IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 695/16 OF 2022

ABSA BANK TANZANIA LIMITED ..... 1ST APPLICANT
JOSEPH JOHN NANYARO ..... 2ND APPLICANT
VERSUS
HJORDIS FAMMESTAD..... RESPONDENT

(Application for extension of time to lodge notice of appeal against the judgment of the High Court of Tanzania (Commercial Division)
(Fikirini, J.)
dated the 8th day of October, 2019
in
Commercial Case No. 06 of 2018

.....

RULING

20th & 26th March, 2024

NGWEMBE, J.A.:

The applicants **ABSA Bank Tanzania Limited and Joseph John Nanyaro,** on 11th November, 2022, filed notice of motion seeking extension of time from this Court to lodge notice of appeal against the impugned judgment and decree of the High Court (Fikirini, J as she then was) in Commercial Case No. 06 of 2018 delivered on 8th October, 2019. The application is preferred under Rules 10, 45A (1)(a) and 48 (1) (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

The application is supported by an affidavit sworn by Florian Pesha, who is identified as a Principal Officer of the 1st applicant. According to his

affidavit, Mr. Pesha averred that, he took his affidavit also on behalf of Mr. Nanyaro, the 2nd applicant, whom he averred to have obtained authorization to swear on his behalf.

In turn the respondent Ms. Hjordis Fammestad, filed an affidavit in reply opposing the application for extension of time. She disputes the contents of the notice of motion and its supporting affidavit.

It is noteworthy at this juncture to state a brief background giving rise to the application for extension of time, as obtained from the record of application. The 1st applicant is a commercial bank having a bank-customer relationship with the respondent. The respondent, a Norwegian and US dual citizenship, arrived in Tanzania around in year 2014 and managed to invest in Tourism through her Tanzania incorporated company to wit *Sakira Sunrise Ltd.* In the course, she opened a bank account with the 1st applicant (Formerly known as Barclays Bank). She made her associates in her business be co – signatories in operation of her bank account maintained by the first applicant. At a later stage, in year 2016, she employed the 2nd applicant as the Project Overall Manager and gave him signatory rights to the account.

In her letter to the first applicant was categorically restricted that the 2nd applicant's right of withdrawal of money was only up to USD 10,000 per withdrawal transaction. The condition was sufficiently communicated

to the 1st applicant, that any transaction beyond that amount must be authorized by the respondent.

What ignited the cause of action in the corridors of court was several transactions of withdrawal by the 2nd applicant amounting to USD 335,121.59, well beyond the prescribed limit. It was a fact also that the 1st applicant allowed such transactions without seeking any authorization from the respondent. The respondent, thus claimed from the applicants jointly and severally, *inter alia*, a total of USD 335,121.59 the amount withdrawn by the 2nd applicant without authorization, damages, interest and costs.

The High Court Commercial Division (The High Court) upon hearing the suit, found the 2nd applicant had withdrawn the money and misappropriated them. Also, that the 1st applicant acted negligently without duty of care by not preventing the transactions to occur. The applicants were found severally and jointly liable for the respondent's loss.

A decree was passed to the tune of USD 335,121.59, but apportioned by 60% and 40% to the 1st and 2nd applicant respectively. Apart from that, 15% interest per annum was awarded from 17/12/2017 to the date of last transaction, 12% interest per annum from the date of filing the suit to the date of full satisfaction of the decree with costs.

However, the applicants being dissatisfied with that judgment and decree, on 21/10/2019 jointly lodged notice of appeal followed with memorandum of appeal which was filed on 14/02/2020 and registered by this Court as Civil Appeal No. 30 of 2020. Equally the respondent lodged a cross appeal, however, the applicants appeal was struck out for being out of time and the cross appeal remained in this Court. In attempt to bring their appeal back, the applicants filed Miscellaneous Commercial Application No. 11 of 2022 at the High Court, seeking extension of time to file notice of appeal. Such application as well was, in a ruling delivered on 28th October, 2022 struck out for being incompetent as the High Court lacked jurisdiction.

The applicants' being dissatisfied, have come to the Court as a second bite by instituting this application on 11th November, 2022. The respondent through her advocate one Salimu Juma Mushi, on 30/11/2022, filed an affidavit in reply together with a notice of preliminary objection, bearing two grounds as follows:

1. *That the application is incompetent and bad in law for violating Rule 45A(1)(a) and (c) and Rule 47 of the Court of Appeal Rules, 2009 as amended by G.N. 344 of 2019 and in alternative,*
2. *That the application is bad in law and unmaintainable for lack of supporting affidavit by the 2nd applicant.*

It is settled in our jurisdiction, that when an application is encumbered with a preliminary objection, it should first be resolved before hearing the application on its merits. Thus, on the hearing date of the preliminary objections, the 1st applicant had the legal services of Mr. Mpaya Kamara, learned advocate, while the 2nd applicant enjoyed the legal services of Mr. John Laswai, also learned advocate. On the other side, Mr. Salimu Juma Mushi, learned counsel, appeared for the respondent together with the respondent herself.

