**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).*

**RULING**

**IBRAHIM J:** The plaintiff on 23 October 2003 filed an application by way of a notice of motion under Order XXXV, rule 1, 2 and 3 for summary judgment to be entered against the defendant for a sum of KShs 29 498 862-50, interest and costs. The defendant filed a replying affidavit in opposition to the application and also took out a notice of preliminary objections of law. There were four points of law in the said notice, however, at the hearing of the application the defendant’s counsel, Mr *Wandabwa* prosecuted and argued one objection only, namely: “That the verifying affidavit sworn on 10 February 2003 is incurably defective on the grounds that it does not comply with the mandatory provisions of section 35(1) as read together with section 34 of the Advocates Act (Chapter 16), Laws of Kenya and should be struck out”. I perused the said verifying affidavit and confirmed that 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 is a partner or is employed. Section 35(1) of the Advocates Act reads as follows: “35(1) Every person who draws or prepares, or causes to be drawn or prepared, any document or instruments 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 so to do shall be guilty of an offence and liable to a fine not exceeding five thousand in case of an unqualified person or a fine not exceeding five hundred shillings in case of an advocate: Provided that, in the case of any document or instrument drawn, prepared or engrossed by a person employed, and whilst acting within the scope of his employment, by an advocate or by a firm of advocates, the name and address to be endorsed thereon shall be the name and address of such advocate or firm”. The defendant contends that as the verifying affidavit does not conform to this mandatory requirement, the same is defective and irregular and should be struck out. Consequently, the defendant urges the Court to strike out the plaint as it cannot stand without the verifying affidavit. The defendant referred to a recent decision of this Court in *Barclays Bank of Kenya Ltd v Dr Solomon Otieno Orero* in which Justice Njagi High Court civil case number 1736 of 2001 held as follows: “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 the 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 subsections (1) and (2) of section 35 are couched in mandatory terms. Subsection (1) takes such serious cognisance of any omission to obey the dictates of the subsection that it criminalises any such omission. In its turn, subsection (2) takes the issue so equally seriously that it enjoins the Registrar not to accept or recognise any document or instrument referred to in section 34(1) unless if it is endorsed in accordance with this section. Parliament has led the way by demonstrating the gravity with which it views matters under subsection 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 Judge proceeded to strike out the application which was supported by an affidavit without the aforesaid endorsement. In response the plaintiff says that the failure or omission to endorse the drawer’s name on the document goes to form and not the substance. The plaintiff’s counsel invites the Court to invoke the provisions of Orders XVIII, rule 7 and treat the said omission as a mere irregularity as to form and capable of being cured. He said that section 34 and 35 of the Advocates Act deals with unqualified persons who purport to draw documents. That it is a penal section that is intended to punish offenders who purport to draw legal documents when they are not qualified as advocates. I have very carefully read section 35(1) read together with section 34 of the Advocates Act. The preamble of the Advocate’s Act states that it is “an Act of Parliament to amend and consolidate the law relating to advocates”. Part VIII of the Act under which sections 34 and 35 fall is headed: “Provisions with respect to unqualified persons acting as advocates and offences by advocates”. The provisions or section under Part VIII of the Act deal with the acts or things which cannot be done by an unqualified person and which are the reserve of qualified persons as advocates. The offences and penalties in this regard are prescribed. The offences and penalties for advocates are also prescribed in this part. Section 34 provides against unqualified person preparing certain documents or instruments. The section stipulates, *inter alia*, as follows: “34(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument: (*a*) relating to the conveyance of property; or (*b*) for, or in relation to, the formation of any limited liability company, whether private or public, or (*c*) for, or in relation to, an agreement of partnership or the dissolution therefore; or (*d*) for the purpose of filing or opposing a grant of probate or letters of administration; or (*e*) for which a fee is prescribed by any order made by the Chief Justice under section 44; or (*f*) *relating to any other legal proceedings*. Nor shall any such person accept or receive, directly or indirectly any