# The Defective Affidavit

***By Pheroze Nowrozjee***

"Truth", said Lord Justice Bowen, "will out, even in an affidavit." Not, it would appear in East Africa, despite the manipulations of clever counsel seeking the most from the Courts while giving away the least. But, rather, despite the unconsciously determined efforts of a generation of advocates to persist in presenting to the courts documents that can only loosely be called affidavits, and which only the weary patience of an indulgent bench has permitted to be used in the exacting business of dispensing justice.

It would seem that the problem is universal. Justice William O. Douglas of the United States Supreme Court recalls an example:

> "*In one case involving a judgement obtained by fraud and the remedies for correcting it (Hazel-Atlas Co. v. Hartford-Empire Co. 322 U.S. 238) the questioning from the bench was very searching. The critical document was as I recall, an affidavit; and I asked an attorney, 'Who prepared this affidavit?' He instantly fainted, falling to the floor and hitting his head against a table as he went down.*"

Such pangs of conscience about a poorly drawn affidavit are rare, (even if judges may feel the injuries were well-merited). Indeed, affidavits of this nature have even been defended by the bar. In one case in the court of Appeal for Eastern Africa counsel gave the court "*to understand that this breach of the Rules was deliberate and not merely slovenly; he seemed to suggest it was in accordance with local practice."*

As a result the courts have been moved to hear applications supported by affidavits that have not been worn, affidavits that have had no jurat, affidavits that have been sworn to in other applications,[3a] affidavits that have given various conflicting sources of the deponents' information, affidavits that have given no sources, affidavits that are submissions of law,[4] affidavits sown prior to the filing of the suit,[5] affidavits that have not averred the truth of their contents, and affidavits worn by the wrong parties. Arising from these a considerable body of case law has grown around the defective affidavit.

## THE ARGUMENT OF THE PAPER

This paper examines this body of case law and seeks to discover what rules have emerged therefrom. It will argue that certain of the earlier cases are no longer authorities for rules that have long been propounded in their name, and also that more recent cases are not in fact departing from certain basic requirements of the proper affidavit.

The paper also briefly touches on the requirements of the proper affidavit derived from legislation, judicial extension and common law requirements of form, and examines the law of evidence in relation to affidavits.

## THE PROPER AFFIDAVIT

The proper affidavit is governed by:

The rules of civil procedure;
Judicial extensions of legislative requirements; and
Common law requirements of form.

The subsequent discussion of the courts' treatment of affidavits brings out the interaction of these various requirements and show the emphasis which the courts have place on certain requirements and the willingness with which they have condoned the absence of others.

### The Rules of Civil Procedure:

The Civil Procedure Acts and Code and Rules of the East African countries provide for a number of applications and situations in which affidavits are required, and prescribe for the contents of affidavits in a number of varying situations.

However in the codes, a general order in respect of affidavits has also been provided for. The main rule providing for the contents of affidavits was in Kenya as follows:

> *"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, provided that the grounds thereof are stated."*

It is against this main requirements that the courts have tested the affidavits that have come before them; this of course, as has been mentioned, is in addition to the requirements of any particular application, rule or remedy then being considered by the court which may e.g. prescribe the form of the necessary affidavit (See Kenya, Order XXXV r. 2 and Form 3A, Appendix A).

**Judicial pronouncements:**

In East Africa have extended the legislated for requirements of the Civil Procedure Rules to permit in affidavits in interlocutory applications matters deponed to on information, provided that the sources thereof are disclosed and specified.

The Civil Procedure Rules did not themselves permit this. as has been seen above all that the rules did permit were matters of belief (provided the grounds thereof were stated) in interlocutory applications.

From time to time the courts remarked on the absence of any authority in the rules for the admission of matters deponed to on information but never shut them out.

The authority for their admission appears to be the case of ***World-wide v. Phakey*** (1948) 15 E.A.C.A. 1. in which Graham Paul C.J. sitting in the Court of Appeal remarked on the necessity for sources of information to be specified and called in aid English authority to that effect.[6]

The judicial extension has grown out of an obvious necessity, applications such as those for arrest before judgment, or for attachment before judgement, or for temporary injunctions, must overwhelmingly be based and determined on matters that can only be derived from information rather than on the observation or direct knowledge of the dependent. Though it will be argued that permitting averments derived from information are really an examination of grounds of belief, (and hence covered by the rules any way), this category is now "well settled" and "binding" and "cannot be doubted".

In fact it finally received legislative recognition in Kenya by the amendment of O.18 r. 3(1) (by L.N. 119/1975) to read as follows:

> *Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:*

> *Provided, that in interlocutory proceedings, or by leave of the Court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."*

Thus in Kenya now, the Civil Procedure Rules themselves authorise the inclusion in certain proceedings of matters deponed to on information.

**Requirements of form derived from Common Law**

There are no statutes specifying the forms of affidavits, save in the few prescribed examples.

Affidavits must nevertheless comply with certain formal requirements. Our law reports are silent on cases of affidavits rejected for lack of form rather than content but the following cases would invite judicial wrath. An affidavit that did not "make oath" or "solemnly affirm" the statements to follow would be inadmissible (***Phillips v. Prentice*** (1843) 2 Hare 542). An affidavit not in the first and place of swearing – to be properly stated. If the jurat is completely omitted the affidavit is bad.

These then briefly are the requirements of what the courts would consider a proper affidavit. We now turn to what the courts are more often faced with – the affidavit that in one way or another fails to meet those requirements.

**THE DEFECTIVE AFFIDAVIT**

The large majority of cases has mainly concerned itself with the failure of the deponents to satisfy the requirements of the Civil Procedure Rules and of the judicial extension in respect of matters deponed to on information and belief, and the major part of this paper concerns itself with those defects.

It may be useful to recap here the requirements of the Kenya Rules: Affidavits shall be confined to such facts as that deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the Court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

(O.18, r. 3(1).

As remarked by Georges C.J. in a much later case, a convenient place to begin a review of the Court' consideration of these requirements is ***Standard Goods v. Harakchand Nathu & Co.*** (1950) 17 E.A.C.A. 99. In this leading case the Court of Appeal laid down the necessity of strict compliance with the provisions of these rules.

The Plaintiff had applied to the then Supreme Court of Kenya for an order under the provisions of 38, Civil Procedure Rules, to compel the Defendant to furnish security prior to judgment, on the grounds that it was about to dispose of its property. The judgement made an order nisi for the conditional attachment of the Defendant's goods.

The Defendant appealed to the Court of Appeal and the first question in the appeal was as to the adequacy of the affidavit upon which the Plaintiff had relief in support of the application and upon which the Judge's order was based.

