

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB- DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 537 OF 2022

(Arising from the decision in Civil Case NO. 184 of 2020)

ETG INPUTS LIMITED.....APPLICANT

VERSUS

DOMINIC LOGISTICS (T) LIMITED..... RESPONDENT

RULING

Date of last Order: 13/07/2023.

Ruling date: 28/07/2023.

E. E. KAKOLAKI, J

Before this Court the applicant is seeking for an extension of time within which to review the ruling of this court in Civil Case No. 184 of 2020, dated 04/03/2022, which transferred and ordered the applicant's suit to be tried by the Resident Magistrates Court of Dar es salaam at Kisutu. The application is preferred under section 14 of the Law of Limitation Act, [Cap. 89 R.E 2019] (the LMA) and dully supported by applicant's advocate affidavit one Kelvin Edward Lubago. In response the respondent is vehemently challenging the application, the resistance which is manifested in the counter affidavit duly filed by one Mussa Kiobya, the respondent's advocate.

Briefly stated, on 04/03/2022 the applicant had her suit Civil Case No. 184 of 2020 transferred from this Court to the Resident Magistrates Court of Dar es salaam at Kisutu to be tried there in terms of provisions of section 21(1)(a) and (2) of the Civil Procedure Code, [Cap. 33 R.E 2019]. It is deposed that, upon follow up the applicant was informed that the file was sent to Kisutu where upon her attempt to have the plaint admitted the same was declined on the ground that the case had reached a far stage of mediation before the information was passed to her that the file has been reverted back to the High Court. It is further deposed that, upon several correspondences and encountering with the Deputy Registrars Hon. Nyembele and Hon. Lwambano, the applicant was advised to institute this application in which he states it intends to inform this Court that, even if the Court had no jurisdiction the position she is not subscribing to, the remedy was to strike it out and not to transfer the same to Kisutu.

Hearing of the application took the form of written submission and both parties were represented and filed their respective submissions timely. The applicant enjoyed the services of Mr. Symphorian R. Kitare while the respondent hired the services of Mr. Mussa Kiobya, both learned counsel.

Having thoroughly revisited the submissions, affidavit, counter affidavit and reply to counter affidavit, it came to the attention of this Court that, the respondent in the course of response to the applicant's submission raised legal issue as to the competence of the affidavit which is the heart of this application for containing evidence supporting the same. Apart from responding on the merit or otherwise of the said raised issue on competence of the applicant's affidavit, it is Mr. Kitare's contention that the same ought to be raised as preliminary objection hence this Court should disregard the same and proceed to determine the application on merit.

It is true and I agree with Mr. Kitare's proposition that, as a matter of prudence the respondent ought to have earlier on raised the said issue as a point of preliminary objection. However, Mr. Kitale has not cited to this Court any authority preventing the respondent to raise the same in the course of submission given the uncontested fact that, if found to be meritorious it has the effects of disposing of the matter. I am alive to the fact that, as a matter of prudence a party to the suit has not to take the other party by surprise so as to maintain the noble principle of fair trial. In this case much as the applicant was accorded with the right to responded to the same, it is my conviction that its consideration and finally determination by this Court won't

prejudice her anyhow. With that spirit and finding I proceed to determine the same first before going into the merit or otherwise of the application.

It is Mr. Kiobya's contention that, the affidavit by the applicant offends the provisions of Order XIX Rule 3(1) and (2) of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC) by containing hearsay evidence. He argues that, in paragraph 5 of the affidavit, the applicant deponed that they were informed by that the court file was sent to Kisutu, on 01/09/2022, and that on the same paragraph she asserts further that, the Magistrate incharge informed them, they are sending back the court file to the High Court, the information which according to him was not in the applicant's personal knowledge, thus its source ought to have been disclosed in the verification clause. In support of his argument Mr. Kiobya referred the Court to the case of **Salima Vuai Fom Vs. Registrar of Cooperatives and 3 Others** [1995] TLR 75, where it was stated that, where an affidavit is made on information it should not be acted upon by the Court unless the sources of information are disclosed.

That aside Mr. Kiobya lamented paragraphs 10 and 11 of the affidavit are argumentative and consist of opinions and conclusion, hearsay evidence, sentiment, speculations and suppositions. And further that in paragraphs 5

and 8 the affidavit was mentioning persons whose affidavits could not be obtained to render credence to the facts stated therein hence the whole evidence in the affidavit becomes hearsay, incapable of supporting the application in question since the source of information is not even disclosed in the verification clause. He relied on the case of **Suzan Ng'ondo Vs. Anna Samwel Urassa**, Civil Application No. 606/01 of 2021 (CAT-unreported), where the Court was insistent that, an affidavit which mentions another person is hearsay unless that other person swears as well.

In rebuttal Mr. Kitare argued that, paragraph 5 is based on the deponent's own knowledge as he deposed on what he was told by the court official that the file was sent to Kisutu otherwise he would not have stated the source of that information. To him therefore the case of **Salima Vuai Foum** relied on by the respondent is distinguishable from the facts of this case. He said in the event it is proved by the Court that the paragraph is offensive still the same cannot render the entire affidavit defective as it was held in the case of **D.T Dobie (Tanzania) Limited Vs. Phanthom Modern Transport (1969) Ltd**, Civil Application No. 141 of 2001 (CAT-unreported). Regarding the contention that paragraphs 10 and 11 of the affidavit contain opinion, hearsay, speculations, suppositions and conclusion, it was Mr. Kitare's

argument that, the submission in respect of that assertion should to be considered as the same were not pleaded in the counter affidavit save for paragraph 4(i) of the counter affidavit where the applicant blames the affidavit to contain arguments. On the need to have the affidavits of Deputy Registrars mentioned in paragraph 8 of the affidavit, he countered that not every fact should be supported by affidavit of another person mentioned therein. Further to that he argued, even if the said paragraph is expunged from the affidavit still won't damage the substance of the affidavit as according to him it was not possible for the applicant to obtain registrars or magistrates affidavits. He thus prayed this Court to disregard the said raised issue.

