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Barclays Bank of Kenya Limited v Orero

MILIMANI COMMERCIAL COURTS

NJAGI J

Date of Ruling: 23 April 2004 Case Number: 1736/01

Sourced by: LawAfrica Citation: [2001] LLR 2706 (CCK)

4(3)

Cases referred to in ruling:

Jovenna East Africa Limited v Sylvester Onyango and others, Milimani civil case number 1086 of 2002

Miben (K) Limited v Mark Wangai Muchemi t/A Border Services Station and others, Kisumu High Court civil case number 234 of 2001

Ruling

NJAGI J: Before the court is the Defendant's application dated 30 October 2003. It seeks orders that the Plaintiff's suit be dismissed with costs to the Defendant for want of prosecution. At the hearing of that application on 25 March 2003, Mr Njagi for the Respondent raised a preliminary objection touching upon Mr Kajwang's supporting affidavit dated 4 November 2003.

Mr Njagi submitted that the affidavit was incurably defective on the ground that it did not comply with the mandatory provisions of section 35(1) read together with section 34 of the Advocates Act (Chapter 16) of the laws of Kenya. He argued that the affidavit did not bear the endorsement of the person who drew, prepared and filed it, or the name of the firm of advocates from which either a partner therein or an advocate employed by the firm drew or prepared the affidavit. He referred the court to Miben (K) Limited v Mark Wangai Muchemi t/A Border Services Station and others, High Court at Kisumu civil case number 234 of 2001, and Jovenna East Africa Limited v Sylvester Onyango and others, Milimani civil case number 1086 of 2002 and urged the court to strike out the notice of motion dated 30 October 2003 with costs to the Plaintiff.

In his response, Mr Kajwang submitted that the issue raised by the Plaintiff was not a point of law, and even if the affidavit is struck out as being defective, the notice of motion would still stand without the affidavit since there is nothing in the affidavit which is not on record. Counsel, however, agreed with the positions of law taken in the two authorities cited by Mr Njagi only because **Section 35 of the Advocates Act** read with section 34 thereof says so. But what exactly was missing from the affidavits in those authorities has not been demonstrated. Mr Kajwang also submitted that it is the commissioner for oaths who draws and prepares an affidavit, and in the instant case the commissioner has endorsed his name and address. He urged the court to dismiss the objection and hear the substantive application.

**Section 35 of the Advocates Act states:**

"(1) Every person who draws or prepares or causes to be drawn or prepared any document or instrument referred to in section 34(1) shall at the same time endorse or cause to be endorsed thereon his name and address, or the name and address of the firm of which he is a partner and any person omitting to do so shall be guilty of an offence and liable to a fine

not exceeding five hundred shillings in the case of an advocate.

(2) The registrar ... shall refuse to accept or recognise any document or instrument referred to in section 34(1) unless such document or instrument is endorsed in accordance with this section."

Section 34(1) itself prohibits any unqualified person from drawing or preparing any document or instrument ... "relating to any other legal proceedings". An affidavit is a document relating to legal proceedings. It should therefore comply with the requirements of section 35(1) as to endorsement with the name and address of the drawer.

That was not done in this case and, to that extent, the affidavit falls foul of section 35(1). Both sub-sections (1) and (2) of section 35 are couched in mandatory terms. Subsection (1) takes such serious cognizance of any omission to obey the dictates of the subsection that it criminalizes any such omission. In its turn, subsection (2) takes the issue so equally serious that it enjoins the registrar not to accept or recognize any document or instrument referred to in section 34(1) unless such document or instrument is endorsed in accordance with this section. Parliament has led the way by demonstrating the gravity with which it views matters under sections 34 and 35 of the Act. The least we can do is to emulate Parliament by treating these sections with the seriousness they deserve and obey them in observance.

The court was referred to *Miben (K) Limited v Mark Wangai Muchemi t/A Border Services Station and others*, Kisumu High Court civil case number 234 of 2001 in which a breach of section 35(1) was invoked, as in this case. Upholding a preliminary objection similar to the one before this Court, Justice Tanui said:

"While the endorsement of the names and addresses on the documents by the person who drew them would appear to be a technicality, under section 35(2) of the said act the registrars are forbidden to accept such documents for all purposes. It is clear therefore that a failure to endorse ... renders the application fatally defective."

These observations are on all fours with the circumstances of the application before this Court. In *Jovenna East Africa Limited v Sylvester Onyango and others*, Milimani civil case number 1086 of 2002, Justice Nyamu had occasion to address **Section 35 of the Advocates Act**.

He said:

"As regards the requirement of advocates Act section 35 these are statutory requirements and they cannot be said to be irregularities in form only. A violation of a statute cannot be an irregularity in form. The violation of section 35 does attract a fine. To the extent that his Lordship, Justice Tanui in *Miben (K) Limited v mar* and another High Court civil case number 34 of 2001 says that non compliance is a major defect, I do concur with him."

Mr Kajwang submitted that these authorities are only persuasive and urged the court to follow in the footsteps of Justice Ringera who has said elsewhere that the omission to endorse a document in terms of section 35(1) is a mere irregularity. My worry with that view is - when does an irregularity graduate from an irregularity? Where would one draw the dividing line between an irregularity as envisaged in Order XVII, rule 7 of the Civil Procedure Rules and a blatant breach a statutory provision? In an appropriate case, one would not hesitate to invoke the soothing effects of the petroleum jelly offered by Order XVIII, rule 7. But when an "irregularity" touches upon the breach of express statutory provisions one has to be careful. If the treatment of such breaches as mere irregularities becomes common practice, then it will be difficult to state the law with certainty and finality.

For the above reasons, I am constrained to uphold the preliminary objection and strike out the Defendant's application dated 30 October 2003, with costs to the Plaintiff.

For the Respondent:  
Njagi

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