The judgement of the Court of Appeal succinctly detailed the objection in these words of Sir Graham Paul C.J.:

> "The affidavit in question consisted of several paragraphs. Paragraph 2 was;
>
> > *"The facts stated herein are within my knowledge", and paragraph 7 was" "What is stated above is true and correct to the best of my knowledge and information." As regards paragraph 2, I would observe that facts can be within a person's knowledge in two ways: (1) by his own physical observation; or (2) by information given to him by someone else. It is clear that reading paragraphs 2 and 7 of the affidavit together, the deponent was stating facts without stating which were from his own observation and which from information. An affidavit of that king ought never to be accepted by a Court as justifying an order based on the so called "facts". In my view the court below ought never to have granted the order nisi on such an affidavit, and when the defendant-appellant on notice of the order nisi appeared to show cause they the order nisi should not be made absolute, it was quite enough to point to the defect in the affidavit and the court, in my view, should have refused to make the order nisi and to make it absolute.*
> >
> > *It is well settled that, where an affidavit is made on information, it should not be acted upon by any court unless the sources of the information are specified. Taking that view of the original affidavit,*

> *I find it unnecessary to go into any of the other points raised in the appeal. Neither the other nisi nor the order making it absolute should have been made and I would allow the appeal and set aside both the order nisi and the order making it absolute."*

Holding that the affidavit was defective to support the application the court allowed the appeal and set aside the order of the judge below.

In view of the fact that ***Standard Goods*** is a frequently cited authority and in view of the courts' approach in later years it is worthwhile attempting to extract from the above quoted judgement the propositions that constitute the ratio decidendi of the case. They may be stated thus:

> Where an affidavit is made on information it should not be acted upon by any court unless the sources of the information are specified.

> That if it is not stated in the affidavit what is deponed to from the deponent's own observation and what from information the affidavit ought not to be accepted.

Keeping the above in mind we may turn to examine the line of cases over the years in which ***Standard Goods*** was then followed.

In ***Janmohamed v. Madhani*** (1953) 20 E.A.C.A. 8 the Court of Appeal again considered the competence of an affidavit, this time arising out of an application for a temporary injunction. An injunction had been granted ex-parte in the Supreme Court and the Defendant appealed. The appeal was allowed on two grounds:

Firstly, that the requirements prerequisite to the grant of an ex parte injunction had not been satisfied, and secondly, that the affidavit supporting the application was defective and ought not to have been acted upon.

The court applied ***Standard Goods*** and held that the affidavit was defective in that it did not state whether the deponent was deposing to the facts of his own knowledge or on information and therefore it ought not to have been accepted.

In ***Assanand & Sons (Uganda) Ltd. v. East African Records Ltd*** (1959) E.A. 360 the Court of Appeal considered the sufficiency of an affidavit filed in support of an application for service outside jurisdiction. It found the affidavit deficient in three

respects:

> "*First, it did not set out the deponent's means of knowledge or his grounds of belief regarding the matters stated on belief and secondly, it did not distinguish between matters stated on information and belief and matter deposed to from the deponent's information (See I. XVIII, r. 3(1) and* ***Standard Goods Corporation Ltd. V. Harakchand Nathu & Co****. (1950) 17 A. A.C.A. 99). The court should not have acted upon the affidavit as drawn. Thirdly, the assertion that payment of the account was to be made at Nairobi was a bare assertion not based on any alleged facts. There was nothing to show whether this assertion was a fact, an inference from undisclosed facts, or a conclusion of law."* (per O'Connor P. at 354).

In ***Caspair Ltd v. Gandy*** (1952) E.A. 414, a Uganda case, the Court of Appeal again relied of ***Standard Goods*** by way of quoting and confirming the above passage from Assanand. Against this test, the affidavit, in support an application for examination of the plaintiff outside the jurisdiction, was held defective and the order of the High Court granting the application was set aside.

In the Tanganyika High Court, Windham C.J. examined the problem in ***Bombay Flour Mill v. Patel*** (1962) E.A. 80. Feeling himself bound by Janmohamed's case and by the following words from the judgment:

> "*The deponent does not pretend to say whether he is deposing to the facts sworn to of his own knowledge or on information given to him by someone else."*

Windham C.J. upheld an objection against a like affidavit in support of an application for leave to defend a suit brought under summary procedure. The passage relief on was itself based on the authority of ***Standard Goods***.

The Kenya High Court in ***Suleman v. South British Insurance Co. Ltd*** (1965) E.A. 65 did not accept an affidavit which merely stated "that the contents of this affidavit are true and to the best of my knowledge, information and belief" and which did not disclose which facts were to the deponent's knowledge, and which true to his information and belief. Against ***Standard Goods*** was relied on.

In ***Camille v. Merali*** (1966) E.A. 411 in the Court of Appeal Spry J.A. was clear that "In my view, the affidavit, with its bare reference to information and belief is clearly defective ...

In each of these cases the court also passed remarks and based their decision on the insufficiency of the affidavit on other grounds. These and their implications are examined later. At this stage the cases have been assembled here to note that ***Standard Goods*** was relied on to establish and act upon the proportion that an affidavit is defective if the deponent does not state which of the facts he is deponing to are of his own knowledge and which from information and belief.

But was this really what ***Standard Goods*** was saying? Or was it saying that an affidavit is defective if it is not apparent from the face of it what is deponed on knowledge, what on information and what on belief/ (And then laying down the requirements of sources and grounds?). As applied in the above line cases the courts believed that ***Standard Goods*** was saying that it was for the deponent to state or 'distinguish' what was sworn to from observation, what from information, and what from belief. Or was ***Standard Goods*** saying that one had to examine the affidavit, and, if not stated by the deponent, look at the face of it to see whether it was clear from there what was deponed to on observation and what from other sources? In the absence of any specific averment by the deponent was the affidavit to be rejected only if it could not disclose on a reading thereof what was deponed to on the various sources? And if it did was it saved notwithstanding that the deponent had omitted to demarcate which paragraphs were from what source?

It is submitted that in fact ***Standard Goods*** did impose a duty on the deponent to state which paragraphs of his affidavit were sworn to from his own knowledge (observation), which from information and which on belief. There were the words used:

> *"It is clear that reading paragraphs 2 and 7 of the affidavit together, the deponent was stating facts without stating which were from his own observation and which from information. An affidavit of that kind ought never to be accepted by a court as justifying an order based on the so-called "facts".* (at 100).

***Standard Goods*** therefore required the deponent to state the distinction. And as has been seen the words were clearly construed as such so that for instance, in Suleman v. South British it was enough for the judge to note that the affidavit before him merely stated "that the contents of this affidavit are true to the best of my knowledge, information and belief" and did not disclose which paragraphs were true under which of these possible sources and therefore was defective on the authority of ***Standard Goods***.

Again in the earlier case of ***Assanand & Sons v. E.A. Records Ltd.,*** the Court of Appeal's threefold requirements included the obligation that the deponent must

distinguish between matters deponed to from his knowledge and those from information given to him. And this requirement was confirming by the same court in ***Caspair v. Gandy***.

But correct though the reasoning was the courts were finding difficulty in its application and a way out was sought but failed in the case of Bombay Flour Mill referred to earlier. ***Bombay Flour Mill v. Patel*** (1962) E.A. 803 T. was a suit by way of summary procedure in the District Court where the Defendant applied for leave to defend and supported the application by an affidavit. The plaintiff objected inter-alia on the grounds that the affidavit did not disclose the deponent's means of knowledge or his sources of information and belief, and relief on Phakey v. World Wide and Janmohamed. The magistrate upheld the objection and refused leave to defend.

On appeal to the High Court Windham C.J. distinguished Phakey v. World Wide by showing that in that case the deponent expressed that the affidavit was sworn to on information and belief whereas in the present case the deponent was completely silent as to whether the matters were deponed to on information, on knowledge or belief.

