda Muindi & Another***, H.C. Misc. Civ. Appl. No. 1587 of 2003, in which it was held that s.35 of the Advocates Act (Cap.16) should be read together with s.34 of the same Act which prevents *unqualified persons* from preparing certain documents or instruments. The learned Judge in that case considered the categories of documents/instruments contemplated which an unqualified person may not draw, as specified in s.34 of the Advocates Act; and he concluded that an *affidavit* is a *documen*t for the purposes of that section ? and so cannot be drawn by an unqualified person. Therefore an affidavit, ***Nyamu, J*** held:

> ***"If it is drawn by an unqualified person for the purpose of legal proceedings it is prohibited by s.34(1) of the Advocates Act. Under s.35(1) of the Advocates Act both [the advocate] and [the unqualified person] commit offences under the section which attract fines of Kshs.5,000/= in the case of [the] unqualified person and Kshs.500 in the case of the [advocate]. The offence as defined in the section is failure to endorse thereon the drawer's name and address, or the name and address of the firm [of advocates] ..."***

***Nyamu, J*** was dealing with the case of two affidavits which lacked the endorsement of the drawer but had been field in the legal proceedings. His view was that the filing of the two affidavits was a contravention of the statute law; in his words:

> ***"Is a contravention of a provision of an Act an irregularity in form only? The answer is clearly 'no' because … Parliament intended to prevent unqualified persons from drawing legal documents as specified in the Advocates Act and also to prevent them from charging fees in respect of such documents. The overall object is to ensure that legal documents are drawn by***

***qualified persons."***

And so what were the Court's orders, in that case? It is in the words of the learned Judge:

> ***"I hold and find that failure to comply makes the two affidavits unavailable for the purpose of legal proceedings such as this. The two affidavits are hereby struck out and expunged from the record, and the ultimate consequence is that the application is also struck out with costs to the respondents."***

Learned counsel, to the same effect, relied on another decision of the High Court (***Njagi, J.)***, in ***Barclays Bank of Kenya Limited v. Dr. Sollomon Otieno Orero***, HCCC No. 1736 of 2001, in which it was held:

> ***"Section 34(1) [of the Advocates Act] itself prohibits any unqualified person from drawing or preparing any document or instrument 'relating to any other legal proceedings.' An affidavit is a document relating to legal proceedings. It should therefore comply with the requirements of s.35(1) as to endorsement with the name and address of the drawer."***

***Njagi, J*** considered the requirement mandatory, and he founded the governing legal principle in the constitutional status of Parliament, and on the intendment of Parliament in its law-making capacity; in the words of the learned judge:

> ***"Parliament has led the way by demonstrating the gravity with which it views matters under ss. 34 and 35 of the (Advocates) Act. The least we can do is to emulate Parliament by treating these sections with the seriousness they deserve and obey them in observance."***

***Njagi, J*** did not agree to any mix-up between the terms of *ss. 34 and 35 of the Advocates Act,* on the one hand, and on the other hand, the provision in *Order XVIII, Rule 7 of the Civil Procedure Rules* (which is concerned with the mode of *making depositions* in affidavits) which, in effect, treated improprieties in affidavits as *curable* irregularities. The learned judge posed:

> ***"Where would one draw the dividing line between an irregularity as envisaged in O. XVIII, rule 7 of the Civil Procedure Rules, and a blatant breach of a statutory provision? …[When] an 'irregularity' touches upon the breach of express statutory provisions one has to be careful. If the treatment of such breaches as mere irregularities becomes common practice, then it will be difficult to state the law with certainty and finality."***

In that case, the learned Judge upheld the preliminary objection and *struck out* the defendant's application with costs to the plaintiff.

In the same strain was another High Court (***Waweru J.)*** decision which ***Mr. Ohaga*** relied on: ***Peter Kimonye & Others v. Barclays Bank of Kenya Limited & 2 Others,*** HCCC No. 403 of 2004. In this case the learned Judge was concerned precisely with the status of an affidavit that was not in compliance with the requirements of *s. 35 of the Advocates Act* (Cap 16); and he thus held:

> ***"The aforesaid endorsement is a statutory requirement. It is not a mere formality or technicality. A document that goes counter to an express statutory requirement is invalid. An invalid document must be struck off the record of the Court. The affidavit sworn in support of the application is therefore invalid. It is hereby struck out. The application is thus unsupported by affidavit. The nature of the application is such that it must be supported by affidavit. Without such support it must collapse because it cannot stand on its own. It is liable to be struck out."***

On the basis of the foregoing persuasive authorities learned counsel posed the question; "Once a verifying affidavit is struck out, what is the effect on the plaint?" He further raised the question: "Is there room for the affidavit to be substituted?" No, was the answer counsel proposed to the latter question – on the basis of another persuasive authority: ***The Delphis Bank Limited v. Asudi (K) Limited & Another***, HCCC No. 82 of 2003.

In that case ***Ibrahim, J*** considered the status of a defective verifying affidavit, and the consequence for the plaint as filed; the learned Judge thus held:

> ***"Once a verifying affidavit has been struck out and the defendant applies to have the plaint struck out then the court must strike out the plaint. I agree with the defendant's counsel that a plaint cannot remain standing after the verifying affidavit is found to be defective and is struck out. A plaint is founded on a verifying affidavit and without this foundation, it has no legs to stand on, it collapses and cannot be made to stand or lifted by the stilts of discretion and/or principles of equity."***

On those principles, the learned Judge's decision on the specific matter was rendered as follows:

> ***"In the aforesaid circumstances, this Court has two options; it can allow the plaint to remain on record, and leave it to the defendants to formally apply to strike it out, or ….it may exercise the discretion given to it under sub-rule 3 and strike it out at its own motion. Judicial time is precious and having been given the discretion, this Court will expunge the said plaint from the record."***

Learned counsel also relied on a decision of the Court of Appeal, ***Gawo v. Nairobi City Council*** [2001] 1E.A. 69 (CAK) in which it was held that the requirement that a plaint be accompanied with a verifying affidavit, is mandatory and leaves no room for interpretation such as would allow a supporting affidavit annexed to a Chamber Summons application to serve as a substitute for a verifying affidavit.

To further buttress his contention that, a plaint filed in Court without a verifying affidavit would be fatally defective, learned counsel brought authorities from other countries of the common-law heritage. He cited the Judicial Committee of the Privy Council decision in a case from Sierra Leone, ***MacFoy v. United Africa Co. Ltd.*** [1961] 3 All E.R. 1169, in which ***Lord Denning*** considered the contrast between mere *irregularity*, on the one hand, and an act that is void and a *nullity*, on the other. His Lordship thus expressed himself on the question (pp 1172 – 1173):

> ***"The defendant here sought to say .. that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was void and not merely voidable ….If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity. But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside: and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile, it remains good and a support for all that has been done under it. So will this statement of claim be a support for the judgment, if it was only voidable and not void.***
>
> ***"No court has ever attempted to lay down a decisive test for distinguishing between the two: but one test which is often useful is to suppose that the other side waived the flaw in the proceedings or took some fresh step after knowledge of it. Could he afterwards, in justice, complain of the flaw? Suppose for instance in this case that the defendant, well knowing that the statement of claim had been delivered in the long vacation, had delivered a defence to it? Could he afterwards have applied to dismiss the action for want of prosecution, asserting that no statement of claim had been delivered? Clearly not. That shows that the delivery of a statement of claim in the long vacation is only voidable. It is not void. It is only an irregularity and not a nullity. It is good until avoided. In this case, the statement of claim not being avoided, it took effect at the end of the long vacation and the time for defence then began to run. Likewise when the plaintiffs signed judgment in default of defence, that too was voidable but not void. It was not a nullity. It was therefore a matter for the discretion of the court whether it should be set aside or not."***

The ***MacFoy Case***, I think, is an important contribution to the juristic criteria for determining whether a complaint before the Court is concerned with *irregularity* (and the instrument in question is only *voidable)*, or with *nullity* (and the instrument in question is incurably *void). T*he main principle to be derived from that case is that the *manner in which the complainant has acted* with regard to the instrument, from the very beginning, is a relevant factor in determining whether the instrument is void or voidable.

Is it, in addition, the case that if such an instrument fails to comply with the provisions of an Act of Parliament, then it must be *void*, and not merely *voidable?* Yes, in the submission of learned counsel ***Mr. Ohaga.*** He relied on a decision of the English Court of Appeal, ***Re Pritchard*** (*deceased*) [1963] 1 All E.R. 873. ***Lord Upjohn*** in that case (p. 883) listed the categories of situations in which a suit had been held to be *void*, and not merely voidable. In his words:

> ***"The authorities do establish one or two classes of nullity such as the following. There may be others, though for my part I would be reluctant to see much extension of the classes. (i) Proceedings which ought to have been served but have never come to the notice of the defendant at all. This, of course, does not include cases of substituted service, or service by filing in default, or cases where service has properly been dispensed with… (ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; (iii) Proceedings which appear to be duly issued, but fail to comply with a statutory requirement: see e.g. Finnegan v. Cementation Co. Ltd [1953] 1Q.B. 688."***

***Mr. Ohaga*** submitted that a suit which is a nullity is to be regarded as if it was never filed; "but it is only convenient that the Court should declare as much, for the record, and to ascertain the position as between the parties." He urged that there indeed was a proper basis for the preliminary objection; and that the suit should be struck out with costs.

