

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL SUIT NO.39 OF 2000

TREADSETTERS TYRES LIMITED PLAINTIFF

VERSUS

HUSSEIN DAIRY LIMITED DEFENDANT

R U L I N G

Application dated 22nd February 2000 came up for hearing on 21.11.2002. The Respondent raised a Preliminary Objection in which it objected to admission of a further affidavit sworn by Rashmin Kapadia on 28th March 2000 on the grounds that the same was filed without leave of the court, that the same offends provisions of Order 18 of the Civil Procedure Rules and that the same does not comply with the requirements in relation to a jurat. This Ruling is only confined to that objection.

The Respondent states that further affidavit sworn on 28th March 2000 was filed without leave of the court and that is true. All that Mr. Inamdar for the Applicant says is that the Respondent has never raised the same objection earlier on and has thus by conduct waived its right to object. That is an argument that would have been readily acceptable in contract cases but not in a case of this nature where the rules of the court were clearly violated. I do not think a party can by delay in pointing out the legal defect in a document be estopped from getting justice if the defect is a breach of the law or failing to comply with the rules of the court.

The Affidavit remains inadmissible however long it takes to point out the violation of the rules.

Mr. Inamdar, the learned counsel for the Applicant applied during his submission for leave. That was not proper. The Notice of Preliminary objection has been on record for over a month. He could have pleaded with the court earlier on being reminded through that Notice that the Affidavit was not properly on record. He will need to make a proper application for leave if he still needs to file a further affidavit. That will afford the Respondent opportunity to respond to the same application.

On the question of the effect of the jurat being on a separate page, I do feel Justice Waki's approach in the case of **Hamida K. Kamakhan vs. Emad Abdulaled Abdulkada - Mombasa HCCC No.5 of 2000 (OS)** is correct. I must however add here that it all depends on whether the mischief that was meant to be taken care of by rule in the Supreme Court rules is taken care of in a case under consideration. The whole rule, I do feel was to avoid situations where alleged deponents are given a page with a jurat on it to sign and they sign the same without having read and understood what the text of the Affidavit is and often without seeing the same.

Later the text is prepared and the already signed page is annexed to it. That in effect would mean that although the deponent appears to have sworn the Affidavit and to have known the contents, he in fact knows nothing on the Affidavit. However in the Affidavit of 28.3.2000, it appears to me that there was no space at the end of the text so that the jurat had of necessity to be on the next page and I cannot say that was improper particularly as there is no provisions in our law against the same. The sum total of the above is that the Preliminary objection succeeds. The Affidavit sworn on 28.3.2000 and filed on the same day expunged from the record. Costs of the objection to the Respondent. Orders accordingly.

Dated and delivered at Mombasa this 26th Day of November, 2002.

J.W. ONYANGO OTIENO

JUDGE