Reluctant to reject the affidavit on such objections only, Windham C.J. looked wistfully at an Indian decision ***Chandrika Prashad Singh & Ors v. Hiralal & Ors***. (1924) A.I.R. Patna 312. In that case it was held that where an affidavit says nothing at all about whether the facts are deponed to on information or from knowledge or belief it is not a bad affidavit. But if it states that what is deponed to is on knowledge, information and belief and does not make clear which facts are from which sources, then that affidavit is bad.

In the case before him the defendant's affidavit was of the former kind and would have been saved by Chandrika's case. But held the Chief Justice, no such distinction was permitted by Janmohamed's case, (relying on ***Standard Goods***) which held fatal the defect that "the deponent does not pretend to say whether he was deposing to the facts sworn to of his own knowledge or on information given to him by someone else."

Holding himself bound by the Janmohamed judgment of the Court of Appeal, Windham C.J. rejected the affidavit and dismissed the appeal. If the affidavit was completely silent as to sources ought not the court, as in ***Nandala v. Lyding***, referred to later, to have examined the affidavit's contents, to determine what was sworn from which source? Ought the court not to have followed Chandrika's line of judgment – that if the affidavit is silent in such fashion "it must, I think, be taken that the statements made by him are represented as statements true to his knowledge"?

It is clear therefore that what the C.J. held as binding on him was the injunction that there is a duty on the deponent to say whether he is deposing to the facts sworn, on his own knowledge, on information or on belief. It is not enough that the court may be able to see what is from where or presume that all is from his own knowledge. The duty

is on the deponent and this is the meaning of Janmohamed's case and ***Standard Goods***.

But even while this interpretation of ***Standard Goods*** was being applied and confirmed and seeming finality given both to its reasoning and its authority as a Court of Appeal judgement, Bombay Flour Mill was only foreshadowing the move by the courts shortly thereafter to open a new flank and in fact modify that supposedly final statement.

**NANDALA V. LYDING**

This change came about from the increasing use of the defective affidavit and the only slightly less frequent invitation by opposing Counsel to reject the whole affidavit on that sole ground. The objection was obviously valid but it was equally obvious that often there was no merit in it save to underscore the laxity of advocates; that if such objections prevailed each time, technical defects would operate to defeat substantive justice. Accordingly the courts were unhappy over the indiscriminate application of the rule. At the same time no court left included to explicitly trim ***Standard Goods***. When the courts finally did move, they did so circumspectly, whittling away its excesses while noisily confirming its authority.

What the courts have accordingly done is to qualify the rule in the following manner:

It is the duty of the deponent to distinguish between what he swears to on knowledge (observation) and what on information and belief. But there is no obligation to do so as an express averment. If from an examination of the affidavit it is clear reading which averment is from what source the duty is discharged.

The earliest of the reported cases where the court applied this approach was ***Nandala v. Lyding*** (1963) E.A. 603 U. The first requirement of ***Standard Goods*** that if an averment has been sworn to on information the source of that information must be disclosed has never been questioned, and has been consistently applied (together with ***Phakey v. World Wide Agencies***). It is the second limb of ***Standard Goods*** namely that if an affidavit does not state what is deponed to from the deponent's own observation and what from information (or on belief), it ought not to be accepted, that has seen a transformation.

In ***Nandala v. Lyding***, the Plaintiff made an application to the High Court of Uganda to enforce a contract notwithstanding failure to register necessary particulars in respect of his business with the Registrar of Business Names. He supported the application with an affidavit which was objected to by the defendants.

The plaintiff's affidavit consisted of five paragraphs of averments and a sixth paragraph stating: "That what I have stated above is true to the best of my knowledge, information and belief." The defendant's objection was based on O.XVII (U) and he

argued that the plaintiff's affidavit ought to be struck off on the ground that in breach of the well established rule it did not disclose the sources of the deponent's information and belief.

No argument was addressed on the point that the plaintiff had also failed to state what in his affidavit was deponed to on knowledge (observation) and what on information and belief, but it was clear from the affidavit that no effort had been made at all to make any such distinction expressly. But the ruling was to affect this point greatly.

Both ***Standard Goods*** and ***Phakey v. World Wide*** were urged in support of the objection. The objecting defendant also relief on an Indian case ***Federal Indian Assurance Co. Ltd. v. Anantras Dixit*** (1944) A.I.R. Nagpur 161, which put the real objection better than the defendant had. In this case the deponent averred that "the entire contents of paragraphs 1-3 above are true according to my knowledge and according to information received and believed to be true." It was held that the paragraph made "the whole affidavit meaningless and infructuous because it was difficult to see how the identical facts could be verified both on knowledge and information."

This was exactly what ***Standard Goods*** was condemning and this the defendant argued in ***Nandala v. Lyding***, was exactly what had happened in this case: the last paragraph of the plaintiff's affidavit also swore to identical facts on knowledge, information and belief, and moreover did not give the sources of that information or belief.

Udo Udoma C. J. dealt with the objections in the following manner. Federal India Assurance was distinguished on the grounds that it did not decide the point on an interlocutory application and that before the affidavit in it could have been filed a court order had had to be obtained. But its main point (as quoted above) and that of ***Standard Goods*** and Phakey's case were met thus:

> *"On a careful examination of each of the paragraphs of the affidavit of the plaintiff's application herein it seems clear that every averment contained in paragraphs 1 to 5 of the said affidavit concerns the activities of the deponent himself. There is nothing relating to information and belief. I am of the opinion that paragraph 6 of the affidavit is completely unnecessary and meaningless in terms of the contents of the other paragraphs of the affidavit.*
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> *"I am satisfied that the contents of paragraph 6 of the affidavit are a mere empty verbiage – a surplusage – which bear no relation to the contents of the affidavit as a whole. It is therefore severable from the rest of the*

> *affidavit without in any way affecting the merits or detracting from the remaining paragraphs of the affidavit as in my view the contents of paragraphs 1 to 5 of the affidavit are statements of facts peculiarly within the knowledge of the deponent and relate to his own personal activities.*

> *"In the circumstances I would strike off paragraph 6 of the affidavit, leaving thereby the rest of the affidavit as I am satisfied that the contents thereof are facts which the deponent is able of his own knowledge to prove. Accordingly paragraph 6 of the affidavit is hereby struck off." 91963) E.A. at 710 B-E).*

At one stroke the decision opened the way for a look at the substantive and not formal contents of an affidavit. It certainly was bold. Was it correct? Could ***Standard Goods***' explicit second requirement, confirmed specifically in Janmohamed's case, be ignored? Did the court have power to 'strike out' an offending paragraph in an affidavit? Could the court hold that the matters were only deponed to from knowledge when the deponent himself explicitly swore that he was deponing to on knowledge, information and belief? Can there be "surplusage' in an affidavit? Is a part of an affidavit 'severable'?

Whatever the debatable answers to these questions were, the decision provided a release from the tyranny of ***Standard Goods***. That the hand of the latter was heavy and the courts chafing under it may be seen from the case of ***Bombay Flour Mill v. Patel*** discussed earlier. In ***Bombay Flour Mill v. Patel*** (1962) A.E. 803. T. Windham C. J. had sought a way out through the Indian case of Chandrika Prashad Singh only to hold that he was bound by Janmohamed's case – itself relying on ***Standard Goods*** – to rule out as defective any affidavit which failed to comply with the requirement to specify what was deposed to on the deponent's own knowledge and what on information.

