



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION – MILIMANI
CIVIL CASE NO.836 OF 2003**

RWAMA FARMERS CO-OPERATIVE

SOCIETY LIMITED PLAINTIFF

VERSUS

THIKA COFFEE MILLS LIMITED DEFENDANT

RULING

When the Defendant's application dated 27th January, 2005 came up for hearing before me on 23rd February, 2005, Counsel for the Defendant/Applicant sought leave of the Court to raise a Preliminary Objection to the Plaintiff's Replying Affidavit sworn on 4th February, 2005. I allowed Counsel to argue the objection first. It turned out that the objection was predicated upon Rules 9 and 10 of the Oaths and Statutory Declarations Rules made under Cap. 15 which reads:

“9. All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner and shall be marked with serial letters of identification.

10. The forms of jurat and identification of exhibits shall be those set out in the third schedule.”

Counsel submitted that the documents between RNK 5 and RNK 6 annexed to the replying affidavit aforesaid offend the rules cited above and so are copies of cheques annexed after RNK 7. The offending annexures do not form one bundle but are independent of each other. In the premises Counsel urged me to expunge the offending annexures from the Replying Affidavit.

Counsel for the Plaintiff made his responding submissions on 9th March 2005 and argued that the Replying Affidavit being challenged had complied with Rules 9 and 10 of the Oaths and Statutory Declarations Rules. In the alternative Counsel argued that failure to comply with the said rules is not fatal. For this proposition he relied upon several decisions of this Court and the Court of Appeal.

In the further alternative, Counsel for the Plaintiff submitted that the objection raised is not a proper Preliminary Objection as defined by the Court of Appeal in its decision in Mukisa Biscuit Manufacturing Co. Ltd –v- West End Distributors Ltd (1969) E.A. 696. and restated in the case of Eunice Karimi Kibunja –v- Mwirigi M'Ringer Kibunja: Nyeri Civil Appeal No. 103 of 1996 (U.R).

Having set out the rival submissions of Counsel on the preliminary Objection, I take the following view of the matter. The challenge made against the Replying Affidavit aforesaid is not without merit. However

the challenge is not raised against the entire replying affidavit but against the annexures that offend the provisions of Rules 9 and 10. In my view the Objection has been raised at the right time and is a valid Preliminary Objection in respect of matters being challenged. The Objection is based on a pure point of Law and has been argued on the assumption that the facts pleaded are correct. No fact is to be ascertained.

I have perused the annexures being challenged and agree with Counsel for the Defendant that exhibit RNK 5, the Surcharge Order, does not seem to have any nexus with copies of warrants of attachment. There is also no apparent connection between exhibit RNK 7 and the rest of the documents that follow up to exhibit RNK 8. I have also found that the letter dated 18th March 2004 from M/S Gitonga Muriuki & Co. to M/S Ndonge Mbugua Atundo and Macharia Advocates and the hearing notice dated 30th July, 2004 are not properly exhibited in accordance with Rules 9 and 10 of the Rules made under section 6 of the Oaths and Statutory Declarations Act Cap.15 of the Laws of Kenya.

In the result, I uphold the Preliminary Objection and order that the offending annexures discussed above be and are hereby expunged from the replying affidavit sworn by Robert Ndiga Kagwi on 4th February, 2005. Costs of the Preliminary Objection to the Defendant. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF APRIL 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-