



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO 601 OF 2001**

**SOLOMON SOFTWARE (EA) LTD & ANOTHER.....APPLICANTS**

**VERSUS**

**MICROSOFT CORPORATION T/A**

**GREAT PLAINS BUSINESS SOLUTIONS.....RESPONDENT**

**RULING**

The defendant/applicant filed an application dated 4/2/2002 which was served to be heard *interpartes*. The respondent/plaintiff filed a replying affidavit sworn by its Managing Director one Sankarasubbu Ramasubramanian on 18/2/2002. The original copy of this document is on the file.

On 22/2/2002 the defendants' advocates filed and served "Notice of Intention to raise a Preliminary Point of Objection". That the replying affidavit of Sankarasubbu Ramasubramanian aforementioned does not comply with the mandatory provisions of section 5 of the Oaths and Statutory Declaration Act, Chapter 15 Laws of Kenya (the Act) consequently the replying affidavit is incurably defective and should be struck out.

Section 5 of the Act provides as follows:

"Every Commissioner for Oaths before whom any oath is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

At the hearing of Chamber Summons the counsel for defendant sought to argue first the preliminary objection which was taken before proceeding with the application. The objection was disclosed at the hearing as the failure by the Commissioner before whom the affidavit was taken to state truly the place where the affidavit was made.

A glance at the original affidavit shows that indeed the place where oath was taken is not stated. The counsel of the plaintiff/respondent does not dispute this. Counsel's submission is that the omission is not fatal. And that he is able to correct the affidavit to meet the requirements of the Act. It is clear the issue of the validity of affidavits has occupied our courts as evidenced by several authorities referred to by both counsel.

As I see it the issues are two whether the omission is a breach or non compliance with the Act being Act of Parliament or whether the omission is mere irregularity that can be excused under Order 18 rule 7 Civil Procedure Rules. Of the authorities referred to me, I am in agreement with the ruling of Hon. Justice Onyango Otieno in HCC No 1092/2000 Nairobi Milimani Commercial Courts. In that ruling the judge found that failure to comply with section 5 of the Act is a breach of an Act of Parliament and therefore non-compliance is illegal. He also found that while irregularity may be excused as provided under Civil Procedure Rules, Order 18 rule 7 to excuse non-compliance of a statutory provision is illegal, Civil Procedure Rules being only subsidiary legislation. That case was dealing with a verifying affidavit filed under Civil Procedure Rules Order 7 rule 1(2) which requires a verifying affidavit to accompany the filing of the plaint. The ruling was made on 8/5/2001 after delivering another ruling on 6/11/2000 in the HCC No 1450/2000.

In this case the affidavit was commissioned by a partner in the firm acting for the deponent contrary to section 4(1) of the Act. Section 5 was also not complied with. The Court in both cases expunged the affidavit complained of. Similar ruling was made by court in HCC Kisumu No 152 of 1988 by Wambilyanga J. On the other hand counsel for respondent/ plaintiff referred to the judgment of court in HCC Nairobi No 173/2000 ruling of Visram J. (as he now is) where that court was of the view that although the wording of section 5 of the Act was in mandatory terms, the courts powers granted under order 18 rule 7 Civil Procedure Code are not altered and the court may receive affidavits under the order. The court proceeded to accept the affidavit complained of under the provisions of order 18 rule 7 in “an effort to meet the ends of justice” and because he was of the view that the irregularity and not prejudice the defendant’s case.

In doing so he relied on the provisions under *Halsbury’s Laws of England* Vol. 15 3rd edition where he quoted:

“Unless a commissioner to administer oaths exposes the time and the place where he takes an affidavit, it will not be permitted to be filed or enrolled without leave of the court or a judge. The parties cannot waive irregularities in the form of a jurat, but in a case where the place of swearing is omitted, the court may possibly assume that the place was within the area in which the notary before whom it was taken was certified to have jurisdiction and the irregularity may be overlooked.”

The respondent also relied on Nairobi HCC No 1759/99 Milimani Commercial Court the ruling by Hon J Ringera where the same section of the Act and Rules were considered on 9/3/2001. Hon judge was of the view that the situation in England where Commissioners of Oath and Notaries had limited jurisdiction is not comparable to Kenya. In Kenya a Commissioner can commission documents anywhere within the Republic and therefore the need to state the place of taking oath is not of any importance. That court held that the irregularity complained of was not fatal. Again in the case No 810/2001 Nairobi Commercial Courts *Microsoft Corporation vs Mitsumi* another case well known by both counsel here. Hon Justice Ringera had occasion to consider a preliminary objection raised regarding a defective verifying affidavit for non-compliance with section 5 of the Act. The affidavit complained of was sworn in England and it was deemed valid according to the Laws of England. In his ruling the court distinguished defect of substance and of form and whereas the court was quick to strike out an affidavit defective in substance (not showing the authorization to make affidavit) he was unwilling to strike off on the ground of want of form namely for non-compliance with the provisions of section 5 of Commissioners of Oaths Act 1889 of England (reading same with our section 5) as the omission would be regarded as a mere irregularity as permitted under order 41 rule 4 of Supreme Court Rules.

I have considered both arguments and authorities stated above. It will be seen that most of these authorities relate to verifying affidavit which if struck off the important consequence would have required the plaint and therefore the whole suit to collapse incurring expenses to the plaintiff. The courts have gone to great lengths to avoid this situation and have granted leave (Onyango Otieno J) for filing a corrected affidavit so as to maintain the suit.

In the present case the affidavit complained of is a replying affidavit to an application which is filed under

the provisions of Order 50 Rule 16. If it was struck off the respondent would be granted leave to file another affidavit or the respondent could proceed to argue the matter without replying affidavit or on grounds of opposition only. The suit would not be in danger of being struck off. Of the two conflicting provisions on these issues raised it is clear the practice in England is different in that Commissioners of Oaths have limited jurisdiction of operation. It must be important to ensure that the oath was taken within the correct jurisdiction.

In Kenya there are no such limitations on the Commissioner of Oaths. They can take oath in any part of the country. Nevertheless the Act demands that the place be stated and until the Law is repealed the court should not encourage non-compliance. The subsidiary legislation cannot override the provisions of an Act of Parliament. That is not disputed.

I am therefore of the view that the affidavit complained of is fatally defective and the same is hereby expunged from the record. However to avoid delay of the hearing of the applicants application, I grant leave to the respondent to file a corrected valid affidavit within the next 3 days.

Costs of this preliminary objection proceedings shall be paid by respondent in any event.

**Dated and delivered at Mombasa this 28th da of August, 2002**

**KHAMINWA CA**

**JUDGE**