Whether or not Chandrika Prashad Singh was brought to the court's attention in ***Nandala v. Lyding*** – and the affidavit in it would not have been saved by the Indian case – Udo Udoma C.L.'s approach was wide enough to do away with the subtle distinctions and hesitant approaches of his brothers in various courts. For was Chandrika really proposing a worthwhile solution? It is submitted that it was not doing so, for what it was doing was making a distinction between total absence of compliance with the rules and insufficient compliance with the rules. In the latter case the defect was fatal. In the former, a presumption (of own knowledge) arose to save the affidavit from a defect otherwise fatal. Was this not an artificial presumption? What if the affidavit were silent, such a presumption were made and then examination of the affidavit revealed areas deponed to information and belief and others doubtfully so?

It is submitted with respect that the approach of ***Nandala v. Lyding*** (Udo Udoma C.J.) was a more real one. What it did was to free the court from the actions of the deponent and leave to look at the affidavit itself to determine whether or not there had been compliance with the rules.

It did not matter whether in respect of an omnibus averment the deponent was completely silent or gave sources which he did not relate to the previous paragraphs. All that this showed was carelessness. And as Georges C.J. has remarked of similar objections to pleadings:

> *"One can only hope that at some none-too-distant date, the rule that a plaint must be rejected when it fails to disclose a cause of actin will be reviewed, so that these fruitless and dilatory investigations into the minutes of pleadings will abate, at great savings in costs, and, I would think, enhanced appreciation for the legal processes which one would assume are intended to resolve the problems of those who seek such solutions without being begged in arguments over matters of form".*[7]

The real test is whether in the body of the affidavit, in each averment of it, the rules are being complied with. The presence or absence of a last paragraph indicating, or omitting, possible sources is immaterial. What is material is whether there is a source disclosed on the face of the affidavit in compliance with the rules.

Once paragraph 6 was held surplusage and struck out, how did ***Nandala v. Lyding*** then deal with the requirement of ***Standard Goods*** and Janmohamed's case that the deponent must say whether he is deposing to the fact sworn to on knowledge or information or belief.

The answer was that the deponent had done so not expressly, (what he had stated expressly was meaningless), but nonetheless obviously. Obvious upon a reading of the document.

But that was not what the Court of Appeal's decisions in ***Standard Goods*** and Janmohamed permitted. Windham C.J. clearly thought not, because although in ***Bombay Flour Mill v. Patel*** the affidavit before him was capable of the presumption permitted by Chandrika's case, he felt himself bound to reject it because of the deponent's failure to say what was deponed to from where. ***Nandala v. Lyding*** does not meet this point expressly. Does it matter?

Apparently not! As if a dam of pent up judicial frustration had been breached by this decision a flood of approval poured out. Suddenly ***Standard Goods*** was not saying

what it had always been held to say. Suddenly ***Standard Goods*** was permissive, not mandatory. Suddenly the courts began to possess a discretion to accept or reject a defective affidavit. Within a very short time ***Nandala v. Lyding*** had been approved, followed and vigorously applied by the Court of Appeal, a higher court: In ***Camille v. Merali*** (1966) E.A. 411 A.C. one of the issues was that the affidavit of the plaintiff was so unsatisfactory that it could not have been used in support of his motion for leave to enter judgment. In support of this the appellant argued that paragraph 4 of the affidavit stated that the affidavit was made partly from information and belief without specifying the sources of such information. This was the Court of Appeal's reply:

> "*While the form of the affidavit was by no means satisfactory—and I would here again emphasize the words of Sir Kenneth O'Connor, P. in Assanand & Sons v. E.A. Records (1959) E.A. 360 (at p. 364) as to the necessity of complying with the provisions of O. 18 R.3 – I do not consider that it was so bad as, in the particular circumstances of this case, to preclude the court from paying any regard to it … Paragraph 4 is very unsatisfactory, but having regard to the contents of the affidavit it is obvious surplusage as the plaintiff was swearing to the facts in relation to his own business. Accordingly, in my view, there is nothing in the first issue raised on this appeal*."

Where there degrees of 'badness' in an affidavit? Why hadn't the court been willing in earlier cases 'to have regard to the contents' and draw 'obvious' conclusions? And reject 'obvious surplusage'?

In ***Life Insurance Corporation v. Panesar*** (1967) E.A. 614 (CA) Counsel for the plaintiff argued that because there was no express statement in the affidavit that the deponent had derived his information from a perusal of the policies, the affidavit should be rejected as offending against O. 18 R.3, and presumably ***Standard Goods***. To which the court replied, "… I think it is implicit that the source of his information was the policies themselves or the duplicates or copies of them retained by the appellant company." (Emphasis added). "While I agree that the affidavit is badly drawn, I do not regard the defect as fatal."

Did not ***Standard Goods***, Janmohamed, Assanand and Caspair all require the deponent to be explicit? How-badly must an affidavit be drawn before such defects are fatal? If the sources can be one of three possible are they "Implicit" enough? Can an affidavit ever be based on alternative facts? or sources?

In ***Zola v. Ralli Bros*** (1969) E.A. 681, at 694, this is what the Court said in response to an objection to an affidavit:

> *"It may be that the affidavit could have been more explicit in certain respects."*

Now, if the deponent was not explicit it was sufficient that there was implicit compliance. If this had been all along in accordance with ***Standard Goods*** why had not Udo Udoma C.J. prayed it in aid? Why had not Windham C.J. acted on it in that fashion?

The plain answer is that ***Nandala v. Lyding*** was a departure from the strict early cases. It mixed into the Court of Appeal's rarified atmosphere an element of common sense that its members were happy to breathe once there but had been loath to introduce on their own. ***Nandala v. Lyding*** so affected the court that its President was even moved to remark in kindly fashion:

> *"There is scarcely an affidavit, or indeed any document which cannot be criticised."*

But do these Court of Appeal decisions lay down any principles? If they establish that some element of discretion vests in the court, do they state how it is to be exercised? In each they accepted the affidavits, before them: what if they had rejected them? What would have been the consequence? And was the matter further affected one way if the deponent was either wholly silent as to sources and another way if he did not specify which was from which but instead used the familiar formula.

It was again left to the High Courts to initiate a new pattern and it is submitted that in the two cases discussed hereunder the process begun with ***Nandala v. Lyding***, and having the Court of Appeal's blessings, has been carried to a conclusion both logical and widely applicable. The two cases also provided keys to the ending of the confusion regarding the effect of the defects we have been examining above, and we take a look at that confusion before turning to the two cases.

**WHAT IS THE CONSEQUENCE OF SUCH A DEFECTIVE AFFIDAVIT?**

When it is held by a court that there are such defects in an affidavit two questions arise: What is the effect on the affidavit of these defects? and, How is the court to treat the affidavit? The most cursory look at the above cases shows the total confusion prevailing. At various times the courts have held various results to follow in the wake of the defects.

