



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Suit 407 of 2005**

**NYANZA SPINNING & WEAVING MILLS LIMITED.....**  
**.....PLAINTIFF**

**VERSUS**

**CREDIT BANK LIMITED.....1<sup>ST</sup> DEFENDANT**  
**VIPUL SHAH .....2<sup>ND</sup> DEFENDANT**  
**KAMAL SHAH.....3<sup>RD</sup> DEFENDANT**

**RULING**

Before the defendant’s notice of Motion, dated 24<sup>th</sup> March 2006 could be heard, the plaintiff raised preliminary objection on different heads.

The first was on the basis that the defendant’s said motion was incurably defective and should be struck off with costs in so far as the said application purports to be drawn and/or filed by Singh Gitau Advocates for the plaintiff, whereas the said advocates act for the defendant. That that defect was unsustainable and incurable by amendment.

That ground was opposed by defendant, firstly on the ground that the defence counsel had began by seeking an amendment to the motion, but was interrupted by plaintiff’s counsel, who then proceeded to raise the objection. Defence counsel submitted that although the motion indicated at the end, “**SINGH GITAU ADVOCATES FOR THE PLAINTIFF**”, that was a typographical error which can be amended by virtue of section 100 of the civil Procedure Act. That the error does not go to the root of the application and was not incurable. Defence counsel then read the top of that motion as follows: -

**“TAKE NOTICE that this court will be moved on the .....day of .....2006 at 9.00 o’clock in the forenoon or so soon thereafter as counsel for the defendant may be on an application FOR THE FOLLOWING ORDERS.”**

Defence counsel then asked a rhetorical question, “**how does description affect the question in issue.**”

Defence counsel was also of the view that the objection raised by the plaintiff ought to have been made by a formal application under Order 50 of Civil Procedure Rules since it was not on pure points of law.

The plaintiff was of the view that the objection was on points of law and submitted that section 100 of the Civil Procedure Act was not designed to such amendment being sought by defence.

I am of the view that the objection on this head is not on a pure point of law, I do accept defence submission that, for a motion to mistakenly state it is drawn by an advocate for the plaintiff instead of stating that it is an advocate for the defendant does not go to the root of the application. To state the advocate who has drawn it goes to giving notice to the opposite party. That error, which defence described as typographical, can be amended under Order VIA Rule 5 (1) of the Civil Procedure Rules. That rule provides: -

**“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”**

The court therefore to enable it to determine the real questions in controversy in the defendant’s motion will require the defendant to file within 7 days an amended notice of motion reflecting that the firm of Singh Gitau appears for the defendant.

The second objection was in regards to paragraphs 4 to 18 of the 1<sup>st</sup> defendants managing director affidavit in support of the defendant’s motion. The objection was that the said paragraphs contained argumentative matters, they are irrelevant to the matters in issue and are oppressive to the plaintiff. plaintiff also sought the striking out of the said affidavit on the basis that it was titled **“Replying Affidavit”** yet it was the supporting affidavit.

Defence responded under Order 18 Rule 7 of the Civil Procedure Rules, which provides

**“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by mis description of the parties or otherwise in the title or other irregularity in the form thereof.”**

On the objection of certain paragraphs of defence affidavit defence counsel stated that those were issues of fact and cannot be the subject of a preliminary objection.

I have looked at the paragraphs objected to by the plaintiff, I did not find the paragraphs to be argumentative nor were the matters therein irrelevant, indeed I find that they are relevant to the motion before court. I do also find that the objection to those paragraph is not made on a pure point of law, it is an objection that seeks the exercise of this court’s discretion in determining whether the paragraphs are argumentative or oppressive to the plaintiff. That objection therefore was mis placed and ought not to have been raised.

The title of the defendant’s affidavit which was mistakenly stated to be a replying affidavit, rather than a supporting affidavit finds solace in Order 18 Rule 7, the court may receive that affidavit notwithstanding its defects.

The court finds that there was no legal basis for raising the objections raised herein and accordingly the objections will be dismissed.

The orders of the court are: -

- (1) That the plaintiff’s objections contained in the Notice of preliminary objection dated 13<sup>th</sup> April 2006 are dismissed with costs to the defendant.**
- (2) That the defendant is granted leave to amend the Notice of motion dated 24<sup>th</sup> March 2006 to indicate that it is drawn by defendant’s advocate. Such amended Notice of Motion shall be filed and served within 7 days from todays date.**

MARY KASANGO

**JUDGE**

Dated and delivered this 14<sup>th</sup> July 2006.

**MARY KASANGO**

**JUDGE**