



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1806 OF 2000(O.S.)**

SALIM ALHAMED ALI)

MOHAMMED SALIM ALHAMED) PLAINTIFFS

VERSUS

EMAG AGDEFENDANT

RULING

By an originating summons dated and filed in court on 12th October, 2000 the applicant seeks the following orders:-

1) appointment of an arbitrator to resolve the dispute that has arisen between plaintiffs and defendant.

2) Costs

At the hearing, Mr. Wanyonyi for the plaintiffs urged me to strike out the replying affidavit of NIKLAUS THOMAS ZEHNDER sworn on 29th June 2001 and filed on 3rd July, 2001. According to counsel that affidavit is, ex-facie incompetent and, inadmissible in evidence in the Kenyan courts. Counsel contends that at the jurat is a stamp bearing the name ALFRED FELBER. Around the name is a stamp which has words which Shakespeare would term "Greek".

Mr. Wanyonyi took the position that without the person who took the oaths showing by his signature and attesting stamp, which is in English, that he is either a Notary Public or a Commissioner for Oaths the court cannot vouch that indeed the affidavit has been sworn before such a Commissioner for Oaths or Notary Public. That it may well be that the other writings in SWISS language was meant to do that. However, as there was no translation of the same in English which is the official language of the High Court the court cannot and will not know the position.

It was also contended by counsel that the affidavit is sworn at a place called WANGEL BEI OLTEN, Switzerland which is outside the Commonwealth and hence inadmissible in our courts, as evidence, by dint of the provisions of S.88 of the Evidence Act (Cap 80) Laws of Kenya.

It was further contended that the only annexure to that affidavit marked "NTZ1" is purportedly in respect of affidavit of NIKLAUS THOMAS ZEHNDER sworn on the 29th day of July 2001 at Dulliken. The country where Dulliken is situated is unknown to the defendant in any event.

According to Mr. Wanyonyi the language of the court, in terms of the provisions of Section 86 of the Civil Procedure Act, is English. To the extent that the affidavit and its annexure are in a language other than that of the court, to that extent is the affidavit inadmissible in evidence in these proceedings. Mr.

Adera for the respondent conceded that the subject affidavit was sworn by a Notary Public called ALFRED FLEBER in Switzerland but contended that the same is admissible in evidence in Kenya courts.

According to Mr. Adera, by way of alternative argument, in the event the affidavit is found by the court to be wanting, then the court should order substitution of the affidavit and allow the originating summons to proceed as per directions given by the court earlier on. It was his contention that no prejudice would be occasioned to the defendant in any event.

In Mr. Adera's view the introduction of the preliminary objection, at the hearing stage other than at the direction stage, is meant to derail these proceedings and nothing else. I subscribe to the view of RINGERA J. in HIGH COURT OF KENYA, MILIMANI COMMERCIAL COURTS NAIROBI: CIVIL SUIT No. 966 OF 2000 PASTIFICIO LUCIO GAROFALO S.P.A. –vs- SECURITY & FIRE EQUIPMENT CO. ZAZECO(K) LTD [unreported] at page 6:

“As regards whether the affidavit is taken before a Notary Public, there is no specific statute or rules of court dealing with the formalities and admissibility in court of affidavits taken abroad. However Section 88 of the Evidence Act [Cap 80 Laws of Kenya] provides that documents which would be admissible in English courts of justice are admissible in Kenyan courts without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed. In England by virtue of Order XLI rule 12 of the rules of the supreme courts, affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp and seal or the official position of the person taking the affidavit in Kenya. It accordingly follows that the same position obtains in Kenya”.

Accordingly, therefore, as there is no such presumption in favour of documents made outside the Commonwealth, it follows that the affidavits in the instant case which was taken in Dulliken, Switzerland, have to be proved by affidavit or otherwise to have been taken by a Notary Public in Switzerland and that the signature and seal of attestation affixed thereto was that of such a Notary Public. There is no such proof here.

For those reasons I find and hold that the affidavit of NIKLAUS THOMAS ZEHNDER, sworn on 29th June, 2001 at Wangel Bei Olten in Switzerland by one Alfred Felber, is inadmissible in evidence in Kenyan courts. The inevitable upshot is that the same is struck out with costs.

DATED and DELIVERED at NAIROBI this 10th day of April 2002.

N.R.O. OMBIJA

JUDGE

Mr. Maweru for Odera for respondent

N/A for the applicant