



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 8 of 2005**

**DILSHAD HASSANALI MANJI .....**  
**APPLICANT**

**VERSUS**

**HASSANALI VASANJI MANJI .....**  
**DEFENDANT**

**RULING**

The Originating summons was filed on 2<sup>nd</sup> July, 1998 under Section 17 and Section 12 of the Married Women's Property Act, 1882 amongst other provisions of Kenyan Act and all enabling provisions.

I also see that the Chamber Summons dated 8<sup>th</sup> March, 1999 for directions was heard and allowed on 5<sup>th</sup> October, 1999. Thereafter the cause was fixed for hearing on various dates.

After that on 2<sup>nd</sup> March, 2006 the counsel for the Respondent filed a Notice of intention to raise a preliminary point of law which, as is mentioned therein, is that the originating summons dated 19<sup>th</sup> June, 1998 is improper and fatally defective. It is filed under Order XIV Rule 2 of Civil Procedure Rules.

As is evident, no elaboration on the aforesaid impropriety and fatal defect has been given.

The details were so disclosed on 27<sup>th</sup> April, 2006 when the notice was fixed for hearing.

The point raised by Mr. Nyabiro, the learned counsel for the Respondent is that the affidavit sworn in support of the originating summons does not comply with Section 5 of Oaths and Statutory Declaration Act, (Cap. 15 Laws of Kenya).

Section 5 stipulates:

**“Every Commissioner for oaths before whom an oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation (*emphasis mine*) at what place and what date the oath or affidavit is taken or made.”**

What is objected to by the Learned Counsel for the Respondent is that the Jurat fails to disclose the place at which the affidavit was sworn by the Applicant.

What the jurat has mentioned is and I quote:

**“Sworn by the said Dilshad Hassanali Manji this 19<sup>th</sup> day of June, 1998”**

On the aforesaid attestation by the Commissioner of oath is his stamp which gives address as P. O. Box 28673 Nairobi. What is missing in the jurat are the words “*at Nairobi*”.

With this lack of wordings, it was contended that the affidavit is defective and thus the whole originating summons becomes defective and should be struck out.

This contention was strengthened by two unreported cases of the High Court. The first is **Narok Transit Hotel Ltd and Another versus Barclays Bank Kenya Ltd. (H.C.C.S. (Milimani) No.12 of 2001.**

In this case Onyango Otieno J. (as then he was) struck out the application which was based on the affidavit which had similar jurat and attestation. It was observed that the address on the stamp “*cannot be on its own without anything further be taken as the place where the affidavit was sworn.*”

The next case was that of **Eastern and Southern Africa Development Bank Ltd. V. African Green Fields Ltd. and 2 Others (H.C.C.S Milimani) 1189/00.** Hewett J. also struck off the suit on the defect in jurat.

It was also contended that Order XVIII Rule 7 which authorizes the court to receive the affidavit despite the irregularity in the form thereof along with other defects specified therein, cannot be relied upon as the Section 5 of the Oaths and Statutory Declarations Act relied upon is a specific statutory provision.

Finally, I state that the Counsel did not submit on any prejudice or hardship suffered by the Applicant with the defect in Application.

Mr. Sevany the Learned Counsel for the Respondent first of all pointed out at the wrong provisions under which the Notice is premised, which is Order XIV Rule 2 of the Civil Procedure Rules. Without quoting the said Rule, I can state that it does not provide for remedy sought for by the applicant. The Learned Counsel was quick to respond that the said defect is not fatal as per Order L. Rule 12 of the Civil Procedure Rules which provides inter alia that no objection shall be made and no application be refused on the ground that rule or statutory provision is not stated under or by virtue of which the application is made.

I do agree and find that only because of quotation of wrong rule the notice cannot be held to be defective.

I must state here that before the response was made by Mr. Sevany, I indicated to both the counsel, that I have made a ruling in the case of **Ocean Freight Transport Co. Ltd. Versus Purity Gathoni Wamae and Another (H.C.C.S. No.3958/91 (unreported)** which touches on the same issue and was on all fronts similar on facts herein and wherein relying on Section 72 of the Interpretation and General Provisions Act (Cap 2 Laws of Kenya) I have found and I quote:

**“In my humble opinion, the present affidavit falls squarely within the above provision of the Act of Parliament. I am also fortified by the fact that the stamp affixed by the Commissioner of Oaths does state the place of his signature. I would have presumed that if he or she was not affixing the stamp on the place where it was signed, the necessary statement or amendment to the stamp would have been made. In any event, I can safely surmise that the stamp affixed does satisfactorily state the place where the affidavit was sworn and that the omission to mention the place in jurat is not a deviation in substance but is in its form and the same is not prejudicial to the opposite side and is not calculated to mislead.”**

In spite of my above ruling, the counsel for the Applicant agreed to continue the hearing before me.

