IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 66 OF 1996
In the Matter of Intended Appeal

BETWEEN

TANZANIA TRANSCONTINENTAL
TRADING COMPANY LIMITED ..... APPLICANT

AND

DESIGN PARTNERSHIP LTD. ..... RESPONDENT

(Application for restraining the disposal of the suit premises pending the hearing of an application for Review)

(Ramadhani, J.A., Mnzavas, J.A., And Lubuva, J.A.)

dated the 2nd day of October, 1996

in

Civil Appeal No. 28 of 1996

R U L I N G

RAMADHANI, J.A.:

This is an application by Tanzania Transcontinental Trading Co. Ltd., the Applicant, seeking an order of this Court to restrain the Respondent, Design Partnership Ltd., "from disposing off the suit premises until the application for the Review of the judgment and order of the Court in Civil Appeal No. 28 of 1996 is heard and determined by the Court".

Prof. Fimbo, representing the Respondent, had two objections to the affidavit filed in support of the application. First, he said that the deponent has not shown which paragraphs are of his own knowledge and which are based on information. Secondly, he pointed out that the deponent being a Jew should not have been sworn but should have been affirmed.

Mr. Tenga, learned advocate for the Applicant, submitted that the requirement to indicate in an affidavit which matters are of personal knowledge and which are from information, is contained in the Rules of the Civil Procedure Code which, he pointed out, do not apply to this Court. Mr. Tenga contended that affidavits filed in this Court are governed by general rules of customs and general principles of practice.

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Mr. Tenga contended that the affidavit contains matters of personal knowledge and that the word 'information' appearing in paragraph 8 was accidentally used. He argued that there were, therefore, no matters on information to be identified. Mr. Tenga in support of his contention relied on Mogha's Laws of Pleadings, 14th. edition (1987) (Eastern Law House) at p.407 listing eight rules of guidance in making affidavits and particularly rule six which provides as follows:

> Affidavits should generally be confined to matters within the personal knowledge of the declarant. If he verifies a fact on information received, he should use the words "I am informed by so and so" before every such allegation or in the paragraph containing the verification. If the declarant believes the information to be true, he must add "and I verily believe it to be true".

However, Prof. Fimbo pointed out that the affidavit does not contain only matters of personal knowledge of the deponent but also on information. The learned advocate pointed out paragraphs 3 and 4 regarding proceedings in the High Court and in this Court respectively. Prof. Fimbo said that those matters were obtained on information and he added that if the deponent became aware of them from the judgments of the courts, then copies of those judgments ought to have been annexed to the affidavit.

I agree with Prof. Fimbo in this regard. Even when relying on Mogha's, and not on the provisions of the Civil Procedure Code, there was a need to indicate which matters were of personal knowledge and which were on information so long as the affidavit contains both such matters.

Despite the fact that the Civil Procedure Code, as correctly pointed out by Mr. Tenga, does not apply to this Court, there are a number of decisions, both of this Court and of its predecessor, which demand that there should be such verification in an affidavit. Those decisions have laid down the principle that where an affidavit is made on an information, it should not be acted upon by any court unless the sources of information are specified.

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In this case the matters which could be said to be on information are contained in judgments and so can be verified without difficulty. The mischief which is sought to be avoided, I think, is the possibility of a person to conduct evidence but alleging to have been informed by unidentified sources which makes it impossible to verify. But here that fear is absent for it can be verified though no copies of the judgments have been annexed. So, I do not think this omission is fatal. We should not be too technical.

Then Prof. Fimbo said that it is a rule of practice that a Jew is affirmed and not sworn. Mr. Tenga, on the other hand, referred the Court to Rule 2(b) made under the Oaths Decree (Cap 7) of the Laws of Zanzibar, requiring a Jew to be sworn. Admittedly the law of Zanzibar cannot be used on Mainland Tanzania. However, the comparisons of the situation within the same country goes to show that the distinction is not all that important. What is important is that a deponent is either sworn or is affirmed. If neither of the two is done then that is fatal. But mixing up the two is, in my opinion, harmless. Likewise, the fact that at the beginning of the affidavit it is indicated that the deponent affirms but at the end it is stated that the deponent is sworn, does not, necessarily, make the affidavit dubious but is a mere oversight and, as I have already said, is harmless but suggests muddled thinking. That is not illegal.

So, I hold that the affidavit is valid.

The background to this application is that the Applicant successfully appealed to this Court. The memorandum of appeal contained two alternative prayers: specific performance or the refund of money advanced with interest at the rate of 40%. The learned advocate for the appellant, however, categorically abandoned the prayer for specific performance and asked for refund with interest at 10% and not 40%. This Court granted that and the Applicant is aggrieved and has filed an application for review on the grounds that the learned advocate was not given those instructions. Meanwhile the Applicant applies for an order to restrain the Respondent from disposing that property pending the review.

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Prof. Fimbo has resisted the application on the ground that the Applicant has not shown what irreparable damage it will suffer. He cited our decision in Yaledi Sai & Another v. Lilian Haro & Another, Civil Application No. 19 of 1994 (unreported) dealing with stay of execution. The learned advocate said that since this is a novel application, there is no precedent and that we have to use the analogy of stay of execution.

If the Court reviews the award and orders specifit performance while the Respondent has disposed of the suit premises then that order cannot be executed. That will be irreparable damage. However, in Yaledi Swai this Court gave another consideration and that is the likelihood of success of the appeal, in this application, of the review. This Court has given three instances in which it can review its decision; if there is an apparent error on the record, if there was fraund and if one party was not heard. This was decided by the full bench in Transport Equipment v D.P Valambhia. Of course, the Court did not close the categories of instances of review. Anyway, for fear of prejudging the matter, and as the application will definitely come before me and my two colleagues, I should stop there. However, in the event that the review is refused the Respondent will equally incur some loss.

So, an order to restrain the Respondent from disposing of the suit premises is granted but should the review be unsuccessful then the Applicant to compensate the Respondent any loss that this order will occasions. Cost of this application to follow event. It is so ordered.

DATED at DAR ES SALAAM this 25th. day of February, 1997.

(A.S.L. Ramadhani)
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(M. S. SHANGALI)
DEPUTY REGISTRAR COURT OF APPEAL