Moshi Co-operative University

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Summer October 18, 2018

ORDER XIX: THE LAW OF AFFIDAVITS

MWAKISIKI MWAKISIKI, *Moshi Co-operative University*



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CHAPTER TWENTY ONE: AFFIDAVITS[1]

BY

MWAKISIKI MWAKISIKI EDWARDS

NOTE: This chapter has been extracted from Mwakisiki ME (2018). Civil Procedure law in Tanzania: A Student Training Manual: Moshi Cooperative University.

You can request the copy of the whole manual via +255 678 143 774 or Mwakeyeddy@gmail.com

Affidavits defined

Affidavit is a statement in writing, made before an officer of the court authorized to administer oaths. The person making the affidavits known as the **deponent** for he 'deposes' to the facts contained therein. An affidavit is a declaration of facts that is made voluntarily by the declarant before an officer authorized to administer oaths.

For instance, interrogatories are answered by way of affidavit. Where a party is bound to disclose documents in answer to interrogatories, it is called **affidavit of documents**. A declaration of facts that have been reduced to writing and affirmed before an officer competent to administer oaths is an affidavit. Simply put, it is a declaration of facts drawn up in first person and states facts alone and not inference.

Katiti J, in the case of **OTTU v. AG and others[2],** attempted the definition of affidavit. He defined the term into the following words; " The expression, "affidavit" , unfortunately despite its being a lawyers everyday tool, is not defined by any statute, I could lay my hands on. But the lexicon meaning of the expression "affidavit" is that it is a sworn statement in writing, made especially under oath , or affirmation before an authorized Magistrate or Officer."

In **East African Cables (T) Ltd versus Spencon Services Ltd; MISC[3],** It's was held that (i) In law affidavit and or counter-affidavit (as the case may be) is evidence. It is a voluntary declaration of the facts written down and/or sworn to by the declarant before an officer authorized to administer oaths. Unlike pleadings (plaint and written statement of defence and other pleadings), affidavit and counter–affidavit are prima facie evidence of the facts stated therein.

Usually, a fact has to be proved by oral evidence as affidavits are not included in definition of evidence under Section 3 of TEA but a court may order that any fact may be proved by affidavit. The court may

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[1]Order XIX of the Civil Procedure Code
[2]Misc. Civil Application No. 15/97, High Court of Tanzania, at Dar es salaam (Unreported)
[3]Commercial Application No 61 of 2016: High Court of Tanzania (Commercial Division) at Dar es Salaam (Unreported).

do so of it's own motion or on application of any party. The court may also, at the instance of either party, order attendance of the deponent for his cross-examination, unless he is exempted from personal appearance in Court[4].

Affidavits are not included within the purview of the definition of "evidence" as has been given in Section 3 of the Evidence Act, and the same can be used as "evidence" only if, for sufficient reasons, the Court passes an order under Order XIX of the Code of Civil Procedure.

Matter to which affidavits shall be confined

An affidavit must contain only such facts that are known to the deponent or such information that he believes to be correct. Order XIX Rule 3 of the Civil Procedure Code which states:-" Affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interdictory applications on which statements of has belief may be admitted'.

In **Noormohamed v. Kassamali[5],** it was held that "an affidavit which does not say whether the facts stated are of the deponent's own knowledge or on information given by someone else, ought not to be accepted by a court."

Further in the case of **Assanand & Sons v. E.A.Records[6],** in which the deponent had stated in his affidavit as follows:- "That the facts deposed herein are true to the best of my knowledge, information and belief and I make this affidavit in support of plaintiff's application.....".

At page 364 Sir K. O'Connor P. said:- "The affidavit of Mr. Cambell was 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 information and belief, and, **secondly**, it did not distinguish between matters stated on information and belief and matters deposed to from the deponent's knowledge (**see Standard Goods Corporation Ltd v. Harakhchand Nathu & Co (1) (1950), 17 EA,CA 99**). The court should not have acted upon an affidavit so 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, and inference from undisclosed facts, or a conclusion of law."

In The National Bank of Commerce vs Manubhai Shankarbhai Desai and others, (1969) HCD 206; Kubach & Saybook Ltd v Hasham Kassam & Sons Ltd (1972) HCD 228 and Mtale v January Kapembwa (1976) LRT N.7. Principles pronounced in all these cases are now settled; an affidavit should clearly show which matters are deposed to from the deponent's knowledge, information and belief, and on each of these categories the sources thereof should be disclosed.

An affidavit which does not qualify as above should not be acted upon by Court. However the court can act on those parts of the affidavit which qualify the test and strike out those which do not.