In answer to the first question the courts have variously held that affidavits with such

defects are "worthless". (J.L. Young's case), "incompetent" (Bombay Flour Mill), "not sufficient" (***B.E.A. Corp. v. Ladha*** (1945) 18 K.L.R. 91), "improper" (***L.I.C. v. Panesar***), not "admissible evidence" (Janmohamed's case), of "no evidential value" (***Premchand Raichand v. Quarry Services*** (1969) E.A. 514 C.A.).

Having thus held variously the courts have then to decide how to treat such an affidavit. Here too we note a distressing lack of precision. The courts have said of such affidavits: "I never pay the slightest attention myself to affidavits of that kind." (J.L. Young's case); they "ought never to be accepted by the Court" ***Standard Goods*** and Suleman v. South British Ins.), they should not be acted upon (***Standard Goods***, ***Assanand***, ***Caspair v. Gandy***, ***L.I.C. v. Panesar***, ***Premchand Raichand***); they ought to be "***ignored" v. Merali***); they "ought not to be received as evidence" (J.L. Young); they are a "nullity" (***Zola v. Ralli Bros***. (1969) E.A. 691): they are to be "struck off" (***Nandala v. Lyding***); they "cannot be accepted" (Suleman's case); they are to be "taken off the file" (***Walker v. Poola***).

But while these all indicate the court's displeasure they do not lay down exactly how the court is going to ignore, not accept, not pay the slightest attention, not act upon, or not receive the offending affidavits. Nor do they indicate under which power the court will strike out, take off the file or not admit as evidence. Does the court act under its inherent jurisdiction or under the Civil Procedure Rules or under the Evidence Act?

Secondly, and more importantly, if certain parts are defective is the whole of the affidavit to be rejected? Or is there some machinery for severing the offending parts, leaving an emasculated affidavit on the record? Some of these questions were considered in the two cases mentioned earlier and we now turn to them.

**ADIJA MOHAMED & ORS. V. KIBERA WANANCHI TRADING CO. LTD & ORS.**

In ***Adija Mohamed & Ors. v. Kibera Wananchi Trading Co***. Ltd. Nairobi H.C.C.C. No. 1580 of 1968, Unreported Ruling. Harris J. the Plaintiffs applied to the court for the appointment of a receiver by way of a notice of motion supported by three affidavits. The defendants objected to the validity of those affidavits and raised the familiar arguments and line of cases detailed above. The court upheld the objections against the parts of the affidavits complained of but did not accept the defendant's arguments as to the effect of the defects. the defendant first argued that if any portion of the affidavit should offend, the entire affidavit must be rejected. The court held that it could find no such implication in the line of authorities referred, namely that from ***Standard Goods*** and ***Phakey v. Worldwide Agencies*** onward. It held instead:

> *"In my opinion each paragraph of an affidavit, which is called in question under the rule, must be considered individually, and if a paragraph fulfills*

*the requirements of the rule it should not be rejected merely because another paragraph in the same affidavit fails to do so."*

The second argument raised by the defendants as alternative to the first was that if an affidavit should offend in one or more paragraphs against the rule and those paragraphs constituted the substance or a substantial part of the case which the affidavit sought to make or support, the whole affidavit ought to be struck out. The court also rejected this and held instead that:

*"it seems to me that where any portion of an affidavit offends against rule 3(1) the proper course is for the court to ignore that portion and to give to the remainder of the document, taken by itself, such weight and effect (if any) as may be proper notwithstanding that what is possibly the more important portion of the document has had to be rejected."*

The issue also arose in ***Rossage v. Rossage*** (1960) 1 All E.R. 600 C.A. which was not cited in the Kibera Wananchi case. In Rossage the mother of a child appealed from the order of the High Court refusing her application to have certain affidavits filed by the father, in a matter of access to the child, removed from the court file. In the lower court the judge upheld the objections but did not reject the whole affidavit. The Court of Appeal did not agree and dealt with it thus:

*"... the learned judge quite clearly, from what we have been told of the mater, recognised that the material to which I have drawn attention (without saying what it is) was matter which he could not consider for the purpose of arriving at a decision in this case. However he said he was not going to remove it from the file because he was quite capable of shutting his mind to the irrelevant matter. I do not think this is sufficient answer to the application in this case."*

The court felt that there was a real danger of great injury to the opposite party and an answer would be almost impossible. It accordingly held:

*"Those affidavits contain material which is relevant, but contain also a great deal of material which is irrelevant – pure hearsay evidence which the court cannot take into account in the form in which it stands. The proportion of that material to the relevant material is so high that if the matter is to be disposed of with any regard to convenience it is clearly right*

> *that the whole of those affidavits should be removed from the file rather than by seeking, by expunging irrelevant matter, to put the affidavits in order."*

It is submitted that this might have been an appropriate argument in the Kibera Wananchi case. In the event the resultant position in that case was that the affidavits complained of were left on the record but were to be utilized by plaintiffs only to the extent that court had indicated, namely with certain paragraphs rejected.

**NATIONAL BANK OF COMMERCE v. M.S. DESAI**

Meanwhile the High Court of Tanzania had also come to a similar conclusion in its treatment of the defective affidavit. In ***National Bank of Commerce v. M.S. Desai*** (1969) H.D.C. 206 an objector and a defendant filed affidavits in opposition to an application for attachment of property before judgement. The plaintiff objected that the affidavits were deficient in that they did not specify what was deponed to on knowledge and what on information and belief nor were any grounds specified. Accordingly they ought to be rejected.

The court in the fashion of ***Nandala v. Lyding*** weighed each paragraph to ascertain whether it could be upheld. Some it could, others it could not. At the end of the exercise it came to the following conclusion:

> "*There remains a body of evidence sufficiently vouched for in the affidavits from personal knowledge or from information and belief with sources specified to enable the matter to be disposed of."*

The court accordingly did not reject the affidavits in toto and proceeded to deal with the merits of the application and the objections thereto.

Thus both High Court have considered that such objections to affidavits only tough the individual portions complained of; that the court will not rush to reject the whole document, rather the contrary. The manner in which the rejected portions are to be dealt with are not spelled out, but both judgements on a full reading indicate that the approach of the court is to treat the offending paragraphs as inadmissible evidence and deal with them as such.

A more specific consequence was indicated by the later case of ***Mayers v. Akira Ranch Ltd.*** (1974) E.A. 169, in which case the same judge as in the Kibera Wananchi case, Harris J., proceeded as follows:

> *"In the result, therefore, each of the three paragraphs of the affidavit particularized in the chamber summons is held to be inadmissible in evidence in these proceedings and it remains to consider whether they should accordingly be struck out as being irrelevant and oppressive.*
>
> *O. 18, r. 6 provides that the Court may order to be struck out any mater, which is scandalous, irrelevant or oppressive, three characteristics which it is clear, despite the applicants' contention to the contrary, are to be read disjunctively where, as here, an affidavit contains averments of apparent importance in the proceedings but which transgress the requirements of O. 18, r. 3(1) and in regard to which the leave of the Court under the proviso to that sub-rule has not been obtained, the retention of such averments in the affidavit contrary to the expressed wishes of the opposing party would, in my opinion, be oppressive within the meaning of r. 6 of the Order.*
>
> *Accordingly the application by chamber summons succeeds and those portions of paragraphs 9 and 10 of Mr. Mayers' affidavit dated 29 January 1981 already indicated are struck out. The company will have the costs of the application to be taxed on the disposal of the originating motion."* (at 171).

