



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT 827 OF 2005**

FREDBLACK INSURANCE BROKERS LTD..... PLAINTIFF

VERSUS

HARRO TREMPENAU..... 1ST DEFENDANT

KIM MACKENZIE..... 2ND DEFENDANT

ADRIAN LUCKHURST..... 3RD DEFENDANT

AERO CLUB OF EAST AFRICA..... 4TH DEFENDANT

RULING

The applicant in the Chamber Summons dated 30th September 2005 has, as a preliminary point of law challenged the Respondents Replying Affidavit filed on 12th October 2005 on the grounds that

- (1) The Respondents did not serve the same within the prescribed time, that is, three clear days prior to the inter partes hearing**
- (2) That the same is fatally defective and should be struck out for failing to disclose the drawer thereof as required under Section 35 of the Advocates Act.**

Counsel for the Applicant cited the authority of JOHANNE DISTELBERGER – vs- JOSHUA KIVINDU MUINDI & ANOTHER H.C. MISC. CIV. APPLICATION NO. 1587 OF 2003 in support of the objection.

The Respondent’s response to the objection is that the application having been served on them on 5th October 2005 a Replying Affidavit could not be filed sooner as the deponent was away and 10th October 2005 was a holiday. Counsel for the Respondent submitted that there could not have been three clear days to give in the circumstances.

As regards the non-disclosure of the drawer of the affidavit the Respondents are of the view that the defect is not incurable but curable under Order 18 of the Civil Procedure Rules which, according to the Counsel for the Respondent ought to be relied on as it applies specifically to affidavits unlike Section 35 of the Advocates Act which, according to him, is intended to prohibit unqualified persons from “collecting fees for documents drawn by them when not qualified to do so”.

The reasons for delay in serving the Replying Affidavit 3 clear days before the inter partes hearing are not convincing. As regards the second objection I am persuaded that the failure to disclose the drawer of the Replying affidavit constitutes an incurable defect as held in the authority cited by the Applicant and also in my own Ruling in H.C.C.C. No. 41 of 2004 HANNS-SEIDEL-STIFTUNG NAIROBI -vs- ARMITLAL SHETH & ANOTHER wherein the guilty party presented an argument similar to the one

presented by the Respondents herein.

It is clear from the wording of Section 35(1) that it refers and applies to:

“every person who draws..... or causes to be drawn... any document or instrument referred to in Section 34(1).... (of the Advocates Act)

An affidavit is one such document under Section 34 (1) (e) and the provisions of Section 35 (1) are mandatory. They apply to both advocates and non advocates alike. In my considered view failure to adhere to the same is incurable.

In the premises the objection herein is upheld. The Replying Affidavit is therefore struck out and expunged from the record. The application shall proceed ex parte on a date to be fixed at the Registry.

Dated and Delivered at Nairobi this 18th day of October 2005.

M.G. Mugo

Judge

In the presence of

Mr. Nduati for the Plaintiff

Mr. Mugambi for the Defendant