

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO 41 OF 1998

JEREMIAH OGOLA DUNGA APPELLANT
VERSUS
COOPER MOTORS CORPORATION (K) LTD RESPONDENT

RULING

This is an application for review of the Orders of this Court made on 11th November, 2004 when the Appeal herein was dismissed for want of prosecution, and for reinstatement of the Appeal. It is made under Order 44 of the Civil Procedure Act and is supported by an affidavit sworn by the Appellant on 18th February, 2005.

Mr Macharia, Counsel for the Respondent, submitted that the aforesaid affidavit is incurably defective on the ground that it did not comply with the mandatory provisions of Sections 35 (1) and 34 of the Advocates Act, Cap 16 in that the affidavit did not bear the endorsement of the person (or Advocate's firm) who drew, prepared and filed it.

Mr Nyachoti, Counsel for the Applicant, responded by submitting that the Notice of Motion application to which the Affidavit is annexed did indeed bear the name of the law firm, and accordingly the Affidavit could not be struck out.

I would disagree with Mr Nyachoti's argument that a document annexed to another need not comply with Sections 34 and 35 of the Advocates Act as long as the principal document has so complied. The Affidavit here is an independent document that supports the main application. There is no requirement that it be drawn by the same firm or Advocate who drew the main application. It could have been drawn by any authorized advocate or firm, and often times is, especially when depositions taken out of town or out of jurisdiction are filed with applications made by Advocates here.

It is, therefore, essential that the Affidavit annexed to the Notice of Motion bear the endorsement of the Advocate or firm that drew and filed it. As the Affidavit in support of this application does not do so, it is in violation of the mandatory provisions of Section 35 (1) read together with Section 34 of the Advocates Act. Accordingly, it is incurably defective, and is struck out. That leaves this application without any evidence in support. As such the application dated 2nd February, 2005 cannot succeed, and is dismissed with Costs to the Respondent.

Dated and delivered at Nairobi this 11th day of May, 2005.

ALNASHIR VISRAM

JUDGE