



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

Civil Case 596 of 2004

**FRANCIS NJAKWE GITHIARI.....1ST
PLAINTIFF**

NJAMA LIMITED.....2ND PLAINTIFF

VERSUS

**HON. DANIEL TOROITICH ARAP MOI T/A MOI EDUCATIONAL
CENTRE.....DEFENDANT**

R U L I N G

On 10th May 2005, the plaintiffs filed a Notice of Motion dated 4th May 2005. By the said application, the plaintiffs sought to strike out the defence, and also get summary judgement.

However, when the matter came up for hearing on 16th February 2006, the plaintiffs abandoned the prayer for striking out the defence. Therefore, this Ruling is limited to that part of the plaintiffs' application, through which they sought summary judgement and costs.

In the considered view of the plaintiffs, the defence herein raises absolutely no triable issues at all.

In a nutshell, the plaintiffs contend that they were verbally instructed by the defendant to construct some classrooms; they say that they carried out the instructions, and built classrooms at Moi Educational Centre, Nairobi. Thereafter, notwithstanding the handing over of an invoice to the defendant, no payment had been made by the defendant, in respect of the work done by the plaintiffs.

The plaintiffs are aggrieved, and do direct their claims at the defendant, for the reason that he is said to have openly presented himself as the owner of the Moi Education Centre.

It is the plaintiffs' case that during the time when they performed their part of the contract, they communicated with the defendant through his agents, one of whom was the principal of the Moi Educational Centre (hereinafter cited as "the school").

The plaintiffs say that between 1993 and 2004, they demanded payment for the services rendered to the school, but the defendant's agents did not deny that the work, for which payment was sought, had been carried out. The agents are also said not to have disowned the defendant as being a stranger to the school. They also did not deny the defendant's proprietorship of the school.

In support of the application the 1st plaintiff swore an affidavit, to which was annexed a number of

documents. The first document referred to by the plaintiffs' advocate, when he was prosecuting the application herein, was the "architectural map" of the work which the plaintiffs had been instructed to undertake.

The plaintiffs also exhibited a letter from headmaster of the school. The letter is dated 19th December 1990, and was addressed to the 2nd Plaintiff, for the attention of the 1st Plaintiff. That letter is said to provide evidence of the construction which had been undertaken by the plaintiffs.

Other pieces of evidence exhibited by the plaintiffs, were their letter dated 7.4.92, through which they forwarded Bills of Quantities to the Headmaster to the school; two demand letters dated 18th October 1993 and 24th November 1993, demanding payment of KShs. 8,370,462/= from the Headmaster to the school; two letters from the 2nd plaintiff to the chairman to the Board of Governors to the school, dated 31st March 1994 and 6th February 1996; A letter from the 2nd plaintiff to the Board of Governors, dated 20th March 1997, demanding payment of KShs. 281,115,865/=; A letter from the 2nd Plaintiff to the Board of Governors dated 12th May 1997, offering to accept KShs. 100,000,000/= in an amicable settlement; a letter from the 2nd Plaintiff to the Chairman of the Board of Governors, giving notice that unless the defendant paid KShs. 100,000,000/=, the 2nd defendant would seek legal redress; a letter dated 4th November 1997 from the 2nd plaintiff's advocates, M/s Onesmus Githinji & Co. Advocates, demanding Shs. 100,000,000/= plus their "collection charges" of KShs. 1,004,500/=; A letter from Kibet & Company Advocates, on behalf of the school, denying liability for the sums claimed; a letter dated 31.1.2001 from the 2nd Plaintiff to the Comptroller State House, demanding shs. 8,370,462, plus interest of Kshs. 178,861,647/=; A letter from the defendant dated 14.11.03, which was addressed to the Minister for Education, notifying the minister that the defendant wishes to run the school and Sunshine Secondary School, as private schools.

