

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOROGORO SUB-REGISTRY)**

AT MOROGORO

MISC. CIVIL APPLICATION NO. 21 OF 2022

(Arising from Civil Appeal No. 254 of 2020)

KINGS AGRO LIMITED APPLICANT

VERSUS

JEREMIAH CHARLES NYAGAWA RESPONDENT

RULING

30th November, 2022

CHABA, J.

In this application, the appellant, a limited liability company lodged an appeal before this Court and registered as Civil Appeal No. 254 of 2020 appealing against the judgment and decree of Mvomero District Court in Civil Case No. 6 of 2019. However, the appeal was dismissed with costs on 25th November, 2021 for non-appearance.

Through her advocate, the applicant successfully lodged Misc. Civil Application No. 11 of 2021 seeking to set aside the dismissal order by this Court, unfortunately the application was struck out for being incompetent. Upon struck out of her application, on 10th March, 2022 the applicant found himself already out of time, and she consequently applied before this Court for an extension of time to lodge an application to set aside the dismissal order and restore Civil Appeal No. 254 of 2020 via Misc. Application No. 10 of 2022. On 12th May, 22 the Court granted the application as prayed.



Consequently, on the basis of the afore stated background and order of this Court, the applicant by way of chamber summons taken out under Order XXXIX, Rule (19) of the Civil Procedure Code [Cap. 33 R. E, 2019] (the CPC), filed the instant application seeking for the following orders: -

- i) That, the Honourable Court may be pleased to issue an order setting aside Dismissal Order of this Honourable Court (Kalunde, J.) in the Civil Appeal No. 254 of 2020 dated 25th November, 2021, substitute to re-admission of the appeal;
- ii) Costs of this application may be provided for; and
- iii) Any other order that this Honourable Court may deem fit and just to grant.

The application is supported by an affidavit deposed by Mr. Mohinder Singh Rehal.

As gleaned from the applicant's affidavit, the applicant deposed that, through the services of his former advocate Mr. Chacha, the applicant filed a memorandum of appeal in the High Court of Tanzania Main Registry against the respondent, but in the end of November, 2021, when he was at Kigoma for a business trip, he received a WhatsApp call from Mr. Chacha who notified him that he got an emergence and that he was outside of the country. Upon receiving that information, he started making follow up on his own in respect of his case, i.e., Civil Appeal No. 254 of 2020.



He further deponed that, on 13th December, 2021 he went to the High Court of Dar Es Salam, only to find out that all cases that were handled by Honourable Kalunde, J., originating from Morogoro region were transferred to the High Court of Tanzania, Morogoro Sub-Registry. He immediately travelled to Morogoro High Court, where he found out that his appeal was dismissed on 25th November, 2021.

He claimed further that, failure to enter appearance on the date of hearing before this Honourable Court was neither deliberately nor negligently as it is shown that, his case was transferred to Morogoro High Court in absence of his knowledge, notification or even being issued with the Court summons.

He concluded that, the decision of the District Court of Mvomero in Civil Case No. 6 of 2019 is tainted with serious illegalities which merits the attention of this Court. He said, if the dismissal order, will not be set aside, it will deny the applicant's rights to be heard, and that the applicant stands a chance of suffering irreparable loss.

So, when the respondent was served with the chamber summons in support of the application, the respondent attacked the application by filling a counter affidavit coupled with the notice of preliminary objections on points of law to the effect that: -

1. The application is supported by incurable, defective affidavit which contain prayers, legal arguments and reasoning, hearsay evidence,



expectations, speculations and false statements in paragraphs 4, 5, 6, 7, 9 and 12.

2. The application is supported by incurable defective affidavit which was attested before Commissioner for Oaths with conflict of interest.

As a matter of procedure, I was obliged to stay hearing of the application and proceeded to determine first the points of law raised by the learned advocate for the respondent. Hence, at the hearing of the preliminary objections on points of law (P.O), the applicant was represented by Ms. Sharifa Mohammed, learned advocate whereas the respondent enjoyed the legal services of Ms. Susana Mafwere, learned advocates.

Submitting in support of the first limb of preliminary objection, Ms. Mafwere submitted that, wording used by the applicant in the affidavit deposed by Mr. Mohinder Singh Rehal at paragraphs 4, 5, 6, 7, 9, and 12 includes prayers, legal arguments and reasoning, hearsay evidence, expectations, speculations and false statements.

She accentuated that, to mention few examples, the words in paragraphs 4, 5, and 6 of the affidavit states that; I quote: "in the end of November when I was in Kigoma"; then in paragraph 5, he narrates that on 13th December, 2021 after I came back I went to the High Court of Dar Es Salam to check the status of the case and informed that, the case was transferred to Morogoro High Court; whereas in paragraph 6, it is stated that, immediately the applicant travelled to Morogoro High Court and on 16th November, 2021 wrote a letter to

this Honourable Court requesting for perusal, only to find out my appeal was dismissed on 25th November, 2021 before Hon . Kalunde J., for non-appearance.....”.

