

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO 446 OF 1976

PHILLIS WAMAITHA WAHINYA

JOSEPH MUHIA WAHINYA

LUCY WAMBUI WAHINYA (trading as Phillis Wamaitha & Bros).....APPLICANTS

VERSUS

SIMEON NJOGU WAHINYA RESPONDENT

JUDGMENT

This is an application for a temporary injunction to restrain the respondent from using a motor vehicle registration KMR 937, which is alleged to be the property of the partnership. The applicants have also asked that the motor vehicle be delivered to them. The vehicle is registered in the name of the respondent and this is strong evidence of ownership. The applicants contend that on 11th June 1975 it was agreed that the vehicle would form part of the partnership assets. They have produced a "note of attendance" signed by all partners including the defendant. As Mr Patel for the respondent pointed out this is not an agreement but a "note of attendance". Mr Patel has raised another important point about the affidavit sworn by Phillis Wamaitha Wahinya, one of the applicants, in support of the application. He says the affidavit was sworn before the suit. It was sworn on 18th February 1976 and filed on 19th February 1976. The plaint was filed on 27th February 1976. He says that such an affidavit is useless. He referred to 32 *Halsbury's Laws of England* (3rd Edn) page 393, paragraph 632, which reads as follows:

An affidavit sworn before action is valueless, even though filed after issue of the writ, but the Court sometimes makes an order on such an affidavit, the applicant undertaking to have it resworn and refilled.

Mr Kaai for the applicants has stated that his clerk made a mistake in that he filed the application and the affidavit first, but kept the plaint till later. I do not think this assists the applicants much. The plaint itself is not dated, so we even do not know when it was drawn. It was filed on 27th February 1976, a week after the application had been filed. Order XXXIX, rule 1, of the Civil Procedure Rules under which the present application is brought states: "Where in any suit it is proved by affidavit or otherwise..."

The law contemplates commencement of a suit first before an affidavit can be sworn. In my opinion an affidavit which is sworn before action is valueless and cannot be acted on even if it is filed after issue of the summons. The Court may, however, in its own discretion, make an order on it upon an undertaking by the applicant to reswear and refile the affidavit, but such discretion will be exercised only where refusal to make the order prayed for would cause irreparable damage, hardship and injustice to the applicant.

In the instant case, the applicants' affidavit is valueless, as it was sworn before the action. The vehicle belongs to the respondent and there is no evidence to the contrary. The affidavit in support of the application, being valueless, cannot be acted on. There is no strong oral submission in support of the application or other grounds to support it in the absence of the said affidavit. This is not a proper case on which to make an order on a valueless affidavit and order reswearing and refiling the same. For the above reasons I dismiss the application with costs.

Order accordingly.

Dated at Nairobi this 30th Day of April, 1976

Z.R. CHESONI

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JUDGE