In **Uganda vs Commissioner of Prisons, Ex-parte Matovu[7]** "….The Affidavit sworn to by the counsel is also defective. It is clearly bad in law. Again as a rule of practice and procedure, an affidavit for use in

[4]Proviso of Rule 1 and Rule 2 of Order XIX of the Civil Procedure Code
[5]20 EACA 8
[6][1959] E.A.360
[7][1966] EA514 at 520

court, being a substitute for oral evidence, should only contain elements of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true. Such an affidavit must not contain an extraneous matter by way of objection or prayer or legal arguments or conclusion. The Affidavit…….. should have been struck out."

Generally the affidavit must be confined to such statements as the declarant is able of his own knowledge to prove but may also contain statements of information and belief with grounds stated thereon. Apart from the statement declaring the facts, an affidavit also must contain a verification clause, a **jurat** and signature of the declarant. Without these an affidavit is rendered incurably defective.

Are Affidavits Pleadings?

Essentially an affidavit does not fall within categories of the pleading **strictly speaking an affidavit is not a pleading.** The distinction between the two was made in the case of **East African Cables (T) Ltd versus Spencon Services Ltd; MISC[8],** It's was held that (i) In law affidavit and or counter-affidavit (as the case may be) is evidence. It is a voluntary declaration of the facts written down and/or sworn to by the declarant before an officer authorized to administer oaths. **Unlike pleadings (plaint and written statement of defence and other pleadings),** affidavit and counter–affidavit are prima facie evidence of the facts stated therein.

(ii) When a fact is stated on oath, it has to be controverted on oath and this gives the court an opportunity to weigh which fact is probably true than the other. When the fact sworn or affirmed is not controverted then it is deemed to be admitted.

(iii) When a person swears or makes a sworn declaration of a fact the best way to challenge him/her is to swear a fact which tends to show that what he has sworn to was false. Putting to him to strict proof of the fact without giving your side of the story which you want to be believed amount to admission of the fact. **A requirement of strict proof of the facts applies to pleadings in the suit** (i.e plaint, written statement of defence e.t.c) and **not for affidavit and counter-affidavit which are evidence.**

AFFIDAVITS VERSUS WITNESS STATEMENT

Mansoor, J, in his ruling in the case of **MOHANS OYSTERBAY DRINKS LIMITED PLAINTIFF VERSUS BRITISH AMERICAN TOBACCO KENYA LIMITED[9],** had the following to say;

[8]Commercial Application No 61 of 2016: High Court of Tanzania (Commercial Division) at Dar es Salaam (Unreported).

[9]COMMERCIAL CASE NO. 90 OF 2014, IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM

A person who gives evidence by affidavit, affirmation or deposition is called a "**deponent**"; and a person who gives evidence by witness statement is a **'witness'**. Thus a witness statement is not an affidavit, and the rules governing affidavits cannot be made to apply to witness statements.

However Affidavits and witness statement have some common features. They both must comply, inter alia, with the following: (a) the date and place made (b) they both must be sworn statements of the maker and the name of the person before whom it is sworn must be given;

On this there is a difference and in the case of a witness statement, the statement must be in the maker's own words, **while** in affidavits information received from third parties, and statements of beliefs are permitted, provided that the source of information. and belief are given and verified .

There are strict requirements applying to affidavit as provided by Order 19 of the Civil Procedure Code, such as, affidavits must state which of the statements in it are made from the maker's own knowledge and which are matters of information and belief; and the source for any matters of information and belief must be shown. **Whereas** in a witness statement, the statements must be on a makers own knowledge and statements of belief and information from third parties are not allowed, since that would amount to hearsay evidence.

An affidavit is the testimony of the person who swears it. A witness statement is the equivalent of the oral evidence which the maker would, if called, give in evidence.

The jurat of an affidavit is a statement set out at the end of the document which authenticates the affidavit. It must be signed by the deponents; it must be completed and signed by the person before whom the affidavit was sworn whose name and qualification must be printed beneath his signature; and, contain the full address of the person before whom the affidavit was sworn; An affidavit must be sworn before a person independent of the parties or their representatives.

Only the Commissioner for Oaths may administer oaths and take affidavits. A **witness statement on the other hand**, must include a statement of truth by the intended maker that the facts stated in the witness statement are true so as to' avoid verifying a witness statement containing a false statement without an honest belief in its truth.

This shows that although there are some similar requirements between affidavits a witness statements, **a witness statement is not an affidavit and the rules governing affidavits do not apply to witness statements.**

VERIFICATION OF AFFIDAVITS

In **Paul Makaranga versus The Republic[10];** Held:-(i) An affidavit which lacks verification clause is incurably defective; (ii) **A jurat**[11] that lacks the name of the Commissioner who administered the oath renders the affidavit incurably defective.