## C. OBJECTION IS BELATED AND NOT PLEADED, LACKS SUBSTANCE, NOT CONSISTENT WITH GOALS OF JUSTICE: PLAINTIFF'S RESPONSE

### *(a) Defence Pleadings should have carried Objections on Points of Law; Striking-Out of Plaint would create Time-bar*

Learned counsel ***Mr. Machira*** entered upon his response to the preliminary objection, on his own behalf as the plaintiff, on 12th May, 2005 and urged that the objection lacked merits and was only actuated by the ulterior object of scuttling his own application for the striking out of the statement of defence. He urged that the fact that the preliminary objection was coming so late in the day, on *2nd November, 2004* when the plaint had been filed on *1st December, 2000* and a defence thereto duly filed on *15th January, 2001* showed the objection as an afterthought, merely conceived to stop the suit in its tracks. ***Mr. Machira*** urged that no point of law of a preliminary nature had been intimated in the statement of defence, and no such point could now be raised so belatedly and when the hearing of the suit has not been scheduled during several years of waiting.

***Mr. Machira*** posed: "If the defendants felt so strongly about the alleged invalidity of the plaint, why did they not apply for it to be struck out, by virtue of Order VI, rule 13(1)?" Counsel urged that "in the absence of any plea in the [statement of] defence that the plaint was invalid, and that the verifying affidavit too was invalid, the defendant cannot be allowed to raise this issue at this belated hour." ***Mr. Machira*** submitted that it was trite law that a party could not depart from his pleadings; and that Order VI, rule 6(1) of the Civil Procedure Rules stipulates that –

> ***"No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit."***

Learned counsel also cited Order VI, rule 4(1), which provides –

> ***"A party shall in any pleading subsequent to a plaint plead specifically any matter, for example***

***performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality –***

***(a) which he alleges makes any claim or defence of the opposite party not maintainable; or***

***(b) which, if not specifically pleaded, might take the opposite party by surprise; or…"***

Counsel urged that "if there was invalidity perceived, it ought to have been pleaded [if it would make] the pleading of the opposite party not maintainable [and which if] not pleaded would take the other party by surprise."

***Mr. Machira*** urged that it would not be equitable, in all the circumstances, to strike out his suit *in limine*: because the limitation period for libel suit such as this one is *one year*, and the suit had been filed on *1st December, 2000;* there is no possibility of filing another suit, as it would be time-barred. In these circumstances, counsel urged, it would work injustice against him as plaintiff, to strike out the plaint "purely on a technicality." After waiting to be heard for three years, counsel pleaded, "we are being taken by surprise"; and he urged that such an element of surprise was not permitted by the terms of Order VI, rule 4(1) of the Civil Procedure Rules. By Order VI, rule 7 of the Civil Procedure Rules, "A party may by his pleading raise any point of law"; and so if the defendants thought the plaint was invalid, or that the verifying affidavit was invalid, then they ought to have raised this point in the statement of defence – so that the plaintiff is not taken by surprise after such a long period of waiting to be heard. Counsel urged: "Pleadings give each party the [other party's] case…Points of law cannot be kept secret then blown out at any moment. A point of law should be raised at the earliest possible opportunity, and there have been years of opportunity which have not been used."

***(b) If Valid in Form, is the Defendants' Complaint valid in Substance***?

Learned counsel submitted that the challenge to the plaintiff's papers on the ground that the drawer of the verifying affidavit was not shown, was "a mere technical objection", which could not sustain the objection because it was provided in Order VI, rule 12 of the Civil Procedure Rules that –

***"No technical objection may be raised to any pleading on the ground of any want of form."***

***Mr. Machira*** noted that his application of 26th February, 2001 seeking to strike out the statement of defence had been duly served on the defendants, who filed their own replying affidavit of 24th May, 2001 on 25th May, 2001 – an affidavit of the 1st defendant himself. And thereafter the plaintiff's application of 26th February, 2001 *proceeded to hearing* before ***Aganyanya, J.*** Submissions begun before the learned Judge who in all probability would have disposed of the plaintiff's prayers in the Chamber Summons of 26th February, 2001 had it not, unfortunately, turned out that he could not accomplish the proceedings. Even at that stage, the defendants had raised no objections, and it was learned counsel's reckoning that the instant preliminary objection would not have been raised, if the hearing of the application had proceeded to completion. Counsel urged: "The defendants having realised they may not resist the application to strike out the [statement of] defence, came up with the novel idea of a preliminary objection; [but] preliminary objections must be raised at the earliest opportunity: ***Mukisa Biscuit Co. Ltd. v. West End Distributors Ltd.*** [1969] E.A. 696. The application to strike out had already taken off before another Judge. Is it in order, at this moment, to raise the preliminary objection purely on a technicality? What is the justice of the matter?"

***(c) Is it True, in any case, that the Plaintiff's Plaint – Verification Affidavit Offends the Advocates Act (Cap.16), ss.34 and 35?***

***Mr. Machira*** urged that the object of s.34 of the Advocates Act (Cap.16) was only to bar *unqualified persons* from drawing or preparing the category of documents or instruments specified under sub-section 1(a) of the section, namely:

(i) conveyance of property;

(ii) constitutive documents for limited-liability companies;

(iii) partnership-formation or dissolution agreements;

(iv) instruments seeking or opposing grant of probate or letters of administration;

(v) documents or papers in respect of which a fee has been prescribed by the Chief Justice, by virtue of s.44 of the Advocates Act (Cap.16); or

(vi) instruments or documents relating to any other legal proceedings.

Counsel then urged: "Nowhere is it alleged by the objector that the plaint [herein] was drawn by an unqualified person." He drew the Court's attention to the fact that the plaint in question had been filed as a document, and in its filed form, was physically *bound together* with its verifying affidavit; and the plaint itself showed on the last page (p.18) that it was drawn and field by the advocates for the plaintiff, M/s. S.K. Ritho & Co. Advocates of Solar House, 5th Floor, P.O. Box 58670, Nairobi. When the said complete document as filed was served, counsel urged, "the defendant stamped the last page of the verifying affidavit; so it is one document." For greater effect, counsel touched – I think improperly – on a matter of evidence: "These documents, the plaint and the verifying affidavit, were printed by the same machine." It is a well-established principle of law that a preliminary objection is an objection on *legal points*, and no controversial evidence is to be introduced in the canvassing of such an objection – ***Mukisa Biscuit Co. Ltd. v. West End Distributors Ltd***. [1969] E.A. 696.

Counsel urged that it goes against the grain of *bona fide* claim to contend that in the dossier of plaint-and-verifying-affidavit as filed and served, the plaint itself emanated from M/s. S.K. Ritho & Co. Advocates while the attached verifying affidavit had been "drawn by an unqualified person." So he urged: "it be held that the plaint and verifying affidavit were drawn by the same advocates." He further urged it be accepted that the said verifying affidavit had been sworn by himself as shown on the document itself, and that his deposition at para.1 of the said affidavit, "THAT I am an Advocate of the High Court of Kenya practising law in the firm name and style of M/s. Machira & Co. Advocates", be taken into account. From that position counsel asked for acceptance of his suit documents; he posed: "Is it possible that I would have made that outrageous mistake, as an advocate of long standing, to have my plaint drawn by qualified advocates but verified by an unqualified person?" He noted that in his affidavit (last page) he had sworn as required under s.5 of the Oaths and Statutory Declarations Act (Cap.15), and his oath had been verified by a Commissioner for Oaths. In these circumstances, counsel urged, his suit documents were not in breach of the terms of s.34 of the Advocates Act (Cap.16) which dealt with the subject of *unqualified persons* purporting to draw and file certain documents. Counsel submitted: "In view of my own standing as an advocate being represented by another advocate, the [verifying affidavit] could not have been prepared by a lay person."

With regard to the provision in s.34 of the Advocates Act (Cap.16), again, counsel submitted that it would not be in breach of the law if a *lay person drew his own plaint* and then indicated it was drawn and filed by him; but it would run against the law if such a person prepared the plaint for someone else, and charged a fee for his assistance – in which case such a plaint would be liable to be condemned as void. And thus, the object of s.34 of the Advocates Act (Cap.16) is to prohibit lay people making certain documents or instruments, and charging fees therefor.

Counsel, against the foregoing background, then considered s.35 of the Act, which required the endorsement of the name and address of the drawer on the category of instruments provided for in s.34. He posed the question: "Does the technical omission or irregularity [as regards the endorsement under s.35] warrant the plaint being struck out?" He wondered whether the omission was not a mere technicality that could be cured, by weighing the shape of the injustice that would be occasioned by striking-out of the plaint, against the claims of justice in all the circumstances. Curing the shortcoming, learned counsel urged, was brief and only required an order that the name of the drawer of the verifying affidavit be

inserted; and the alternative is that the plaintiff's gravamen would be excluded *in limine,* as another suit would be time-barred.

Counsel urged that the Court, in disposing of the issue, do consider what prejudice the respondents would suffer if the plaintiff's application proceeded to hearing on the merits. He submitted that the impugned omission in the verifying affidavit was minor and caused no prejudice to the respondents. He urged that the provisions of s.34 of the Advocates Act (Cap.16), regarding unqualified persons, did not apply in this case because there were no unqualified persons; and similarly the provisions of s.35 of the Act, regarding endorsement of name and particulars of drawer, should not be applied in this instance out of context – as both the plaintiff and his advocates at the time of drawing and filing, S.K. Ritho & Co. Advocates, are not unqualified persons. Learned counsel urged that s.35 of the Advocates Act fails to state *what happens to a document drawn by a qualified person but not endorsed* with the name and particulars of that person. Consequently, it was urged, the striking out of a document for lack of endorsement, where that document was drawn by a qualified advocate, cannot itself be said to be consistent with s.35 of the Act on a literal construction of that section.

