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**IN THE HIGH COURT OF TANZANIA  
AT DAR ES SALAAM**

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**CIVIL CASE NO. 70 OF 2004.**

**COLGATE PALMOTIVE COMPANY ..... APPLICANT  
VERSUS  
CHEMI COTEX INDUSTRIES LTD ..... RESPONDENT.**

***Date of last Order: 30/10/2007  
Date of Ruling: 02/11/2007***

**RULING**

**Mlay, J.**

The Applicant filed a suit against the Respondent and also, an application for temporary injunctive orders, pending the determination of the main suit.

The application for temporary injunctive orders, is supported by the affidavit of KIBUTA ONG'WAMUHANA the Advocate instructed to represent the Applicant in the main suit.

The Respondent's Advocate Mr. D. KESARIA filed a notice of preliminary objection. The Notice of Preliminary objection states as follows:

*“TAKE NOTICE that at the hearing of the Plaintiff’s Chamber Summons for temporary injunction the Respondent/Defendant will move the court to strike out paragraphs 7 and 8 from the Affidavit of Kibuta Ong’wamuhana filed in support of the Chamber Summons for lack of proper or adequate verification”.*

The counsels of both parties were allowed to argue the preliminary objection by way of written submissions. In his written submissions, the Respondent’s .

Advocate having referred and quoted the verification clauses in paragraphs 2 and 10 of the supporting affidavit, contends that:

*“The offending paragraphs in the Affidavit are paragraphs 7 and 8, wherein Mr. Kubta states:-*

- that the Plaintiff will suffer additional and irreparable losses;*
- that the additional losses cannot be claimed in advance given the uncertainty of the time over which the suit will last”.*

The learned advocate for the Respondent argued that;

*“whether or not the Plaintiff stands to suffer loss cannot be within Mr. Kibuta’s own personal knowledge as deposed by him in para 10 of the Affidavit. Only the Plaintiff is competent to depone to this fact, ie what kind of loss, quantum of loss and the extent and degree of such loss”.*

He went on to argue that Mrs. Kibuta did not name the source of information and if the information was based on his belief, he was obliged to state the grounds of his belief, which he did not do. The learned advocate submitted that, failure, which he did not do. The learned advocate submitted that, failure to disclose the source of information and grounds of belief, renders paragraph 7 and 8 of the affidavit defective.

In support of his submissions, the respondents advocate referred to the decision of this court (Mackanja, J) in High Court Civil Case No. 8 of 1999; 565 SOCIETE GENERALE DE SURVEILLANCE VS TANZANIA REVENUE AUTHORITY, in which his Lordship stated:

*“Where the truth, correctness and the authenticity of the facts deposed to are*

*based on the Deponent's beliefs, the grounds for those beliefs must be disclosed".*

The Respondents' advocate contended that the statements contained in paragraphs 7 and 8 of Mr. Kibutas affidavit are matters of belief, but he did not disclose the grounds of his belief. He invited this court to draw an analogy between this case and the case decided by Mackanja, J. contending that, the deponents beliefs in paragraph 7 and 8 of the affidavit are his personal feelings or the fears and suspicions he holds and he ought to have offered evidence, ie. grounds for those beliefs, failing which, renders the affidavit defective. The learned advocate provided the text of the ruling by Mackanja, J, for which we express an appreciation.

The applicants Advocates submitted that ***"from the contents of the Affidavit sought to be challenged it is clear that there is no dispute that the affidavit is properly verified"***.

He cited the provisions of Order XIX Rule 3 (1) of the Civil Procedure Code, Cap 33 RE. 2002 on the law on Affidavits, which states:

*“Affidavits shall be confined to such facts as the deponent is able of his non knowledge to prove except on interlocutory applications, on which statements of his belief may be admitted”.*

The Applicants advocate argued that “from the wording of the Rule it is clear that interlocutory applications affidavits may contain statements based on belief provided grounds of the belief are stated. He further argued that from decided cases, it is well established that in interlocutory applications an affidavit may contain matters derived from information, belief advise, provided the grounds are stated. He cited the case of **STANDARD GOODS IN CORPORATION LTD VS HARAKHACHAND NATHU & CO LTD [1950] 17 E.A.CA 99** which he said was followed in the case of **SALIMA VUAI FOU M VS REGISTRAR OF COOPERATIVE SOCIETIES & OTHERS [1995] T.L.R 75**. He contended that the application of the principles enunciated in the two cases has varied from case to case, depending on the circumstances of the case.

He submitted that the contents of paragraph 7 of the affidavit of Kibuta contain sufficient disclosure to show that the matters are from his personal knowledge. He tried to demonstrate how such matters could be within Mr. Kibutas knowledge in that he has been instructed by the Plaintiff

company in which the counsel instructed ***“is briefed in details on all aspects of the case ..... and becomes personally knowledgeable”***.

He made a second demonstration that, in paragraph 7 of the Affidavit the applicant simply stated that:

*“While the main suit awaits determination, the Plaintiffs stand to suffer additional and irreparable losses by reason of the continued infringement by the Defendants. To us this is another within the knowledge of the deponent”*.

