

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

MISCELLANEOUS APPLICATION NO. 704 OF 2018

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(ARISING FROM HCCS NO. 623 OF 2018)

KCB BANK UGANDA LIMITED.....APPLICANT

VS

KALEMA DEUSRESPONDENT

BEFORE HON. MR. JUSTICE RICHARD WABWIRE WEJULI

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RULING

When the Application came up for hearing, counsel for the Respondent raised an objection premised on Order 19 R 3 of the Civil Procedure Rules regarding the Affidavit in Support of the Application

He contended that the Affidavit of Terence Kavuma in support of the Application was fatally defective for non-disclosure of the source of his information specifically paragraph 5 in which he avers that the alleged wrong if any committed by the first and second defendant were committed on the 3rd defendant.

He submitted that an Affidavit that does not disclose the source of information renders the Affidavit incurably defective and that the failure to conform to the rule 20 makes it impossible for the court to save the Affidavit.

He cited the cases of **Pacific Summit Hotel Vs DFCU Bank and others miscellaneous Application 09 of 2013** and **Allan Isingoma Vs Alex Muhumuza and 2 Others Criminal Case Number 29/92** to support his contention and submissions.

In reply, counsel for the Applicant contended that the Affidavit is deponed by
25 counsel in full conduct of the instructions in the matter and it is in support to a point
of law which can only be raised by counsel at any time of the proceedings.

He submitted that courts of law have held that if any paragraph of an Affidavit is
found infringing, the same can be severed or ignored and the Affidavit preserved.

He argued that the Affidavit was not incompetent or incurably defective because
30 the matters in paragraph 5 were matters of law. He drew the courts attention to the
case of **Katuramu Vs Matiya Kizza** in which he said an Affidavit sworn by counsel
was saved and prayed that the objection be overruled.

In rejoinder, the applicants counsel sought to distinguish between an Affidavit that
does not comply with the law and one that contains falsehoods and submitted that
35 if it is a falsehood the offending paragraph can be severed and court proceeds with
the rest of the Affidavit, but that in the instant case it was a matter of
nonconformance with the law and not falsehoods. He argued that this is the import
of the decision in the **Pacific Summit Hotel** case (supra).

He distinguished the facts of the instant case from those in **Katuramu V Matiya** for
40 the reason that in **Katuramu V Matiya** counsel confined himself to matters of law
while in the instant Counsel deponed to facts which are not proven and yet he does
not disclose the source of his information.

The obligation of this court is to determine whether the provisions of order 19 rule

3 have been offended by the applicant in his Affidavit in support sworn by Terence
45 kavuma.

The Respondents counsel's grief is that the averments in paragraph 5 of the Affidavit are not facts within the deponent's knowledge in his capacity as counsel in conduct of the matter but rather information whose source he ought to have disclosed but did not, contrary Order 19 r 3 of the Civil Procedure Rules which
50 provides that the Affidavit should be confined to such facts as the deponent is able to, of his knowledge, prove, except interlocutory Applications in which statements of belief may be admitted provided the grounds thereof are stated.

The authorities of **Pacific Submit Hotel Vs DFCU and Others** and of **Allen Isingoma V Alex Muhairwe** in which various decisions of courts including **PremChand**
55 **Richard v Ouamy services Ltd (1969) EA 514, Ezeza Namirembe v Musa Kizito (1972) ULR 8** are all in agreement to the effect that an Affidavit based on information must disclose the source of information, otherwise the omission to do so renders the Affidavit incurably defective because disclosure is not simply a matter of form but goes to the essential value for the Affidavit.

60 I have carefully analyzed the Affidavit deposed by Terence Kavuma and in none of the paragraphs does he indicate a source of information, which in effect means that the averments are within his knowledge.

The comments in paragraph 5 are statements of fact which the deponent cannot have had the knowledge of by virtue his role as counsel but only as information

65 from the parties to the suit or elsewhere and so that whatever he stated in paragraph 5 of the Affidavit is based on information and the source of the information should have been disclosed.

This anomaly, as submitted by counsel for the Respondent is distinguished from a falsehood which, as it has been held by courts in more recent cases, can be cured 70 by severing the offending paragraphs and saving the rest of the Affidavit.

Non- disclosure of the source of information is however a breach of the law - order 19 rule 3 CPR) and has been held to be a fundamental requirement in drafting an Affidavit, with the consequence that omitting to disclose the source of information goes to foundation of the Affidavit thus rendering it incurably defective. See **Allan 75 Isingoma v Alex Muhairwe and 2 others** (supra)

I am in agreement with Counsel for the Respondent that the Affidavit in Support is incurably defective for failure to disclose the source of information at paragraph 5 and yet this offending paragraph cannot simply be severed to cure the defect.

In the event, the Affidavit is struck out and in consequence the Application, the 80 grounds of which are contained therein, cannot stand unsupported and therefore incompetent.

I uphold the preliminary objection and dismiss the Application with costs.

Ruling delivered this 22nd day of March, 2019.

85 Richard Wejuli Wabwire

JUDGE