***(c) There are Varying Judicial Interpretations of ss.34 and 35 of the Advocates Act (Cap.16): How Should This Court be Guided?***

Learned counsel submitted that there are numbers of decided cases which demonstrate that a Court of law would not do injustice to a litigant merely on grounds of a *technical omission* in papers filed. The first case demonstrating this point cited was this Court's (***Ibrahim, J***) decision in ***Dubai Bank Kenya Ltd. v. Come-cons Africa Ltd***., HCCC No. 68 of 2003 – which counsel urged should be preferred to ***Ibrahim J's*** earlier decision in ***The Delphis Bank Limited v. Asudi (K) Limited & Another***, HCCC No. 82 of 2003 which had been relied on by the respondents in their preliminary objection. ***Mr. Justice Ibrahim*** decided the ***Delphis Bank Case*** on *15th January, 2004,* and the ***Dubai Bank*** Case five months later, on *15th June, 2004*. The later ruling apparently made no reference to the earlier one, but it contained a *new line of reasoning* which the plaintiff has called in aid, in contesting the preliminary objection. The gravamen in the preliminary objection in the ***Dubai Bank*** case was exactly the same as the one in the instant matter – that the verifying affidavit accompanying the plaint did not "comply with the mandatory provisions of section 35(1) as read together with section 34 of the Advocates Act." The following passage in the ***Dubai Bank*** case is the crucial one upon which the plaintiff in the instant case relies:

> ***"What I have now to ask myself…is, was the verifying affidavit in the present case drawn or prepared by, or were instructions taken by 'an unqualified' person and therefore an offence was committed? There has been no allegation or suggestion that the verifying affidavit was drawn or prepared by a non-advocate. A part from the [non]-endorsement of the name and address of the drawer, this affidavit looks quite in order in all other respects. It was made and sworn before a Commissioner of Oaths. When I perused the plaint which it accompanies, the same is drawn and filed by a firm of advocates, called 'Mohamed and Lethome Advocates'. The said firm prepared and drew the plaint and I would be justified to conclude that indeed, the verifying affidavit was drawn by a qualified person or advocate. So, strictly, no offence has been committed under the provisions of section 34. However, the said advocate failed and omitted to endorse their firm's name and address on the verifying affidavit to show that it was drawn by a qualified person.***
>
> ***"If the said advocate or firm of advocates were to be arraigned in Court for commission of an offence under section 35(1), without prejudice to his right of presumption of innocence until proven guilty, there is all likelihood that he would be found guilty...and ordered to pay a fine not exceeding a sum of Kshs.500/=.***
>
> ***"Would this make the plaintiff herein also guilty of the said omission? The answer is certainly, no. The plaintiff did not draw or prepare the verifying affidavit, it is the advocate who presented the plaint for filing and who drew the same. The plaintiff is therefore an innocent party and cannot be punished for the offences of his advocates under the provisions of the Advocates Act.***
>
> ***"From the foregoing, the question that naturally follows is whether the aforesaid omission or***

***failure by the advocates to endorse their name and address on the verifying affidavit makes it incurably defective under the provisions of section 35(1)?***

***"With much respect to the decisions of this Court that have been referred to, I am of the view that the said provision does not state or express anything about the effect, or consequences, or validity of a document or instrument which does not bear the name and address of the advocate who drew it."***

***Ibrahim, J*** noted that the obligation to stop a defective document or instrument, in the terms of s.35 of the Advocates Act (Cap.16), fell not upon a person such as the plaintiff, but upon [s.35(2)] "The Registrar, the Registrar of Titles, the Principal Registrar of Companies and any other registering authority." Did such shortcoming then invalidate a document such as the plaintiff's plaint in this case? ***Ibrahim, J*** remarked – and in my view, with eminent justification –

***"In my view from a simple reading of the words in [s.35(2) of the Advocates Act (Cap.16)], I am unable to come to any conclusion that the said sub-section invalidates or declares such a document or instrument in question to be defective.***

***"Of course the document should not have been filed in Court. It should have been rejected at the counter…However, it has now been filed and this suit commenced. Yes…the Registrar failed to enforce the provisions of section 35(2) by not rejecting or refusing the filing thereof. Is the verifying affidavit in the circumstances incurably defective [and] it should be struck out? Again, with much respect, I do hold that there is no word, statement or stipulation in section 35(1) and (2) that renders an instrument or document with the omission of the endorsement of the name and address of the advocate who drew or prepared [it], incurably invalid, void or defective. I do accept that the verifying affidavit in its [present] form has omitted a very necessary feature which is expressly stipulated by…law, [by] an Act of Parliament. From a reading of section 34 and 35, the said document made in violation of the law is defective. It should not have been allowed to be filed in the first place in order to ensure that section 35(2) is applied effectively and effectually to remedy the mischief intended by the legislature."***

The learned Judge then considered the intent of Parliament, and concluded:

***"I do not think…the intention of Parliament was to punish innocent litigants or deny…them access to justice***."

He further remarked:

***"In the circumstances, why should the innocent plaintiff and litigant suffer by having its plaint thrown out for this omission? He is not the intended unqualified person, he is not the advocate or the Registrar. The said section was not intended for the innocent litigant. Accordingly, I am not inclined to accept that the omission herein renders the verifying affidavit a nullity or incurably defective."***

The learned Judge held, quite properly, with respect, that –

***"the omission of the advocate's name and address on the verifying affidavit was a mere irregularity in form."***

He applied the Court's discretion under *Order XVIII, rule 7* of the Civil Procedure Rules and its inherent powers under s.3A of the Civil Procedure Act (Cap.21), to deem the subject verifying affidavit as "regular and properly filed," and he *disallowed* the preliminary objection, while awarding costs to the defendant, to be paid personally by the *plaintiff's advocates* on account of their non-compliance with s.35(1) of the Advocates Act (Cap.16).

A similar preliminary objection had been raised in ***Geology Investments Ltd. v. Rogonyo Njuguna &***

***Others***, HCCC No. 1067 of 2002 and the position taken by ***Azangalala, J*** was as follows:

> ***"The documents envisaged by section 35(1) [of the Advocates Act] are given under section 34(1) of the same Act and include [s.34(1) (f)] documents or instruments relating to any other legal proceedings. I hold that a verifying affidavit is the type of document or instrument covered by section 34(1) (f). On the face of it therefore, it would appear that the verifying affidavit in this case offends section 35(1). But what is the mischief section 35(1) as read with section 34(1) (f) intended to prevent? The side-note to section 34 reads 'unqualified person not to prepare certain documents or instruments.' It is obvious therefore that the sections quoted above protect mainly advocates. The sections were not in my view intended to invalidate documents or instruments by advocates who had omitted to endorse their names and addresses."***

Of the kind of omission which led to the objection, the learned Judge held:

> ***"An omission of this nature should not lead to the striking out of the plaint as such an action would not serve the ends of justice. I accordingly dismiss the defendant's application to strike out the plaint."***

Counsel urged that even in those situations in which a verifying affidavit may be struck out for its defect, there are decisions showing an inclination on the part of the Court to create *locus poenitentiae* enabling the party concerned to file a replacement-affidavit. Such was the case in ***Kenya Shell Ltd. v. James Njeru Wilson & Five Others,*** HCCC No. 550 of 2003, in which there was a breach of rule 9 of the Oaths and Statutory Declarations Rules (which provides that "All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters for identification"); and ***Njagi, J.*** thus held:

> ***"…there was failure to comply with rule 9 which constitutes an irregularity. But I don't think that it is such a serious irregularity as to prejudice the defendants in any way… It is my considered view that this is an innocuous irregularity which is not prejudicial to anyone and in respect of which appropriate steps may be taken to rectify the anomaly."***

Learned counsel next cited another High Court decision given by ***Ringera, J*** (as he then was), ***Microsoft Corporation v. Mitsumi Computer Garage Ltd.*** [2001] 2 E.A. 460; and here again, the validity of a verifying affidavit attached to a plaint was questioned. The learned Judge was in agreement that the relevant affidavits were defective, and he struck them out; but he then created *locus poenitentiae* for the filing of fresh affidavits. The following passage in the ruling (pp. 67 – 68) is relevant:

> ***"The next matter for consideration is whether I should consequently strike out the suit itself. Rules of procedure are the handmaidens and not the mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it. In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances, the Court should rise to its higher calling to do justice by saving the proceedings in issue. In the matter at hand I am of the view that the error manifest in [the] verifying affidavit neither goes to the jurisdiction of the Court nor prejudices the defendants in any fundamental respect. Indeed no prejudice has been alleged. Being of that persuasion, I think the ends of justice would best be served by sustaining the proceedings by declining to strike out the suit while at the same time putting right the lapses in the offending affidavit. The broad purpose of the verifying affidavit is… to verify the contents of the plaint. That purpose may be attained by rejecting a defective affidavit and ordering that a fresh and complying one to be made and filed on record."***

Learned counsel submitted that the respondents had suffered no prejudice on account of the plaintiff's

non-compliance with a legal provision that sought to prevent the drawing of documents by *unqualified persons;* because they had not alleged anywhere that the verifying affidavit was drawn by an unqualified person.

