REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 113 OF 2001

SAID KARAMA HANTOOSH …….. PLAINTIFF

- Versus -

SWALEH KARAMA HANTOOSH …….. DEFENDANT

R U L I N G

This suit was filed on the 7th March 2001. The last time it was before a judge was on the 18th October 2001. The defendant has therefore applied by way of a notice of motion brought under Order 16 Rules 5 and 6 of the Civil Procedure Rules to have it dismissed for want of prosecution. In response the plaintiff swore a replying affidavit alleging that he had difficulty tracing the court file when he wanted to fix the case for hearing.

Mr. Kalama for the defendant/applicant challenged the competence of the replying affidavit. He submitted that the affidavit does not give the name of the deponent in the jurat and is therefore incurably defective and should be ignored. He cited for this proposition the case of West Kenya **Sugar Company Ltd. -Vs- P.J. Shah & 2 others Nairobi HCCC No. 907 of 1999** and section 5 of the Oaths and Statutory Declarations Act Cap 15 of the Laws of Kenya.

I do not think that failure to state the name of the deponent at the jurat makes the affidavit incurably defective. There is no requirement in section 5 of Cap 15 to state the name of the deponent in the jurat. That section provides that:-

“Every Commissioner for Oaths before whom any Oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the Oath or affidavit is taken or made.”

The affidavit in the case of **West Kenya Sugar Co. Ltd.** was struck out because the place where it was sworn and the date when it was sworn were not stated. That is not the case here. The replying affidavit in this case states at the jurat that it was sworn at Mombasa on the 20th January 2004. In the circumstances I overrule Mr. Kalama’s preliminary objection. I agree with Mr. Kalama that the plaintiff has not given any satisfactory explanation as to why he has not, for about two years now, fixed this case for hearing. However in view of the fact that this is a land matter and especially that the parties are brothers we shall not be doing justice to them if the suit is dismissed on a technicality. The suit should be heard and the issue of ownership of the suit piece of land be determined once and for all. In the circumstances I decline to dismiss this suit for want of prosecution and instead dismiss the application.

However because the plaintiff went to sleep I order that he should pay to the

defendant the costs of this application.

DATED this 24th day of February 2004.

D.K. Maraga

Ag. **JUDGE**