

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CRIMINAL CASE NO. 39/92**

**ALLEN ISINGOMA.....PLAINTIFF**

**VERSUS**

**ALEX MUHAIRWE & TWO OTHERS.....DEFENDANT**

**BEFORE: THE HONOURABLE MR. JUSTICE G.M. OKELLO**

**RULING:**

The original case was by originating summons whereby the plaintiff, a widow, brought to be answered by this court some questions relating to the administration of the Estate of her deceased husband.

When the originating summons came up for hearing before me on 19/2/92, counsel for the defendant took a preliminary objection in which he contended that the originating summons was incompetent and improperly before this court on the ground that by it was accompanied by a defective affidavit. That the affidavit does not disclose the source of information of those facts which are deponed to on information; that it does not give grounds of belief for those facts which are deponed to on belief; that the affidavit also does not distinguish between those facts which are deponed to on information, belief and on the deponent's knowledge; Further that the affidavit is tainted with inconsistency. On these grounds, the learned counsel prayed that the originating summons be dismissed with costs.

The relevant supporting affidavit was sworn by the plaintiff Allen Isingoma (Mrs.) of P. O. Box 139 Bushenyi on 5/12/91 as widow of the deceased. The affidavit reads in part as follows:—

“6 That on 13/2/92 I was led by. Alex Muhairwe to the High Court Civil Registry and told by a clerk to sign a form which I heard at

the meeting was to enable us to withdraw money from the Co-operative Bank Kasese Branch.”

8 - That since 13/2/91, I never heard from Muhairwe or any other executors regarding the Kasese money nor did I receive my children who were too young to look after themselves.

9 - That on 3/4/91, I contacted my advocate to try and obtain for me not only the release of my children and also funds for their maintenance and mine. (copy of the letter written to counsel for the Estate is annexed hereto and marked “A”).

18. - That on 16-7-92, I was accompanied by Mr. Mwebasa of Mwene Kahima Advocates and an armed escort from the District Administrator went to Karoza with the permission of the Chairman RC III Mitoombe to try and rescue the children who I had been told by one Kanono working at Ishaka Hospital, were very sick and without any treatment (a copy of the letter of chairman RC III Mitoombe is annexed here and marked ‘I’.)

21 - That when I saw the state in which my children were, I broke down in tears.

25 - That Mid Biribwa eats the lorry proceeds and Abaho collects all the revenue from the milk and cattle at Karoza to the exclusion by me and my children.

26- That whatever is stated herein is true and correct to the best of my knowledge and belief”

Expounding his argument Mr. Muhwezi for the defendant contended that the law requires that source of information of facts deponed to on information must be disclosed. That failure to make such disclosure renders the affidavit incurably defective. He relied on **Kabwinukya vs. Kasigwa (1978) HCB 252** where it was held that failure to disclose the source of information renders the affidavit defective.

Counsel pointed out that in the instant case, paragraph 6 of the plaintiff’s supporting affidavit seems to be deponed to on information but that the source of that information was not disclosed. He submitted that this failure to disclose the source of information rendered the affidavit incurably defective.

He further contended that it is also a requirement of the law that in an affidavit where facts are deponed to on belief of the deponent, the ground of that belief must be given. That failure to give such ground renders the affidavit incurably defective. For this proposition counsel relied on O.7 r.3 CPR.

Applying the above principle to the instant case, the learned counsel pointed out that paragraphs 6 and 25 of the plaintiff's supporting affidavit contain facts which are deponed to on belief but that the grounds of these beliefs were not given. He submitted that the failure to give the ground for such belief rendered the affidavit incurably defective.

Thirdly, Counsel contended that it is yet a requirement of the law that an affidavit must distinguish between facts which are deponed to on belief, information or on knowledge.

That failure to make such distinction renders the affidavit incurably defective. For authority counsel cited Kabwinukya .v. Kasigwa above

Relating the above legal principle to the present case, the learned counsel pointed out that in the instant case, paragraph 26 of the supporting affidavit does not distinguish between matters which are deponed to on belief and those deponed to of the deponent's knowledge. He submitted that this failure to make the distinction renders the affidavit incurably defective.

On his fourth ground, counsel contended that it is the law that inconsistency in an affidavit however minor must not be ignored since a sworn affidavit is a document not to be treated lightly. That if it contains an obvious falsehood, then the entire affidavit becomes suspect. That an application which is supported by a false affidavit is bound to fail. He cited Bitainana vs. Kananura (1977) HCB 34 Applying the above principle to the present case, Mr. Muhwezi pointed out that paragraph 8 and 23 of the supporting affidavit are inconsistent on the question whether the plaintiff has since 13/2/91 not received her children. Counsel submitted that the above is obvious contradiction and that it renders the affidavit incurably defective because the applicant did not come to court with a clean hand to tell the truth.