fee, gain or reward for the taxing of any such instruction or for the drawing or preparation of any such document or instrument.” (emphasis added) I have deliberately emphasised subsection (*f*) which refers to preparation of any document or instrument relating to any other legal proceedings. I do agree with Njagi J in the aforementioned case that an affidavit is one such document or instrument. What I have now to ask myself even for exclusionary purposes is, was the verifying affidavit in the present case drawn or prepared by or were instructions taken by “an unqualified” person and therefore an offence committed? There has been no allegation or suggestion that the verifying affidavit was drawn or prepared by a non advocate. Apart from the endorsement of the name and address of the drawer, this affidavit looks quite in order in all other respects. It was made and sworn before a Commissioner of Oaths. When I perused the plaint which it accompanies, the same is drawn and filed by a firm of advocates, called “Mohamed and Lethome Advocates. The said firm prepared and drew the plaint and I would be justified to conclude that indeed the verifying affidavit was drawn by a qualified person or advocate. So strictly, no offence has been committed under the provisions of section 34. However, the said advocate failed and omitted to endorse their firm’s name and address on the verifying affidavit to show that it was drawn by a qualified person. If the said advocate or firm of advocates were to be arraigned in court for commission of an offence under section 35(1), without prejudice to his right of presumption of innocence until proven guilty, there is all likelihood that he would be found guilty of the said position and ordered to pay a fine not exceeding a sum of KShs 500. Would this make the plaintiff herein also guilty of the said omission? The answer is certainly, no. The plaintiff did not draw or prepare the verifying affidavit, it is the advocate who presented the plaint for filing and who drew the same. The plaintiff is therefore an innocent party and cannot be punished for the offences of his advocates under the provisions of the Advocates Act. From the foregoing, the question that naturally follows is whether the aforesaid omission or failure by the advocates to endorse their name and address on the verifying affidavit make it incurably defective under the provisions of section 35(1)? With much respect to the decisions of this Court that I have been referred to, I am of the view that the said provision does not state or express anything about the effect, or consequences or validity of a document or instrument which does not bear the name and address of the advocate who drew it. From a reading of the said decisions, it would appear that section 35(2) may have influenced the minds of the Court in finding that an affidavit with such an omission is fatally defective and incapable of being cured. The said provision stipulates: “(2) The Registrar, the Registrar of Titles, the Principal Registrar of Companies and any other registering authority 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”. The said provision forbids the Registrar (in this case of the Court) from accepting or recognising any document or instrument in any legal proceedings unless such a document or instrument is endorsed in accordance with section 35(1) of the Advocates Act. This means that the Court registry through the powers of the Registrar could have rejected the filing of the plaint which is accompanied by such an affidavit with the aforesaid omission. In fact strictly the Registrar was required to refuse to accept or recognise the said plaint as long as it was accompanied by the said affidavit. If the Registrar applied and implemented the letter of the law then the present plaint would certainly not have been filed in court to commence this suit. Unfortunately, the Court registry did not reject the offending verifying affidavit with or without the plaint and this suit was commenced. We should view this situation *vis-à-vis* the provisions in section 35(2). In my view from a simple reading of the words in the said provision, I am unable to come to any conclusion that the said subsection invalidates or declares such a document or instrument in question to be defective. Of course the document should not have been filed in court. It should have been rejected at the counter, so to speak. However, it has not been filed and this suit commenced. Yes, an offence was committed by the said omission, yes, the Registrar failed to enforce the provisions of section 35(2) by not rejecting or refusing the filing thereof. Is the verifying affidavit in the circumstances incurably defective that it should be struck out? Again, with much respect, I do hold that there is no word, statement or stipulation in section 35(1) and (2) that renders an instrument or document with the omission of the endorsement of the name and address of the advocate who drew or prepared, incurably invalid, void or defective. I do accept that the verifying affidavit in its form has omitted a very necessary