According to the learned advocate, the above-mentioned paragraphs contradict each other as annexures A2 shows that, this Court received such a perusal letter on 16th December, 2021.

To add weight in this point, she cited the case of **Robert S. Lova and Another vs. Ministry of Natural Resources and Tourism and Another**, Revision No 742 of 2018, High Court of Tanzania, Labour Division at Dar Es Salaam (Unreported), where it was held that: -

"An affidavit being a substitute for oral evidence, should only contain true statements of facts and circumstances which the witness deposes of own personal knowledge from information believed to be true. The fact that the first applicant's affidavit contains untrue statement of evidence taken under oath cannot be amended therefore I find the affidavit is incurably defective and I strike it out".

He further contended that, paragraphs 7 and 12 of the affidavits contains legal arguments and reasoning which is contrary to the law, as the law requires that an affidavit should contain only facts and not otherwise, hence words like "in the event, if the dismissal order is not set aside will deny the applicant the right to heard" were not supposed to be included in the affidavit. He cited Order


XIX, Rule 3 (1) of the Civil Procedure Code [Cap. 33 R. E, 2019] to fortify her argument. Basically, the law provides that, *"affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove...."*

She further referred this Court to the case of **Mathias Daffa & 27 Others vs. Permanent Secretary, Ministry of Works and Two Others**, Misc. Application No. 502 of 2017, where the High Court of Tanzania (Land Division) speaking through Honourable S.A.N Wambura, J., (As she then was) had the following to state: -

"As correctly submitted by Ms. Mtulia, Order XIX, Rule 3 (1) of Civil Procedure Code, [Cap. 33 R. E, 2002], provides that the affidavit shall be confined to facts only..."

As to the second limb of preliminary objection, the learned advocate argued that, in this application, the jurat of attestation is attested by one Ndanu E. Stephen and the same application was filed by Emmanuel Ndanu. She said, after a cross check in the *E-Wakili Database*, it appears to be one person under the name of Mr. Ndanu Emmanuel Stephen who had previously represented **Vehicle and Equipment Leasing (T) limited**, in Civil Appeal No. 265 of 2020, which was dismissed for being time barred on 26/05/2021 before Mlyambina, J.

She continued to elaborate that, Mr. Emmanuel Ndanu has a conflict of interest in this case, and he can't attest an affidavit which he has an interest




therein, because Civil Appeal No. 265 of 2020 arose from a Civil Case No. 6 of 2019 and it was instituted at the District Court of Mvomero (wherein so-called Vehicle and Equipment Leasing (T) limited was the first defendant).

He stressed on this point by citing the law under section 7 of the **Notaries Public and Commissioners for Oaths Act [Cap. 12 R. E, 2019]** which bars a commissioner for oath practising on issues which he has conflict of interest. For ease of reference, the law says: -

"No commissioner for oaths shall exercise any of his powers as a commissioner for oaths in any proceedings or matter in which he is advocate to any of the parties which he is interested".

She ended to submit by stating that since Mr. Ndanu Emmanuel has a conflict of interest, it renders the affidavit incurable defective for being filed by the same person who attested and has an interest in the same application, and hence prayed for the court to dismiss the application with costs.

In reply to the applicant's submission in chief, the respondent through her learned advocate Sharifa Mohamed averred that, regarding the first point, the respondent failed to explain how the contents of paragraphs 4, 5, and 6 are argumentative, prayers, hearsay, speculations and false. She said, all stated in those paragraphs are what had transpired and are relevant to the present application.



On the issue of false averment, Ms. Sharifa propounded that, in his counter affidavit, the respondent hasn't even stated what he believes to be true while the laws are very clear that when a certain statement is believed to be true, and the correct true statement is made, then the court has to consider the true statement.

Responding to the second ground of preliminary objection, Ms. Sharifa contended that, the respondent has not clearly stated how the commissioner for oaths who attested the affidavit in support of the application have interest with the present application.

He further stated that under Regulation 45 (1) of the Advocates (Professional Conduct and Etiquette) Regulations, GN. No. 118 of 2018 it is provided that: -

"a conflict of interest is one that would be likely to affect adversely the advocates judgment or advice on behalf of loyalty to a client or prospective client".

She stressed that, a conflict of interest between the client and his/her advocate may only arise from the proceedings or transactions in the former case and where the subsequent proceedings are the same. To fortify her contention, she referred this Court to the case of **Pravinchandra Girdharial Chavda vs. Vidyadhar G. Chavda**, (Civil Revision 7 of 2016) [2017] TZCA 197 (09 February 2017); where it was held that: -



"Since Mr. Mkono acted in arbitration proceedings between the two warring brothers it would be unethical for the same Mr. Mkono to appear subsequently as an advocate for one of the parties in the same dispute between the parties".


To add more weight on her argument that, Mr. Ndanu Emmanuel Stephen is not prohibited to attest any document in this application, Ms. Sharifa highlighted that, Regulation 51 (1) (a) (c) of the Advocates (Professional Conduct and Etiquette) Regulations, of 2018 (GN. No. 118 of 2018), provides that:

"In this Part, conflict of interest arises where a member moves from one law firm, being the former law firm, to another law firm, being the new law firm, and either the moving member or the new law firm is aware at the time of the move or later discovers that: -

(a) the new law firm represents a client in a matter which is the same as or related to a matter in respect of which the former law firm represents its client ("former client");

(b) the interests of those clients in that matter conflict, and

(c) the transferring member actually possesses relevant information respecting that matter.



She concluded by accentuating that based on the above submission, there is no conflict of interest between Mr. Ndanu Emmanuel and the respondent, since the instant application, i.e., Misc. Civil Appeal No. 265 of 2020 is quite different from the alleged Civil Appeal No. 265 of 2020. She prayed the Court to overrule the POs raised by the respondent.

Having considered the written rival submissions advanced by both parties and upon going through parties' pleadings, the issue worth of determination is whether the raised preliminary objections on points of law have merits.

I will start with the first ground as to whether the applicant's affidavit in support of this application contravenes Rule 3 (1) of Order XIX of the Civil Procedure Code [Cap. 33 R. E, 2019]. The law states that:

"Affidavit shall be confined to such facts as deponent is able of his own knowledge to prove, except in the interlocutory applications, on which statement of his belief may be admitted provided that the grounds thereof are stated".

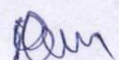
Basing on the above legal requirement, I have revisited and perused the chamber summons and the supporting affidavit deposed by the applicant to see and gauge whether the paragraphs afore mentioned by the learned advocate for the respondent are offending the provisions of Rule 3 (1) of Order XIX of the CPC. After reviewing the same, this Court is of the firm view that, paragraphs 4, 5 and 6 respectively, contains false statements and it contradicts



each other. In the meantime, paragraph 7 contains arguments and legal reasoning to the effect that the delay was not caused deliberately by negligence. On this facet, it is quite clear that the deponent ought to have stated facts revealing that the delay was not caused by negligence. The issue of legal status of non-conforming affidavits has been clearly settled with a plethora of legal pronouncements including in the case of **Uganda vs. Commissioner of Prisons Exparte Matovu (1966) EA 514**. In this case, defunct Eastern African Court of Appeal succinctly stated: -

"The affidavit sworn by Counsel for applicant is also defective. It is clearly bad in law. Again, as a general rule, of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only constitute statements of facts and circumstances to which the witness deposes either of his own knowledge or from information to which he believes to be true. Such affidavit must not contain extraneous matter by way of objection or prayer or legal argument. The affidavit by Counsel in this matter contravenes Order 17 Rule 3 and should have been struck out."

I must hasten to add that, the quoted provision of the law above is in *pari-materia* with our own Order XIX, Rule 3 of the CPC. The Court also observed that, the Evidence Act [Cap. 6 R. E, 2019] under section 62 (1) (a), (b), (c) and (d), qualifies oral evidence to be direct evidence. And since affidavits are termed

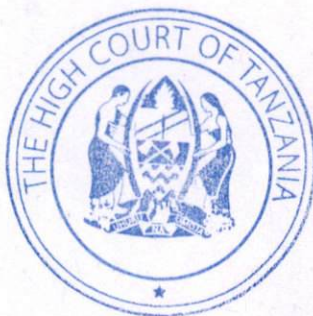



as substitute for oral evidence, it means that a sworn affidavit as written evidence should and it must be direct evidence, as provided by the law under Order XIX, Rule 3 of the CPC.

In view of the above observation, the affidavit deposed by the applicant must fail, and thus it is hereby struck out. In the situation like this, Order XLIII, Rule 2 of the CPC which states that, *"every application to the Court made under this Code shall, unless otherwise provided, be made by a chamber summons supported by affidavit"*, must come into play because the present chamber summons truly has no supporting affidavit and thus cannot stand in the eyes of the law, simply because it is incompetent.

For the foregoing reasons, suffice it to say that the first ground of preliminary objection on a point of law is sufficient to dispose of the entire application, and it is hereby sustained. That being the position, I find no reason to labour much on the second ground of the PO as by so doing that will be an academic exercise. Accordingly, this application is struck out with costs. **I so order.**

DATED at MOROGORO this 30th day of November, 2022.




M. J. CHABA

JUDGE

30/11/2022