The learned counsel further contended that it is the law and practice of this court to refuse to act on defective affidavit. For authority he cited Kabwinukya v. Kasigwa above, and submitted that

each of the numerous defects pointed out above in the supporting affidavit in this case renders the affidavit incurably defective. He thus invited me to refuse to act on the affidavit that this leaves the originating summons without any supporting affidavit. That this rendered the originating summons incompetent and improperly before court for failure to comply with O.34 r 7 CPR. He therefore prayed that the application be dismissed with costs.

On his part Mr. Mwebesa learned counsel for the plaintiff contended that the preliminary objection was misconceived and that it should be overruled.

He argued that paragraph 6 of the supporting affidavit complies with the requirement of the law to disclose the source of information when it stated that it was the clerk who told her to sign the document and that the meeting was the source of the other information that the (form) was to enable them to withdraw money from Cooperative Bank Kasese Branch. He submitted that it was not necessary to disclose the name of the relevant clerk or who at the meeting gave the information.

In reply, Mr. Muhwezi insisted however that it was essential to disclose the name of such clerk or of the person at the meeting who gave the information for the purpose of establishing the truth.

Mr. Mwebesa denied that the supporting affidavit ever contain facts deponed to on information. That even the matter in paragraph 18 relating to the condition of the children as converted by the verification in paragraph 20 to become matter based on knowledge of the deponent. Counsel also denied that there was any inconsistency between paragraphs 8 and 23 of the supporting affidavit. He explained that paragraph 8 must be read together with paragraphs 2,4,5,6, and 9 for explanation. That the authorities cited by counsel for the defendant were thus irrelevant. He prayed that the preliminary objection be overruled.

O. 34 r.7 of the CP.R is quite clear I think, as to the method of presenting to court an originating summons. It requires that the originating summons is to be accompanied by an affidavit setting forth concisely the facts upon which the right to relief sought by the summons is founded. And the law regarding the drafting of affidavit appears to be settled in this country. It has been repeatedly held by the defunct East African court of Appeal and by this court that an affidavit

must distinguish between matters deponed to on information, belief and on the deponent's Knowledge.

In the case of **ESEZA NAMIREMBE .Vs. MUSA KIZITO (1972) IULR 88** which case was by originating summons, the application was dismissed amongst other reasons because the supporting affidavit did not set forth the plaintiff's means of knowledge or her grounds of belief and did not distinguish between matter stated on information and belief and those deponed to on the deponent's knowledge.

In **Premchard Raichard Vs. Quarry Services LTD (1969) EA 514 at 517** Spry JA as he then was said,

“It has repeatedly been said by this court that affidavit based on information must disclose the source of information (see standard— Goods corporation Ltd .vs. Harakhchard Nahus & Co. (1950) 17EACA 9). On this ground alone the Judge would have been entitled to refuse, to act on the affidavit, this is not merely a matter of form, but goes to the essential value of the affidavit”.

It is clear from the above passage that disclosing the source of information of facts deponed to on information, and giving ground of belief where facts are deponed to on belief and distinguishing between those facts which are deponed to on information, belief and knowledge of the deponent are fundamental requirements in the drafting of affidavit. An omission in any of them goes to the essential root of the affidavit. It renders the affidavit incurably defective.

In the instant case, paragraph 26 of the supporting affidavit shows that the affidavit contained facts which are deponed to on belief and knowledge of the deponent but these facts which are based on the deponents knowledge are not distinguished from the facts which are deponed to on the deponents beliefs.

Mr. Mwebesa submitted that the omission to make that distinction is a minor irregularity and that it is not fatal to the affidavit, I do not subscribe to that view in the face of the authorities cited above. The authorities point to the fact that such omission is a fundamental defect which goes to the essential root of the affidavit. It is therefore fatal. It renders the supporting affidavit incurably defective.

On the question whether the supporting affidavit of the plaintiff contains facts which are deponed to on information depends on the construction placed on the document. I am inclined to agree with Mr. Muhwezi that the statement "I heard at the meeting was to enable us to withdraw money from the Cooperative Bank Kasese Branch" in paragraph 6 of the affidavit, is based on information. The statement refers to what the deponent heard at the meeting about the purpose of the (Form). It was necessary for the source of that information to have been disclosed. It was not enough to say that the meeting" unless that was s decision of the meeting. In that case the minute of the meeting becomes the source otherwise the person from whom she heard at the meeting should be named.

Following the above findings that he affidavit incurably defective. I agree wits Mr. Muhwezi that the originating summons is now hanging without an affidavit setting forth concisely the facts upon which the right of relief sought by the summons is founded. Without those facts the originating summons is incompetent. It does not comply with O.34 r.7 CPR. For the reasons given above, I up hold the preliminary objection.

Consequently the application must be dismissed with costs.

**G.M. OKELLO**  
**JUDGE**

**18/3/92.**