Before we turn to a summary of the present direction of the courts as compared with the position at the time of ***Phakey v. Worldwide*** and ***Standard Goods***, two matters must be referred to: Firstly, we consider the position of affidavits in relation to the law of evidence. Secondly, we consider that interlocutory proceedings are, and how they affect the admissibility of affidavits.

## AFFIDAVITS AND THE LAW OF EVIDENCE

In Uganda and Tanganyika the Evidence Acts provide that the act shall not apply to affidavits presented to any Court or officer.[8]

In Kenya the Evidence Act contained a like provision until 1969 when the existing provision was deleted and a replacement made to the relevant section, altering the position. We shall examine first the position in Uganda and Tanganyika including as it does the position obtaining in Kenya prior to the above amendment.

The full provisions of the Uganda, Tanganyika and pre-1969 Kenya Evidence Acts in respect of their application were in the following terms:

> *"This Act shall apply to all judicial proceedings in Tanganyika in or before the High Court and all Magistrates' Court except Primary Courts but not to affidavits presented to any court or officer nor, subject to s. 76, to proceedings before an arbitrator"*

with suitable changes regarding the courts to which the Act did not apply.

The words used appear explicit enough and obvious enough to fulfill the purpose of excluding the operation of the Act in relation to affidavits. Prima facie, the result of this would be to permit, for example, the presence of hearsay in the affidavit. It would prevent the courts from applying to affidavits the rules relating to admissibility and relevancy contained in the acts. But were the words explicit enough, obvious enough? Apparently not, if the challenge posed to them in ***L.I.C. v. Panesar*** (1967) E.A. 614 C.A. is any measure.

In this Kenya case the plaintiff sued the insurance company upon maturity of two policies for sums due thereof. At an appropriate time the plaintiff made an application for summary judgement under the provisions of O.XXXV, C.P. rules. The defendant resisted the application, filing an affidavit denying certain of the plaintiff's allegations and alleging certain triable issues, based on the terms of the policies. But it did not exhibit the policies. (Neither had the plaintiff in his affidavit). The judge granted the defendant unconditional leave to defend but entered judgement for part of the claim on an alleged admission. The defendant appealed against the judgement entered and the plaintiff cross-appealed against the grant of leave to defend arguing on two grounds:

that the defendant's affidavit did not disclose triable issues; and

that the defendant's same affidavit was inadmissible as it offended against the best evidence rule because the policies themselves were not exhibited.

Counsel for the plaintiff's argument was that while not exhibiting the policies the defendant was attempting to adduce evidence in contravention of the well known rule of evidence which requires that the contents of a document must be in the absence of legal excuse permitting certain exceptions, be proved by production of the document itself.

In the words of the court, "the question for decision," therefore was, "simply whether an affidavit in an interlocutory application which sets out facts derived from a document without itself being exhibited or its absence explained in invalid."

In support of this proposition Counsel for the plaintiff urged the following points:

That the Common Law requirements of evidence were not impaired by the provisions of s. 2. Evidence Act (which expressly stated that the Act did not apply to affidavits presented to courts);

That the provisions of O.18, r. 3 expressly permitting hearsay suggested that these basic rules of evidence have not been excluded on the basis of the ***maxim expression unius est exclusio alterius***.

The court was able to dispose of the first ground by arguing that the Evidence Act was the complete law of evidence in Kenya. Therefore if it excluded affidavits from complying with its provisions; there was nothing else left for an affidavit to comply with. "The Act is entitled 'An Act to Declare the Law of Evidence' and as I understand it contains the whole of the law of evidence in Kenya with one reservation. That reservation stems from s. 182 of the Act which provides that save as otherwise expressly provided in the act nothing in it shall be deemed to derogate from the provision of any other law which relates to matters of evidence. It follows therefore that unless otherwise provided for in a written law the rules of evidence do not apply to affidavits; and s I have not been referred to any written law applying the best evidence rule to affidavits and know of none, the foundation of Counsel for the plaintiffs' submission disappears." (per de Lestang V.P. at 617).

The second ground was rejected on the basis that in the court's view "r. 3 (Order 18) does not really create an exception to the applicability of the rules of evidence to affidavits but merely provides a safeguard where an affidavit contains hearsay evidence by requiring the ground upon which the hearsay evidence is founded to be stated."

Was not the answer to the first submission obvious? What it not obvious that the rules of evidence did not apply to affidavits? Apparently not, because the appellant found strong support in a forthright dissenting judgment from the President of the Court of Appeal. Of the proposition that because the Evidence Act did not apply to affidavits there were therefore no rules of evidence relating to what could be set out in affidavits, other than the rules contained in O. 18, Sir Charles Newbold, P. had this to say:

> *"I reject such a proportion completely; and I say that it is not only wrong but manifestly wrong." "To accept that would be to substitute chaos for order and to permit any sort of evidence being placed before a court ..." "the proposition is so manifestly wrong that no one has had the temerity in the past to advance it."*

Sir Charles Newbold P. abhorred the vacuum in the rules of evidence relating to

affidavits apparently created by s. 2 of the Evidence Act on these grounds:

> *"It is true that what this court has to decide is the law of Kenya and it is true that the Evidence Act does not apply to affidavits tendered to the court but it is also true, as is shown by the judgments in the cases to which I have referred, that the basic rules of evidence nevertheless apply to evidence tendered by affidavit and if those basic rules are not complied with the evidence is of no probative value whatsoever and should be rejected."* (at 622)

But what are these rules of evidence that affidavits must comply with if they do not comply with the Evidence Act. Sir Charles is not very clear. At one stage he refers to them as "the fundamental rules of evidence". At another he calls them "the normal rules of evidence." He finally settles on "the basic rules of evidence." But even then refers to these requirements as "the practice of the courts from time immemorial."

What are these fundamental, normal, basic rules of evidence practiced from times immemorial if not the very rules codified into the Evidence Act? Did Sir Charles mean 'the common law rules' as suggested by the plaintiff's counsel?

Is there any law of evidence residuary to that contained in the Evidence Act and applying in Kenya? Sir Charles does not meet the point and does not answer the argument of his brothers on the bench that the Evidence Act contains the whole of the law of evidence in Kenya.

Would the provisions of the then applicable Kenya (Jurisdiction of Courts and Pending Proceedings) Regulations 1963 (L.N. 319/1963) (now set out in S. 3 Judicature Act, Cap. 8) permitting the application of the substance of the common law as at the reception date have been of assistance? They were not prayed in aid. But the applicability of any other rules of evidence. In view of the fact that the Evidence Act is a written law and deals specifically with the mode of proof of documents it would not be open to the court to look to any prior common law rules to re-apply what had been specifically excluded. Such peeking behind the curtain of codification would defeat the very purpose of enacting common law and would create a dual set of laws. Such a practice would create the exact chaos sought to be avoided. Thus, vigorously though Sir Charles advances this thesis and right thought it may be, it is submitted that on this point the majority view was correct in that the words of the legislation do not really permit of interpretation other than that the Evidence Act is expressive of the whole of the law of evidence of Kenya.