feature which is expressly stipulated by the law, an Act of Parliament. From a reading of section 34 and 35, the said document made in violation of the law is defective. It should not have been allowed to be filed in the first place in order to ensure that section 35(2) is applied effectively and effectually to remedy the mischief intended by the legislature. It is my opinion that the purpose for which section 35(2) was intended was to discourage or put an end to situations where unqualified persons prepare legal documents in legal proceedings. By making it mandatory that the instruments on legal proceedings are endorsed with the name and address of the drawer, this would make it impossible for an unqualified person to present such documents at the registries and if he did then the law would take its course that is he would be known and caught. As it is usually stated Parliament is taken to do nothing without reason. In a commentary in *Francis Bennion’s* “*statutory interpretation*”, (3 ed) and with reference to *Heydon*’s case it is stated at 725. “It is presumed that Parliament intended by the enactment to suppress the mischief. The law usually does this by ordering those who perpetrate the mischief to desist; and imposing a penalty if they fail. Once the interpreter has correctly marked out the area of mischief intended to be dealt with by the enactment, he or she can go on to identify the corresponding penalty or remedy. It is further presumed that Parliament did not intend to apply coercive measures going wider than was necessary to remedy the mischief in question”. In another part are the following words: “... The Court must endeavour to insure that the remedy provided by Parliament does not set up some other mischief. Clearly Parliament is unlikely to intend to abolish one mischief at the cost of establishing another which is just as bad, or even worse”. I wish to adopt some of these thoughts and principles. In this case, I would like to look at the social and legal mischief intended to be remedied by section 35(2). The intention of his law was intended to enhance section 34 so that no unqualified person was to either directly or indirectly practice law and this was to be done only by duly enrolled Advocates of the High Court of Kenya. I do not think that the intention of Parliament was to punish innocent litigants or deny or hinder them access to justice. In this case, the plaintiff a tax payer is permitted by the Registrar of the Court to file its plaint and pay a whooping sum of over KShs 70 000 as filing fees. The document is defective in form but the Registrar does not do his duty by rejecting it before filing and incurring of the said amount in filing fees. The plaintiff is not the drawer of the document, his advocate is. The omission is by the advocate which it retained. The failure or inaction to reject the document at the registry was the Registrar of this very court. In the circumstances, why should the innocent plaintiff and litigant suffer by having its plaint thrown out for this omission. He is not the intended unqualified person, he is not the advocate or the Registrar. The said section was not intended for the innocent litigant. Accordingly, I am not inclined to accept that the omission herein renders the verifying affidavit a nullity or incurably defective. The need for endorsement was so a clear mischief known to the law. In this case, the drawer is an advocate and the omission due to his error, mistake or otherwise. It is a statutory offence committed by him. The Registrar did not carry out his duty. I find that it would be misconstruing the literal meaning of the words in section 35(2) and the objects of the said legislation. As Bennion sates at 614: “It is a principle of legal policy that law should be just, and that court decisions should further the ends of justice. The Court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. The Court should therefore strive to avoid adopting a construction that leads to injustice”. I think our parliament intended well when enacting sections 34 and 35. They are good law. However, I cannot read them or apply them to render a vital document like a verifying affidavit belonging to an innocent litigant who has heavily paid for its filing, incurably defective. The purpose of mischief of the provision was not to render the document defective or invalid, *per se*. In the premises, I hold that in the circumstances of this case, the omission of the advocates name and address on the verifying affidavit was a mere irregularity in form. In exercise of this Court’s direction under Order 18, rule 7 and the Court’s inherent powers under section 3A of the Civil Procedure Act, the verifying affidavit sworn on 10 February 2003 is deemed to be regulatar and properly filed. The preliminary objection is disallowed with costs to the defendant. The said costs to be paid by the plaintiff’s advocates personally in view of the objects of section 35(1) of the Advocates Act. For the plaintiff:

*Information not available*

For the defendant:

*A Wandabwa* instructed by *Langat & Wandabwa Adv*