Mr. Mushi commenced his submission by arguing on the first ground of objection that, there are rules governing second bite application for extension of time. The requirement is that the applicant must first apply for such extension of time before the High Court. It is only when such application has been refused by the High Court, the applicant can face this Court on second bite as governed by Rules 45A (1)(a) and 47 of the Rules. He went further that, the applicants' application before the High Court was not determined on merit and refused, but rather was struck out based on a preliminary objection, thus this application is incompetent. He supported his argument with the case of **Central Electricals International Limited vs. China Railway Jiacheng Engineering Co. (T) Limited,** Civil Application No. 450/16 of 2023.

Mr. Mushi also took cognizance of authorities filed by the 1st applicant's advocate, particularly the case of **Arunaben Chaggan Mistry vs. Naushad Mohamed Hussein and 3 others,** Civil Application No. 40 of 2015 which allowed the application for extension of time in second bite despite the fact that at the High Court, the applicant was not refused. Mr. Mushi pointed out categorically that, the said decision was subject of discussion in the subsequent cases by the Court, including the case of **Central Electricals International Ltd (supra)**, which is the most recent, where the Court observed that:

> *"This earlier decision did not interpret the word refusal, only allowed an aggrieved party to approach the court on a second bite when his earlier application for leave was dismissed for whatever reason. With due respect to the learned counsel, this case did not discuss what refusal is. It left the matter to the court to decide after the application has been filed"*

That the same principle was as well stressed in **Rajabu John Mwimi vs. Mantract Tanzania Ltd,** Civil Application No. 367/01 of 2020 and in the case of **Telia Bupamba vs. Elisha Abel Shija,** Civil Application No. 438/08 of 2017.

He concluded by submitting that, the first ground alone would be sufficient to dispose of the application. However, he proceeded to argue on the second ground as an alternative.

The second ground was pegged in Rule 49(1) of the Rules, which mandatorily requires every formal application to the Court to be in a form of a notice of motion supported by an affidavit. He pointed that, the application has two applicants, to him there should be two affidavits of both applicants, but there is only one affidavit sworn by Mr. Pesha. He noted the first paragraph of the affidavit in which Mr. Pesha averred that, he was also given authority by the 2nd applicant to swear on his behalf. To his opinion, the said authority should have formed part of the 2nd applicant's affidavit.

He challenged even the verification clause in which the deponent verified that all what was stated was true to the best of his own knowledge. Mr. Mushi was adamant that the verification meant there was nothing given from the 2nd applicant as there are no facts which the deponent deposed on the knowledge given by the 2nd applicant.

He sought support from the case of **The Registered Trustees of St. Anita's Greenland School (T) & 6 others vs. Azania Bank Limited, Civil Application No. 168/16 of 2020,** where Rule 49 of the Rules was discussed as mandatory. He insisted that failure to observe such

mandatory Rule is fatal, yet he referred the Court to another case of **LRM Investment Company Limited and 5 others vs. Diamond Trust Bank Tanzania Ltd,** Civil Application No. 418 of 2019, p. 13 which stressed the same position of law.

Mr. Kamara in turn, opted to start his submission with the second ground of objection on the missing affidavit of the 2nd applicant. He admitted that, there was no affidavit of the 2nd applicant, but went to paragraph one of Pesha's affidavit that he was duly authorized to swear for the 2nd applicant as well. It was his position that such authority is a fact that cannot be challenged by a preliminary objection. He insisted that Mr. Pesha was aware of the facts relevant to the 2nd applicant as well, that is why he verified them to be in his own knowledge.

It was his argument that although the same facts may be in the knowledge of the 2nd applicant, the deponent Mr. Pesha cannot be prevented from swearing the same facts on behalf. He referred to the case of **LRM (Supra)**, in which the Court allowed a party to swear an affidavit on behalf of others. Thus, he justified that the deponent swore an affidavit covering both applicants, hence Rule 49 (1) of the Rules was complied with. He proceeded to refer to the case of **Eliatirisha E. Akyoo and another vs. Julius Azael,** Civil Application No. 382 of 2022 which supported his position.

