

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL CASE NO. 265 OF 1999**

SHUVJI NATHA PATEL PLAINTIFF

- VERSUS -

SEIFEE SPARES & HARDWARE LTD. DEFENDANT

R U L I N G

This court (Khaminwa, J.) has decreed that the defendant should be evicted from the suit premises. Aggrieved by that decision the defendant wishes to exercise his right of appeal to the Court of Appeal and has demonstrated his intention to do so by filing a notice of appeal. He has also applied for stay of execution pending the filing and final determination of that appeal. However, before the application for stay could be heard Counsel for the plaintiff has raised a preliminary objection on the validity of the affidavit in support of the application.

Mr. Kinyua for the plaintiff has submitted that the affidavit in support of the application contravenes the provisions of Section 35 (1) of the Advocates Act in that it is not endorsed with the name and address of the person or firm which drew it. This omission, Mr. Kinyua further submitted, is not a mere irregularity which can be cured by Order 18 Rule 7 of the Civil Procedure Rules. He cited the High Court decisions in **Juvenna East Africa Ltd. –vs- Sylvester Onyango & Others, Milimani Commercial Courts Civil Case No.1086 of 2002 and Barclays Bank of Kenya Ltd. –vs- Dr. Solomon Otieno Orero, Milimani Commercial Courts Civil Case No. 1736 of 2001** in support of his argument. He concluded that if the affidavit is struck out then the application will have no legs to stand on and the same should also be struck out.

In response Mr. Gikandi for the Applicant submitted that the preliminary objection is unmeritorious and should be overruled. The application which is endorsed with the name and address of the drawer, he contended, states that it is supported by the affidavit of the defendant hence the affidavit should be read as part of the application.

In the alternative, Mr. Gikandi argued, the omission of the endorsement should be regarded as an irregularity on the form and not the substance of affidavit. He further argued that if the affidavit is struck out then the application should be left intact. Section 35(1) of the Advocates Act is in the following terms:-

“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 or cause to be endorsed thereon his name and address, or the name and address of the firm of which he is a partner and any person omitting so to do shall be guilty of an offence and liable to a fine not exceeding five thousand shillings in case of an unqualified person or a fine not exceeding five hundred shillings in the case of an advocate.

Provided that, in the case of any document or instrument drawn, prepared or engrossed by a person employed, and whilst acting within the scope of his employment, by an advocate or firm of advocates, the name and address to be endorsed thereon shall be the name and address of such advocate or firm.”

As the Judges in the two above cited cases have held, and I concur with them, this provision is clearly mandatory. Apart from subsection 2 of that Section directing the Registrar of the High Court and Registrars of other registries not to accept documents drawn without that endorsement, the Section

criminalizes the omission. Contravention of such provision cannot therefore be said to be a mere irregularity. I do not agree with Mr. Gikandi that the affidavit the part of the application. Although it is in support of the application an affidavit is a separate document which should be endorsed as required by Section 35.(1) of the Advocates Act.

In the circumstances I find that the affidavit of Yusuf Ali Hassan Ali sworn on 1st November, 2004 in support of his application for stay is fatally defective and I hereby strike it out. Having struck out the affidavit the issue that arises is whether or not the application can stand on its own. Mr. Gikandi says it can. Mr. Kinyua is of a contrary view.

Looking at the application it is clear that the grounds upon which it is based are factual. They require a supporting affidavit to expound on and explain them. There are no legal issues that can be argued from the bar without an affidavit. In the circumstances the application has no legs to stand on. Accordingly I also strike it out with costs to the Respondent.

DATED and delivered this 26th day of November, 2004.

D.K. MARAGA

AG. JUDGE