

The learned Commissioner nonetheless considered that point and struck out the appeal.

Mr. Wafula for the respondent in his grounds of opposition states that the issues raised in this appeal are res-judicata since they had been considered in the appeal which was struck out.

Mr. Kiarie for the applicant on the other hand maintains that the appeal was just struck out and not dismissed and so he is in order to file another appeal based on the same issues. I have considered all these arguments. I have also considered the very able oral submissions by both counsels made for and against this application.

Mr. Wafula for the respondent introduced another issue in this matter which was not in his grounds of opposition. He asked the court to strike out the application because the supporting affidavit offends the provisions of section 35(1) of the Advocates Act.

Both parties cited cases each in support of his stand. I will discuss this later in this ruling. Let me start with the issue as to whether I should allow leave for the appeal to be filed out of time. According to Mr. Kiarie for the applicant, the applicant should not be punished for the mistake of his advocates.

In other words, the sins of the advocate should not be visited on his client. He therefore argues that the applicant should not be punished because the advocates failed to include a certified decree in his memo of appeal. According to Mr. Wafula however, the firm representing the applicant then was a firm of Senior lawyers who had no excuse to make such a mistake. In any event, the said advocates have not sworn an affidavit to explain why they failed to file the certified decree.

I am totally in agreement with Mr. Wafula on that issue. The advocates should have filed the affidavit to explain why that very vital document was missing in the memorandum of appeal. This is the only way to decide on whether this was a genuine inadvertent mistake, or sheer laxity or negligence on the part of counsel. If it was a genuine and inadvertent mistake, then the court would have been swayed to rule in favour of the applicant. If on the other hand the omission was caused by laxity or negligence on the part of the advocates, then the court would be less sympathetic to the applicant herein. I wish to draw the distinction here – if a mistake is inadvertent, then in that case, his omission should not be visited on his client. If on the other hand, the mistake was caused by counsels laxity, negligence on sheer carelessness, then the court cannot condone such conduct by indulging such an advocate.

In this case, we have not been told why the decree in question was not certified. As rightly stated by Mr. Wafula, this is a very old matter. The appeal is 7 years old and it may not be in the interest of justice to revive the appeal – more so considering the amount of money which is the subject matter of the said appeal.

In my considered view however, the fact that the learned commissioner of assize analysed the grounds of appeal and even the evidence in the earlier appeal does not make the intended appeal Res-judicata. I say so because even after analyzing that evidence, no finding or decision was made on the same. That ground of opposition must therefore fail. The court has not been persuaded to exercise its discretion in favour of the applicant herein to allow him leave to file the intended appeal out of time. This is a good case where the loss must be allowed to rest where it falls.

On the issue of the affidavit in support of the application not being proper, this may appear like a moot point now - since the application has already been dismissed. I nonetheless find that it is a pertinent issue and I should make my stand known – this early in my career. I have been furnished with authorities from different judges who have ruled on the issue. I was informed that only one decision by Justice Ringera – then a Judge of the High Court states that an affidavit is not a document or instrument as envisaged by section 34 of the advocates Act. This was his decision in HCCC No. 572/00 at Milimani Commercial courts.

(GARNISHEE).

The learned Judge had the following to say in that matter.

***“On whether or not an affidavit should on the face thereof declare by whom it was drawn and upon whom it is to be served, I agree with the submission of the Decree holder’s advocate that there is no such requirement in law. It is definitely not in the oaths and statutory declarations Act cap 15 of the laws of Kenya or the Civil Procedure Rules and the objector’s advocate did not pinpoint which other statute or rule of court required any such indication. I think the advocate must have been labouring under the erroneous assumption that an affidavit is a pleading, which is not*”**

Against this ruling were the cases of JOVENNA EAST AFRICA LTD VS SYLVESTER ONYANGO & OTHERS; (Judge Nyamu).(HCCC No. 1080/02. HCCC No.234/01 MIBERO (4) Ltd vs MARK & ANOTHER – Justice Tanui.

HCCC 1736/01 BARCLAYS BANK OF KENYA LIMITED VS DR. SOLOMON OTIENO ORERO (Judge Njagi).

All these cases basically say that failure to endorse a document (read affidavit) with the name of the drawer renders the documents fatally defective. According to Mr. Wafula, I should follow the “wide path” and not follow the “narrow path” of Justice Ringera.

I have considered all these authorities and the relevant statutes. From the outset, I would like to say that the road most traveled is not always the right route. I have tried not to be influenced by the number of decisions in favour of Mr. Wafula’s argument. I have decided to tread the road least traveled. I will give my reasons for doing so hereunder.

