**Dubai Bank Kenya Ltd v Come-Cons Africa Ltd**

**Division:** Milimani Commercial Courts of Kenya at Nairobi

**Date of ruling:** 15 June 2004

**Case Number:** 68/03

**Before:** Ibrahim J

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*[1] Advocate – Affidavits – Failure to endorse name of advocate who drew affidavit – Whether such*

*failure is fatally defective or an irregularity in form – Sections 34 and 35 – Advocates Act (Chapter 16).*

**Editor’s Summary**

The plaintiff filed an application seeking summary judgment for a sum of KShs 29 498 862-50. The defendant filed a replying affidavit in opposition to the application and took out a notice of preliminary objection. At the hearing of the application the defendant raised the objection that the verifying affidavit sworn on 10 February 2003 was incurably defective on the grounds that it did not comply with the mandatory provisions of section 35(1) as read together with section 34 of the Advocates Act. The person who drew or prepared or caused to be drawn or prepared the said verifying affidavit did not endorse or cause to be endorsed on the affidavit his name and address or the name and address of the firm of which he was a partner or was employed. The defendant therefore urged that the affidavit be struck out and the suit dismissed. The plaintiff opposed the objection arguing that the failure or omission to endorse the drawer’s name on the document goes to form and not the substance.

**Held** – Section 34 of the Advocates Act provides for the situation where an unqualified person prepared certain documents or instruments. An affidavit was a document relating to “any other legal proceedings” and therefore covered under section 34(*f*) of the Advocates Act. The verifying affidavit was drawn by a qualified person and therefore no offence had been committed under section 34 of the Act. However, the Advocate who drew the affidavit had committed an offence under section 35(1) of the Act and the plaintiff cannot be punished for the offences of his advocates. Section 35(1) does not state or express anything about the effect, consequence or validity of a document or instrument which does not bear the name and address of the advocate who drew it whereas section 35(2) does not invalidate or declare such a document or instrument in question to be defective. In the premises, the omission of advocates name and address on the verifying affidavit was a mere irregularity in form. Preliminary objection overruled.

**Case referred to in ruling**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Barclays Bank of Kenya Ltd v Orero* High Court civil case number 1736 of 2001 – **DA**