REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 810 OF 2001

MICROSOFT CORPORATION ……..……PLAINTIFF

VERSUS

MITSUMI COMPUTER GARAGE LTD

MITSUMINET (KENYA) LTD……..…….. DEFENDANTS

RULING

On 4th June 2001, Microsoft Corporation, an American company, instituted a suit in the High Court against Mitsumi Computer Garage Ltd, a Kenyan company hereinafter referred to as "Mitsumi" for infringement of intellectual property rights. The plaint was accompanied by a verifying affidavit sworn by one Marilyn Lesley Pearman. On the same date, Microsoft moved the Court under a certificate of urgency and obtained *ex parte* an Anton Pillar Order against Mitsumi allowing it to enter the latter's premises to seize and inspect all computers and other equipment which allegedly contain or could contain pirated computer software, all purchases and sales records for the past one year and other records which constitute or could constitute evidence in the trial of the cause of action. On 8th June, 2001, Mitsumi applied and was allowed to join Mitsuminet (Kenya) Ltd (hereinafter referred to as "Mitsuminet") as the second defendant to the suit. On the same date an amended plaint was filed. It was accompanied by a verifying affidavit sworn by one Louis Otieno.

At the hearing of Microsoft's application *inter-partes* on 14.6.2001, Mr Ochieng Oduol, counsel for Mitsumi raised a preliminary objection on three grounds. First, that the verifying affidavit of Marilyn Pearman is *ex-facie* incompetent, fatally defective and inadmissible as a verifying affidavit. Secondly, that the verifying affidavit of Louis Otieno sworn on the 7th of June is *ex-facie* incompetent, fatally defective and inadmissible as a verifying affidavit. And thirdly, that the substitution of the verifying affidavits by the plaintiff in the suit is contrary to law.

The substance of the objection to the Pearman affidavit is this. The deponent is an employee of Microsoft whose responsibilities include overseeing software anti-piracy enforcement. She does not state under what authority she is swearing the affidavit. It is submitted that an affidavit by a corporation can only be sworn by an officer under authority of the corporation according to order III rule 2 (c) of the Civil Procedure Rules. It is further submitted that as Pearman is an employee, her affidavit is insufficient for purposes of order VII. Moreover, it is further submitted, the corporation's authority is not exhibited. The point is also taken that there is no indication in the jurat of the place of swearing contrary to the provisions of section 5 of the Oaths and Statutory Declarations Act, Cap 15 of the Laws of Kenya. While on this, counsel submits that my own decision in the case of *Tom Okello Obondo v NSSF* [HCCC No 1759 of 1999] where I held that the omission to state the place where an affidavit was taken was a mere

irregularity which the Court could excuse under the provisions of order XVIII rule 7 of the Civil Procedure Rules should not be followed for the reason that it did not address the issue of whether order XVIII rule 7 which is subsidiary legislation could be interpreted to defeat the express and mandatory provisions of section 5 of the Oaths and Statutory Declarations Act, which is a substantive enactment. Counsel cited section 31 of the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya in support of the proposition that subsidiary legislation should not be inconsistent with an Act. My own decision in *Kentainers Ltd v V M Assani* (HCCC No 1625 of 1996) where I opined that rules of court cannot be interpreted to nullify substantive enactments was also prayed in aid. Counsel submitted that the conflict between order XVIII rule 7 and section 5 of the Oaths and Statutory Declarations Act, should be resolved in favour of the substantive enactment. The substance of the attack on Otieno's affidavit is this. He has described himself as the Country Manager of Microsoft. He has not deposed to the authority of the corporation to swear the affidavit. Moreover, it is argued, as Microsoft has no corporate presence in Kenya but carries on business in Kenya through a wholly owned and controlled subsidiary known as East African

Software Ltd, the conception that the deponent is its Country Manager is illusory and untenable. It is pointed out that Microsoft is neither a registered foreign company nor is it exempted from registration under the provisions of sections 365 (2) of the Companies Act, Cap 486 of the Laws of Kenya. In the premises, it is contended, there cannot be a Country Manager purporting to swear an affidavit on behalf of such a corporation in Kenya. It is also contended that even if Microsoft has a corporate presence and a Country Manager in Kenya, such a Manager cannot swear an affidavit. Reliance is placed on *Halsbury's Laws of England*, 4th Edition, Vol 10, Paragraph 641 in that regard. That passage reads:-

"Any persons who are regularly employed as part of their business or occupation in conducting the affairs of the company may be 'officers' of the company. The term is defined by the Companies Act 1985 as including any director, manager or secretary. 'Manager' means, in everyday language, a person who has the management of the whole affairs of the company. It connotes a person holding, whether *de jure* or *de facto*, a position in or with the company of a nature charging him with the duty of managing the affairs of the company for the company's benefit. It does not include a local manager."

The substance of the third point of preliminary objection is that the Civil Procedure Rules do not permit two verifying affidavits in the same suit. Counsel for the 1st defendant asks me to uphold the preliminary objections and strike out the entire suit on the above grounds.

Mr Iseme, counsel for Microsoft, in reply asked me to consider the mischief the amendment to order VII which introduced verifying affidavits was meant to cure. In that regard, he invited me to consider an extra judicial commentary on the amendments which were effected vide legal notice No 36 of 2000 by the Honourable Mr Justice J V O Juma, the Nyeri Resident Judge. The commentary is in a publication called *Hakimu*. It is entitled "*General Comments on the Civil Procedure (Amendment) Rules 2000*. The learned judge describes the overall purpose of the amendments as follows:

"The object of the amendments like any other amendments is to streamline the existing rules with the hope of improving the civil justice in our Courts. Improving the civil justice includes curtailing the abuse of the court process."

And commenting specifically on order VII rule (1) (2) which introduced the requirement of a verifying affidavit, the learned judge observes:-

"It is not uncommon these days to find that a plaintiff is represented by different firms of advocate. This arises as a result of ambulance chasing. To try and put a stop to this kind of conduct, order VII was amended by adding a new sub rule, (2). This sub rule provides that the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint. The affidavit is to be sworn by the plaintiff verifying the correctness of the averments contained in the plaint. The affidavit is to be sworn by the plaintiff NOT his advocate. It is hoped that the plaintiff will, therefore, instruct one advocate as he or she will be required to swear an affidavit. I need not emphasize the consequences of filing a false affidavit.

Mr Iseme submits it is clear from the above commentary that the purpose served by a verifying affidavit is to avoid multiple representation of a plaintiff by requiring verification of the averments contained in the plaint.

He submitted that the two affidavits assailed in this case verify the averments contained in the plaint and serve the intended purpose. As regards the competence of Pearman and Otieno to swear these affidavits on behalf of Microsoft, counsel submitted that an officer of a company is defined in section 2 of the Companies Act, Cap 486 of the Laws of Kenya, to include a director, manager or secretary. He submitted that both deponents are officers of Microsoft within the meaning of the Companies Act and are accordingly competent to swear affidavits on its behalf as allowed by order III rule 2 (c) as Pearman is an employee of the Corporation and Otieno is the Country Manager of the corporation. He submitted that the passage in *Halsbury's Laws of England* relied on by the 1st defendant favours his contention as Mr Otieno has the everyday management of the plaintiff's affairs in this country. He submitted that there was no basis for saying that the concept of Country Manager is illusory and untenable. In his view section 365 (2) of the Companies Act is a deeming provision which can be rebutted by evidence at the trial.

As regards the alleged omission to state the place of swearing in the jurat of the Pearman affidavit, counsel submitted that there was no such omission as the place was stated to be 33 Queen Street Miadenhead, Berks, UK. He also relied on the case of *Tom Obondo Okello* (*supra*) for the proposition that such an omission is in any event a defect of form which is a mere irregularity curable under order XVIII rule 7. Counsel also invoked section 3 of the Judicature Act to urge me to do substantial justice without undue regard to the technicalities of procedure.

Mr Ochieng Oduol in reply submitted that order XVIII rule 7 applied to irregularities of form. It could not be used to excuse the swearing of an affidavit on behalf of a corporation by a person other than an officer thereof or the non disclosure of the corporation's authority to such officer. In his view the designation of the person making the affidavit and the existence of this authority to make it are matters of substance. On the mischief sought to be prevented by the requirement of a verifying affidavit, counsel pointed out that the commentary cited by the plaintiff is not judicial *dicta*. On whether or not Otieno is Microsoft's Country Manager, counsel submitted that it cannot be assumed that East Africa Software Ltd though a subsidiary of Microsoft is the same entity as Microsoft. The two were different legal entities. Otieno was an employee of a subsidiary company and as such he could not purport to swear an affidavit on behalf of a corporation registered in the USA, counsel submitted. As an employee of a subsidiary, the submission that he was Microsoft's Country Manager was misplaced, counsel contended. On the question of Microsoft's corporate presence, counsel submitted that the issue of adducing evidence did not arise for a foreign corporation is required to be either registered or unregistered. On the form and content of the jurat of an affidavit, counsel submitted that the Oaths and Statutory Declarations Act indicates what should be in the jurat and accordingly the witnessing referred to in the Pearman affidavit was not admissible as part of the jurat thereof. Finally, he submitted that there was no evidence that Pearman was an officer of Microsoft.

Having set out the submissions of counsel on the points of preliminary objections I think it is now convenient to consider the objection. I propose to deal with the points raised *seriatim*.

I start with the issue of the competence, propriety and admissibility of the Pearman affidavit. According to the provisions of order III rule (2) an affidavit by a corporation can only be made by an officer thereof who is duly authorized by the corporation to do so. I accept the submission by counsel for the first defendant that this is a matter of substance, not form and that it is incompetent of any other person howsoever conversant with the averments in the plaint he may be to make an affidavit on behalf of the corporation. I therefore ask myself whether Marilyn Pearman is an officer of Microsoft and whether she is authorized to make the affidavit.

She describes herself as an employee of the plaintiff whose current responsibilities include overseeing software anti-piracy enforcement. She swears that she is conversant with all the facts giving rise to this suit and she verifies that all the averments contained in the plaint are correct. Now neither the Civil Procedure Act itself or the Rules made thereunder defines the term "officer of the corporation". And the

definition in the Companies Act at section 2 which defines "officer" in relation to an association or a body corporate to include a director, manager or secretary is an inclusive rather than an exhaustive definition. It is the same sort of definition offered in *Halsbury's Laws of England* (*supra*). It does not state that officer means director, manager or company secretary. It states it includes those mentioned. Obviously persons other than those expressly identified are included. When one turns to the dictionary for the ordinary meaning of the term "officer" it is found that one of the meanings of the word is "a person holding a position of authority or trust" (see *The Concise Oxford Dictionary*). The deponent to the affidavit herein being an employee of Microsoft with the broad responsibility she has described is obviously a person holding a position of authority or trust within Microsoft. She is thus an officer within the ordinary meaning of the word. As neither the Companies Act nor the Civil Procedure Act and Rules have assigned the term "officer" any special and exhaustive meaning, I find that Pearman is an officer of Microsoft within the contemplation of order III rule 2(c). However, while she may indeed be authorized to make the affidavit she does not depone to that fact. This is a substantial defect in her affidavit.

How about the alleged omission in the jurat? The first thing to note is that the affidavit is taken in England. Neither counsel has addressed me on the implications and consequences of that. I must therefore do the best I can without the benefit of counsel's submissions on the point. The Oaths and Statutory Declarations Act, Cap 15, gives Commissioners for Oaths appointed under the provisions thereof jurisdiction throughout Kenya (section 4). It also commands the Commissioner to indicate in the jurat the place where he took the affidavit. Obviously a Commissioner for Oaths appointed under Cap 15 cannot take an affidavit in England. Accordingly the provisions of section 5 of the Act or indeed any other section in Cap 15 cannot apply to an affidavit taken out of Kenya by a foreign person. In the premises I think the issue of whether the affidavit complained of complies with section 5 of Cap 15 raised by counsel for the first defendant is misconceived and is a mere moot point in the instant matter. The real issue and which issue was not debated ought to have been whether an affidavit for use in Kenyan Courts can be taken out of jurisdiction and by who and what forms, if any, should it comply with. In that regard, I am not aware of any Kenyan legislation directly to the point. However, section 88 of the Evidence Act, Cap 80 of the Laws of Kenya, does seem to allow for the admissibility in Kenya Courts of documents which would be admissible in any Court of justice in England under the law in force for the time being in England. In that respect it is observed that in England an affidavit taken in a commonwealth country is admissible in the Courts of Judicature without proof of the seal or signature of the person taking the affidavit (see order 41 rule 12 of the Rules of the Supreme Court in the *Supreme Court Practice*, 1999 Edition). From the foregoing it follows that Kenyan Courts can admit affidavits taken in England which is a commonwealth country. The affidavit herein having been taken in England, I find the same to be admissible in this Court. As regards the formal validity of such a document I venture to think that in the absence of any Kenya enactment governing the matter, it would suffice that the document is valid according to the laws of England. Section 5 of the Commissioner of Oaths Act, 1889 reads:

"Every Commissioner before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

And order 41 rule 4 of the Rules of the Supreme Court provide that an affidavit may, with the leave of the Court, be filed or used in evidence not withstanding any irregularity in the form thereof. As I pointed out in the *Tom Okello Obondo* case the English practice is summarized in *Halsbury's Laws of England*, 3rd Edition, Volume 15, at paragraph 15 where it is propounded that:-

"The parties cannot waive irregularities in the form of a jurat, but where the place of swearing is omitted, the Court may possibly assume that the place was within the area in which the notary before whom it was taken was certified to have jurisdiction, and the irregularity, may be overlooked."

In short the English Courts of Judicature may treat an omission to state the place where the affidavit is taken as an irregularity which the Court can overlook despite the apparently mandatory rendition of section 5 of the Commissioners of Oath Act of 1889. In my opinion if failure to state the place where an affidavit was taken in the jurat thereof does not *ipso facto* make such an affidavit fatally defective and inadmissible in an English Court despite the wording of the section of the law which I have just read, there is neither rhyme nor reason to hold that such an affidavit if filed in a Kenyan Court is fatally

defective and inadmissible.

In conclusion I hold that the Pearman affidavit which was taken in England would have been admissible in this Court notwithstanding any omission it may have had within the jurat as regards the place where it was taken.

Be that as it may, nothing turns on that view of the matter as I have found that as a matter of fact the affidavit in question does not suffer from such a defect. To conclude, the only merit I find in the first point of the preliminary objection is that the deponent Pearman does not state that she makes the affidavit with the authority of Microsoft. To my mind that is a substantial defect which renders the said affidavit incompetent and courts its being struck out. I accordingly order it struck out for that reason.

As regards the objections to the affidavit of Louis Otieno, I accept the submission by counsel for the first defendant that that affidavit too is defective for want of disclosing the authority upon which it is made. This ground alone invites its being struck out. I am not however persuaded that the affidavit should be struck out on the additional ground that the deponent has described himself as the Country Manager of Microsoft when Microsoft is neither registered nor exempted from registration under Part 10 of the Companies Act. In the first place, even if I accept the view expressed in the passage in *Halsbury's Laws of England* relied upon by counsel for the 1st defendant that the word "manager" does not in England include a Country Manager, I can see no reason why in Kenya a Country Manager should not be regarded as an officer of a corporation on a proper interpretation of section 2 of the Companies Act, Cap 486 and by extension order III rule 2 (c) of the Civil Procedure Act. In my opinion, and I so hold, such a person is an officer of the corporation. Neither do I accept the submission that since Microsoft is not registered as a foreign company in Kenya; the concept of its having a Country Manager is untenable or illusory. My reading of Part 10 of the Companies Act is not that all foreign companies which seek to do business in Kenya must be registered in accordance with that section. My reading of it is that a foreign company which does business in Kenya through an agent need not be registered and the agent's place of business shall not be deemed to be its place of business. If a foreign company is registered in Kenya under section 366, it shall have the benefits and be bound by the obligations and be subject to any penalties provided for in pPart X of the Companies Act. I do not understand any of those provisions to prohibit a foreign company from suing in the Courts of Kenya or as barring an officer of such a corporation from taking any step including making any affidavit which an officer of a corporation duly registered under the Act may undertake. I would in the premises dismiss the objection to Mr Otieno's affidavit on this ground as unmeritorious. While on this, let me state that while I accept that Microsoft and East African Software Ltd are two distinct entities in law, that does not preclude Mr Otieno from being an officer of Microsoft as he claims to be. If he is also at the same time serving East Africa Software Ltd, so be it. That is a matter of contract between himself and Microsoft. Had it not been for the failure to disclose his authority for making the affidavit, I would have had no hesitation in finding the said affidavit to be valid.

However since the defect I have found to exist is a substantial one I would order the affidavit struck out on that account.

The third point of preliminary objection is entirely well taken. Order VII does not require any verifying affidavit to accompany an amended plaint or indeed any other pleading save the plaint originating the action. The verifying affidavit of Louis Otieno may have been filed by the plaintiff *ex abundanti cautela* but is definitely an unnecessary surplusage. I uphold this point of preliminary objection also and order that the said affidavit be struck out of the record.

The result of my consideration of the preliminary objection is that both verifying affidavits by Marilyn Lesley Pearman and Louis Otieno are ordered struck out.

The next matter for consideration is whether I should consequently strike out the suit itself. Rules of procedure are the hand maidens and not the mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not to fetter or choke it. In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate

form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances the Court should rise to its higher calling to do justice by saving the proceedings in issue. In the matter at hand I am of the view that the error manifest in the verifying affidavit neither goes to the jurisdiction of the Court nor prejudices the defendants in any fundamental respect. Indeed no prejudice has been alleged.

Being of that persuasion, I think the ends of justice would best be served by sustaining the proceedings by declining to strike out the suit while at the same time putting right the lapses in the offending affidavit. I am fortified in this view of the matter by two consideration. First, sub rule (3) of rule (1) of order VII itself seems by the usage of the word "may" to leave the striking out of a plaint which is not accompanied by a verifying affidavit within the realm of discretion. If a discretion can be exercised in the case of an omission of the verifying affidavit, *a fortiori* it is also exercisable in the event of such an affidavit being incompetent. Secondly, and to me this is equally important, an appreciation of the mischief which the rule was meant to cure inclines me to the same conclusion. In that respect, I think that Juma, J, though speaking extra judicially, correctly fingered that mischief to be the hitherto unseemly spectacle of legal multi representation of plaintiffs by advocates particularly in accident cases. Verification of the contents of the plaint was conceived as a cure for that mischief as the plaintiff would be required to make an affidavit and he could not, it was thought, make two or more affidavits in respect of the same cause of action. If it be the case that the rule was intended to cure any other mischief the same is not manifestly obvious. However, the rule having been framed in broad terms verification of the plaint is now necessary in every type of action originated by a plaint. The broad purpose of the verifying affidavit is thus to verify the contents of the plaint. That purpose may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on record. I would accordingly order that the verifying affidavit of Marilyn Lesley Pearman be struck out but the plaintiff be at liberty to file a fresh verifying affidavit within 15 days of today.

The upshot of this matter is that I decline to strike out the suit but order that the verifying affidavits of Marilyn Pearman and Louis Otieno be struck out of record. I further grant liberty to the plaintiff to file and serve the defendants with a fresh and compliant verifying affidavit within 15 days of the giving of this order. The costs of the preliminary objection are awarded to the first defendant in any event.

Dated and delivered at Nairobi this 2nd day of July, 2001

A.G. RINGERA

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JUDGE