It is the plaintiffs' submission that the letter dated 14th November 2003 expressly confirmed that the defendant was the proprietor of the school. That contention is said to be backed by none other than Mr. James C. Muriuki, who was the headmaster of Moi Education Centre ("the school") between 1987 and 1995. Mr. Muriuki swore a supporting affidavit in which it was deposed, inter alia, that the defendant had introduced "the plaintiff" as the person whom the defendant had contracted to build the classrooms. Mr. Muriuki also deposed that the classrooms had been constructed by "the plaintiff."

As far as the plaintiffs are concerned, the affidavit of Mr. Muriuki proves that there existed an agreement for the construction of the classes.

To all the evidence tendered by the plaintiffs, the defendant responded by filing an affidavit of Abraham Kiptanui. Mr. Kiptanui is said to have sworn the replying affidavit pursuant to a "special power of attorney", which was issued by the defendant herein.

The plaintiffs have criticized the replying affidavit on the grounds that it contains no more than hearsay evidence. And, as the defendant had not personally sworn the replying affidavit, the plaintiffs invited the court to take a dim view of the defendant's failure to deal with issues of fact. I was asked to grant summary judgement for the plaintiffs, on that basis.

Meanwhile, the plaintiffs contend that this court has discretion to award interest, in accordance with the provisions of Section 26 of the Civil Procedure Act.

Finally, Section 14(3) of the Constitution is said to provide an absolute answer to the defendant's assertion that the suit herein is barred by limitation. The plaintiffs submit that for as long as the Defendant remained the president of the Republic of Kenya, that period of time had to be excluded when computing time.

When called upon to answer to the application, the defendant submitted that the same was bad in law, incompetent and an abuse of the process of court.

The first point which the defendant emphasized was that in responding to this application, he was entitled to show that he ought to have leave to defend the suit. In order to demonstrate to the court that he should be accorded leave to defend, the defendant submitted that he could not be restricted to the Replying Affidavit. In his view, he could do so either through an affidavit, oral evidence or otherwise.

In this instance, the defendant contends that through the replying affidavit and the grounds of opposition, he had demonstrated that there were no less than seven triable issues. The said seven issues are enumerated as follows:

- (i) The defendant is sued in the wrong capacity.
- (ii) There was no contract between the plaintiffs and the purported defendant.
- (iii) The 2nd plaintiff is an artificial person, who is incapable of receiving verbal instructions.
- (iv) The suit is founded on an oral contract, which cannot be tried summarily.
- (v) Interest is in the nature of special damages, which must be strictly proved at a trial.
- (vi) The claim is time-barred.
- (vii) The claim is not for a liquidated sum.

In his submissions, the defendant stated that the 2nd plaintiff is a limited liability company, whose Managing Director was the 1st plaintiff. In his considered view, the suit offends the principle of law which stipulates that a company is a separate legal entity from its members.

The defendant feels that a company was incapable of receiving verbal instructions. Therefore, it was asserted that paragraph 5 of the Plaintiff was very imprecise. The said paragraph was worded in the manner following:

“Sometimes in the year 1990, the Defendant verbally instructed the plaintiffs to construct three classroom blocks for the business known as Moi Educational Centre on terms that payment for the said construction was to be met by the Defendant.”

That pleading is said to have blurred the entire suit, as the plaintiffs do not make it clear whether the 1st plaintiff was instructed in his capacity as the Managing Director of the 2nd plaintiff, or as a separate entity. Until the plaintiffs can clarify their respective status, vis-à-vis the defendant, it is the defendant’s contention that there arises a triable issue.

To my mind, there appears to be some credit in that contention, for the plaintiffs have consistently made reference to one single contract. That being the case, it begs the question as to why there were two plaintiffs in the suit. In other words, did the 1st plaintiff get separate instructions from the defendant, to construct the classrooms at the school? If so, he does not appear to have raised an invoice, and therefore one would be right to ask the basis for his claim against the defendant. Were there two contracts for the construction? If so, what role and to what extent was each of the plaintiffs obligated to the construction works?

On the other hand, if the 1st plaintiff was simply instructed by the defendant, in light of the fact that the said plaintiff was the Managing Director of the 2nd plaintiff, that would imply that the 1st plaintiff, in all probability, may be without the requisite locus to bring a suit against the defendant. That would be because the 1st plaintiff would have been the agent of a disclosed principal, Njama Limited.

In the circumstances, the court concurs with the defendant that the fact that there were two plaintiffs, in respect of the very same task of construction of three classroom blocks, gives rise to a triable issue, which

would enable the trial court ascertain the parties to the contract with the defendant.

The defendant also asserts that as the plaintiffs have pleaded, (at paragraph 5 of the Plaintiff) that they were instructed to construct three classrooms, there was no contract that came into being. The reason for that submission is that, as far as the defendant is concerned, “verbal instructions” could not constitute a contract, where no such contract is alleged to have come into being.

To my mind, the defendant appears to be giving the contents of paragraph 5 of the Plaintiff, a very narrow interpretation. Indeed, he seems not to have given the entire paragraph an appropriate interpretation. Instead, the defendant has chosen to concentrate on the phrase “the defendant verbally instructed the plaintiffs to construct three classroom blocks

I am afraid that that would not be the correct way of going about the interpretation of that pleading. The phrase should be given due consideration within the context of not only the rest of the wording in paragraph 5 of the Plaintiff, but also within the wider context of the Plaintiff, as a whole.

Without purporting to make any definitive findings on the issue, I note that there is a possibility that if the trial court were to give due consideration to the facts, it may well find that there was a contract. On the other hand, I well recognize that the trial court might arrive at the conclusion that there was no contract between the defendant and the plaintiffs, or either of them. In other words, the matter is not clear-cut at all. That would therefore imply that there was a triable issue.

As regards the question as to the proprietorship of the school, it is the defendant’s contention that the plaintiffs had not proved that he (the defendant) was the proprietor.

The defendant submitted that the defendant was a school, not a business, as has been alleged by the plaintiffs. Indeed, the defendant insisted that the Moi Educational Centre is a school, which was duly registered, as such, with the Ministry of Education. He says that he has no connection whatsoever with the said school, as he is not registered under that business name or any other business name.

That assertion appears somewhat strange, in the light of the letter dated 14th November 2003. The said letter is set out in full herebelow:

“OFFICE OF THE FORMER PRESIDENT

Telephone: Nairobi 2730513/4/5 KABARNET GARDENS

Fax 2730520

P.O. Box 630 – 00502

KABARNET LANE

14th November, 2003

NAIROBI

Hon. George Saitoti, EGH, M.P

Minister for Education

Jogoo House ‘B’

P. O. Box 30040

NAIROBI

Dear George,

MOI HIGH SCHOOL – KABARAK

MOI EDUCATION CENTRE

SUNSHINE SECONDARY SCHOOL

I am writing in connection with the above schools. As you are aware, I developed them as private schools, although the Government had assisted them since their inception in paying the teachers' salaries. Due to the payment of teachers' salaries by the Government, the schools charged fees like the public schools for they have all along been non-profit making. I now wish to discontinue the payment of teachers' salaries by the Government and run them as fully fledged private schools. It is therefore appropriate that your Ministry recognises them as such.

With effect from 1st January, 2004, the schools will be responsible for the salaries of the teachers, who opt to remain under the new management of the private schools.

Yours sincerely

(signed)

HON. DANIEL T. ARAP MOI

FORMER PRESIDENT

Why did I say that I found the defendant's assertion that he was not connected with Moi Educational Centre, strange? The reason is that by the letter set out above, the Hon. Daniel T. Arap Moi expressly stated that he had developed the schools as private schools. By virtue of that fact alone, Mr. Moi must be deemed to have had some connection with that school. Whether the said connection was that of a developer or proprietor is another issue altogether. But, in my considered view, it cannot be the case that Mr. Moi did not have any connection with the school.

The difficulty which the plaintiffs herein are faced with emerge from their decision to sue "Hon. Daniel Toroitich Arap Moi,

Trading as Moi Educational Centre."