It was urged that there existed a lack of clarity in s. 35 of the Advocates Act (Cap 16), but that this section must be so construed as to make it operative, being guided by the recognised principle of construction, *ut res magis valeat quam pereat:* it is better for a thing to have effect than to be made void. This principle is explicated in ***Halsbury's Laws of England*** (3rd ed.), para 582:

> ***"Statutes must be so construed as to make them operative. If it is possible, the words of a statute must be construed so as to give a sensible meaning to them ... A statute must, if possible, be construed in the sense which makes it operative, and nothing short of impossibility so to construe it should allow a court to declare a statute unworkable. Thus where a statute has some meaning, even though it is obscure, or several meanings, even though there is little to choose between them, the courts must decide what meaning the statute is to bear, rather than reject it as a nullity. It is not permissible to treat a statutory provision as void for mere uncertainty."***

In ***Tom Okello Obondo V. National Social Security Fund,*** HCCC No. 1759 of 1999 a preliminary objection had been brought by the plaintiff, that certain affidavits were defective and should be expunged from the record; and ***Ringera, J*** (as he then was) ruled:

> ***"The upshot of this matter is that I find the irregularity of form complained of is not fatal. The same can be excused by the Court in its discretion. And as I find no prejudice to the plaintiff occasioned by such error, I excuse the same and overrule the preliminary objection."***

In ***Njagi v. Kihara*** [2001] 1 E.A. 165 the respondent filed an application seeking a stay of execution of judgment pending appeal. The application was heard and determined, in favour of the respondent. However, it later emerged that the respondent's advocate, at the time he signed the application, did not have a current practising certificate; and the applicant now sought orders to lift the stay which had been granted. And ***Mulwa J,*** thus held (pp 167 – 168):

> ***"…the unqualified person will face criminal penalties ... but nothing is said about [his] acts so done ...being void ab initio.***
>
> ***"Thus the question which stands to be answered is whether such [documents]…as plaint drafted and signed, applications or orders obtained, by an unqualified person, are void ab initio or they [nonetheless] constitute valid and binding Court procedures.***
>
> ***"To my mind, ... the documents duly drawn, signed and filed in Court, and which the Court has acted upon, by an unqualified person and more specifically by an advocate [whose] name is in the Roll of Advocates …., should not be expunged from the records….. It would be most hurting [for a party] to realize that a defect in [the] qualification of an advocate [is to be taken as] sufficient ground to quash the proceedings……."***

Similarly in ***Kajwang v. Law Society of Kenya*** [2002] 1 KLR 846, after the appellant's advocate had closed his submissions, the respondent's advocate filed a notice of preliminary objection, that because the appellant's counsel lacked a current practising certificate on two occasions during which he had prosecuted the appeal, he was an unqualified person within the meaning of s. 2 of the Advocates Act (Cap 16), and was in contempt of Court; and that consequently, the proceedings should be declared a nullity and the appeal struck out. The Court ***(Amin*** and ***Mulwa , JJ.*** ) held:

> ***"….we are …. of the view that the client should not bear this draconian penalty, with [a] striking-off of his application, as he could not have known by [any] stretch of the imagination that his counsel was under an impediment, real or imaginary which would affect this right of audience in court…."***

In ***Beat Koch v. Mukahawa Hotels Holdings Limited,*** HCCC No. 888 of 2001, the defendant sought leave to withdraw an affidavit already filed, and to file another in its place – because "the ….affidavit of 25th March, 2004 is not endorsed with the name and address of the drawer thereof." ***Azangalala, Ag. J*** (as he then was) thus held:

> ***"In respect of the supporting affidavit I am in agreement with the ruling of Ringera J. as he then was, in Nairobi HCCC No. 1759 of 1999, Tom Okello Obondo v. NSSF … and hold that the omission to state the place of swearing is a minor technical point which I can excuse under Order XVIII, rule 7. The irregularity is one of form and is not fatal.***
>
> ***"…The Court in my humble view should lean in favour of doing substantial justice to the parties."***

In ***Jovenna East Africa Ltd. v. Sylvester Onyango & Four Others*** HCCC No. 1086 of 2002 a preliminary objection was raised that the verifying affidavit annexed to the plaint was defective; and ***Nyamu, J*** while accepting the claim, preserved the suit, and thus held:

> ***"..I strike out the verifying affidavit. I exercise my discretion as implied in Order VII, rule 3 in refusing to strike out the plaint. Instead I order that a verifying affidavit be filed and served within 10 days of this Order….."***

Similarly in ***Stephen Kinini Wang'ondu v. Kobil Petroleum Limited***, HCCC No. 600 of 2003, a preliminary objection was taken regarding a defective affidavit, and ***Njagi, J.*** thus held:

> ***"…I think that the Court has the power to allow the plaintiffs to rectify the irregularity on the affidavit by withdrawing the affidavit on record and filing a compliant supplementary one which indicates that it was drawn by the plaintiff's advocates."***

Similarly in ***Saggu v. Roadmaster Cycles (U) Ltd.*** [2002]1 E.A. the Ugandan Court of Appeal had to address an objection taken to a defective affidavit; and it was held:

> ***"See Ex p. Harris, L.R. 10 Ch. 264, 266; and Ibrahim v. Sheikh Bros Investment Limited [1973] E.A. 118 at 120 where it was held that the Court could always allow a party to reswear and redate an affidavit as this would not go to [the] jurisdiction of the Court. Section 8 of the Oaths Act (Chapter 52) which renders it mandatory to date the affidavit before tendering it in Court simply means that an affidavit cannot be used without dating it or indicating where it was sworn and before whom. The errors or omissions regarding the date, place and the commissioner, cannot vitiate an application."***

Learned counsel urged that the general body of case law indicates that where there are defects in affidavits, this does not by itself compromise the *main cause*, as the Courts are guided by the object of substantial justice; and that the Courts are always interested to know what *prejudice* the objector has suffered, whenever such defects in the depositions are alleged. A further illustration of this principle is ***Pastificio Lucio Garofalo SPA v. Security and Fire Equipment Co.*** [2001] 1 E.A. 184, where ***Ringera, J*** (as he then was) held (p. 188):

> ***"The last matter of consideration is whether having ordered the verifying affidavit struck out, the suit should also be struck out. Sub-rule (3) of rule 1 of Order VII reads:***
>
> ***'The Court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with sub-rule (2) of this rule.'***
>
> ***"To my mind the use of the word may shows the Court has a discretion in the matter. In exercising such discretion the Court should be alive to the principle of justice that procedural lapses, omissions and irregularities unless they go to the jurisdiction of the Court or prejudice the adversary in a fundamental respect which cannot be atoned for by an award of costs, are not***

***to be taken as nullifying the proceedings affected. In the instant matter I am of the opinion that the filing of the defective verifying affidavit is such a procedural lapse."***

In ***National Bank Ltd. v. Lucy Muthoni Kahir Magelo & Two Others,*** HCCC No. 101 of 2002 a preliminary objection was taken to an affidavit, said to have been drawn without compliance with the terms of s.35 of the Advocates Act (Cap.16). ***Kasango, J.*** thus held:

***"The Court having made [the finding that the affidavit contravened the terms of s.35 of the Advocates Act (Cap.16)] does hereby order that the replying affidavit...be struck out of the record.***

***"The Court is acutely aware that it is in the interests of justice that the application of the 1st defendant be heard and determined after hearing all parties.***

***"Accordingly the Court invokes the inherent power found in section 3A of the Civil Procedure Act, and does hereby order that the plaintiff does within seven days from the date of this ruling file another replying affidavit."***

The same question was considered by the Court of Appeal in ***Grace Ndegwa & Others v. The Hon. The Attorney-General***, Civil Appeal No. 228 of 2002 and it was held:

***"The learned Judge…found that the verifying affidavit was defective as it did not comply with Order VII, rule 2…***

***"Before we allow the appeal, as we are inclined to do, we need to make it clear…as was clearly stated by the predecessors of this Court in ..Mukisa Biscuit Co. v. West End Distributors [1969] E.A. 696, the practice of applying the guillotine to cases through preliminary objection before the full hearing should be discouraged."***

Learned counsel urged that, in the majority of cases in which a preliminary objection such as the present one has been taken, the Courts have saved the *main cause*, in their quest for substantial justice; and he now urged that if it would be held in this Court that the plaintiff's verifying affidavit is tainted by a fundamental omission, in the terms of ss.34 and 35 of the Advocates Act (Cap.16), then the Court do exercise a discretion to allow a *rectification* of the omission. Counsel submitted that the instant preliminary objection had been taken on the basis of Order VII, rule (3) of the Civil Procedure Rules – and that those rules place no mandatory obligation to strike out the document in question. Where the Court does not act *suo motu*, then there ought to be an application to strike out the plaint. There had not been such an *application,* learned counsel urged, as an application would have had to be brought by virtue of Order VI, rule 13(1); and so it was urged that on this technical ground, the preliminary objection should be overruled, as it was in effect claiming the plaintiff had no reasonable cause of action even though it was not itself the *application* as contemplated.

***(d) Appropriateness of Authorities Cited by the Objectors***

Learned counsel disputed the relevance to this case of the authority, ***Gawo v. Nairobi City Council*** [2001] 1 E.A. 69 which was relied on by the objectors as supporting the position that the affidavit annexed to a plaint must be in proper form, for the suit to be saved. Counsel urged that the ***Gawo*** case be distinguished; and this contention is, in my view well founded, for in the ***Gawo*** case "there was no verifying affidavit at all, [whereas] in the instant case we have."

***Mr. Ohaga*** had also relied on the ***Privy Council*** case, ***MacFoy v. United African Co., Ltd*** [1961] 3AII E.R 1169 in which the Board made a distinction between *irregularity* (which makes something *voidable)* and *nullity* (which makes something *void*). ***Mr. Machira*** urged that the ***MacFoy*** case was not applicable to the matter now before the Court; especially because there are more apposite *local authorities* to guide the Court in this instance. In any event, learned counsel urged, such analogy as may be drawn from the ***MacFoy*** case should be construed more in favour of the plaintiff's than the defendants' position. It had

taken the defendants nearly five years to come to Court to challenge the plaint by preliminary objection; counsel urged that, as in ***MacFoy,*** in these circumstances "it is not open to the defendants to have waited for so many years to come up with the preliminary objection", for it would be "unjust to strike out [the] plaint after [a period so long]." On *1st December, 2000* the plaint was filed; on *12th January, 2001* a reply to defence was filed; on *1st March, 2001* the application to strike out defence was filed, and on *25th May, 2001* the defendants filed their replying affidavit resisting the application to strike out the statement of defence; and in none of the defence pleadings and prayers, had there been a challenge to the plaint's verifying affidavit on grounds of *propriety* or *competence.* Thus, counsel urged, the defensive position (as in the pleadings) of the defendants remained the sole contest to the integrity of the suit, and that position consisted in a plea of *justification, denial,* and *privilege*. These defensive positions, in the plaintiff's perception, showed no triable cause, and so the plaintiff was entitled in law to come up with his application of 26th February, 2001 to have the statement of defence struck out – to which application the defendants had already properly laid their stage for rebuttal, and, indeed, a *lis* existed, which already was being heard before ***Aganyanya,J.***

Learned counsel urged that there had been differing judicial interpretations of Order VII, rule 2 of the Civil Procedure Rules which provides: ***"The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint***". Counsel would prefer the position set out by ***Ringera, J*** (as he then was) in ***Microsoft Corporation v. Mitsumi Computer Garage Ltd*** [2001] 2 E.A 460: that "Rules of procedure are the handmaidens and not the mistresses of justice [p. 461]"; and that such proceedings as may be afflicted by procedural flaws but which do not go to jurisdiction, should be saved in the interests of justice.

