

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

Civil Suit 1004 of 2004

SHADE MANUFACTURERS & HOTELS LTDPLAINTIFF

VERSUS

SERAH MWERU MUTUU1ST DEFENDANT

JOSEPH KANGARI2ND DEFENDANT

GRACE GACIKU3RD DEFENDANT

VIRGINIA WANJIRU4TH DEFENDANT

LOUIS WAITHERA5TH DEFENDANT

RULING

In the notice of Motion dated filed on the 1st March 2005, the plaintiffs seeks (*inter alia*) a review of the orders made by this court on the 2nd February 2005 upon the grounds set out therein supported by the affidavit of David Thairu made on the 1st March 2005.

Before the hearing of the application, the Plaintiff took a preliminary point of law by notice dated and filed on the 11th March 2005, the subject of this ruling, contending that the defendants grounds of objection dated and filed on the 8th March 2005 and the replying affidavit by J.G Kimani sworn and filed on the 8th March 2005 respectively are incurably defective and should therefore be struck out and expunged from the record because both such documents offend the express and mandatory provisions of Order 50 rule 16 of the Civil Procedure Rules.

Order 50 rule 16(1) aforesaid reads as follows:-

“16 (1) Any respondent who wishes to appose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any, not less than three days before the date of hearing”

Failing which the application may be heard *ex parte*.

Mr. Wamahiu Kimeria, learned counsel for the plaintiff, and relying on the ruling dated the 25th April 2002 of Ombija, J. in **National Industrial Credit Bank Ltd. V. Githuku Ngethe Gathuku** (Milimani HCCC No.1628 of 2000) (unreported) argued that the defendants are not entitled to file both such grounds of opposition and replying affidavit respectively and having elected to do so contrary to the provisions in the said rule, both such documents are incompetent and must be struck out.

With profound respect to the learned judge, I am not at all persuaded that a respondent is not entitled to file both a statement of grounds and a replying affidavit. In my judgment, the purpose of the rule is to ensure that a respondent who wishes to contravene any statements of facts alleged by an applicant does so by filing and serving a replying affidavit and, if he wishes to rely on any matters of law, does so by filing

and serving a statement of grounds of opposition, otherwise a respondent risks the hearing of the application *ex parte* at the discretion of the court. It seems obvious to me, therefore, that where a respondent, as in the present application, challenges the averments of fact made in the supporting affidavits and also opposes the application on other grounds, he is entitled to file both a replying affidavit and a statement of grounds of opposition. The argument advanced by learned counsel for the plaintiff would result in the absurd situation where a respondent would be restricted by law to oppose an application only on matters of fact or law. If this was intention of the rule, then it would have expressly provided that a respondent shall file either a replying affidavit or a statement of grounds of opposition but not both – and I so hold.

Accordingly, the plaintiff's preliminary objection as stated in the notice dated and filed on the 11th March 2005 fails and it is ordered that the same be and is hereby dismissed with costs to the Defendants.

Dated and delivered at Nairobi this 16th day of March 2005.

P. Kihara Kariuki

Judge