



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Civ Appli 778 of 2004**  
**IN THE MATTER OF MUSIC COPYRIGHT SOCIETY OF KENYA LIMITED**  
**AND**  
**IN THE MATTER OF THE COMPANIES ACT**  
**(CHAPTER 486 OF THE LAWS OF KENYA)**  
**AND**  
**IN THE MATTER OF AN APPLICATION FOR APPOINTMENT OF**  
**INSPECTORS TO INVESTIGATE THE AFFAIRS OF THE COMPANY UNDER SECTION**  
**166(b) OF THE COMPANIES ACT**

**BETWEEN**

**THE REGISTRAR OF COMPANIES ..... APPLICANT**

**AND**

**MUSIC COPYRIGHT SOCIETY OF KENYA ..... RESPONDENT**

**R U L I N G**

The Applicant has moved the court by way of a Notice of Motion dated the 10<sup>th</sup> June 2004 for orders (*inter alia*) that the court do appoint competent inspector(s) to investigate the affairs of the Respondent and to report thereon in such manner as the court may direct. The Motion is supported by the affidavits of Longet Terer and Premchard Pouka Olang' respectively both made on the 10th June 2004.

Before the hearing of the said application, the Respondent took a preliminary point of law that both such affidavits are fatally defective and therefore inadmissible for the reasons set forth in the Notice of Preliminary Objection dated and filed on the 26<sup>th</sup> July 2004, the subject of this Ruling.

Paragraph 3 of Terer's said affidavit reads as follows:-

"That following information given to me and a series of complaints lodged with the Registrar of Companies by several members of the company, which information and complaints I have reason to believe to be true and also following subsequent meetings held with several of their representatives and upon further perusal of the company file and documents contacted therein I am of the opinion that circumstances exist that make it imperative for an investigation of the company by this Honourable court."

while paragraph 6 thereof is in the following terms:-

"That what is stated herein above is true to the best of my knowledge save for those on information and belief sources and grounds whereof have been respectively shown."

Mr. Nyamunga for the Respondent in his submissions contended that though Terer in his said affidavit purports to depone to information given him and also to a series of complaints lodged with the Registrar of Companies, the sources thereof have not been disclosed. In support of his arguments, learned counsel cited several decisions including **Standard Goods Corporation Ltd. v Harakhchand Nathu & Co.** [1950] E.A. 99 and **Kentainers Ltd. v V.M. Assani and Others** (Nairobi HCCC No. 1625 of 1996) (unreported) and on the authority thereof urged that Terer's said affidavit be struck out.

With regard to Olang's said affidavit, Mr. Nyamunga argued that it was fatally defective for reasons including that the deponents had no authority of the Respondent to make such affidavit as is expressly required under order 3 rule 2 of the Civil Procedure Rules, citing also the decision in **Microsoft Corporation v Mitsumi Computer Garage Ltd.** [2001] 2 E.A. 460. Further, Mr. Nyamunga took the view that Olang's said affidavit was in any event superfluous and misplaced inasmuch as only the Registrar of Companies can competently move the court under section 166 of the Companies Act [Cap, 486]. For these reasons, Mr. Nyamunga urged that the Olang' affidavit should also be struck out, and consequently the Motion: **Kenya Commercial Bank Ltd and Another v. Kenva Hotels Ltd.** (Civil Application No. NAI 40 of 2004 (24/04 VR)) (unreported).

In reply, Mr. Adera argued that paragraph 3 of Terer's said affidavit sufficiently discloses by description the sources of the deponent's information as being "*several members*" and "*several of their representatives*", citing the **Kentainers** case (supra) in support of this view.

On Olang's said affidavit, Mr. Adera submitted that the deponent does not purport to make the affidavit on behalf of the Respondent but rather in his own capacity as a member thereof with personal knowledge of the facts deponed. Mr. Adera further contended that an application under section 166 of the Companies Act aforesaid may be supported by an affidavit of a member of the company concerned if such member is seized of the relevant facts. He urged that the preliminary objection be dismissed with costs.

I have considered the preliminary objection in light of these submissions and the law. Dealing first with the Terer affidavit, I would respectfully agree with the view adopted by Mr., Nyamunga that the sources of information identified therein by description as being "*several members of the company*" and "*several of their representatives*" are too vague as to be able adequately to discharge the requirement of disclosure which is intended to assist the court in evaluating the strength of the foundation of a deponent's belief.

Terer offers no grounds for entertaining his belief of the information and complaints deponed to and presumes that the court should take it for granted that the members of the Respondent who gave him the information and/or made the complaints were fully conversant with the matters deponed to. There is no basis for me to be persuaded accordingly.

Turning to the Olang' affidavit, and with respect, I would agree with Mr. Adera that an application brought by the Registrar of Companies under section 166 of the Companies Act aforesaid, in addition to the Registrar's affidavit, may also be supported by such other affidavit(s) as may be necessary and expedient in the circumstances, including an affidavit of a member of a company, particularly for the purposes of adducing evidence as to the matters envisaged under sub-section 166 (b)(i)(ii)(iii) of section 166 aforesaid perpetuated by the principal officers of a company.

The foregoing notwithstanding however, I find that Olang', like Terer, also fails to disclose in his affidavit which of the matters deponed to are matters within the deponent's own knowledge, which are matters of information and which are matters of belief and the grounds of such belief. It is not conceivable that all of the matters deponed to in the Olang' affidavit are within his own personal knowledge.

Finding, as I do, that the affidavits of Longet Terer and Prechard Pouka Olang both respectively made on the 10th of June 2004 are defective for the reasons aforesaid, it is ordered that each of them both such affidavits be and are hereby struck out. In consequence, and as both such affidavits form the fulcrum to the Notice of Motion also dated the 10th June 2004 the Motion itself is rendered incurably defective and it is ordered that the same be and is hereby also struck out with costs to the Respondent.

Dated and delivered at Nairobi this 21st day of September 2004.

P. Kihara Kariuki

Ag. Judge