Of the English authority relied on by the defendants, ***Re Pritchard*** *(deceased*) [1963] 1 AII E.R 163, which identified " proceedings which appear to be duly issued but fail to comply with a statutory requirement [p.873]" as falling in the "*nullity"* category, learned counsel urged that the facts in that case were remarkably different from those in the instant matter; in particular, in the English case, what was missing from the subject instruments was a proper sealing *by the Court itself* – and that is not the case in the matter now before the Court.

In ***Re Pritchard*** *(deceased),* the majority (***Upjohn*** and ***Danckwerts, L.JJ***.) nullified the subject instrument; but ***Lord Denning, M.R***. dissented, lamenting the stand of the majority (p.879):

> ***"My brethren take a different view. They think the defect is fatal and that the plaintiff must be driven from the judgment seat without a hearing. I greatly regret that this should be so …."***

***Lord Denning's*** preferred position is set out (p.876):

> ***"Apart from authority, I should have thought that the high court had ample jurisdiction to correct the error. It ought not to penalize the widow for a technical slip, especially when the defendants have not been in the least prejudiced by it, and indeed never raised it themselves. The court ought to allow any necessary amendment to put it right."***

Learned counsel then considered another case relied on by the defendants, ***Johann Distelberger v. Joshua Kivinda Muindi & Another,*** H.C. Misc. Civil Application No.1587 of 2003 in which ***Nyamu, J*** struck out two affidavits for offending against s.35 of the Advocates Act (Cap 16), and also struck out the application itself. ***Mr. Machira*** urged that whereas this authority was only persuasive, there was a binding authority to the contrary, ***Grace Ndegwa & Others v. The Hon. The Attorney-General,*** Civil Appeal No.228 of 2002 in which the Court of Appeal, on fairly similar facts adopted the statement of principle by ***Madan, J.A*** in ***D.T. Dobie Co. Ltd v. Muchina & Others,*** Civil Appeal No.37 of 1997:

> ***"A court of justice should aim at sustaining a suit rather than terminating it by a summary dismissal. Normally, a law suit is for pursuing it".***

Such a path of resolution, moreover, learned counsel urged, would comport well with ***Nyamu, J's*** *later* ruling (another persuasive authority) in ***Jovenna East African Ltd v. Sylvester Onyango & Four Others***

HCCC No.1086 of 2002, in which he held:

> ***"I think that the Court has the power to allow the plaintiffs to rectify the irregularity on the affidavit by withdrawing the affidavit on record and filing a compliant supplementary one which indicates that it was drawn by the plaintiff's advocates."***

In that case the learned Judge struck out an application but not the *plaint,* and he accorded the party *locus poenitentiae* to file fresh documents. Since in that case what was struck out was the *interlocutory application* (Notice of Motion), counsel urged, the applicant could readily file another one in its place; not so, however, in the present case if the *main suit* is struck out; for the plaintiff would be caught by the *limitation period* which is now several years gone-by. ***Nyamu, J*** in ***Jovenna*** had to deal with such a situation precisely, and he exercised his discretion to *save the suit,* even after finding that –

> ***"As regards the requirements of the Advocates Act [Cap.16], s.35, these are statutory requirements and they cannot be said to be irregularities in form only. A violation of a statute cannot be an irregularity in form."***

Of ***Barclays Bank of Kenya Ltd v. Dr. Sollomon Otieno Orero***, HCCC No.1736 of 2001 in which ***Njagi, J*** struck out an affidavit for non- compliance with s.35 of the Advocates Act (Cap 16), and also struck out the application itself, learned counsel submitted that, as against this persuasive authority, there was before the Court the binding authority of ***Grace Ndegwa & Others v. The Hon. The Attorney-General,*** Civil Appeal No. 228 of 2002 which favoured a saving of the suit in an instance such as this.

Besides, in the ***Orero*** case, learned counsel urged, "what was struck out was an *application* and not a *plaint."* This distinction was important, and it would stand in favour of saving the plaintiff's plaint, in the instant matter.

Such a position, ***Mr. Machira*** urged, would commend itself all the more because the learned Judge in the ***Orero*** case, ***Njagi, J*** had taken a position more favourable to the plaintiff's position herein, in ***Stephen Kinini Wang'ondu v. Kobil Petroleum Limited***, HCCC No. 600 of 2003:

> ***"…I think that the Court has the power to allow the plaintiffs to rectify the irregularity on the affidavit on record and filing a compliant supplementary one which indicates that it was drawn by the plaintiff's advocates."***

Of the ruling rendered by ***Waweru, J*** in ***Peter Kimonye & Two Others v. Barclays Bank of Kenya & Two Others***, HCCC No. 403 of 2004, learned counsel urged its *persuasive* status, and submitted that it was different on the facts: there, the impugned affidavit was attached to an interlocutory Chamber Summons application, and not to a *plaint*; and so if the Chamber Summons was struck out, it was still open to the applicant to file a fresh application. In that particular case the learned Judge was considering the *merits* of the whole application, and on that basis he, indeed, dismissed it – which also differentiates that matter from the instant one. Learned counsel considered the tenor of the ruling in the ***Peter Kimonye*** case not to detract from the merits of his position in the instant matter; in his words: "***Waweru, J*** refused to confine himself to the technicality; so the applicant couldn't go to Court to file another application; it was dismissed on merits."

***Mr. Machira*** submitted that the ruling relied on by the respondents, ***The Delphis Bank Ltd. v. Asudi (K) Limited & Another***, HCCC No. 82 of 2003 had no application in the present instance – because the facts are different. The matter in contention, in the ***Delphis*** case, was that "the plaint is dated and made on 17th February, 2003 yet the verifying affidavit was sworn on 8th January, 2003," and that "the plaintiff could not aver or swear to a non-existent plaint", and that "as a result the affidavit was false and invalid"; and this led ***Ibrahim, J*** to "strike out the plaint for non-compliance with sub-rule (2) of Order VII [of the Civil Procedure Rules]."

Learned counsel submitted that the authority which, perhaps, tallied most with the circumstances of the instant matter was ***Ibrahim, J's*** ruling in ***Dubai Bank Kenya Ltd. v. Come-Cons Africa Ltd***, HCCC No.

68 of 2003. The learned Judge in that case pronounced himself as follows:

> ***"I think…Parliament intended well when enacting sections 34 and 35 [of the Advocates Act (Cap.16)]. They are good law. However, I cannot read them or apply them [so as] to render a vital document like a verifying affidavit belonging to an innocent litigant who has heavily paid for its filing, incurably defective. The purpose [or] the mischief of the provision was not to render the document defective or invalid, per se.***
>
> ***"In the premises, I hold that in the circumstances of this case the omission of the advocate's name and address on the verifying affidavit is a mere irregularity in form."***

Learned counsel takes the cue from the principles set out in the ***Dubai Bank*** case, and urges a matching construction of Order VI, rule 12 of the Civil Procedure Rules, which stipulates –

> ***"No technical objection may be raised to any pleading on the ground of any want of form."***

And he urges that the verifying affidavit attached to his plaint be deemed to be regular and properly filed. He urges that the preliminary objection be dismissed ? but costs be awarded to the defendant, to be paid personally by the advocate, in view of the terms of s.35 of the Advocates Act (Cap.16).

***(f) Irregular Form in Affidavits, by the Civil Procedure Rules (Order XVIII, rule 7): Does it Provide a Solution in the Instant Matter?***

Order XVIII, rule 7 of the Civil Procedure Rules thus provides:

> ***"The Court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof***."

This provision has been cited in the case law in which the special problem presented by ss.34 and 35 of the Advocates Act (Cap.16) was involved, and a decision was being made to save essential suit or application documents. Learned counsel sought to rely on that principle, and urged that the Court do proceed by virtue of Order XVIII, rule 7 to allow the verifying affidavit which is the subject of this preliminary objection.

Such a submission, however, would appear to raise a special difficulty, in terms of legal principle. For such procedural requirements as *directly* emanate from the sections of the *Advocates Act* (Cap. 16) are attached to the substantive law of Parliament; whereas discretions such as that created by Order XVIII, rule 7 of the Civil Procedure Rules are of a *secondary* order, emanating from subsidiary legislation. The procedures which form part of the express statutory provisions, will clearly be superior to those of an "in-house" nature, made by virtue of rules and regulations. Strictly speaking, therefore, questions as to the meaning and intendment of express provisions of legislation ? such as the Advocates Act (Cap.16) – must be addressed by the Court within a different foundation of empowerment. Such empowerment obviously flows from the terms of s.3A of the *Civil Procedure Act* (Cap.21) which provides:

> ***"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."***

It also comes from the Interpretation and General Provisions Act (Cap. 2) which is ***"An Act of Parliament to make provision in regard to the construction, application and interpretation of written law…"*** The Court's empowerment to *attach particular meaning* to the provisions of a statute, such as ss.34 and 35 of the Advocates Act, also emanates from the *general law* of the land which is represented by recognised principles of the common law.

***Mr. Machira*** relied on the Court of Appeal decision in ***Grace Ndegwa & Others v. The Hon. Attorney-***

***General,*** Civil Appeal No. 228 of 2002, to support the submission that considerations of *substance*, and not *form*, should determine the outcome of this preliminary objection. The learned Judges of Appeal, in that case, thus stated the governing principle:

> ***"In our mind, as clearly spelt out in section 72 of the Interpretation and General Provisions Act (Cap.2, Laws of Kenya), in a case where a form is prescribed by a written law (as is the case here where a form of the notice of intention to sue is prescribed), all instruments or documents which purport to be in that form shall not be void by reason of a deviation from the form if the same document does not affect the substance of the document or is not calculated to mislead. We reiterate that the courts, in dealing with situations such as was before the learned Judge have a duty to look into the spirit of the document and whether the document served its purpose*** [emphasis added]."

On the specific facts of that case the Court of Appeal restated the broad principle:

> "…***the principle is the same and that is that as far as possible, a case should be heard on its merit, and terminating cases on technicalities should be discouraged. We do not say that in appropriate cases a party should not seek to have a case struck out by way of a preliminary objection or by way of a substantive application. Rules are there to allow the same to be done, and the Civil Procedure Rules and all other rules for ensuring orderly conduct of cases have to be complied with fully, but in such cases, the Court should ensure that where, as in this case, the spirit or purpose of a document is clear, a litigant should be allowed to pursue his substantive claim so long as no prejudice will be suffered by the other party***."

***Mr. Machira*** urged that in the documents which are the subject of this preliminary objection, the omission in question does not affect the substance; that the documents in question are not calculated to mislead; and that the impugned verifying affidavit, does indeed serve its purpose; the said affidavit has been sworn by the plaintiff, an advocate of some 30 years' standing. Counsel urged that, in accordance with the principle in the ***Grace Ndegwa*** case, the suit should as far as possible be determined on the merits. He urged that the preliminary objection be disallowed, so that his application to strike out the defence, of 26th February, 2001 may be heard and disposed of.

**D. LAY PERSON OR ADVOCATE?; DISCRETION TO REST ON LAW; PLAINTIFF RELIES ON AUTHORITIES BEARING MIXED SIGNALS; OF JUDICIAL AND LEGISLATIVE ROLES: OBJECTORS' REJOINDER**

***(a) Plaintiff isn't a Lay Person, Hence No Protection Under S.35 of the Advocates Act (Cap.16)***

Learned counsel ***Mr. Ohaga*** submitted that the shortcoming in the verifying affidavit was all the more censurable precisely because of the plaintiff's long experience as an *advocate*, who entrusted his litigation to yet another experienced advocate: "That other advocate must have been well aware that Order VII, rule 1(2) required that the plaint be verified by affidavit." He urged that a distinction be drawn, for the purposes of s.35 of the Advocates Act (Cap.16), between the innocent litigant deserving of protection, and an *advocate* who knows the terms of that Act, and that: "This litigant signed and swore the verifying affidavit knowing it lacked the endorsement required by s.35 of the Advocates Act (Cap.16) – legislation applying to him directly." Learned counsel contended that "The fact that a litigant is an advocate must place him in a special category different from that of other litigants."

***(b) It is Not True the Objection wasn't Foreshadowed in the Pleadings***

***Mr. Ohaga*** contested the submission made for the plaintiff, that the instant preliminary objection had not been foreshadowed in the early pleadings; he recalled the content of paragraph 16 of the statement of defence dated 11th January, 2001 and filed on 15th January, 2001; this asserts: "Without prejudice to all the aforegoing the defendants aver that the plaint does not disclose any or any reasonable cause of action:' and in learned counsel's view such an assertion has made sufficient mention of the competence of the plaint. It doesn't look quite so plain though, in my perception.

***(c) Plaintiff Seeks Discretion, But What's the Legal Basis for That?***

***Mr. Ohaga*** queried the purpose of the very lengthy submissions made in Court; there was, in his view, conflicting jurisprudence; and it seemed, he thought, that the plaintiff's pursuit in this instance was a prayer for an exercise of *discretion* to keep the suit alive.

Discretion could not thus be sought, counsel submitted, unless it was first acknowledged that the subject affidavit was defective, contrary to statute and a nullity.

It was not urged that ***Mr. Machira*** had not acknowledged the defect in the verifying affidavit; but that, in the circumstances, the Court could only deal with the document lying before it: "We cannot speculate as to the qualification of the drawer of the affidavit; there is no endorsement regarding the drawer."

Counsel contested the submission that the shortcoming in the subject affidavit was only a technical omission curable under Order XVIII, rule 7 of the Civil Procedure Rules. He urged that this was not a *mere irregularity* – as a number of Judges pronouncing on similar situations "have held that failure to comply with the statute renders it a nullity and not just an irregularity"; and at this point counsel reverted to the Privy Council decision, ***MacFoy v. United Africa Company Ltd.*** [1961] 3 All ER 169 where it is stated that an act which is void is a nullity. He considered that principle to have been endorsed in Kenyan Courts, so that the subject affidavit's want of integrity was not contestable.

***Mr. Ohaga*** restated the question before the Court as, whether or not the plaint should be struck out; and he submitted that discretion was the basis for arriving at a decision. He then urged: "Discretion in any form is a creature of law, exercised on the basis of some statutory provision which donates it to the Court." He contested the position of the plaintiff in relation to that principle: "No guidance has been placed before this Court, as to the basis upon which this discretion should be exercised. " He doubted that the plaintiff could rely on Order XVIII, rule 7 of the Civil Procedure Rules – because "that Order addresses irregularity in the form of an affidavit"; yet, in his view, what is before the Court "is not a mere irregularity and therefore Order XVIII, rule 7 has no application." In order to identify the origin of the necessary discretion, counsel submitted, "we must look at the provision which provides for a verifying affidavit"; and the relevant provision, O. VII, rule 1(2) by which the attachment to a plaint of a verifying affidavit is, counsel urged, mandatory. By Order VII, rule 1(3) "The court *may* of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with sub-rule (2) …" The word *may*, counsel urged, is not permissive; "it denotes that either the Court can do it *suo motu*, or can do it on application by the defendant"; "but where there is non-compliance, the Court is required to strike out the plaint." Therefore, counsel further urged, the *limits of the discretion* of the Court in the matter have been defined. To buttress this point of view, learned counsel extolled ***Ibrahim, J's*** first decision on this subject, ***The Delphis Bank Limited v. Asudi (K) Ltd. & Another*** HCCC No. 82 of 2003 [given on *15th January, 2004*], rather than his later decision in ***Dubai Bank (K) Ltd. v. Come-Cons***, HCCC No. 68 of 2003 [given on *15th June, 2004*]. He recalled the passage in the earlier decision which, with regard to Order VII rule 1(2) and (3), thus reads:

> ***"The discretion given to the Court here is that at its own motion...and without being moved by someone else [it] …can invoke its powers and strike out a plaint which is non-compliant with sub-rule (2).***
>
> ***"……..***
>
> ***"It follows that where the defendant moves the Court and applies for the striking out of a plaint and the Court finds that the plaint does not comply with sub-rule (2) of rule 1, then the Court must strike out the said plaint. Sub-rule (3) does not give or leave the Court with any discretion to strike out or sustain the suit by allowing the plaintiff to file a fresh and compliant verifying affidavit – there is only one option and that is that of striking out the plaint."***

***(d) Authorities Relied on by Plaintiff Carry Mixed Signals***

Thus anchored on the single decision in ***The Delphis Bank*** case, ***Mr. Ohaga*** urged the Court to pay no regard to the several cases cited by learned counsel ***Mr. Machira***, in which the Court ruled in favour of curing a bad affidavit and saving the main suit so it may go on to trial on the merits. On what basis did learned counsel dismiss these many other decisions? In his words: "In the other cases referred to by ***Mr. Machira,*** the Courts exercised a discretion that was *not available* to them"; and in any case, counsel urged, "such decisions are not binding on this Court."

***Mr. Ohaga***, however, had to address the two decisions of the Court of Appeal cited before this Court. In ***Gawo v. Nairobi City Council*** [2001] 1 E.A. 69 the Court of Appeal underlined the importance of Order VII, rule 1(2) though, as noted by ***Mr. Machira,*** this was a case where the verifying affidavit to accompany the plaint was *missing* altogether. Still, ***Mr. Ohaga*** considered that the Court of Appeal's position was as good as an affirmation that the Court's discretion had been excluded, in the matter of a plaint being accompanied with a verifying affidavit. In learned counsel's words: "The Court of Appeal determined that those were mandatory terms, leaving no room for [discretion]; a plaint that does not comply would have to be struck out."

Learned counsel sought to distinguish the Court of Appeal decision in ***Grace Ndegwa & Others v. The Hon. The Attorney-General,*** Civil Appeal No. 228 of 2002, mainly on *facts* – even though the material facts therein would appear to be quite pertinent in relation to the judicial positions on the *verifying affidavit* accompanying a plaint. This is evident from the following passage in the Court of Appeal's decision:

> ***"The learned Judge….found that the verifying affidavit was defective as it did not comply with Order VII, rule 2 in that whereas Grace Ndegwa purported to have sworn that affidavit with the authority of all the appellants, that authority is lacking as what she referred to as the authority did not authorize her to appear, plead or act for the other appellants and in any case, it was not signed by all the appellants."***

Learned counsel's contention was that it was the ***Gawo*** case which dealt squarely with the question of plaints and verifying affidavits; and that the ***Grace Ndegwa*** case was only concerned with "a side-issue". So he urged that the ***Gawo*** case be preferred as the main reference in determining the instant preliminary objection.

***Mr. Ohaga*** submitted that this Court be not influenced by factors such as: lapse of *time* between the fling of suit and the lodgement of preliminary objection; or *prejudice* or lack thereof, affecting one party or the other. On what account? Counsel urged that a *breach* of s.35 of the Advocates Act (Cap.16) had been disclosed, and an implicit plea of *estoppe*l against the play of statute law was inadmissible; statutory requirements must be seen as trumping such elements as would be taken into account in the exercise of equitable discretion.

***(e) Strict Construction, Judicial Search for Justice, the Legislative Function: The Dubai Bank Case***

Counsel submitted: "once a verifying affidavit is not just irregular but a nullity, then the effect is that the plaint is unaccompanied by a verifying affidavit, and the consequences in law are unequivocal. The Court has *no discretion* to sustain such a suit."

Learned counsel then found an obstacle to his juristic scenario in the shape of *one* High Court-decision, ***Dubai Bank Kenya Limited v. Come-Cons*** HCCC No.68 of 2003. Where an affidavit becomes a nullity on account of the requirements of s.35 of the Advocates Act, the blame, ***Ibrahim, J*** held, attaches to the *advocate* – not the litigant. Now ***Mr. Ohaga*** proposed a perception of that principle which draws a distinction between *lay person,* and his advocate; and that such a distinction is not available in *this instance*, because the litigant was an advocate of long standing.

Learned counsel not only urges a new construction of the principle proposed by ***Ibrahim, J***; he is also critical of the decision itself – that it will amount to the perpetuation by the Court of an unlawful act, since the Judge held that the subject documents *should not* have passed the Registry's filing desk; and if

an impropriety had already been committed at that desk, then the Court "could not properly allow client-and-advocate to perpetuate the commission of the offence".

Learned counsel also submitted that the Court in the ***Dubai Bank*** case wrongly typified the non-endorsement of the verifying affidavit in accordance with s.35 of the Advocates Act (Cap 16), as "a *mere irregularity of form"*. The failure to endorse the verifying affidavit, counsel submitted, "was not a mere irregularity, it goes to the validity of the document". The Court in the ***Dubai Bank*** case, counsel submitted, had been overly solicitous of the interests of the *innocent litigant*, and in that mode it had "lost sight of the principles of law that ought to be applied in a matter such as this". He urged that ***Ibrahim, J's*** decision in ***The Delphis Bank Limited v. Asudi (K) Ltd & Another*** HCCC No.82 of 2003 be preferred to the ***Dubai Bank*** case.

Counsel submitted that if there was any perceived injustice wrought by a rigid application of Order VII, rule 2(3) of the Civil Procedure Rules and s.35 of the Advocates Act (Cap. 16), then it falls only to *Parliament* to amend the law as appropriate ? to "mitigate the harshness of the application of those provisions".

Counsel submitted that the case law was replete with conflicting decisions, and there were even cases where such conflict marked the decisions of the same Judges; and in his view, all this was " *an attempt to mitigate the rigours of the law";* in his view such a quest for a tolerable legal position was an item of agenda for the *legislature*; the Courts should *apply* the law; "where the words used are unclear or ambiguous, then there are aids to statutory interpretation …." In the present situation, counsel urged, "the words used have not been said to be anything but *clear* and *unambiguous;* and so, the law be applied in accordance with the natural meaning".

**E. FURTHER ANALYSIS**

***(1) Preliminary Remarks***

This is a *preliminary objection* substantively canvassed on the legal and procedural status of a *verifying affidavit* required to be filed together with the plaint. It is acknowledged that the verifying affidavit, unlike the plaint in which it was physically lodged so as to form but one dossier, failed to carry an endorsement of the particulars of the person who drew and filed the said dossier. That is the basis of the preliminary objection by which the defendants contend that, insofar as the plaint was not verified by an affidavit that complied with s.35 of the Advocates Act (Cap.16), the plaint itself was tainted and must fall, as an unverified plaint contrary to the express provisions of the Civil Procedure Rules (Order VII, rule 1(2)); the defendants contend that the Court is placed under a mandatory duty to strike out the Plaint as a document that is a nullity.

***(2) Nullity Versus Irregularity***

Learned counsel ***Mr. Ohaga***, for the objectors, brought to the Court's attention the Privy Council decision in ***MacFoy v. United Africa Co. Ltd*** [1961] 3 AII E.R.1169, which is valuable as it considers the distinction between *nullity* and *irregularity*, and addresses the question, when should a Court hold a particular instrument to be void (*null*) and not voidable (*irregular).* The relevant passage, in the judgment of ***Lord Denning,*** has already been set out; its essence is that where an instrument is only voidable, then it is to be treated as regular all the time, until the Court considers it, finds it irregular, and quashes it; but where an instrument is a nullity, it is void *ab initio,* and strictly speaking it cannot be the basis of any valid process at any time – save that the *stamp of the Court* is the sole instrument for the declaration of that total nullity. And thus, whether an instrument is void or voidable, nobody but the Court, is the proper authority to pronounce on the question – in the absence of new *legislation* declaring the invalidity thereof.

It is the common position of the Court in ***MacFoy,*** that there are certain factors to be considered in determining whether an instrument is void or voidable: (i) demands of *justice*; (ii) whether the objector has given *waiver* by his conduct; (iii) whether the impropriety complained of is or is not a *mere formality*; (iv) whether or not the point is only a *technical objection;* (v) whether undue *prejudice* may fall upon a

party.

But ***Lord Upjohn***, when he sat with ***Lord Denning, M.R***. and ***Danckwerts, LJ*** in the English Court of Appeal case, ***Re Pritchard*** (*deceased)* [1963] 1 AII ER 873, was of the (majority) view that the existing authorities showed three categories of nullity and one of these was "Proceedings which appear to be duly issued, but *fail to comply with a statutory requirement."*

The authority which appears to have guided the learned Judge most, in identifying the said basis of nullity, was the unanimous Court of Appeal decision in ***Finnegan v. Cementation Co., Ltd*** [1953] 1 Q B. 688, from which the following passage is taken (***Jenkins, L.J*** at p.700):

> ***"I agree that this appeal fails, though I share the regret expressed by my Lord in coming to that conclusion. It seems to me to be a case in which a technical blunder has deprived the plaintiff of her remedy, although the blunder was not such as to affect the substance of the claim in any way, or to prejudice the defendants in defending the action in any degree. Nevertheless, the defendants are entitled to have their objection to the competence of the action dealt with according to law, and if the law supports their objection effect must be given to it, however unmeritorious it may appear to be*** [emphasis added]."

Similarly, the objectors herein are insisting that, on the basis of such principles of law, the plaintiff's suit must be struck out, for offending the terms of an *Act of Parliament*, of s.35 of the Advocates Act (Cap. 16). It is thus the duty of this Court to *examine that statute,* and determine if there indeed has been a breach of its provisions.

***(3) Section 35 of the Advocates Act (Cap. 16)***

The Advocates Act (Cap.16) is by its very title a statute about *advocates*, rather than anyone else. It should, therefore, be expected to have little to do with non-advocates. It describes itself in the long title as –

> ***"An Act of Parliament to amend and consolidate the law relating to advocates."***

Section 35 of the Advocates Act thus provides:

> ***"(1) Every person who draws or prepares or causes to be drawn or prepared, any document or instrument referred to in section 34(1) shall at the same time endorse or cause to be endorsed thereon his name and address, or the name and address of the firm of which he is a partner and any person omitting so to do shall be guilty of an offence and liable to a fine not exceeding five thousand shillings in the case of an unqualified person or a fine not exceeding five hundred shillings in the case of an advocate:***
>
> ***Provided that, in the case of any document or instrument drawn, prepared or engrossed by a person employed, and while acting within the scope of his employment, by an advocate or by a firm of advocates, the name and address to be endorsed thereon shall be the name and address of such advocates or firm".***

By s.34 of the same Act, *no unqualified person* is permitted to draw or prepare the documents or instruments contemplated under s.35. Perhaps this explains the fact that the penalty imposed by s.35 for failure of endorsement of particulars is more severe for the unqualified person than for the qualified advocate.

Yet still, the manner in which the penalty is imposed, I think, imports an ambiguity in s.35 of the Act. If a lay person may not draw or prepare the said documents or instruments in the first place – and he is already liable to punishment for purporting so to do – then how can he be regarded as having failed to endorse his particulars on an impugned document or instrument, so that on that account the heavier penalty is to be meted out? Is the punishment for arrogating the reserved professional role? Or for not

endorsing his particulars on the document or instrument?

As already noted, ***Nyamu, J***. in ***Johann Distelberger v. Joshua Kivinda Muindi & Another,*** H.C. Misc. Civ. Appl. No. 1587 of 2003 held (in agreement with several other decisions of the High Court) ? and I believe him to have been right, in law ? that an affidavit is a d*ocument* within the meaning of sections 34 and 35 of the Advocates Act (Cap.16). What of a *plaint*, or an *Originating Summons* or *Motion?* Are such not, as contemplated by s.34(1)(f) of the Advocates Act (Cap.16), *documents* "relating to any other legal proceedings", much like the *affidavit?* I would think they *are.* Does s.35 of the Advocates Act require that no *lay person* may draw and file any such *documents*, in their own interests, and for which they have charged no fees to anyone else? It compounds, I think, the ambiguity of s.35 of the Act which, on one construction, would be the basis of a criminal charge against a lay person who drew and filed his *own* plaint.

This, I would hold, is a typical case of ambivalent legislation. What, in law, must happen to such legislation, especially at the stage where there are competing claims between parties? The Constitution of Kenya (s.60) established the High Court, " a superior court of record [with] unlimited original jurisdiction in civil and criminal matters", and by virtue of this empowerment, this Court has to pronounce on *an enactment* such as the said s. 35 of the Advocates Act (Cap. 16), in the course of *determining disputes* between parties.

Furthermore, there are enactments of Parliament itself, notably the Civil Procedure Act (Cap.21) (s.3A) and the Interpretation and General Provisions Act (Cap.2), which expressly recognize the Court's interpretative function, enabling it, within the mandate of the Constitution, to properly interpret *all laws* and to apply them in accordance with principles of justice.

Parliament's role in law-making, I take judicial notice, is essentially *episodic* in character, and a Parliament which in its five-year lease of life enacts a statute, is rarely called upon to amend the same; and it is definitely not convened to clarify its *intent* at the time it enacted legislation. Thus, in the very nature of things, the proper interpretation and application of Parliament's enactments is squarely the responsibility of the *Judiciary*, and thus if there remains an *ambiguity* in a statute, as now in the case of s.35 of the Advocates Act, then it is for this Court to say so, and to make any appropriate directions.

Quite consistently with those principles, the *common law* tradition which guides the Courts, has always recognized the authority of the High Court to *construe legislation* so as to give the Court's perceived understanding of the Parliamentary intent: *ut res magis valeat quam pereat* – giving effect to the perceived intent of the legislator, so that futility may be avoided.

It is clear that s.35 of the Advocates Act is not in itself self-contained; its prescriptions and sanctions are premised on the content of *s.34 (1), (2) and (3)*, which I will set out here:

> ***"(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument –***
>
> ***(a) relating to the conveyancing of property; or***
>
> ***(b) for, or in relation to, the formation of any limited liability company, whether private or public; or***
>
> ***(c) for, or in relation to, an agreement of partnership or the dissolution thereof; or***
>
> ***(d) for the purpose of filing or opposing a grant of probate or letters of administration; or***
>
> ***(e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or***
>
> ***(f) relating to any other legal proceedings, nor shall any such person accept or receive,***

***directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument ….***

***"(2) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.***

***"(3) Any person who contravenes subsection (1) shall be guilty of an offence."***

It is clear that although the declared subject of the Advocates Act (Cap.16) is *advocates*, this Act carries *substantive provisions* regarding non-advocates; for such "other," any claim they may have to the protection of *their own* legal rights and interests, has apparently been taken away by s.34 (1) of the Act. The Act, on this account, is just as much about advocates as it is about *lay persons*. I would consider that it may very well be desirable for *some* categories of legal work, especially those which require a level of competence which links up with concerns of legal *validity*, or with professional *liability* – such as the preparation of property-conveyance documents; incorporation of limited-liability companies; constitution and dissolution of partnerships, etc – be reserved to persons trained and qualified in law. But it does not appear to me that the specific legislation designed to regulate *legal practice* should in principle, be the one that limits the participation of lay persons, and imposes upon them penalties. This, I think, is an open field for more appropriate legislation in respect of "lay persons undertaking legal work".

It appears to me that whereas the purpose of s.34 of the Advocates Act is to define certain roles as being appropriate only to advocates, and to proscribe lay participation in such roles, s. 35 seeks to advance further the restriction on layman's role: for the required endorsement of the drawer's particulars in s.35 will show that only a *qualified person* has drawn or prepared a document; and if an unqualified person, contrary to the design of s.34 of the Act, were to give such an endorsement, then his offence would be all the more manifest.

It is apparent that the said two sections of the Advocates Act (Cap.16), ss.34 and 35, have attempted, but without achieving drafting clarity, to deal with four separate questions: (i) reserving certain legal work to those trained and qualified in law; (ii) reserving to advocates the right to charge fees for legal work done; (iii) keeping the lay person away from the conduct of certain kinds of legal work; and (iv) denying the lay person entitlement to fees for legal work done. Such an approach to law-making has resulted, in my view, in considerable ambiguity.

The restrictions imposed on the lay person, firstly, are sustained by the penalties imposed on the lay person himself; but there is a second order of such restriction, which is entrusted to public officials by s.35 (2) of the Act:

***"The Registrar, the Registrar of Titles, the Principal Registrar of Government Lands, the Registrar-General, the Registrar of Companies and any other registering authority shall refuse to accept – or recognize any document or instruction referred to in section 34(1) unless such document or instrument is endorsed in accordance with this section".***

It is now known that in the instant matter, officials such as those named in s.35 (2) of the Act *are* the ones who allowed the filing and registration of the verifying affidavit which is the subject of preliminary objection. What is the legal consequence of duly-appointed public officers allowing documents that contravene the law to be filed? Does it make those documents *invalid?* The answer must be, *No.* The Act, it seems, carries *no penalty* against such officials – and so they must be doing what they *may* do, in the performance of their duties; I would take it that, in law, such officials enjoy a *limited immunity*, expressed by the common law doctrine, *omnia praesumuntur rite esse acta* – all acts are presumed to have been done rightly and regularly.

***(4) S. 35 of the Advocates Act, Does it apply to a Lay Person's Affidavit?***

I have already noted the ambiguity in s.35 of the Advocates Act; and on that account I don't think it provides a basis for rejecting a lay person's affidavit which has been accepted at the Registry by the

officers of the Court. I have noted already that the lay person in question cannot rightly be subjected to *penalty* under s.35, owing to the patent ambiguity of that section; Section 77(8) of the Constitution declares that –

> ***"No person shall be convicted of a criminal offence unless that offence is defined, and the penalty therefor is prescribed, in a written law…."***

The *written law* in question (s. 35 of the Advocates Act (Cap. 16)), as I find, is ambiguous and not a lawful basis for *criminal prosecution.*

The plaintiff herein is an advocate, and not a lay person, and learned counsel for the objectors has urged that his case must be treated differently, in the context of s.35 of the Advocates Act. The plaintiff definitely swore the verifying affidavit in question, but is he the one who *drew* it? From the indications on the documents filed, it is not the plaintiff who drew and filed the verifying affidavit; and so even if s. 35 of the Advocates Act could be regarded as validly imposing a penalty (which I have held not to be the case), no charge could have been laid against the advocate-plaintiff, and consequently he must, I would hold, enjoy the protection which I have ascribed to the lay person, in the context of s. 35 of the Act.

The upshot is that the verifying affidavit in question is on Court records *formally,* having passed through the Registry desk, and the plaintiff has committed no offence in relation to it.

Owing to the ambiguity of s.35 of the Advocates Act (Cap.16), I would also hold that the criminal offence which it would attach to the *advocate* drawing and filing the affidavit, is unenforceable – in the light of the principle of legality in relation to crime, as stated in s.77 (8) of the Constitution of Kenya.

The conclusion to be drawn from the foregoing analysis is that, the verifying affidavit being challenged by the objectors is *not* a nullity.

***(5) Is the Verifying Affidavit Irregular, and Does it Merit Being Struck Out?***

Certainly, the verifying affidavit is *irregular*. The plaintiff, however, urged that the suit be saved, because: if the verifying affidavit is struck out, then the suit will be time-barred; the defendants did not plead their objection, and they came up with it some four years belatedly; the defendants have expressed acts of waiver, especially by turning up in Court and arguing their case when, after close of pleadings, the plaintiff applied for the defence to be struck out; the objection is on a mere technicality; demands of justice, and in the manner already shown by abundant case law, dictate that the suit be saved. ***Mr. Machira*** urged that there was no mistaking the particulars of the person who drew and filed the verifying affidavit, for it was physically affixed to a duly-endorsed plaint.

Learned counsel anchored his case on the Court of Appeal decision, ***Grace Ndegwa & Other v. The Hon. The Attorney-General*** Civil Appeal No.228 of 2002 in which the Court made it clear that the goal of justice dictated a departure from extreme attachment to forms of documents, in a matter such as this. And in this regard ***Mr. Machira*** also called up in aid s.72 of the Interpretation and General Provisions Act (Cap.2) which would validate a document that has not fully complied with the prescribed form.

***Mr. Machira*** greatly relied on the wise decision of ***Ibrahim, J*** in ***Dubai Bank Kenya Ltd v. Come-Cons Africa Ltd***, HCCC No.68 of 2003 in which he held that the innocent litigant should not, in principle, be prejudiced owing to the shortcoming in a verifying affidavit much like the one in this case.

The foregoing principles ought to guide this Court, especially in view of the broad *discretion* to ensure ends of justice, which this Court is allowed by s.3A of the Civil Procedure Act (Cap. 21), and by s.72 of the Interpretation and General Provisions Act (Cap.2). As urged by learned counsel ***Mr. Machira***, I would attach due weight to the authority most directly on point, the Court of Appeal's decision in ***Grace Ndegwa & Others v. The Hon. The Attorney General,*** Civil Appeal No.228 of 2002; and this leads me to the decision that the preliminary objection cannot be sustained. I will make specific orders as necessary.

**F. ORDERS**

***1. The defendants' Notice of Preliminary Objection dated 1st November, 2004 is refused.***

***2. The parties shall bear their own costs in respect of the Notice of Preliminary Objection.***

3. ***The plaintiff's application by Chamber Summons dated 26th February, 2001 shall be scheduled for hearing before a Judge in the Civil Division of the High Court, on the basis of priority.***

***4. Any such application or matter whatsoever as may in future arise following this ruling, shall be heard and determined before a Judge of the Civil Division.***

***5. The Deputy Registrar, by due protocol, shall cause this ruling to be forwarded to the State Law Office and to the Law Reform Commission, to the intent that sections 34 and 35 of the Advocates Act (Cap.16) may be more fully considered, in their legislative integrity, and, if necessary, appropriate proposal for legislation be formulated and pursued.***

**DATED** and **DELIVERED** at Nairobi this 26th day of January, 2007

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J**

**Court Clerk: Mwangi**

**For the Plaintiff: Mr. J.P. Machira, instructed by M/s. Machira & Co. Advocates**

**For the Defendants: Mr. Ohaga, instructed by M/s. Ochieng, Onyango, Kibet & Ohaga Advocates.**