



**THE MATTER OF WINIFRED WANJAMA WARUI T/A WANJAMA & ASSOCIATES**  
**IN THE MATTER OF THE ADVOCATES ACT (CAP 16) LAWS OF KENYA**

REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Misce  
us Civ  
Case 7  
2012

ANASTACIA KIOKO MULULU AND  
ZEHRABANU

TRADING IN THE NAME AND STYLE  
OF

ARCHER & WILCOCK ADVOCATES ..... PLAINTIFF

AND

WINIFRED WANJAMA WARUI

TRADING IN THE NAME AND STYLE  
OF

WANJAMA & ASSOCIATES ..... DEFENDANT

**RULING**

1. The Plaintiff herein filed an Originating Summons on 1<sup>st</sup> February 2012, seeking an Order for the enforcement of a professional undertaking against the Defendant, such having been given on 21<sup>st</sup> May 2010. The undertaking had been given to pay Shs.6 million together with compound interest at 16% per annum from 10<sup>th</sup> August 2010 until payment in full. In default of compliance with the Court's first Order, the Plaintiff sought various further orders including the costs of the application and for the Defendant to be suspended from practicing as an advocate after the expiry of 7 days from the date of the Court Order. Further in case of default, the Plaintiff sought a disciplinary order under section 56 of the Advocates Act plus that the Defendant should be held in contempt.

2. The Originating Summons was supported by an Affidavit sworn by **ZEHRABANU JANMOHAMED** and dated 3 February 2012. That Affidavit set out the details in relation to the alleged breach of professional undertaking which I need not go into here. The Defendant filed a Replying Affidavit thereto dated 20 March 2012 plus a Supporting Affidavit bearing even date therewith sworn by one **JONNES MUGAMBI** which detailed that the deponent was the purchaser (hereinafter "the purchaser") of a property known as L. R. No. 2259/544 ("the suit property") and it was he that had authorized the Defendant to issue an irrevocable undertaking on his behalf in May 2010. When the Originating Summons came before me for hearing on the 21 March 2012, Miss. Janmohamed, appearing for the Plaintiff, stated that she wished to take a Preliminary Objection as to certain paragraphs in the Defendant's said Replying Affidavit dated 20 March 2012. It is this Preliminary Objection which is for consideration before this Court.

3. Miss Janmohamed commenced her submissions by referring the Court to **Order 19 Rule 3 (1)** of the *Civil Procedure Rules 2010* which reads as follows:-

**"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove**

**Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof".**

Miss. Janmohamed stated that if facts deponed to were not within the deponent's knowledge then the Rules required her to declare her source of information. Thereafter the Court was pointed to the provisions of **Order 19 Rule 6** which allows the Court to strike out paragraphs in an affidavit which it deems scandalous, irrelevant or oppressive.

4. Miss. Janmohamed detailed that in her opinion, she had no idea where the information in paragraph 4 of the Replying Affidavit had come from and the deponent had not declared her source. That paragraph detailed that the Plaintiff at the time of the signing of the Agreement for Sale of the suit property, knew that the purchaser did not have the entire purchase price and proceeded to negotiate a loan for him with I & M Bank Ltd. Similarly, with paragraph 5 of the same, as the Defendant had not been involved the transaction referred to therein as regards the loan application to the I & M Bank Ltd. Again at paragraphs 6, 7 and 8 of the Replying Affidavit, no source of information had been disclosed. The Defendant had not been present at the time that the purchaser and vendor of the suit property were discussing the purchase of the same. Turning to paragraphs 12,13 and 14 of the Replying Affidavit, Miss. Janmohamed opined that the same were irrelevant as the undertaking had been given and it is the undertaking which is in dispute here.

5. At paragraph 18 of the Replying Affidavit, the Plaintiff is accused by the deponent of misrepresentation in relation to the vendors of the suit property but again, there is no source quoted for this statement. As far as Miss. Janmohamed was concerned, paragraph 19 of the Replying Affidavit is one of the most scandalous allegations as against the Plaintiff firm. That paragraph reads:

**"In any event, the said variation of sale of shares was of no legal consequence and was drawn by the Plaintiff to cover up for their negligence and incompetence in the whole transaction and the obtaining of the professional undertaking was a cover up to shift blame on a third party".**

As far as Miss. Janmohamed was concerned, this paragraph was pure conjecture and if such was the case,

why did the deponent give her professional undertaking at all? As regards paragraphs 21 – 23, Miss. Janmohamed submitted that what was detailed here by the deponent was what had gone on as between her and her client. Such was of no relevance to the application before this Court and was pure conjecture on the part of the deponent. Miss. Janmohamed also had issues with paragraph 24 of the Replying Affidavit stating that the contents involved matters between her and her client the vendors of the suit property. Such was not within the knowledge of the deponent.