Was the President stronger on his second ground? Would the President have been stronger basing himself on the ground that at no stage is hearsay evidence permitted in

an affidavit as evidence of fact nor is any other departure from the rules of evidence other than that contained in O. 18 r. 3(1) permitted? An examination of O. 18 r. 3 as has often been remarked reveals as admissible only matters deponed to on one's own knowledge.

Nowhere is it permitted that a statement may be deponed to as being a fact when the source of that knowledge is information. This is prohibited in interlocutory applications as in other applications and whether the source of that information is disclosed or not.

What is permitted is that if a matter is deposed to on belief and the ground of that belief is information from a third party, that information is admitted, provided its source is specified.

This is best submitted by an illustration:

A plaintiff makes an application for warrant of arrest before judgment on the ground that the defendant is about to abscond or leave the jurisdiction. The plaintiff can know of this of his own knowledge or he can believe it. He can know of it if for example the defendant told him he was leaving. He can believe it either because of extraneous facts upon which he grounds his belief – e.g. the defendant has to the plaintiff's knowledge sold his house, car and furniture in haste; or the plaintiff can believe it because he has been informed by some party of some fact leading to that belief e.g. the plaintiff is informed by a travel agent that the defendant has bought six tickets for his whole family.

It is submitted that the courts, and now in Kenya the C.P. Rules, have permitted, in fact required, the plaintiff to state the information and the source thereof. But the reason they have done so is not to permit a new method of proof under O. 18, r. 3(1), C.P. Rules, which is not available under the Evidence Act. They have permitted hearsay in order to weigh the fact of the belief and not the 'fact' of the information received from the third party.

That is, the averment now permitted, namely that the travel agent informed the plaintiff that the defendant had bought tickets, is not probative of the fact that the defendant is in fact leaving, nor even of the fact that the defendant has sought such tickets, but probative only of the fact that such a belief has been induced in the plaintiff deponent. The deponent then swears to the existence of the belief, and not to the existence of the fact. He cannot swear to the latter because the travel agent may be lying, or mistaken. Thus he cannot know the matter as a fact, but he can believe it to be true.

The plaintiff deponent then presents that belief to the court together with the grounds thereof and asks the court to act on that belief. But the court is not bound to because it has little before it but a belief. If the belief is well grounded and the grounds are laid

before the court the court will act because it is satisfied that its discretion ought to be exercised as prayed for. If not, it will refuse the application.

That is why O. 18 requires that grounds be stated. Both the belief and its grounds must be given (O. 18, r. 3(1). The ground of a belief may be the deponent's own knowledge. It would then, for example, be stated thus:

> "*I believe that the defendant is about to leave because in my presence at the club he sold his house, car and furniture in haste and at prices demonstrably below the value thereof.*"

But it is also a ground to say,

> "*I believe that the defendant is about to leave because I have been informed he has bought air tickets for himself and his family.*"

Here the ground is information not direct knowledge or observation.

But giving the ground here – the information – is not enough. What the courts demand in addition is disclosure of the source of information. So that before the belief may be acted upon the deponent should state:

> "*I believe that the defendant is about to leave because I have been informed by one* ***Mr. XYX, the reservations clerk of Tours Travel Agency of this town****, that the defendant has bought air tickets for himself and his family.*"

The reason for this requirements is obvious: the court must be able to assess the creditworthiness of the deponent's belief by examination of the source of the information. Obviously more weight will be given to a travel agent's word than say to the defendant's unfriendly neighbour's, who could himself only have learnt of it secondhand, and who would be more careless in spreading disparaging stories about the defendant.

Accordingly this viewpoint of the reason why averments on information are permitted in interlocutory applications would have strengthened the dissenting judgment by underlining by a major point the argument advanced in favour of limiting the contents of affidavits to matters governable/governed by the Evidence Act, namely that apart

from the specific extension of O.18 r. 3(1) there is no intent on that part of the legislature there or elsewhere to otherwise dispense with the rules of evidence where affidavits are concerned.

Sir Charles himself advances the argument in these terms – feebly in comparison with his more forthright condemnations:

> *"The very provisions of O.18 r. 3(1) which permit in certain applications statements in affidavits to be based on belief thus relaxing in those circumstances the hearsay rule, show that rule 3 is based upon the assumption that the normal rules of evidence apply to affidavit. Were it otherwise r. 3 would be a classic example of straining at a gnat but swallowing a camel."*

He might have foundered here on the rocks of s. 2 of Evidence Act, which though not meaning to, simply removed all the requirements of the Act and left in only the safeguards of O. 18 which penalize by way of costs rather than rejection.

Could it not have been argued that the legislature had obviously considered that s. 2's exemption ought to be there because of O. 18's provisions? While s. 2 had prevented contradictory legislation in respect of interlocutory applications, had its terms been unintentionally too wide, with the result that it had exempted all affidavits in non-interlocutory matters from all the provisions of the rules of evidence? Was this not a result manifestly absurd? Was it not permissive of abuse of the process of the courts? Would it not lead to futile results?

Was there therefore not room to interpret the intent of the legislature in a more productive fashion? Was there not room to exercise the inherent powers of the court to reject a dangerous document which was strictly within the terms of the legislation but carried in it the germs of injustice?

Perhaps so, but whatever the weaknesses of the argument advanced the position was strong. For so the Kenya parliament thought. For shortly after the decision, and following upon it, the law was altered by the Statute Law (Miscellaneous Amendments) Act No. 10 of 1969 which repealed the old s. 2. Evidence Act, and enacted that:

> *"Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court."*

The position now therefore is that in Tanzania and Uganda the view that prevailed in

***L.I.C. v. Panesar*** in the Court of Appeal obtains and the case applies. In Kenya however the case is no longer such authority, because of the amendment.

But it must be noted that the application now of the Evidence Act is still subject to any other act or rules of court. Since O. 18 is such rule of court the old position still prevails regarding certain categories of applications and affidavits. But this exemption applies only to affidavits relating to interlocutory applications, (or those admitted with the leave of the court). We accordingly must turn to a consideration of what constitutes an interlocutory proceeding.

**INTERLOCUTORY PROCEEDINGS**

What then are interlocutory applications for the purpose of O. 18? The question was examined in ***Gilbert v. Endean*** (1878) Ch. D. 259, upon a similar rule:

> *"... for the purpose of this rule those applications only are considered interlocutory which do not decide the rights of parties but are made for the purpose of keeping things in status quo till the rights can be decided, or for the purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties."* (at 268, per Cotton L.J.)

A distinction therefore has to be drawn between such interlocutory proceedings and those proceedings which are interlocutory in form but in which the rights of the parties are in fact being determined finally. The latter often has the appearance of the former, but the courts are aware of the difference. Thus in ***Gilbert v. Endean*** the court continued:

> *"How many of the cases which are brought before the court on motions and on petitions, and which are therefore interlocutory in form, are not interlocutory within the meaning of that rule as regards evidence. They are to decide the rights of the parties and whether the form may be in which such questions are brought before the court, in my opinion the evidence must be regulated by the ordinary rules, and must be such as would be admissible at the hearing of the cause."* (ibid.)

