



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**MISC APPLI 148 OF 2003**  
**IN THE MATTER OF LAND DISPUTES TRIBUNAL AT KAKAMEGA**  
**A N D**  
**IN THE MATTER OF THE REGISTERED LAND ACT**  
**A N D**  
**IN THE MATTER OF JUDICIAL REVIEW**  
**BETWEEN**  
**REPUBLIC (EX-PARTE FANICE MIDEVA)..... APPLICANT**  
**VERSUS**  
**THE VIHIGA LAND DISPUTES TRIBUNAL..... RESPONDENT**  
**AND**  
**OSCAH ONAYA OKANGA ..... INTERESTED PARTY**  
**RULING**

When the Notice of Motion dated 01.12.2003 came up for hearing on 12.3.2007, Mr. Akwala, learned counsel for the Interested Party, Oscar Onaya Okanga, raised a Preliminary Objection to the effect that the Notice of Motion was incompetent because the supporting affidavit sworn on 1<sup>st</sup> December 2003 by Fanie Mideva Okanga did not comply with sections 34 and 35 of the Advocates Act (Cap 16) in that it did not state by whom it was drawn. Section 34 and 35 of the said Act state:

***S.34 (1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument –***

***(a)***

***(b)***

(c)

(d)

(e)

(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.”***

***s.35 (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 whilst 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 advocate or firm.”***

It was Mr. Akwala’s contention that as the said supporting affidavit was incompetent and inadmissible, the application should be struck out. Mr. Akwala drew the attention of the court of the decision by this court (Justice Ringera, as he then was) in ***Greenhills Investments Lts. V. China National Completer Plant Export Corp. (2002) 1 KLR 384*** in which the court struck out an affidavit that had been amended. The court held that an affidavit is evidence and cannot be amended. The affidavit, the subject of the application having been amended was fatally defective and was struck out.

Mr. Momanyi, learned counsel for the Applicant, submitted that there was no merit in Mr. Akwala’s Preliminary Objection. He contended that the provisions of the Oaths and Statutory Declarations Act do not require the name of the person drawing the affidavit to be stated because an affidavit is evidence and not a pleading. He referred to Greenhills case (supra). As regards the provisions of sections 34 and 35 of the Advocates Act, Cap 16, he contended that the provisions were designed to rein in non-advocates engaging in legal practice. An applicant, he said, could be given a chance to file a further affidavit so as to do justice as no prejudice would be occasioned to the other party. It seems clear that if the affidavit was struck out for want of compliance with the aforesaid provisions of the Advocates Act, the Notice of Motion would stand without support of evidence and would therefore be incompetent so that an order to allow filing of a further affidavit would be futile in that there would not be in being a competent Motion which could be supported by a further affidavit.

This legal issue has been addressed in a number of cases.

It seems clear to me that failure or omission to indicate by whom the affidavit was drawn violated the statutory provisions of sections 34 and 35 of the Advocates Act and must be struck out with the consequence that the Motion would be rendered incompetent.

The application is struck out with costs to the Interested Party.

***Dated at Kakamega this 27<sup>th</sup> day of September, 2007.***

**G. B. M. KARIUKI**

**J U D G E**