



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

**CIVIL CASE NO.117 OF 2004**

DAVID NJENGA KINYANJUI.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

**RULING**

The Plaintiff herein sought by Chamber Summons dated 1st March, 2004 a temporary injunction under Order 39, rules 1 and 5 of the Civil Procedure Rules (the Rules) to restrain the Defendant by itself, its servants or agents from, in effect, exercising its chargee's statutory power of sale in respect to land parcel LR. NO.KIAMBURU/KARURI/T.186 pending hearing and determination of the suit. When the application came up for hearing on 26th July, 2004 learned counsel for the Defendant raised a preliminary objection to the application on a point of law. That point of law is that the affidavit sworn in support of the application offends Sections 34 and 35 of the Advocates Act, Cap.16 in that there is no endorsement on it of the name and address of the person who drew it, or the name and address of the firm of advocates of which he is a partner. Counsel for the Defendant further submitted that the affidavit is for that reason invalid and cannot be used to support the application.

It must be struck out; without affidavit evidence supporting the application, the application itself is incompetent and must also be struck out. Counsel relied on the case of JAMBO BISCUITS (K) LIMITED -VS- BARCLAYS BANK OF KENYA LIMITED & OTHERS, High Court of Kenya, Commercial Division, Milimani, Civil Case No.1833 of 2001 (unreported). In that case Ringera J (as he then was) observed, without deciding the issue, that failure to endorse some two debentures (documents he found to fall within Section 34 (1) (e) of the Advocates Act) with the name and address of the firm of advocates that drew them as required by Section 35(1) of the same Act, would render those documents invalid, going by the broad logic of the decision of the Court of Appeal in the case of GEOFFREY ORAO-OBURA -VS- MARTHA KARAMBU KOOME, Civil Appeal No.146 of 2000 (unreported).

Learned counsel for the Plaintiff replied that as the affidavit was annexed to the application, and as the application itself shows clearly the name and address of the firm of advocates who drew it, an inference can be drawn that the affidavit is also drawn by the same firm of advocates. Counsel further submitted that there is no prejudice caused to the Defendant by the omission, and the omission can be easily cured by the court granting leave to the Plaintiff to make the necessary endorsement upon the affidavit, or to file a supplementary affidavit to the same effect. Counsel pointed out that there was no allegation that the affidavit was drawn by an unqualified person or that it was drawn by a person other than the firm that drew the application. The objection taken was therefore a technicality, and the Plaintiff should not suffer because of failure to comply with a technical requirement.

Whereas I have sympathy for the position of the Plaintiff, nevertheless the law must be complied with. The affidavit in question is a document coming within Section 34 (1) (e) of the Advocates Act. Section 35 (1) of the same Act requires that it must be endorsed with the name and address of the person or firm of advocates that drew it. That is a statutory requirement. It is not a mere technicality. Failure to comply with that express and mandatory statutory requirement must render the affidavit invalid in law. I so hold. An invalid affidavit cannot support an application. Chamber Summons dated 1st March, 2004 is such that without affidavit evidence it cannot stand on its own. It is therefore incompetent. I so hold. I must therefore uphold the objection taken by the learned counsel for the Defendant. The said application, along with the affidavit sworn in support thereof, are hereby struck out with costs to the Defendant. Order accordingly.

**DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2004.**

**H. P. G. WAWERU**

**JUDGE**