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Cross-examination and the WOKOZIM case: a new direction for proceedings in Kenya?

Kenya - [Bowmans](#)

- Osho Chemical applied for cross-examination of Biostadt's employee within context of application for expungement by Biostadt Limited of Osho Chemical's mark WOKOZIM
- Assistant registrar exercised her discretion to allow *viva voce* evidence, but limited scope of cross-examination
- All parties must now factor in possibility of witnesses being cross-examined on formal statements made in statutory declarations

Cross-examination was recently examined by the assistant registrar of trademarks within the context of an application for expungement by Biostadt Limited of the word mark WOKOZIM (No KE/T/2007/60770) in Class 1 in the name of Osho Chemical Industries Limited. The issue for determination was whether the application by Osho Chemical Industries Limited ('the applicant') for cross-examination of an employee of Biostadt India Limited ('the respondent') could be granted.

Background

The respondent filed two statutory declarations sworn by the respondent's general legal counsel on 18 January 2016 and 25 October 2016 in support of its application for expungement of the applicant's WOKOZIM mark. The respondent denied knowledge of the registration of the mark or receipt of any email forwarding the certificate of registration of the mark. The averments conflicted with the statutory declaration sworn on the 23 June 2016 by the applicant's director, in which the applicant deponed that it had notified the respondent of the registration of the mark via email. To resolve the conflict of fact, the applicant filed a notice of motion on 26 January 2018 seeking orders for the respondent's general legal counsel to attend expungement proceedings in order to be cross-examined on the averments he had made in his statutory declarations. The onus of proof regarding the necessity of cross-examination rested on the applicant.

Assistant registrar's findings

Could evidence be given viva voce?

Although evidence had already been given by way of statutory declarations, the assistant registrar used the discretion bestowed upon him by the [Trademarks Act, Chapter 506, Laws of Kenya](#) to depart from the norm. The assistant registrar relied on Section 54(1) of the act, which allows evidence to be given *viva voce* instead of, or in addition to, evidence by way of declaration where the registrar believes that it is right to do so. According to the assistant registrar, the advantages of cross-examination outweighed any concerns (in terms of costs and delay) of the respondent.

Was cross-examination necessary?

The assistant registrar rightly found that cross-examination was critical to establishing whether the mark was registered without the consent of the applicant. The assistant registrar relied on *Law Society of Kenya*

v Faith Waigwa ([2015] eKLR), where the High Court found that cross-examination is necessary where it is used to delineate a cross-examiner's case.

The scope of cross-examination

While exercising her discretion to allow viva voce evidence, the assistant registrar limited the scope of the cross-examination, citing the case of *Kenya Deposit Insurance Corporation v Hassan Ahmed Abdul Hafedi Zubeidi* ([2017] eKLR) where the High Court found that cross-examination should not be expansive, but limited to specific paragraphs in order to resolve key facts in issue. The assistant registrar noted that the applicant had highlighted the specific issues that the proposed cross-examination would cover.

Takeaways

It is now clear that, where a party disputes the facts in issue and shows a proper basis for objection, a deponent can be asked to appear physically for cross-examination. Due to the onerous obligations of a cross-examination order, the assistant registrar limited cross-examination to clear and deserving instances where the scope of cross-examination is narrow and has the legitimate purpose of clarifying a cross-examiner's case. Although the legal threshold for a party seeking cross-examination is high, all parties must now also factor in the possibility of witnesses being cross-examined on the formal statements they have made in any statutory declaration. This is particularly important for foreign entities that should set aside travel expenses into their budget. Notwithstanding, more time is needed to assess the interpretation of this decision and its application in other cases.

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