I also state that I have considered various cases which were relied for and against the issue in question. I also relied on the case from Court of Appeal namely **Unga Ltd. Vs Amos Kinuthia and**

**Gabriel Mwaura (Civil Appeal No.175 of 1997)** wherein it was held that the requirements of Section 5 of Oaths and Statutory Declaration Act are in respect of the form of documents which is covered under Section 72 of the Interpretation and General Provisions Act (*Supra*).

Thus if the defect is in form, it is not a fundamental defect or irregularity and thus can be curable and/or received under Order XVIII Rule 7 of Civil Procedure Rules and Section 72 of the Interpretation and General Provisions Act.

I need not go to all the cases cited by Mr. Sevany as they in one way or another correspond to what I had ruled in the earlier case of **Ocean Freight** (*Supra*).

I shall however mention them which are all unreported, namely:

1. **Patrick Thinguri and 1006 others Vs Kenya Tea Development Authority and Another. (H.C.C.C.Nrb. 261/2004).**
2. **Peter Njunge Nganga and Others Vs Estate of Ali Omar and Another. H.C.C.S. (Nbi) 973/01.**
3. **Galeb Gulam and Another Versus Cyrus Shakhalaza Kwah Kirongo. H.C.C.S. (Milimani) 393/03.**
4. **Anna Wangui Paul Vs Victoria Commercial Bank Ltd. H.C.C.S. (Milimani) 1395/00.**
5. **Kanti Construction Vs Kenya Pipeline Co. Ltd. H.C.C.S. (Milimani) 686/04.**
6. **Masefield Trading Co. Ltd Vs Francis Kibui H.C.C.S. (Milimani) 1796/00.** (This case was determined by Late Hewett J who examined various defects in the affidavit questioned, although I must note that there was no issue on the defect in jurat. He held that despite the affidavit was defective which annexed a wrong Power of Attorney it is not an invalid affidavit).
7. **Lazaro Kabete Vs Ndege Kamau and Another H.C.C.S. (Nairobi) 1222/99.**

In none of the above authorities, Section 72 of the Interpretation and General Provisions Act was considered as I have tried to do in the **Ocean Freight case** (*supra*). In my humble opinion, that provision shall answer the issue of superiority of a statutory provision and the subsidiary legislation.

The Interpretation and General Provision Act is a special statute to provide the guidance to the courts on the interpretation of other statutory provisions, which in this case, is Section 5 of Oaths and Statutory Declaration Act.

Section 72 of Interpretation and General Provisions Act (Cap 2 Laws of Kenya) stipulates that whenever a form is provided by a written law (which definitely is so in the present case), the document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document or which is not calculated to mislead.

In my considered opinion, the defect in jurat does not affect the substance of the affidavit.

I also note that the applicant is silent on the issue whether the said defect is calculated to mislead, and I do not find any ground otherwise to hold so.

Finally, the applicant has not even hinted at any possible prejudice which may be suffered by him. On the other hand, without any objection or demurer from the Applicant, the Respondent has placed on record that she has been awarded orders against the Applicant from the Court in U.K. and shall suffer tremendous prejudice if the affidavit is held to be void.

Lastly I agree with the contention of Mr. Sevany that the Objection has been raised after unreasonable

delay and should be frowned upon. The Originating Summons was filed on 2<sup>nd</sup> July, 1998. The directions under Order XXXVI Rule 8 were given on 5<sup>th</sup> October, 1999. The present notice is filed on 21<sup>st</sup> February, 2005.

I also go along with finding of Hon. Njagi J. in case of **Kenya Re-Insurance Company Ltd. Vs Dr. Joseph N. K. Arap Ng'ok H.C.C.S. NO.776/03 (Milimani)** that the issues pertaining to irregularities in pleadings ought to be raised timeously.

This is definitely not the case herein although it is an understatement.

The short and long of all the aforesaid is that the preliminary objection as to the validity of the affidavit sworn by Dilshah Hassanali Manji on 19<sup>th</sup> June, 1998 is dismissed with costs.

Dated and signed at Nairobi, this 22<sup>nd</sup> day of June, 2006.

**K.H. RAWAL,**

**JUDGE**

**22.6.06**