Arguing on the first ground, Mr. Kamara challenged the impropriety of the objection that, it is not worth consideration by this Court as it has not followed the dictates of Rule 107(1) of the Rules, which requires the preliminary objection to set out the grounds of objection such as the specific law, principle or decision relied upon. That the respondent's counsel has cited Rules 45A (1)(a) (c) and 47 of the Rules are irrelevant to the nature of this application. He insisted that Rule 45A (1) (c) is related to certificate on points of law, which is not the case in the application. However, he admitted that the application before the High Court was struck out and not dismissed on merit. That the High Court declined to determine the application for lack of jurisdiction and there is no single authority covering the circumstance where the High Court declines to determine the application on the ground of lacking jurisdiction. To him, the High Court's decision was tantamount to refusal. He rested his case by praying the preliminary objections be overruled with costs.

Mr. Laswai, advocate for the 2nd applicant stood on the submission of Mr. Kamara as exhaustive enough, thus had nothing to add.

In his rejoinder, Mr. Mushi reiterated what was decided in **Central Electric** case (supra) while discouraging Mr. Kamara's reliance to the case of **Chaggan Mistry.** He maintained that, the applicants cannot file their application before this Court by way of a second bite while there was no

refusal by the High Court. He suggested that the applicants would have chances to file an appeal, revision or review, whichever appropriate. On citation of Rule 45A (1)(c) that it contravened Rule 107(1) of the Rules, Mr. Mushi submitted it as baseless, since in his argument he made the point clearly.

Having dispassionately considered the rival arguments of learned advocates, to the best, the issue for determination is whether the preliminary objections have merits. Specifically, whether Rule 48 (1) and 49 of the Rules were complied with (first ground) and whether Rule 45A (1)(a) and 47 of the Rules were complied with (second ground).

I prefer to start with the second ground of the preliminary objection as it takes precedent due to its nature. Both counsels are at one on the position of the law that in a formal application of this nature, a notice of motion must be accompanied by an affidavit of the applicant. They both agree and it is on the record, that the 2nd applicant did not swear an affidavit to support this joint application. It is also undisputed fact that the 1st applicant is an artificial person, best known as a legal person (ABSA Bank Tanzania Limited) and the 2nd applicant is a natural person. Those two persons and the respondent, have been in the case since its institution. Therefore, it is presumed that, they are well aware of the facts relevant to their case.

Rule 48 (1) of the Rules is couched in a mandatory manner that every formal application to the Court must be by way of a notice of motion supported by an affidavit of the applicant. Where there is more than one applicant, like in this one, there may be filed more than one affidavit as per Rule 49 (1) of the Rules. Generally, the Rule mean every applicant must make his affidavit, though a joint affidavit may serve the same purpose.

It is also correct as Mr. Kamara submitted that; one applicant can swear an affidavit on behalf of other applicants. I do not think there is any problem for one or more applicants to swear their affidavits on behalf of their fellows, when duly and properly authorized as was so decided in the case of **LRM (Supra).** For clarity Rule 49 (1) of the Rules is reproduced hereunder:

> *"Every formal application to the Court shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts."*

I presume this position is clear also to both learned advocates. What is being contested is whether Mr. Pesha's affidavit under the circumstance fulfilled the mandatory requirement of rule 48 (1) and 49 (1) of the Rules. Undoubtedly, there are colossal decisions of the Court on this point,

including the case of **Asha Seif & Others vs. Nada Panga,** (Civil Application 429 of 2016) [2018] TZCA 234 where the Court was faced with an akin situation. In that case, there were three applicants seeking to strike out the notice of appeal filed by the adverse party. The second applicant one Hemed Hussein affirmed an affidavit in support of the notice of motion. It was claimed that he was appearing on behalf of himself and the remaining two applicants, and the affidavit he gave would cover all of them. This Court in determining a preliminary objection held as follows: -

> *"Essentially, an affidavit is evidence which is intended to establish the facts contained in the notice of motion. It is no wonder therefore that, facts in one notice of motion may be established by more than one affidavit. There is however, no provisions of law providing for the vice versa situation that is, one affidavit being used to establish the facts in more than one notice of motion. In that regard, we are in agreement with the learned counsel for the respondents that, the affidavit of Hemed Hussein could not be used to establish his own facts, as well as the facts in the notices of motion lodged by Asha Seif (first applicant) and Amiri Hamza (third applicant). By necessary implication therefore, the notices of motion by the other two have not been supported*

by affidavits and thereby, offending the provisions of Rule 48 (1) of the Rules."

