

**IN THE HIGH COURT OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA
MISC. CIVIL APPLICATION NO. 05 OF 2022**

SAID MUSTAPHA ISSA.....APPLICANT

VERSUS

**COMMISSIONER GENERAL OF PRISON
PERMANENT SECRETARY,
MINISTRY OF HOME AFFAIRS
THE ATTORNEY GENERAL**

.....RESPONDENTS

RULING

12th July & 5th August, 2022

MDEMU, J:.

The Applicant moved this Court under provisions of Sections 14 (1) of the Law of Limitation Act, Cap. 89. In chamber summons, the Applicant prayed to this Court to extend time to apply for leave for orders of certiorari and mandamus against the decision of the Commissioner General of Prisons. The application is supported by an affidavit affirmed by one Said Mustapha Issa, the Applicant, on 09th February, 2022.

The Respondents objected this application in their joint affidavit in reply and also raised four preliminary objections, to wit:

- 1. The Applicant has no cause of action against the 2nd Respondent.*

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2. *The application is pre-mature, misconceived and incompetent before this Court for not exhausting available remedies.*
3. *The application is incompetent for being filed contrary to Rule 4 of the Interpretation of Laws (Use of English Language in Courts) (Circumstances and Conditions) Rules, 2022.*
4. *The application is incompetent being supported by a defective affidavit containing hearsay.*

At the hearing of the above points of preliminary objections, the Applicant was represented by Mr. Paul Mwashitete, learned Advocate and the Respondents were represented by Mr. Camilius Ruhinda, Learned Senior State Attorney. It was agreed hearing of these preliminary objections be by way of written submissions. Parties complied with the scheduling order in which, the Respondents filed their written submissions on 4th of July, 2022 and the Applicant had his on 12th of July, 2022.

On the first point of preliminary objection, Mr. Ruhinda submitted that, the Applicant has no cause of action against the second Respondent as in his chamber summons, prays for an order against the first Respondent only. He therefore said, joining the second Respondent in this application is misconceived. He cited the case of **John Byombalirwa vs.**

Agency Maritime Internationale (Tanzania) Ltd. [1983] T.L.R. 1

to bolster his assertion.

On the second preliminary objection, his view was that, the Applicant has not exhausted available remedies to enable him to apply for orders of certiorari against the first Respondent. He was supposed to appeal to the appropriate authority before resorting to the Court for prerogative orders. On this, he cited the case of **Salim O. Kabora vs. TANESCO Ltd and Others, Civil Appeal No. 55 of 2015** (unreported).

On the third point of preliminary objection, he argued that, the application is incompetent for being filed contrary to Rule 4 of the Interpretation of Laws (Use of English Language in Courts) (Circumstances and Conditions) Rules, 2022. He added that, an order of the Court directing the Applicant to file his application in English, corresponding translation in Kiswahili language and a statement of the grounds upon which he relies to have the proceedings conducted in English language are wanting. He referred the case of **Puma Energy Tanzania Ltd vs. Dimond Trust Bank Ltd, Civil Appeal No. 54 of 2016** (unreported) insisting compliance.

On the fourth preliminary objection, the argument is on the defects in the affidavit containing hearsay information. The Applicant at

paragraph 11 of his affidavit stated to try his best to raise money to engage an advocate to prosecute his case through assisting masons in construction activities being a sole income, is hearsay. It needs supporting evidence to prove this assertion. He cited Order XIX, Rule 3(1) of the Civil Procedure Code, Cap. 33 and the case of **National Housing Corporation and Another vs. Anna Francis Maendaenda, Misc. Land Application No. 107 of 2020** (unreported). He therefore prayed the application be struck out with costs.

In reply, Mr. Mwashitete's submissions on the first preliminary objection was that, it is true that no order has been sought against the second Respondent. But he is joined because the Applicant was working under the Ministry of Home Affairs whose chief executive officer is the second Respondent. He also submitted that, should this Court find joining the second Respondent un-procedural, such a misjoinder of parties cannot defeat this application. On this he cited Order I, Rule 9 of the Civil Procedure Code, Cap. 33 and the case of **Harel Mallac Tanzania Ltd vs. Falcon Chemicals Company Limited and Another, Commercial Case No. 133 of 2019**(unreported).

He thought the second objection has no merits since the Applicant appealed to the first Respondent as evidenced in paragraph five of the

affidavit and annexure S3 and S6. He therefore distinguished the case of **Salim O. Kabora v. TANESCO Ltd and Another** (supra)

On the third objection, he argued that, in Rule 4(2) (a) of the Interpretation of Laws (Use of English Language in Courts) (Circumstances and Conditions) Rules, 2022, it is the duty of the Court upon receiving pleadings filed to admit or to reject and direct be filed in Kiswahili. He added that, in sub rule (3) of rule 4, the decision of such Court under sub rule (2) is final and this is what happened to the application at hand in which the Court admitted it. He wondered for the Respondents to object in circumstances where there is no complaint from the court and they have also filed their reply in the same language used by the Applicant.

In respect to the fourth objection; he submitted that, there is no hearsay in Applicant's affidavit which requires evidence to support it. He said also that, there is no principle governing affidavits which states that, any facts should be accompanied by supporting evidence. It was his submissions that, affidavit being a substitute of oral evidence, should only contain statement of facts and circumstances to which the witness deposes being of his own personal knowledge or information obtained from another source which he believes to be true. He cited the case of **Uganda vs. Commissioner of Prisons Ex Parte Matovu [1966] EA**

514 and the case of **Alliance Finance Corporation Ltd and Two Others vs. Safari Denis Samson Misc. Civil Application No. 22/2022** (unreported).

I had also an opportunity to go through the affidavit in support of the application. One noted omission is want of signature of the deponent. On this pointed omission, this Court having gone through different decisions namely **D.P. Shapriya and Company Ltd v. Bish International B.V [2002] E.A 47, Zuberi Musa v. Shinyanga Town Council, Civil Application No. 100 of 2004** (unreported) and **DPP vs. Dodoli Kapufi and Patson Tusalile, Criminal Application No. 11 of 2008** (unreported) reached to the conclusion that, lack of deponent's signature in an affidavit is a defect which is incurable. Specific in **Dodoli Kapufi** (supra), the Court stated essential ingredients of any valid affidavit in this way:

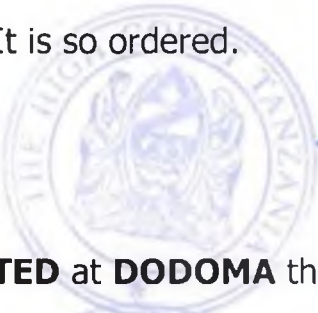

- 1. The statement or declaration of facts by the deponent;*
- 2. a verification clause;*
- 3. a jurat;*
- 4. the signature of the deponent and person who in law is authorised either to administer the oath or to accept the affirmation.*

An affidavit lacking one of the above ingredient or all, renders the affidavit incurably defective. In fact, in a situation where the deponent has not signed at all, one may add that, the deponent never appeared before the Commissioner for oaths to swear/affirm an affidavit. The circumstances in this application are similar to the case of **Dodoli Kapufi** (supra) where, in it, the affidavit supporting the application lacked deponent's signature. The application was rendered incompetent thereof.

Back to the instant application, the deponent never signed in the relevant portion. In it therefore, the affidavit in support of the application is defective for want of deponent's signature thereon. This defect in the eyes of the law is incurable. This in turn renders the entire application incompetent and is hereby struck out.

This defect alone suffices to dispose the entire application. I am saying so because other preliminary objection rests on the affidavit which, as said, is defective and therefore cannot support the application. I will not therefore go that far end. No order as to costs.

It is so ordered.


Gerson J. Mdemu
JUDGE
05/08/2022
DATED at DODOMA this 05th day of August, 2022

Gerson J. Mdemu
JUDGE
05/08/2022