6. Miss. Janmohamed then submitted that she thought paragraph 32 of the Replying Affidavit was scurrilous, scandalous and pure conjecture. The deponent had made a statement not backed by any evidence whatsoever. Miss. Janmohamed then reverted to paragraph 29 and wondered what the fact that the deponent was going on maternity leave had anything to do with a letter of undertaking which was not in dispute. Finally, Miss. Janmohamed, in answer to a query from this Court, detailed that the following paragraphs of the Replying Affidavit should be struck out as they did not disclose the source of information – paragraphs 4, 5, 6, 10, 11, 12, 18, 19, 21, 22, 23, 24, 26, 29, 31, 32 and 35. She was happy to argue the Originating Summons applications, providing these paragraphs were struck out.

7. Mrs. Warui asked for the Preliminary Objection to be dismissed. She detailed that the Plaintiff's Originating Summons raised the issue which Miss. Janmohamed wanted to strike out. She had attached to the Affidavit in support of the Originating Summons, the Agreement for the sale of the suit property as well as the Variation Agreement for the Sale of Shares dated 21 May 2010, plus other documentation including the letter attempting to enforce the professional undertaking. Mrs. Warui claimed that all the information contained in her Replying Affidavit had come from the Plaintiff's said application. The Plaintiff had relied upon the same and the Defendant was responding to the exact documents that were produced to Court. She continued by saying that the Plaintiff had raised issues of misconduct in the application, such should have been raised in a different forum. She had withdrawn her professional undertaking and is allowed to go into the merits and demerits of why the same was rescinded. Such have been detailed in the Replying Affidavit. Mrs. Warui concluded by submitting that the paragraphs that Miss. Janmohamed was seeking to expunge should remain, so that the Court can determine what is relevant or otherwise. It was not for Miss. Janmohamed to tell the Court what is or is not relevant.

8. In reply, Miss. Janmohamed conceded that the Affidavit in support of the Plaintiff's Originating Summons did contain appendices that were annexed for the information of the Court. She maintained that if the Defendant was aware of the sources of the facts, it should have raised the same. The Plaintiff had every right to raise the issues of misconduct and she referred to prayer 4 of the Originating Summons. As far as the Plaintiff was concerned, it was telling the Court that this is a straightforward application, which as yet Miss. Janmohamed had not gone into the merits and demerits of the same. She maintained that the Court had the right to determine, at this stage what was irrelevant or otherwise to the overall application.

9. The Preliminary Objection relies upon the provisions of **Order 19** of the *Civil Procedure Rules 2010* for its basis. This Court, as well as counsel, is not at this stage of the proceedings, being called upon to decide the Plaintiff's Originating Summons on its facts and what is before Court. Order 19 details rules in relation to Affidavits before Court. It details matters to which affidavits shall be confined. It gives power to court to order that any point may be proved by affidavit. It gives power to the court to order the attendance of a deponent for cross-examination. It details as to the deponent's particulars, the manner in which affidavits should be drawn and gives power to the court to receive an affidavit notwithstanding any irregularity in form thereof. Miss. Janmohamed has pointed specifically to Rule 3 as set out above. With this in mind, it appears to this Court that the simplest way to rule on this matter is for the Court to peruse those paragraphs that Miss. Janmohamed states that she wants to see struck out, to see whether the same are within Mrs. Warui's personal knowledge and/or whether she has declared her source of knowledge. I am not satisfied as to Mrs. Warui's submission that all her statements in her said Affidavit, are made in reference to the annexures contained with the Affidavit in support of the Originating Summons.

10. To that end, I would strike out paragraphs 4, 5, 6, 10, 11, 12, 18, 23, 24, 26, and 27 based on **Order 10 Rule 3** of the *Civil Procedure Rules 2010* on the grounds that either those are not within the deponent's personal knowledge or that she has failed to disclose her source of information. I would also strike out paragraphs 19, 29, and 32 of the Replying Affidavit on the grounds that I feel that these 3

paragraphs are scandalous, irrelevant or oppressive. The parties are now directed to take a early hearing date at the Registry on a priority basis for the hearing of the Originating Summons dated 3<sup>rd</sup> February 2012. The costs of this Preliminary Objection shall be in the cause.

**DATED and DELIVERED at NAIROBI this 3<sup>rd</sup> day of July, 2012.**

**J. B. HAVELOCK  
JUDGE**