It was earlier stated that, the 1st applicant is an artificial person, in any way, could not be able to swear an affidavit. Therefore Mr. Pesha swearing an affidavit for her behalf was correct. Even the respondent's counsel does not seem to dispute that fact, that the 1st applicant would properly give authority to Mr. Pesha to swear an affidavit on her behalf. However, Mr. Mushi sees problem with Pesha's affidavit stating that, he was authorized not only by the 1st applicant, but also by the 2nd applicant, and the other problem according to Mr. Mushi's argument is on failure by the 2nd respondent to swear an affidavit.

However, the notice of motion stated clearly that, the application is supported by the affidavit sworn by Mr. Florian Pesha, Principal Officer of the 1st applicant and the same was also authorized by the 2nd applicant to swear an affidavit on his behalf. Para 1 of Pesha's affidavit goes that: -

"That I am the in-house counsel of the applicant thus the principal officer of the applicant well conversant with the facts relating to this application and I am duly authorized to swear to this affidavit for and on behalf of the applicant as I am about to depose hereunder. I am also authorized by the 2nd applicant to swear affidavit on his behalf."

From the outset, Mr. Pesha was a stranger to the main case before the High Court as well as other applications and in this Court. Authorization by the 1st applicant would be proper by virtue of his employment and as a principal officer, he is presumed to be aware of the facts in respect of the 1st applicant (an artificial person). The 2nd applicant is a natural person. It is unknown how did he authorize Mr. Pesha, a stranger to the case to depose the facts on his behalf. Again, Mr. Pesha verified all facts deposed therein as true to the best of his own knowledge. For clarity the verification clause is reproduced hereunder:

> *"I Florian Pesha, do hereby state and verify that all that I have stated in paragraphs 1,2,3,4,5 and 6 inclusive of (a) and (b) there-under here-in is true to the best of my own knowledge"*

Moreover, the deponent is an in-house counsel of the 1st applicant who never appeared in Court for any of the parties, yet he knows the facts in respect of the 2nd applicant without being informed neither by the applicant himself nor by anybody else.

I think Mr. Mushi was right to observe that, owing to the nature of the above quoted verification clause, stating that all what the deponent stated was of his own knowledge, meant that, there was no authorization from the 2nd applicant as there is no fact specifically stated to have been

received from the 2nd applicant. He suggested that there should have been an affidavit of the 2nd applicant authorizing Mr. Pesha to swear an affidavit on his behalf at least or for supporting the notice of motion. Mr. Kamara maintained that the deponent was just aware of the facts which were also in the 2nd applicant's knowledge. That under the circumstances, he would not be prevented from swearing on those facts. Therefore, there was no need to have information from the 2nd applicant, while he was already aware of.

I have read the affidavit of the applicant in line with Mr. Kamara's argument, and clearly observed that, the 2nd applicant's authorization to Mr. Pesha is unclear and obscure. Apart from propriety of the 2nd applicant's authorization to Mr. Pesha, the contents of his affidavit comprise many facts, which in my view are hard to fit in Mr. Kamara's theory. It would not be easy to tell exactly how could Mr. Pesha be aware of those facts, while he is a stranger to the case. The contents of the affidavit state the whole coherence of the dispute from when the main suit was instituted against the applicants up to the point that the applicants were aggrieved and the steps they adopted. It would be correct that he knew all those facts by himself only in respect of the 1st applicant, but when it comes to the 2nd applicant, despite being authorized, he must have secured information from him. The reason is obvious, he was not involved

in the case from the beginning. Therefore, presumed to be ignorant of matters affecting the 2nd applicant. In case he knows those matters, then he is expected to disclose the source of which the 2nd applicant is the closest source.

For example, in paragraph 2 he states among other facts, that the applicants were aggrieved by the decision of the High Court, while in paragraph 5 he partly states that, the applicants are still aggrieved by the decision of the High Court. By a mere common understanding, the condition of 'being aggrieved" is a state of mind. The state of mind of the 2nd applicant being aggrieved by the High Court is decision in paragraph 2 and 5, would naturally be formulated and remained in the party's mind. No one would know exactly that a party is aggrieved by the said decision unless he is told so.

It follows therefore that, if a non-party to the case, tells the Court that the 2nd applicant was aggrieved by the decision of the High Court, he must have been told by the party himself or another reliable person. In that circumstance, the verification clause will reveal the source of such knowledge.