Having made that decision, the plaintiffs have not yet demonstrated that Mr. Moi was trading as Moi Educational Centre. As to whether or not the plaintiffs will eventually be in a position to demonstrate, to the satisfaction of the court, that Mr. Moi was trading as Moi Educational Centre, is a matter which must await resolution by the trial court. But suffice it to say, that as at the moment the best that the plaintiffs have done was to illustrate that Hon. Daniel T. Arap Moi had some connection with the Moi Education Centre, Nairobi.

The connection between Mr. Moi and the school is not in any manner diminished by virtue of the fact that the letter dated 14th November 2003 was on his personal letter-head, as opposed to the letter-head of the school.

However, the plaintiffs will now have to grapple with the issue as to whether the person enjoined as the defendant herein was the proper person to be sued; and if so, in what capacity? I say so because the defendant has submitted that a school could never be registered as a business name, because by so doing,

one would be violating the Education Act. Whilst not determining whether or not that submission is correct, at this point in time, the court recognizes that the plaintiffs will be obliged to satisfy the trial court not only that a school could be registered as a business, but also that Hon. Daniel T Arap Moi did register the Moi Education Centre as such. At the moment, in the face of the certificate of registration for Moi Educational Centre, it appears that Mr. Moi has been sued in the wrong capacity.

I would even go further to state that if it were shown that the Hon. Daniel Arap Moi was the developer of Moi Educational Centre, the plaintiffs may still need to prove to the court that by virtue of that fact, Mr. Moi would be liable to pay for the construction of the school. The reason for this is that it has been contended by the defendant that the “person” who might be responsible for the school would be its Board of Governors. Now, given the fact that the 2nd plaintiff did write several letters to the Board of Governors of the Moi Educational Centre, it is possible that they too may be deemed to acknowledge the fact that the Board has some responsibility in the matter. If not, why was the 2nd defendant writing to the Board? And if the said Board of Governors has some responsibility to the plaintiffs’ herein, where does such responsibility end, and where does the defendant’s responsibility commence? Those are questions that cry out for answers, before the court can determine whether or not the defendant is liable to judgement as prayed or at all.

The other issue relates to the sums claimed in the Plaint. The principal sum is KShs. 8,370,462/=. The said sum is described as the

“consideration for the construction of three classroom blocks at Moi Educational Centre.”

At no time do the plaintiffs explain whether or not there was an agreement between them and the defendant that the said sum of KShs. 8,370,462/= would be the cost of the construction.

When responding to the defendant’s “Request for Particulars,” the plaintiffs stated as follows:

“The sum of KShs. 8,370/462/= is composed in accordance with the Ministry of Works Conditions of Engagement, which is a public document available at the Ministry of Public Works of the Government of Kenya.”

In my considered opinion, if the plaintiffs wish to obtain judgement on the basis of the said Conditions of Engagement, they would have to demonstrate to the court that the parties to the contract in issue agreed to be governed by the said Conditions. Alternatively, the plaintiffs will have to demonstrate that if parties to a construction contract had not agreed on a contract price, the Ministry of Works Conditions of Engagement would automatically come into play, and so be binding on the parties.

For now, the plaintiffs have not yet made available to the court the said Conditions of Engagement. Therefore, the plaintiffs would appear to be asking the court to award them judgement on the basis of material which is not before the court. I am afraid that the court cannot be called upon to act without a proper factual and evidential basis.

Meanwhile, the defendant submitted that the contents of paragraphs 5 of the plaint are contradictory to the contents of paragraph 3 of the supporting affidavit of Mr. Francis Njakwe Githiari. It was pointed out that whilst the plaint talked about THREE CLASSROOM BLOCKS, the 1st plaintiff’s supporting affidavit made reference to 8 CLASSROOMS.

In my considered opinion, the two statements may not necessarily be contradictory, as submitted by the defendant. It may well be that the 3 classroom Blocks, contained 8 classrooms. However, I cannot be sure of the fact, until and unless the plaintiffs lead further evidence, at the trial, to explain the nexus between the 3 classroom blocks and the 8 classrooms.

Meanwhile, the plaintiff will also have to explain how the architectural drawings which were annexed to the supporting affidavit could support their claims for the work which had already been done. The reason

for so saying, submitted the defendant is the fact that whilst the 2nd defendant's letter dated 19th December 1990, states that the plaintiffs had completed the construction of PHASE II OF THE PRIMARY BLOCK, yet the architectural drawings were for "SECONDARY SCHOOL – PHASE III." In effect, the only architectural drawings which the plaintiffs have so far placed before the court, do not support their claims. Therefore, the evidence cannot form the basis for summary judgement, as it does not add up.

Another issue that was raised by the defendant was in relation to the plaintiffs' claim for interest at the rate of 30% per annum from 26th July 1993. The defendant submits that the said claim is arbitrary. But the plaintiffs contend that this court has power, under Section 26 of the Civil Procedure Act, to award such interest as it deems just.

Section 26(1) of the Civil Procedure Act stipulates as follows:

"Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

Clearly, the court does have discretion on the interest to be awarded to a successful litigant. Such discretion is exercisable in three parts, namely, for the period prior to the institution of the suit; for the period between the date when the suit was instituted, to the date of judgement; and for the period after judgement until payment is made or to such earlier date as the court may deem fit.

Whilst the court has the said discretion on the question of interest payable on the principal sum, the court cannot be expected to exercise the said discretion in a vacuum. In other words, it was not good enough for the plaintiffs to remind the court of its discretion, and then leave the issue to it, for determination.

It was necessary for the plaintiffs to lead appropriate evidence or material before the court, which would then enable the court exercise its discretion appropriately. In the absence of any material which would facilitate the exercise of the court's discretion in favour of the plaintiffs' prayer for interest at 30% per annum, I have no alternative but to decline to exercise my discretion in the manner suggested by the plaintiffs. In arriving at this conclusion, I am informed by the provisions of Section 108 of the Evidence Act, which reads as follows:

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

In this case it is the plaintiffs who sought interest at 30% per annum from 26th July 2003 to 26th October 2004. Therefore, it was their responsibility to satisfy the court that the said claim for interest was justified contractually or otherwise. Regrettably, the plaintiff did not make any effort to satisfy the court in that regard. They must therefore be deemed to have failed to discharge their burden of proof on the issue of interest. That issue can only now be determined after a full trial.

Finally, the defendant submitted that this suit is time-barred. He pointed out that the construction works were carried out in 1990. Thereafter, the first demand for payment was made by the plaintiffs in 1993. As this suit was filed in 2004, that was some eleven years after the first demand.

In answer to that submission, the plaintiffs placed reliance on the provisions of Section 14(3) of the Constitution, which reads as follows:

"Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, a period of time during which a person holds or exercises the functions of the office of President shall not be taken into account in calculating any period of time prescribed by that law

which determines whether any such proceedings as are mentioned in subsection (1) or (2) may be brought against that person.”

As the Constitution prohibits the institution or continuation of proceedings, whether criminal or civil, against the President while he holds office, it is very important that by virtue of Section 14(3) of the Constitution, the period of time when the President was in office be excluded in calculating the limitation period.

Therefore, the whole period of time when the Hon. Daniel T. Arap Moi was the President of the Republic of Kenya must be excluded when computing the limitation period.

This court takes judicial notice of the fact that Mr. Moi held the office of President between 1978 and 2002. Therefore no proceedings could have been instituted or continued against him during that period.

These proceedings were filed on 29th October 2004. In effect, the proceedings were instituted within two years of Mr. Moi ceasing to hold the office of the President of the Republic of Kenya.

By virtue of the provisions of Section 14(3) of the Constitution, as read together with Section 4(1) of the Limitation of Actions Act, I hold that this suit is not time-barred, as actions founded on contract may be brought at any time before the expiry of six years from the date when the cause of action accrued.

In my considered view the issue of limitation does not give rise to any triable issue.

I will now give consideration to the authorities cited by the parties.

The plaintiffs cited MUGUNGA GENERAL STORES V. PEPCO DISRIBUTORS LTD [1987] KLR 150, for the proposition that when faced with a summary judgment application, a mere denial was not a sufficient defence.

There is no doubt at all that that is the correct legal position, for the Court of Appeal held as follows, in the said MUGUNGA case, at page 153:

“First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there is no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.

For rule 6 provides that if it appears to the court that any defendant has a good defence, then he may be allowed to defend, while if there is not a good defence, the plaintiff shall be entitled to judgement. In this case, the defendant had put no defence upon the record by affidavit or otherwise.”

Applying the aforecited principles to the matter before me, I have absolutely no doubt that the Defence on record is not a mere denial. Indeed, as I have already held earlier, in this ruling, the said Defence raises triable issues.

In KOBIL PETROLEUM LIMITED V. KISII PETROLEUM PRODUCTS LIMITED HCCC NO. 1238 OF 2002, Ringera J. (as he then was) held as follows:

“ A defence which consists of a general denial and assertions of other matters intended to show that the defendant is not liable but which assertions are completely devoid of material particulars may well be seen as a sham defence.

That is how I see the defence herein. It is a hollow sham calculated to delay the day of reckoning. It raises no triable issues.

.....

As I understand the law, only bona fide triable issues would entitle a defendant to defend, and in judging the bona fides of the issues, the matter of whether or not there is anything of substance to support them is important.”

I wholly agree with those sentiments. Indeed, it was for that reason that I did analyse the material which had been placed before the court, and came to the conclusion that the plaintiffs would need to do much more by way evidence, explanations and clarifications, in order to persuade the court.

For instance, the plaintiffs have provided particulars, in which they state, inter alia, that they do not recall the date or time when the defendant gave instructions to the plaintiffs. And, even more significantly, the plaintiffs say that they do not recall the precise words that were spoken at the time when the defendant allegedly gave them instructions. Given those answers, I hold the view that the plaintiffs will have a mammoth task of proving the terms of the contract which they say was entered into between themselves and the defendant.

Other examples of what the plaintiffs will have to explain are the following:

(i) In the 2nd plaintiff’s letter dated 24th November 1993, which was addressed to the chairman of the Board of Governors; the statement:

“The basis of this project was more of trust.....”

(ii) In the letter from the 1st plaintiff to the Board of Governors, dated 12th May 1997, the statement;

“This project was given in good faith to us having executed to completion Kenya High School Canteen with the shortest record time of 30 days.”

(iii) In the 2nd plaintiff’s letter to the Board of Governors, dated 7th October 1997, the phrases;

“Due to the personalities involved in the award of this project, we did not insist on contract formalities.

We acted on good faith that after completion and handing over we shall be paid all monies due to us.”

All these three letters were attached to the supporting affidavit. They cause me to ask myself if the parties herein ever had consensus ad idem, on whether or not the arrangement they were entering into was intended to be legally binding. And if they did so intend, what will the plaintiffs make of the comment in their letter dated 10th November 2000, that, he was defending the defendant on the grounds that he did not know of the debt.

Before concluding this ruling, there is one important issue which I must tackle. It relates to the replying affidavit sworn by Abraham Kiptanui. The plaintiffs submitted that the said affidavit should be considered in the light of the fact that powers of attorney were only intended to be for deposition of proprietary interests. It was said that a power of attorney cannot donate power to any other person to testify.

On the other hand, the defendant believes that by virtue of the power of attorney, Mr. Abraham Kiptanui had full power and authority to swear the replying affidavit, as if he were the defendant. In effect, the defendant submits that the affidavit of Mr. Abraham Kiptanui is an affidavit by the defendant himself.

I must admit that the “Special Power of Attorney” which the defendant issued to Mr. Kiptanui appears to be so very wide that it also gave to the donee thereof, the power to “give evidence”, with authority to the said donee to bind Mr. Moi in relation thereto.

