

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO. 149 OF 2003

SULTAN HARDWARES LTD

SULTAN WHOLESALERS LTD ===== PLAINTIFFS

VERSUS

AFRICAN BANKING CORPORATION LTD ===== DEFENDANTS

RULING

When the plaintiffs' application dated 17th October 2003 came up for the inter partes hearing, the defendant's counsel raised a preliminary objection to it on points of law.

Ms Pandit for the defendant in support of the objection submitted that the form of identification of the exhibits annexed to the affidavit in support of the application was defective and that it contravened the provisions of the Oaths and Statutory Declarations Rules. It was also a contention of Ms Pandit that the said exhibits were each indicated to have been annexed to an affidavit of S. K. Sultan when there was no affidavit sworn by deponent of that name. The third ground of the objection was that paragraph 7 (ii) and (iii) of the affidavit of Ashraf Karmali Sabjali offends the Provision of Order XVIII rule 3(1) of the Civil Procedure Rules in that the deponent swore to a statement of information and belief without disclosing the source of his information. Ms Pandit contended that the above defects cause a prejudice to her client and were oppressive and she urged that the exhibits and the paragraph of his affidavit complained of should be struck out.

Mr Odunga for the plaintiffs in response contended that a mere deviation of form does not render an identification of the exhibits defective as provided by Section 72 of the Interpretation and General Provisions Act; and in any case rule 10 of the Oaths and Statutory Declarations Rules does not provide the consequences of non – compliance with it. On the claim that some paragraphs of the affidavit in support of the plaintiffs' application were defective Mr Odunga contended that the Court has a discretion to receive and use defective affidavits.

I have carefully looked at all the exhibits annexed to the affidavit of Sabjali and the paragraphs of the said affidavit complained of. I note that to be able to deal with these points of law adequately, there is a need for me to ascertain each of these facts raised by looking up the provisions mentioned by both counsel in their submissions.

I therefore find that the above points are not strictly points of law which should be taken up on a preliminary objection as defined in the case of **Mukisa Biscuit Co. -Vs- West End Distributors Ltd [1969] EA 696**. The defendant should have filed an application supported by an affidavit to enable me sufficiently deal with the issues the defendant has raised. The preliminary objection is therefore rejected.

Dated and delivered this 28th day of May, 2004.

B. K. TANUI

JUDGE

In the presence of:

Mr Odunga for plaintiffs

Ms. Pandit for defendants