



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**Civil Appeal 128 of 2003**

**MWANGI KAMWANA ..... APPELLANT**

**VERSUS**

**BERNARD GATU KANJA ..... RESPONDENT**

**RULING**

This is an application, brought under Order 16 Rule 5 of the Civil Procedure Rules, for an order dismissing the Appellant's Memorandum of Appeal for want of prosecution.

However, before the hearing of the application the Respondent's Counsel, Ms L Wahome, raised a Preliminary Objection, arguing that the affidavit in support of the application, having been sworn by Counsel, without deponing that he had the authority to swear the same, was fatally defective. She cited the case of **Microsoft Corporation vs Mitsumi Computer Garage Ltd (Milimani HCCC 810 of 2001)**. She further argued that Order 18 Rule 3 of the Civil Procedure Rules required that the litigant himself, not his advocate, swear the affidavit, and cited the cases of **Kisya Investments Ltd vs Kenya Finance Corporation Ltd (Nairobi HCCC No 3504 of 1993)**; and **Simon Isaac Ngui vs Overseas Courier Services Ltd (Nairobi HCCC 1632 of 1997)**.

Having perused the Affidavit in support, sworn by Muriuki Njagagua, Advocate, I am satisfied that the deponent has identified himself as the advocate, hence the "agent" of the Respondent, and has, therefore, the authority to swear the affidavit. I do not think the case of Microsoft (supra) has application to the facts of this case, as here it is not an "employee" of a "corporation" swearing the affidavit. In Microsoft, the issue related to Order 3 Rule 2 which requires that an affidavit by a corporation can only be made by an officer thereof who is duly authorized by the corporation to do so.

Here, in this case, the affidavit in question can be received under Order 18 Rule 3 which allows the Court, in interlocutory proceedings, to admit Affidavits which contain statements of information and belief provided the sources and grounds thereof are indicated.

The content of the Affidavit here is factual and non-controversial, and is fully within the capacity of Counsel to depone. According, I do not find it offensive and will allow the same as a proper affidavit in support of the application. It is noteworthy that even in the Microsoft case, although the Court found the affidavit defective it did not strike out the suit, simply ordered that the Affidavit be replaced. It would be highly unjust to strike out matters on technicalities.

The Preliminary Objection is dismissed with costs to the Applicant.

**Dated and delivered at Nairobi this 14th day of June, 2005.**

**ALNASHIR VISRAM**

**JUDGE**