



**REPUBLIC OF KENYA**

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

**Civil Case 214 of 2004**

**KAGUANJAI BUILDERS LTD AND ANOTHER.....PLAINTIFF**

**VERSUS**

**MATIC CONTRACTORS LTD .....1<sup>ST</sup> DEFENDANT**

**STEPHEN MBURU KINYANJUI .....2<sup>ND</sup> DEFENDANT**

**MILTON NJOROGE .....3<sup>RD</sup> DEFENDANT**

**RULING**

There is on record an application filed on behalf of 1<sup>st</sup> and 2<sup>nd</sup> defendants dated 22<sup>nd</sup> September 2004. the plaintiff's opposed that application by the replying affidavit sworn by Charles Kinyanjui Mwaura dated 19<sup>th</sup> November 2004.

The defendant counsel raised a preliminary objection to paragraph 10 of that replying affidavit in the following terms; that the said paragraph should be struck out; that the said paragraph is not based on matters of fact but matters based on advice of the deponent's advocate; that consequently the matters thereof are not within the knowledge of the defendant; that by the use of the word 'advised', which was the advice of their counsel, it cannot be said to be evidence because advise can be wrong. Defence counsel said that the matters deposed in that paragraph ought to have been left to be submitted on by the plaintiff's counsel. He further said that the averments in that paragraph cannot fall within the proviso Order 18 Rule 3 (1) because it did not fall within the definition of "statement of information and belief.....". Counsel then concluded that he sought under Order 18 R. 6 that the said paragraph be struck out.

Plaintiff's counsel responded to those submissions. he said that the replying affidavit, the subject of that paragraph, was in answer to the application, by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, which raises points of law and fact. Plaintiff's counsel pointed out to paragraph 3 and 4 of the affidavit in support of the application by 1<sup>st</sup> and 2<sup>nd</sup> defendant, where the deponent stated "That I am informed by my advocate on record which information I believe to be true". That the paragraph 10 of the plaintiff's affidavit, the paragraph the 1<sup>st</sup> and 2<sup>nd</sup> defendants raise an objection to, sought to answer matters which are stated in paragraph 3 and 4 aforestated. Counsel submitted that there is nothing in Order 18 Rule 3(1) which precluded an advocate to give information to his client. That further the defendant is relying on Order 18 R 6 to have paragraph 10 of the replying affidavit struck out is misconceived because counsel had not shown what is scandalous, oppressive or irrelevant therein. Counsel therefore sought dismissal of the objection.

The plaintiff in its replying affidavit, paragraph 10 stated; "That I am advised by our Advocate on record which I verily believe to be true...." The offence that the 1<sup>st</sup> and 2<sup>nd</sup> defendant find in that portion is that the deponent uses the word 'advised'. Defence counsel argued that advise cannot be equated with information and belief. The pocket oxford dictionary defines the word advise as; "to recommend, to inform, to consult with". That definition clearly shows that to try to distinguish the word information and

advise is to indeed attempt to 'split hairs'. I therefore find that the use of the word advise does fall within the contemplation of Order 18 Rule 3(1) and having so found the defendant's preliminary objection fails and is dismissed with costs to the plaintiff.

Dated and Delivered this 14<sup>th</sup> day of October 2005.

**MARY KASANGO**

JUDGE