He further contended that it is common knowledge that ***“when the infringement continues while the suit is pending, such infringement will impose additional losses to the Plaintiff.....”***. He submitted paragraph 7 of the affidavit sufficiently discloses the source of the information to be the deponents personal knowledge.

With regard to the objection as it relates to paragraph 8 of the affidavit, the applicants Advocate submitted that ***“the ground of the deponents belief is sufficiently disclosed to be uncertainty over time for which the suit will last”***. He argued that *“the deponent has demonstrated sufficiently in his statement in paragraph 8 ..... why he personally believes*

*that the longer the suit remains unconcluded the more the loss the Plaintiff will suffer from the infringement by the Defendant”.*

The Applicant’s Advocate argued an alternative ground that if the court finds that the two paragraphs complained of are defective, the applicant should be allowed to file a fresh affidavit to amend the defects. He argued that the Notice of Preliminary objection and the submissions in support of them, the defects complained of are not fatal, in that they do not relate to lack of verification, but only relate to omissions to disclose source of information.

He cited the case of **DDL INVESTMENT INTERNATIONAL LTD VS TANZANIA HARBOURS AUTHORITY & 2 OTHERS CIVIL APPL. NO. 8/2001**, (CA) (Unreported) and SALIMA VUAI FOMU’s case (supra), to show that the court has discretion to allow a party to amend an affidavit.

The two paragraphs of the supporting Affidavit which have been objected to, state as follows:

*“7 that while the main suit awaits determination, the Plaintiffs stand to suffer additional and irreparable losses by*

*reason of the continued infringement by the Defendants.*

*8. That the additional loss referred to in paragraph 7 above cannot be claimed in advocate given the uncertainty over the time for which the suit will last and the difficulty in estimating with any degree of certainty the loss likely to be suffered by the Plaintiffs during period of the suit which makes it possible to adjust the Plaintiffs' damages claim to include loss covered during trial of the suit".*

It has been argued by the Respondent, that the two paragraphs reproduced about, are defective. It has been argued that paragraph 7 is defective for not disclosing the source of information as the information contained in it, cannot be within the knowledge of the deponent. Paragraph 8 is also alleged to be defective, on grounds that it is based on belief, and the ground of that belief has not been disclosed.

The question whether any matter deponed in an affidavit is based on knowledge, information or belief can be answered by looking at the verification clause, which normally, appears at the end of the affidavit. In the present case, the verification



clause is contained in paragraph 10 of the affidavit, which states as follows:

*“10. That what is stated herein above is true to the best of my knowledge”.*

On the basis of the contents of paragraph 10 of the affidavit set out above, all the information deponed in the affidavit, is based on the deponents knowledge. If the facts deponed to in paragraphs 7 and 8 are based on the knowledge of the deponent, the provisions of Order XIX Rule 3 (1) of the Civil Procedure Code Cap 33 RE 2002, do not require the source of the knowledge to be stated. It is the Respondents contentions that the deponent cannot have personal knowledge of the said matters and that they can only be based upon information (Para 7) or belief (para 8).

In the case of MUKISA BISCUIT MANUFACTURING CO LTD VS. WEST END DISTRIBUTORS LTD [1969] EA 696, the defunct Court of Appeal of East Africa defined a preliminary objection as one which: ***“consists of a point of law which has been pleaded, or which arises by clear implication, and which if argued as a preliminary point, may dispose of the suit”***. The court further stated that:

*“A preliminary objection is in the nature of what used to be a demurrer. It raises a*

*pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained on if what is sought is the exercise of judicial discretion”.*

Applying the two principles enunciated in the MUKISA BISCUIT case quoted above to the preliminary objection which is under consideration, it is doubtful if it meets the tests. First, if the two offending paragraphs are struck out as prayed by the Respondent, that would not dispose of the application. As for the second test, in order to determine that the matters deponed in the affidavit are not within the knowledge of the deponent as it is stated in the verification clause, that fact has to be proved, and this would not meet the second test in the MUKISA BISCUITS case.

Even if the two paragraphs are defective, the defect would not render the affidavit to be incompetent and the defect can be remedied by allowing the applicant to file a fresh affidavit. However looking at the contents of paragraph 2 of the affidavit, as against the contents of paragraph 10, which contains the verification clause, it would appear as if the affidavit has two verification clauses. In paragraph 2 it is deponed that some of the contents of the affidavit are within “**personal knowledge**”

***“and what is not within my personal knowledge it is true to the best of my knowledge information and belief”***. I find that if there is any defect in the affidavit, it is in this paragraph.

If this is the verification clause, then it has to be amended to show which information is within the personal knowledge of the deponent and which facts are upon information and belief and the sources of a such information or basis of such belief. If all the information is within the knowledge of the deponent as stated in paragraph 10, then paragraph 2 has to be deleted. To this extent but for different reasons I agree with the respondent that the affidavit is defective but the defect does not render it incompetent.

In the final analysis the preliminary objection is overruled but the applicant is allowed to file an amended affidavit within 7 days of this ruling. Costs to be in the events.

  
J. I. Mlay,  
**JUDGE**

Delivered in the presence of Mr. Kamala advocate for the Respondent/ Defendant, and in the absence of the Application/ Plaintiff, this 2<sup>nd</sup> day of November, 2007.

  
J. I. Mlay,