It is also amazing, Mr. Kamara stood firm to argue that Mr. Pesha knew all the facts by himself and he was not told by anyone, including that fact that the 2nd applicant was aggrieved by the decision. This Court has

not been assisted to know as to how Mr. Pesha was able to know those facts, particularly the state of mind of the 2nd applicant being aggrieved by the decision of the High Court.

I do not think that the affidavit of Mr. Pesha under the circumstance would cater for the 2nd applicant. I have observed that Mr. Kamara's insistence that Mr. Pesha was aware of those facts in his own knowledge, would ultimately render even the affidavit be defective for containing matters which are not in deponent's knowledge and yet failed to disclose the source of knowledge. Disclosing the source of knowledge is crucial in affidavits. See the persuasive decision of the erstwhile Court of Appeal for East Africa in **Assan and & Sons v. E.A. Records Ltd** [1959] E.A. 360 (C.A.) at p. 364, where it was *inter alia* held: -

> *"The affidavit of Mr. Campbell was deficient in three respects. First, it did not set out the deponent's means of knowledge or his grounds of belief regarding the matters stated on information and belief, and, secondly, it did not distinguish between matters stated on information and belief and matters deposed to from the deponent's knowledge."*

Therefore, the affidavit of the 2nd applicant was necessary in all dimensions as was rightly argued by Mr. Mushi. Even by assumption, that

Mr. Pesha was authorized, yet the mode of authorization was obscure and the authorized deponent failed to swear such an affidavit on the authorizer's behalf in proper way. This crystalizes the issue to the conclusion that the 2nd applicant had no affidavit at all. It is also true that the missing affidavit of the 2nd applicant affects this application.

It is equally noted that if a joint notice of motion is supported by affidavit of only one or few of the applicants, leaving out one or more applicants without affidavit, the whole application becomes defective. This Court provided a good interpretation in the case of **Asha Seif & Others vs. Nada Panga** (supra) that a joint application of two applicants is equal to two applications. Following that perspective, more than one affidavit can support a notice of motion.

Among our previous decisions regarding the requirements of affidavit in the applications of this nature and the effect of the contravention, includes the case of **N.B.C. Holding Corporation and Another vs. Agricultural & Industrial Lubricants Supplies Ltd & 2 Others** (Civil Application 42 of 2000) [2001] TZCA 5. Like in this application, in that case, the affidavit in support of notice of motion was sworn by an authorized officer of the first applicant **NBC Holding Corporation**, while the 2nd applicant one Sudan Auction Mart t/a Mustapha Nyumbamkali did

not swear any affidavit. This court found the application incompetent and proceeded to strike it out.

In another similar relevant case of **The Registered Trustees of Anita's Greenland Schools (T) and 6 others vs. Azania Bank Limited,** Civil Application No. 168 of 2020, seven applicants filed a joint application for stay of execution. But the notice of motion was accompanied by only one affidavit sworn by the third applicant who also made it on behalf of the 1st applicant, the Registered Trustees. This Court having considered the omission in depth, came up with the following finding: -

> *"The omission renders the application incompetent and thus cannot be partly saved...In the event, the incompetent application is hereby struck out with costs."*

In similar vein, in the case of **LRM** (Supra), is another relevant case where the applicants in the joint application sought for stay of execution, but did not have the 5th and 6th applicants' affidavit to support the application. The Court held *inter alia* that the ailment of the application not being supported by affidavits of the 5th and 6th applicants, rendered the application incompetent.

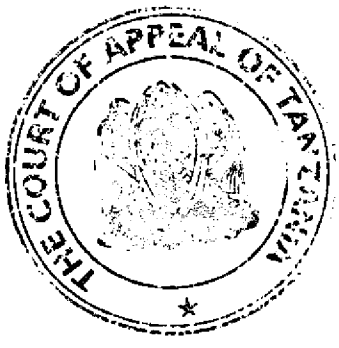
Considering the nature of this application in line with the cases cited above, the effective remedy to this nature of ailment should be to strike out the application as Mr. Mushi suggested. If this remedy takes effect in the application at hand, then no need would arise for considering the other ground of preliminary objection.

Therefore, the second ground of preliminary objection is sustained. On the same reasoning, the application is incompetent. In the circumstances and considering the reasons given above, the application is struck out with costs.

DATED at **DAR ES SALAAM** this 25th day of March, 2024.

P. J. NGWEMBE
JUSTICE OF APPEAL

The Ruling delivered this 26th day of March, 2024 in the presence of Ms. Hamisa Nkya, learned counsel for the 2nd Applicant and also holding brief for Mr. Kamara Mpaya, learned counsel for the 1st Applicant, and Ms. Agnes Dominick, learned counsel for the Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL