



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1823 of 2002

VIRGINIA WANGUI NGUU .....  
PLAINTIFF

- versus -

STEPHEN KAHUKI KAMAU

MINNIE WATIRI GHUKI.....DEFENDANTS/  
RESPONDENTS

R U L I N G

The Plaintiff/Applicant, in a Notice of Motion dated and filed on the 16th September 2004, seeks various orders including an order of eviction against the Defendants/Respondents. The Motion is supported by the affidavit of the Applicant also made on the 16<sup>th</sup> September 2004 and is based on the eight grounds set out therein.

Though no Grounds of Opposition to the application have been filed, the Defendants/Respondents rely on the Replying Affidavit of Joseph Kahi Mbugua, Esp., Advocate, their learned counsel.

It is on this affidavit that the Applicant, at the hearing of the application, raised a preliminary point of law that such affidavit is incompetent and defective and should be struck out. Learned counsel for the Applicant argued that Mr. Mbugua cannot properly depose to matters of fact which are in dispute and on which he cannot be called upon to testify in cross examination. Ms. Muya also contended that the affidavit violates the provisions of order 18 rule 3(1) of the Civil Procedure Rules, relying on the unreported Ruling dated the 15 July 1996 of Ringera, J (as His Lordship then was) in **Kisya Investments Ltd. & Another v. Kenya Finance Corporation Ltd. & Others** (HCCC No. 3504 of 1993).

Mr. Kimanthi, learned counsel for the Respondents, in reply argued that Mr. Mbugua's affidavit is competent as it depones to facts within his own knowledge.

I have considered the preliminary objection in light of these submissions. With profound reseed, I do not see what Mr. Mbugua would have to say if cross examined on the contents of paragraphs 4, 7, 8 and 9 of his affidavit under order 18 rule 2(1) as the matters deponed to therein are clearly not within his own knowledge.

In **Yusuf Abdul Gani vs. Fazal Garage** [1955] 28 K.L.R. 17, affirmed by the Court of Appeal in **David Kinyanjui & Others v. Mechack Omari Monyoro** (Civil Appeal No. 121 of 1993) (unreported), it was held that:-

**“while order 18 rule 3(1) in interlocutory applications relaxed the best evidence rule and the rule excluding hearsay by admitting statements on belief the use made of the rule must be strictly scrutinized lest there be risk of rendering nugatory the saluted proviso that the grounds for belief must be stated. When a client was himself available to depone either to his own knowledge or to his own belief and so state his own grounds was preferable that he, rather than his advocate on his behalf, swore the affidavit lest unacceptable grounds were obliterated or some undue advantage**

**obtained to the defeat of the rule.”**

In light of these decisions, and also because Mr. Mbugua's affidavit does not state that he has been duly authorised to make his affidavit by his clients, the Respondents, I hold that the same is defective and incompetent and do uphold the preliminary objection. Accordingly, it is ordered that the affidavit of Joseph Kahi Mbugua made on the 14th October 2004 be and is hereby struck out with costs to the Plaintiff/Applicant.

Dated and delivered at Nairobi this 22nd day of October 2004.

P Kihara Kariuki

Ag. Judge