Section 35(1) of the Advocates Act cap 16 states as follows:-

***“35(1) Every person who draws or prepares, or causes to be drawn or prepared, any document or instrument referred to in section 34(1) shall at the same time endorse of cause to be endorsed thereon his name and address or the name and address of the firm of which he is a partner*”**

The documents being referred to in section 34(1) are documents

- (a) Relating to the conveyancing of property; or
- (b) for, or in relation to, the formation of any limited liability company, whether private or public; or
- (c) For or in relation to an agreement of partnership or dissolution thereof; or
- (d) For the purpose of filing or opposing a grant of probate or letters of administration; or
- (e) For which a fee is prescribed by any order made by the Chief Justice under section 44; or
- (f) Relating to any other legal proceedings;

In the present proceedings, of interest thereof are the matters referred to under section 34(1) of which are matters relating to any other proceedings. This must be the provision the proponents for the argument that an affidavit is covered by section 35(1) rely on.

The question I am labouring to answer is whether an affidavit falls within the category of documents relating to “others legal proceedings”

The second question to be determined is whether strictly speaking an affidavit is a document or instrument in terms of what is envisaged under section 35(1) of the Advocates Act.

Thirdly, I will also need to answer the question as to whether an affidavit is a pleading or not under the Civil Procedure Act.

I have sought the simple, English, meaning of the word affidavit from three legal dictionaries.

According to the WHARTON'S LAW LEXICON, an affidavit is defined as

"..... A written statement sworn before a person having authority to administer an oath. An affidavit must be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory motions on which statements as to his belief, with the grounds thereof, may be admitted ."

K.J AIYAR'S JUDICIAL DICTIONARY (twelfth Edition) defines an affidavit as hereunder.

"..... A written statement sown before a person having authority to administer an oath ."

MOZLEY & WHITELEY'S LAW DICTIONARY also defines affidavit as

"A statement in writing and on oath sworn before a person who has authority to administa it"

What is important going by these definitions is that the affidavit be sworn before a person having authority to administer an oath.

In some cases especially interlocutory matters, decisions are made on the strength of deponents through affidavits. Affidavits are accepted to prove facts in court where a witness cannot be produced or where xexamination is not required.

Affidavits are therefore evidence in written form as opposed to viva voce evidence. An affidavit is not therefore a document or instrument.

The only requirement inrespect of an affidavit is that it must be sworn before a Commissioner of Oaths. This is a requirement under R7 of the oaths and Statutory Declarations Act cap 15 of the Laws of Kenya which provides a follows:-

"A Commissioner for oaths before administering an oath must satisfy himself that the person named as the deponent and the person before him are the same, and that such person is outwardly in a fit state to understand what he is doing"

It is then clear from the foregoing that an affidavit is evidence made by a person and that is invariably why as a must all affidavits are made in the first person. It is the deponents evidence and only needs to be sworn before a Commissioner for oaths.

It cannot be a document or instrument draw by an advocate as envisaged under section 35(1) of the advocates Act.

I have no hesitation in finding that an affidavit is evidence given in writing under oath by the deponent. Evidence whether given viva voce or sworn in form of an affidavit cannot be a document or instrument as envisaged under section 35(1) of cap 16.

The other aspect of this is that usually, an affidavit will be sworn in support of another document or legal proceeding and is not a pleading on its own. In the case of CASTELINO VS RODRIGUES 1972 E.A. 223. it was held that a reference in a document to an annexure incorporates the contents of the annexure in the document.

Even if therefore one were to insist that an affidavit is a document, once it is referred to in the main application, it forms part of that application. Only the application therefore need show that it has been drawn and filed by an advocate pursuant to section 35(1) of the Advocates Act.

Whichever way one looks at it therefore my argument carries the day.

As to whether the affidavit is a pleading or not. I find that it is not a pleading under OV1 & OVIA CPA.

An affidavit is not a pleading. It is not a document that can be amended. This was held in Civil App. No. 170/95 Court of Appeal sitting in Nairobi.- parties SIMON KITAVE NDUTO & ANOTHER VS OWENGA ANJERE.

It is not therefore one of the documents envisaged under section 34 of the Act. It is definitely not a pleading envisaged under OVI.

My position is therefore clear. An affidavit is not one of the documents or instruments that fall under section 34(1) of the advocates Act. I must in the circumstances uphold Mr. Kiarie's submission on that point although it does not help his application at all.

The application dated 2/7/2003 is hereby dismissed with costs to the Respondent.

WANJIRU KARANJA.

AG. JUDGE.

21/6/2004.

DELIVERED AND SIGNED IN OPEN COURT IN KITALE THIS

DAY OF JUNE, 2004 IN PRESENCE OF: