



Civil Practice and Procedure

- An affidavit which contravenes section 5 cap 15 is not an irregularity which can be cured by use of subsidiary legislation.

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI**

Civil Suit 450 of 2005

SUPERSONIC TRAVEL & TOURS LTD.....1ST PLAINTIFF

JANE KARIUKI2ND PLAINTIFF

GEORGE NGURE KARIUKI3RD PLAINTIFF

FEDEI HOLDINGS LIMITED.....4TH PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

RULING

The defendant raised a preliminary objection in the following terms: -

“(1) That the application is supported by a fatally and incurably defective affidavit;

(2) that the application dated 9th August 2005 is fatally and incurably defective and therefore a nullity and should be struck out with costs because of non compliance with mandatory provisions of the law.”

Defence counsel, Mr. Kenyariri, submitted that the plaintiff’s application, affidavit and the whole suit were defective because the jurat of the affidavits failed to state wherein was attested the attestation was made. This failure, counsel, said was contrary to section 5 of Oaths and Statutory Declaration Act Cap 15. Counsel argued that because of that breach the plaintiff’s affidavit in support of the injunction application and the verifying affidavit should be expunged from record. Defence relied on the following cases.

- **CIVIL APPLICATION NO. NAI 345 OF 2000 BISHOP JOSHUA GAWO &
OTHERS AND NAIROBI CITY COUNCIL.**

In this case the plaint was not accompanied by the verifying affidavit and it was struck out by the High court, and on appeal the court of appeal stated in regard to the Order 7 Rule 1 (2);

“In our view, the rule is so clear as to leave no room for such interpretation. Having so said, we find that the intended appeal does not raise an arguable point.....” ·

HCC NO 1450 of 2000 MILIMANI JAMES FRANCIS KARIUKI & ANOTHER - VERSUS - UNITED INSURANCE CO. LTD. in this case Hon Justice Onyango Otieno, (as he was then) found that an affidavit which failed to state in the jurat the place of attestation to be bad. · HCCC NO.1464 OF 2000 MILIMANI NATIONAL BANK OF KENYA LIMITED VERSUS HULASHBAN N. DARBAR & OTHERS. Hon Justice Mwera when faced with an affidavit whose jurat failed to state the place of attestation expunge the affidavit from record.

· HCCC NO. 880 OF 2000 MILIMANI MARISA LIMITED VERSUS TRIDENT INSURANCE BROKERS & OTHERS. An affidavit was expunged from the record for failing to state the place of attestation.

Counsel finally argued that if the affidavits are expunged, particularly the verifying affidavit, the plaint should then be struck out for being in contravention of order 7 Rule 1 (2) of the civil procedure rules.

The plaintiff’s counsel Mr. Okello argued in opposition to that objection, in that the omission of stating the place of attestation, he said, was a defect of form, which defect can be cured by Order 18 Rule 7,. That rule counsel said, provided that an affidavit could be received not with standing any defect. He further stated that rules of procedure are handmaiden to procedure and that they are to facilitate practice and not to choke it.

Defence counsel responded to the said submissions by saying that the subsidiary legislation, such as the civil procedure rules, could not override an Act of Parliament.

Those were the arguments before me. The submissions of plaintiff’s counsel I believe ought to be considered first. Plaintiff counsel argued that failure to abide by the requirements of section 5 of cap 15 was a mere irregularity which could be cured by order 18 Rule 7 which provides a court can receive an affidavit notwithstanding its irregularity. I have looked at both affidavits, the subject of the present objection, and they are indeed in breach of section 5 cap 15. This section provides: -

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

The plaintiff’s affidavits are dated but fail to state where the Oath was taken. From the provisions of section 5, cap 15; it is clear that the said affidavits are in breach thereof. I am afraid I cannot accept the plaintiff’s contention that, that failure is a mere irregularity. I do accept the defendant’s submission as being correct that a breach of an Act of Parliament cannot be regarded as irregularity that can be cured by a subsidiary legislation. Indeed there can be no waiver of a condition prescribed by law.

I find that the defendants preliminary objection is well taken and must succeed. Indeed as submitted by the defence, once that objection succeeds, the end result is that the offending affidavits have to be expunged. Accordingly the two affidavits sworn by GEORGE NGURE KARIUKI on 9th August 2005 and the verifying affidavit sworn again by GEORGE NGURE KARIUKI on 9th August 2005 are hereby expunged. That being the case the plaintiff’s suit must fail for not having a verifying affidavit accompanying it, in contravention to order 7 Rule 1 (2) of the Civil Procedure Rules. The plaintiff’s suit therefore is struck off with costs to the defendant.

It is so ordered.

Dated and delivered this 29th September 2005.

MARY KASANGO

JUDGE