



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 187 OF 2004**

**BIVE WAVE LIMITED T/A DIVING THE CRAB .....  
PLAINTIFF**

**VERSUS**

**SPIRE PROPERTIES (K) LTD T/A DIANI REEF BEACH RESORT .....  
.....DEFENDANT**

**Coram: Before Hon. Justice Mwera  
Ghalia for the Plaintiff/applicant  
Mrs. Gudka for the Defendant/Respondent  
Court clerk – Sango**

**RULING**

When this court was about to hear the plaintiff's application dated 4.8.04, brought under O. 39 rr. 1, 2, 9 Civil Procedure Rules and S. 3 Civil Procedure Act Mr. Ghalia (for the applicant) sought to argue his preliminary objection regarding the suitability and validity of the defendant's replying affidavit to the said application which was sworn on 13.8.04. The notice served in that regard read:

*"1. That the defendant's affidavit sworn by Deneys Swart on 13th August 2004 is incurably incompetent as some of the paragraphs therein contain facts whose sources have not been disclosed by the deponent who is unable of his own knowledge to prove them.*

The court was referred to the provisions of O 18 r. 3 Civil Procedure Rules:

*"3. (1) 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."*

These being interlocutory proceedings and from the arguments of counsel focus was on whether or not the said deponent had disclosed sources of the information he swore to particularly in paragraphs 5, 6 and 7 of the subject replying affidavit.

Mr. Ghalia placed before this court authorities including extracts from *Mulla: The Code of Civil Procedure Vol. 2 (11 th Edn)* as it relates to O 19 rr. 2, 3 (of India) which essentially corresponds with the

substance in our O 18 r. 3 Civil Procedure Rules. He also put forth Indian cases to emphasise the point that:

*“Where an averment is not based on personal knowledge but on information, the source of information must be clearly stated so that the opposite party gets an opportunity to verify the averment and make an effective answer.” (pp. 2247, Mulla)*

Then he went on to impeach the validity of Swart’s averments in the said 3 paragraphs in that when he deponed that the applicant was never a legal tenant of the defendant upto sometime in July, August 1996, Swart could not know this because he was never with the defendant until 2003. And that he had not disclosed where he got that information or knowledge from.

Further that in paragraph 6 Swart had referred to some correspondence dated March 2001 again before he got on the scene and lastly that he had made references to some purchase of some equipment and removal of others without saying from where that information came. Accordingly he asked this court to expunge all (or parts of the subject replying affidavit) from the record.

Mr. Ghalia did not however press this court to allow the injunction orders in his application as if that application was not opposed. Mrs. Gudka did not have a quarrel with the requirements and mandate covered by O. 18 r. 3 Civil Procedure Rules or the Indian authorities. She conceded and rightly so that those principles of law reign and should be complied with. And that her clients’ affidavit was actually in due compliance. That the deponent thereof did that when at every stage in the paragraphs put under the spot light, he exhibited the letters/documents on which any stated averment rested. These were exhibited as annexures DS1, DS2, DS3, DS4, DS 5 and DS 6.

The court looked at them all. It was satisfied that by such annexing those documents the defendant had:

*“----- clearly stated the source of his information so as to enable the opposite p arty to verify the averments and make effective answers” (paraphrase).*

In any event this court would as well in its discretion consider whether or not to receive any affidavit sworn for the purpose of being used in the suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in its form. Had it not been satisfied as above it could have invoked this discretion.

In sum the preliminary objection is rejected and parties are directed to fix the hearing dates for the application dated 4-8-04. Costs to go to the defendant.

**Orders delivered on 30th September 2004.**

**J.W. MWERA**

**JUDGE**