It is clear therefore that it is not the timing or the form of an application that decides whether it is an interlocutory application within the meaning of the rule, but the substance thereof. If proceedings are not interlocutory, the affidavit will not be allowed

to contain hearsay and such parts of the affidavit will be struck out. The distinction was dealt with by Simpson J. (as he then was) in ***Mackenzie (K) Ltd. v. Pharmico Ltd.*** (1976) K.L.R. 270. He found that the Plaintiff:

> *"for his part conceded that paragraph 7 was hearsay and in-admissible, unless these proceedings are interlocutory. This application will determine the rights of the parties to the property of the judgment debtor and is not in my view interlocutory. Paragraph 7 of the affidavit must be struck out."* (At 273 A).

In ***Mayers v. Akira Ranch Ltd.*** (1976) E.A. 169 High Court dealt with the issue thus:

> *Considering in the first place the proviso to r. 3(1) I am satisfied, having regard to the view of the Court of Appeal in* ***St. Benoist Plantations Ltd. v. Felix*** *(1954) 21 E.A.C.A. 105 and in* ***Boyes v. Guthrie*** *(1969) E.A. 385, that proceedings such as those in the instant case, that is, an originating application brought under S. 118 of the Companies Act, cannot be regarded as interlocutory in nature when there is no suit in existence within the framework of which they are brought,"* (at 171A).

The effect then is that the provisions of O. 18 permitting averments based on information and belief may not be relied upon when the matter, apparently an interlocutory application, is in reality one that will decide the matter in issue between the parties finally.

**LEAVE OF THE COURT**

It is not only in interlocutory proceedings that matters may be deponed to information and belief. In Kenya this can be done even in proceedings where the final rights of the parties are being determined. But it can be done then only with the leave of the court, O.18, r. 3(1), provides for this.

However there is no reported occasion upon which such an application has been made and determined. Harris J. though, has given very useful indications of what a court should keep in mind when the occasion for such an application arises. In ***Mayers v. Akira Ranch Ltd.*** (1974) E.A. 168, after having rejected the affidavit on the ground that the proceedings were not interlocutory, he considered the alternative course of admitting it "by leave of the Court":

> "*Furthermore, although the Court may leave to admit in evidence an affidavit containing statements of information and belief and showing the sources and ground thereof, no such leave has been sought here and I do not feel that it would be proper, in view of the sharp contest which has arisen in the matter, possibly involving or thought to involve a question of principle, to grant such leave without it being expressly asked for,"* (at 171, B).

## CONCLUSIONS

What then are the conclusions that may be drawn from the above survey of the courts' treatment of defective affidavits of the type discussed? We may hazard the following:

An affidavit must disclose what is averred to from the deponent's own knowledge, what from information and what as belief.

> A concluding averment in an affidavit that "What is stated above is true to the best of my knowledge, information and belief" is meaningless. A more proper averment, which takes into account all the cases considered above, would be in terms such as these:
>
> > "*What is stated above is true and to my own knowledge, save as to matters deponed to on information and belief, the sources and grounds whereof are respectively specified and set out hereinabove."*

But this duty to disclose need not be carried out in the form of express averments to that effect. It is sufficient if the Court can perceive from the face of the affidavit which averment is from which such source.[9]

An affidavit which is made on belief or information but from the face of which the Court cannot perceive the grounds and sources thereof, is defective.

When the affidavit is held defective for that reason the whole affidavit will not necessarily be rejected. Only those parts which offend will be held to be inadmissible as evidence. Those offending parts may also then be liable to be struck out from the affidvit.[10]

It is submitted that these represent a move away from the stricter position represented by the early cases of Phakey v. Worldwide and ***Standard Goods*** in that these cases indicated complete rejection of the offending affidavit. These have been therefore a shift in the manner in which the courts have handled defective affidavits of this type. But it is submitted the authorities have been constant in what constitutes a defect in an affidavit and the recent cases have in this aspect only confirmed the basic requirements laid down by the early decisions. While the views presently being applied in the courts accord with equity and day to day practical considerations it is submitted that the courts have not fully structured their actions and the source of their actions have not been spelt out with the detail merited. It is indicated that their authority will ultimately derive from the Evidence Acts, but it is hoped this will be clarified.

The result of the above changes has been, correctly, to check the litigant from seeking to advance his case by inadmissible evidence, while not shutting him out on the ground only that parts of his affidavit are in breach of the rules.

The shift has therefore been in keeping with the precept that Procedural rules are intended to serve as the handmaidens of justice, not to defeat it ..."

***Iron & Steelwares Ltd. v. C.W. Martyr & Co***. (1956) E.A.C.A. 175 at 176.

See Megarry. A Miscellany-at-Law" (London, Stevens, 1955), 145. Judicial cynicism regarding the deterrent and probative value of the oath and the affidavit has expressed itself in the kind of wit judges like to indulge in. "When (in the Gladstone libel case) Birkett suggested that the offending sentence about Mr. Gladstone was not essential to an article which dealt primarily with Lord Cecil and the League of Nations, the witness replied, "Digression is one of the arts of essay-writing. This is an essay, not an affidavit." "It appears to be just as unreliable," the judge (Mr. Justice Avory) observed." H. Montgomery Hyde. "Norman Birkett" (London, Hamish Hamiton, 1964).

William O. Douglas. The Court Years (1980), Random House, New York), 181. "Chief Justice Stone recessed the Court while attendants and a doctor administered to the stricken lawyer."

World-wide Agencies Ltd. v. Phakey (1948) 15 E.A.C.A. 1. "If that is so," continued the Judge. "The sooner it is stopped the better," an injunction that the succeeding 35 years have been largely unobserved.

[3a] A fresh application must have a fresh affidavit in support: **Patel v. Agard** (1951) 24 K.L.R. (2) 21.

As Onyuike J. pointed out in Thssen-**Stahlunlon v. Kibo Wire Industries Ltd. (1973) L.R.T.** n. 54, an affidavit.

> *"Should not be used as an occasion to enter into legal discourses or to pose hypothetical arguments. This will defeat the very purpose of an affidavit which is to set out facts on which a party intends to rely either as the basis of a legal submission or the existence of which will found the application sought."*

The position regarding the premature affidavit may be summarised thus:

> *"I do not personally think that a premature affidavit does go to jurisdiction, as a court can always allow it to be re-sworn and re-dated on objection being taken in time ..."*

(**Ibrahim v. Sheikh Bros. Investment Ltd.,** (1973) E.A. 119 per Law J.A. at 120)

> "*In my opinion an affidavit which is sworn before action is valueless and cannot be acted upon even if it is filed after issue of the summons. The court may, however, in its own discretion, make an order on it upon an undertaking by the applicant to reswear and refile the affidavit but such discretion will be exercised only where refusal to make the order prayed for would cause irreparable damage, hardship and injustice to the applicant.*

(**Wahinya v. Wahinya** (1976) K.L.R. 96, per Chesoni J. at 97).

[6] **J.L. Young Manufacturing Co. Ltd.** (1900) 2 Ch. 753, 755.

**Karimjee Properties Ltd. v. Khaki & Camerapix** (1970) H.C.D. 235 (T).

U: Cap. 43, s.2; T: Act No. 6 of 1967, S.2.

See, for example, **Sapra Studio Ltd. v. Tip Top Clothing** (1971) E.A. 489, at 492 H-1.

[10] See ***Mayers v. Akira Ranch Ltd.*** (1974) E.A. 169, at 172; and Order 18, rule 6, Civil Procedure Rules.