However, if the defendant intended to have Mr. Kiptanui stand in his stead, the donee does not appear to have fully appreciated that intention. I say so because the replying affidavit is not drawn up as if by Mr.

Moi. It clearly indicates that Mr. Kiptanui and Mr. Moi are two distinct persons. Mr. Moi is the defendant, whilst Mr. Kiptanui is the deponent, pursuant to the power of attorney.

Secondly, I accept the plaintiffs' submission to the effect that at no time did Mr. Kiptanui directly state that any of the matters he was deponing to, were on the basis of information from Mr. Moi. At all times, Mr. Kiptanui said that the contents of the replying affidavit were on the basis of advice from the defendant's advocates. Clearly, those did not, and could not, constitute the evidence of Mr. Moi.

And, as the plaintiffs' case was founded on an oral contract, the best way to rebut the plaintiffs' assertion would have been those from the defendant personally. It is only he, who could deny or admit the plaintiffs' assertion that he did give all instructions to the plaintiffs. Not only did the defendant fail to swear an affidavit to deny the plaintiffs' assertions, he also appears not to have told Mr. Kiptanui to make such a denial on his behalf.

In *ZOLA & ANOTHER V RALLI BROTHERS LIMITED & ANOTHER*, [1969] EA 691 at p. 694, SIR CHARLES NEWBOLD, P, held as follows:

"Normally, a defendant who wishes to resist the entry of summary judgement should place evidence by way of affidavit before the judge showing some reasonable grounds of defence."

The reason why there is an emphasis on the need for the defendant to swear his own affidavit stems, first, from the need to have the deponent who could be cross-examined, if it was deemed necessary. That need was alluded to by Sir Charles Newbold in the *ZOLA* case, above-cited.

In this case, even if it were assumed that Mr. Kiptanui had proper authority to swear the replying affidavit, he could not be the proper person to be cross-examined regarding what the defendant said or did not say.

Secondly, the deposition of the replying affidavit appears to contravene the provisions of Order 18 rule 3(i) of the Civil Procedure Rules, which requires affidavits to be confined to such facts as the deponent is able of his own knowledge to prove.

Finally, I can find no legal justification for any person who is otherwise within jurisdiction to donate to another person a power of attorney to testify on his behalf. If the courts were to condone such a practice, we would have provided a convenient vehicle for circumventing the rules of evidence, especially in relation to hearsay evidence.

It must always be recalled that affidavits provide a mode for relaying evidence to the court. I believe that that is one of the reasons why Order 18 rule 5 of the Civil Procedure Rules provides that affidavits are to be drawn in the first person.

The affidavit of Mr. Abraham Kiptanui was drawn in the first person. However, the said deponent is not the defendant and he could not therefore speak in place of the defendant. For that reason, if Mr. Kiptanui had sought leave of the court to incorporate into his affidavit, his sources of information and grounds for his belief, I would have been unlikely to grant such leave. I hold the view that an application for summary judgement is not one of an interlocutory nature. A summary judgement application is intended to provide finality in the adjudication of the issues in dispute, and it is thus not interlocutory. In effect, I hold the considered view that the replying affidavit of Mr. Abraham Kiptanui does not fall within the proviso to Order 18 rule 3(1) of the Civil Procedure Rules. It is thus, the kind of affidavit which commends itself to being struck out; and I would have done so, had I been so requested by the plaintiffs.

But even though I did not strike out the said replying affidavit, this ruling has not been determined by the contents thereof. The decision to dismiss the application has been founded on the material in the Plaintiff, Defence, the supporting affidavit and the particulars provided by the plaintiffs in response to the defendant's Request for Particulars.

In conclusion, I trust that given the nature of the alleged oral contract between the parties herein, the parties will find prudence in proceeding to trial, rather than dwelling on other or further applications.

Meanwhile, the costs of this application are awarded to the defendant, and the application is dismissed on the grounds that it is lacking in merit.

Dated and Delivered at Nairobi this 5th day of March 2006.

FRED A. OCHIENG

JUDGE