In **Juma Said and Another versus the Republic[12],** it was held that:-The purpose of verification clause is to show whether the facts assented by the deponent are of its own knowledge or based on information or beliefs. Since an affidavit is a substitute of oral evidence the requirement of verification thereon goes so the root of substantial justice, and not just a matter of form and not a mere technicality.

In **DB Shapriya and Co Ltd vs Bish International EALR[13]**, it was held that "an affidavit is governed certain rules and requirements that have to be followed religiously. The place at which an affidavit is sworn or oath is taken has to be shown in the jurat....an affidavit which doesn't show where it was sworn or oath was taken is defective. Similarly In **Oryx Oil Co. Limited vs MC Juro Shipping Agency Limited[14],** it was stated that" the omission to state the place where the affidavits was administered is fatal ".

Section 8 of the Notaries Public and Commissioner for Oath Act[15], provides that every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act **shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made.**

This provision is couched in mandatory terms. Therefore, in my view, when it is breached by showing a wrong date, the purported affidavit becomes ineffectual. It cannot serve the purpose for which it was intended.

What are the contents of affidavit filed in the Labour Court?

In **Vodacom (T) Ltd vs. Zawadi Bahenge and 6 Others[16];** it was held that Rule 24(3) of the Labour Court Rules prescribe special specie of affidavits peculiar to labour practice. Affidavits in Labour Court are

[10]Criminal Appeal No 3 of 2010: Court of Appeal of Tanzania at Mwanza (Unreported)
[11]According to Black's Law Dictionary is "the clause written at the foot of the affidavit stating when, where and before whom such affidavit was sworn."
[12]Criminal Application No 4 of 2010, Court of Appeal of Tanzania at Mwanza (Unreported)
[13][2002] 1 EA 47
[14]Commercial Case No 263 of 2002
[15][Cap 12 R.E 2002]
[16]MISC Application No. 223 of 2013: High Court of Tanzania (Labour Division) at Dar es Salaam(Unreported).

distinguished from affidavits in ordinary civil cases, whose contents are prescribe by law plus judicial precedents which are part of our jurisprudence.

Similarly in **Sophia Kweka vs. The Director, Nabaki Africa Ltd[17],** it was stated that Rule 24(3) of the Labour Court Rules provide for special specie of affidavits peculiar to labour practice and, therefore, Order XIX Rule 3 of the CPC does not apply.

AMENDMENT OF AFFIDAVITS

Bakshi, P. M (1997). Mula on the Civil Procedure, 15th Edition, N. M. Tripath Private Limited, Bombay, page 1508, item 2 (c), second paragraph which provides:- "A defective affidavit cannot be amended but a fresh affidavit setting out the facts correctly can be filed".

Further "Every defect in an affidavit is not fatal. For example non mention of date and place is a mere irregularity". That may be so where the date is not mentioned. But where the commissioner for oaths has the audacity to mention a wrong date that, in my view, is fatal.

Affidavit (which is evidence on Oath/affirmation) can not be amended except by lodging another affidavit which is correct (No need to aver on title (Amendment Affidavit)[18].

COURTS DECISIONS REGARDING AFFIDAVITS GENERALLY

In **Kubach & Saybook Ltd vs Hasham Kassam & Sons Ltd[19],** BRAMBLE, J "A court will not act upon an affidavit which does not distinguish between matters stated on information and belief and matters deposed to from the deponent's own knowledge or as regards the former which does not set out the deponent's means of knowledge of his grounds or belief."

In **Standard Goods Corp. Ltd vs Harakchand Nather & Co[20],** " It is well settled that where an affidavit is made on information, it should not be acted upon by the court unless the sources of information are specified". It was found that the deponent in an affidavit stated facts but did no say which were from hi sown observation and which were from information. Similarly in **Re J. L. Young Manufacturing Co[21]** it was laid down that an affidavit of information and belief not stating the source of information and belief is irregular.

In **Salima Vuai Foum vs Registrar of Cooperative Societies and Three Others[22],** Where an affidavit is made on information, it should not be acted upon by any court unless the sources of information are specified. - As nowhere in the affidavit, either as a whole or in any particular paragraph, is stated that the facts deposed or any of them, and if which ones, are true to the deponents own knowledge, or as advised by his advocate, or are true to his information and belief, the affidavit was defective and incompetent, and was properly rejected by the Chief Justice.

[17]MISC Application No. 242 of 2013: High Court of Tanzania (Labour Division) at Dar es Salaam. (Unreported).
[18]See the Registered Trustees of Joy in the Harvest v. Hamza Sungura, Civil Appeal No.3 of 2003 (Unreported)
[19][1972] HCD 228
[20][1950] EACA 99
[21][1900] 2 Ch. 753
[22][1995] TLR 75 CAT