



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KISUMU**

**Civil Case 402 of 2000**

**NIZABA INTERNATIONAL TRADING LIMITED.....1<sup>ST</sup> PLAINTIFF**

**NIZARALI ABBAS JIWA RAJWANI .....2<sup>ND</sup> PLAINTIFF/DECREE-HOLDER**

**VERSUS**

**JOVENNA EAST AFRICA LIMITED .....DEFENDANT/JUDGMENT-DEBTOR**

**AND**

**KENYA PIPELINE COMPANY LIMITED..... APPLICANT/OBJECTOR**

**RULING**

Before me is a notice of motion dated 9<sup>th</sup> November, 2005 brought by M/S Kenya Pipeline Company Limited, the objector in these proceedings, seeking a review of the orders made by this court on 26<sup>th</sup> October, 2005. The application is brought under section 80 of the Civil procedure Act and Order XLIV rules 1,2, and 3 of the Civil procedure Rules and is supported by an affidavit of Mr. Siganga, the objector's counsel. The application is opposed by M/s **Nizaba International Trading Limited** and **Nizarali Abbas Rajwani**, the decree-holders herein relying on a replying affidavit of Noorez Shamji a director of the 1<sup>st</sup> decree-holder.

In his submission Mr. Siganga for the objector stated that in it's ruling of 26<sup>th</sup> October, 2005 the court dismissed the objection on the ground that the objector had not complied with the provision of Order XX1 rule 57 (2) of the CPR. According to Mr. Siganga as the court did not determine the application on its merits the final order should have been a striking out of the said objection instead of a dismissal of it which was made. He relied in the **Civil Appeals Nos. 200 and 201 of 1999 – Kenya Commercial Bank Limited versus Joshua Aggrey Oburi and another**. On the claim that his affidavit was incompetent as was sworn by an advocate acting for the party, Mr. Siganga stated that the said affidavit did not contain any contentious matter in it which would make it lawful under the provision of rule 9 of Advocates (practice) Rules.

In opposing this application Mr. Kopot for the decree-holders contended that the application was duly determined on merit by the court before an order of dismissal of the application was made. He claimed that determination of a matter involves hearing both parties to a matter before making a decision and that

in this case the court enumerated in detail the arguments presented by both parties before reaching a decision, and the fact that the court may have used only one ground in deciding the application it does not mean that it did not consider all other issues raised by the parties and decided the application on merit. It was Mr. Kopot's further contention that even if the court had dismissed the objection instead of striking it out that action is now a point of law and it was a ground for appeal and not for review. He relied the Civil Appeal No.211 of 1996 – **National Bank of Kenya Vrs Ndungu Njau and Civil Appeal No.107 of 1995 – Jackson Gatere Vrs Mount Kenya Bottlers Limited**. Mr. Kopot also submitted that the affidavit in support of the application having been sworn by the advocate for the objector it was incompetent having contravened the Provisions of rule 9 of the Advocates (Practice) Rules.

Turning first to the last ground of the objection to this application, I note that there was no single paragraph of the said affidavit which was indicated to be oppressive for deponing contentious matters. The objection to the said affidavit is a general attack. However this rule provides as follows:-

***“9. No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence whether verbally or by declaration or affidavit; and if while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration on an affidavit, he shall not continue to appear;***

***Provided that this rule does not prevent an advocate from***

***giving evidence whether verbally or by declaration on an affidavit***

***on formal or non-contentious matter of fact in any matter in which he acts or appears.”***

Having perused the said affidavit in support of this application and

Comparing it with that of the replying affidavit I note that there is one issue which was disputed. Paragraph 4 and 5 of the affidavit in support are as follows:-

“4. In its ruling, the court noted that the Objector had not complied with the provisions of Order XX1 rule 57(2) of Civil Procedure Rules and that this application was therefore fatally defective.

“5. As the courts' decision was solely on the basis that the provisions regarding service on the judgment-debtor had not been complied with, and that therefore the application was not a dismissal of the application but to strike it out.”

In paragraph 4 of the replying affidavit the director of the decree-holder stated as follows:-

“4. That I am equally advised by our advocate on record and I verily believe the same to be true that the applicants' objection/application was indeed heard and determined on merits and the court therefore made a proper determination on it by discussing it.”

It would appear to me that issue of fact deponed to by Mr. Siganga was

Disputed by the deponent of the replying affidavit. That made the matter a contentious issue and accordingly the affidavit in support got caught up by the provision of rule 9 of the said Rules and it is therefore incompetent.

I also agree that even if there was no dispute as to the issue of the decision of the objection on merit, such a decision would become a point of law and becomes a ground of appeal and not a ground for a review.

In the result I would dismiss the application for review with costs.

**DATED AND DELIVERED THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2006.**

**B. K. TANUI**

**J U D G E**

In the presence of:

Yogo for Kopot for plaintiff

Siganga for defendant

**B. K. TANUI**

**J U D G E**

**Siganga:**

I pray for leave to appeal and a stay for 14 days.

Order

- (1) Leave is granted to the applicant to appeal against the ruling
- (2) Let there be a stay for 14 days.

**B. K. TANUI**

**J U D G E**

*/mk.*