

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
MISCELLANOUS APP NO. E005 OF 2022

ANHEUSER - BUSCH LLC.....
APPELLANT

VERSUS

BUDWEISER - BUDVAR NATIONAL
CORPORATION.....
RESPONDENT

RULING

1. Before me for determination is a Notice of Preliminary Objection dated 17th June 2022.
2. The respondent filed grounds of opposition dated 20th June 2022.
3. The objection was disposed by way of written submissions.
4. The primary issue for determination is whether the Notice of Preliminary Objection has merit.
5. To begin with, what constitutes a preliminary objection was discussed in the case of **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696** in the following manner:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has

to be ascertained or if what is sought is the exercise of judicial discretion.”

6. As such for a preliminary objection to be successful it must be based on a pure point of law, and further, it cannot be a requirement of its foundation that evidence be produced in its support.
7. Applying these principles to the instant case, I am satisfied that the Respondent's Notice of Preliminary Objection raises pure points of law. The objections revolve around the interpretation and application of Section 21 of the Trade Marks Act, Rule 117 of the Trade Marks Rules, and Order 51 Rules 1 and 4 of the Civil Procedure Rules, 2010. No facts are in dispute; the sole question is whether the Appellant's Notice of Motion, being unsupported by an affidavit, complies with the prescribed manner of appealing from the Registrar's decision. This is eminently a proper preliminary objection, and I shall determine it as such.
8. **Section 21(7)** of the **Trade Marks Act** provides that:

An appeal under this section shall be made in the prescribed manner, and on the appeal the court shall, if required, hear the parties and the Registrar, and shall make an order determining whether, and subject to what conditions or limitations, if any, registration is to be permitted.
9. Turning to the "prescribed manner," **Rule 117** of the **Trade Marks Rules** directs that:

When a person intends to appeal to the court, the appeal shall be made by motion in the usual way, and no such appeal shall be entertained unless notice of motion is given within sixty days from the date of the decision appealed against or within such further time as the Registrar shall allow.

10. **Order 51 Rule 4** of the **Civil Procedure Rules, 2010** states that:

Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.

11. The question, therefore, is whether an appeal from the Registrar of Trademarks is an application that is "grounded on evidence by affidavit" within the meaning of Order 51 Rule 4.

12. The Respondent contends that every application must be supported by an affidavit, and its absence is fatal. The Appellant counters that where the grounds are apparent from the record, no affidavit is required.

13. In **Odongkara v Kamanda [1968] EA 210**, the Court of Appeal for East Africa considered a similar procedural objection. Sheridan J. stated at page 211:

"Order 50 rule 3 of the Civil Procedure Rules provides that every application shall be by motion and shall be heard in open court. Rule 4 requires that the notice of motion shall state

the grounds of the application and where it is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served. There is nothing in the rules which makes it mandatory that an application must be supported by an affidavit. In this case the motion sets out the grounds and the proceedings and judgment of the magistrate. That is the evidence upon which the application is based. In my view that is sufficient.

14. I find this reasoning compelling and directly applicable to the present case. The Appellant's appeal is from a decision of the Assistant Registrar of Trademarks. The grounds of appeal are set out in the Notice of Motion. The record of proceedings before the Registrar, including the ruling appealed against, constitutes the evidentiary foundation upon which this Court is called upon to exercise its appellate jurisdiction. This is precisely the "evidence" contemplated in ***Odongkara v Kamanda (supra)*** the proceedings and judgment of the lower tribunal.

15. Moreover, I am mindful that Section 21(8) of the Trade Marks Act provides that on appeal, the court shall hear the parties on the materials filed before the Registrar, and further evidence may only be admitted with leave of the court. This statutory framework suggests that the primary materials for the appeal are the records from

the Registrar, not fresh evidence by affidavit, unless the court grants leave.

16. In the instant case, I am unable to discern any prejudice that the Respondent has suffered or will suffer by virtue of the absence of a supporting affidavit. The Respondent is fully appraised of the grounds of appeal and has the entire record of the Registrar at its disposal to mount its response. To strike out the appeal on this ground would be to elevate form over substance in the most technical sense precisely what Article 159(2)(d) of the Constitution warns against.
17. Furthermore, I note that the Appellant complied with the core procedural requirement: filing a Notice of Motion within sixty days as mandated by Rule 117. The Motion states the grounds of appeal. The record of proceedings from the Registrar has since been filed. The appeal is, to all intents and purposes, ready for hearing on its merits. To strike it out for want of an affidavit would, in my considered view, be to unduly sacrifice substantive justice at the altar of procedural technicality.
18. Therefore, from my understanding there is no mandatory requirement that such a motion be supported by an affidavit where the grounds are apparent from the record. Furthermore, striking out the appeal would be antithetical to the constitutional imperative under Article 159(2)(d) and the overriding objective under Sections 1A and 1B of the Civil Procedure Act.

19. Based on the foregoing analysis, the only orders that this Court can return is that the Preliminary Objection is without merit and dismissed with costs to the Appellant.

RULING delivered virtually, dated and signed at **NAIROBI**

This **12th** day of **March** 2026.

P.M. MULWA
JUDGE

In the presence of:

Mr. Lawson Ondieki for Appellant

Ms. Kivuva h/b for Mrs. Mohamed for Respondent

Court Assistant: *Carlos*