I took time to chew out and internalise the contending arguments by the parties and peruse the affidavit subjected to scrutiny to establish validity of respondent's raised legal concern. It is gathered from their submissions as uncontested position of the law that, under Order XIX Rule 3(1) and (2) of the CPC, an affidavit must be confined to the facts in the deponent's knowledge only and which he is able to prove, unless the same are related to the interlocutory application which might be based on beliefs. Order XIX Rule 3(1) of the CPC reads:

3.-(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted:

Provided that, the grounds thereof are stated.

What remains in dispute in which this court is called to determine is the issue as to whether paragraphs 5,8,10 and 11 of the affidavit offends the law. And if so what it is the consequence. In order to disentangle parties from locking horns I find it apposite to reproduce the said accused paragraphs. To start with are paragraphs 5 and 8 of the applicant's affidavit reading thus:

*5. That when **we were informed that the court file was sent to Kisutu**, on 01/09/2022 we went to Kisutu registry to reinstitute the suit. However, on receiving the plaint, the Registry Officer In-charge referred us to the Resident Magistrate In-charge who declined to admit the plaint that the suit commenced at the High Court and its proceedings have already advanced to the mediation stage. Accordingly, **the magistrate in-charge informed us that they are sending back the High Court file.***

*8. That after several visits to the registrar's office on 18/11/2022, I succeeded to meet him and explained what transpired to at Kisutu. Accordingly, Hon. **Nyembele shared the problem with Hon. Lwambano and thereafter***

advised us to institute the application for review by asking this Hounourable Court to revisit its decision of transferring the suit to Kisutu. (Emphasis added)

In this matter it is uncontroverted fact that the applicant is seeking for extension of time to file Review against the decision of this Court, in which among other grounds for extension of time, she has to account for the period of delay from when the decision for transferring the case file to the lower court was made, to the time of allegedly refusal of admission of the case before the Resident Magistrates Court for Dar es salaam at Kisutu and its revert back to this Court, before this application was preferred. In so doing the applicant in paragraphs 5 and 8 is referring to unnamed person from this Court and mentioning the Resident Magistrate In-charge for RM's Court at Kisutu and two Registrars' names as persons who gave information and rendered advice to her, the information and advice which its source is neither disclosed in the verification clause nor verified or supported by the sworn affidavits of the mentioned persons therein. It is from that fact I disagree with Mr. Kitale's assertion that, the applicant was in personal knowledge of the said facts as from bolded parts of the two paragraphs in the affidavit there is no facts suggesting that the said information and advice received by the applicant was in her personal knowledge. It was held in the case of

Suzan Ng'ondo (supra) that, an affidavit mentioning other person is a hearsay unless that other person swears in support of it. In so doing the Court observed thus:

"...an affidavit which mentions another person is hearsay unless that other person swears as well."

Regarding the importance of verifying the information or advice received rendered to the application, **Verification clause** is defined by the Court of Appeal in numerous cases some of which are the cases of **Director of Public Prosecution Vs. Dodoli Kapufi and Patson Tusalile**, Criminal Application No. 11 of 2008 and **Paul Makaranga Vs. R**, Criminal Application No. 3 of 2010 (both CAT-unreported). In **Dodoli Kapufi and Another** (supra) **verification clause** was defined as that part of an affidavit which *"shows the facts the deponent asserts to be true of his own knowledge and those based on information or beliefs"*. As to the rationale behind verification clause in the affidavit the Court of Appeal in the case of **Lisa E. Peter v. Al-Hushoom Investment**, Civil Application No. 147 of 2016 (CAT-unreported) quoted with approval the Indian case of **A.K.K. Nambiar Vs. Union of India** (1970) 35 CR 121 which explained the importance of a verification clause in affidavit as follows:

*"The reason for verification of affidavits is to enable the court to find out which facts can be said to be proved on the affidavit evidence or rival parties' allegations may be true to information received from persons or allegation may be based on records. **The importance of verification is to test the genuineness and authenticity of allegation and also to make the deponent responsible for allegations. In essence verification is required to enable the court to find out as to whether it will be safe to act on such affidavit evidence.** In the absence of proper verification clause, affidavits cannot be admitted as evidence". (Emphasis supplied)*

It was further held by the Court of Appeal in the case of **Anatol Peter Rwebangira Vs. The Principal Secretary, Ministry of Defence and National Service and the Hon. Attorney General**, Civil Application No. 548/04 of 2018 (CAT-unreported) on importance of verification clause when made a quote from the book of Civil Procedure by C.K. Takwani &h Edition where it was stated at page 21:-

"Where an averment is not based on personal knowledge, the source of information should be clearly disclosed."

It is learnt from the above cited authorities that, the object of verification clause in the affidavit is to test the genuineness and authenticity of the

assertions in the said affidavit and render the deponent responsible for his averments therein, thus enjoining the court to believe and act on such evidence before proceeding to base its decision on it, bearing in mind the settled position of the law that, affidavit is a substitute of oral evidence. See also the case of **Uganda Vs. Commissioner of Prison Exparte Matovu** [1966] EA 514 as restated in the case of **Phantom Modern Transport (1985) Ltd v. DT Dobie (TZ) Ltd**; Civil References Nos. 15 of 2001 and 3 of 2002 (CAT-unreported). In this matter verification clause in the applicant's affidavit reads and I quote:

VERIFICATION

*I, **KELVIN EDWARD LUBAGO**, do hereby verify that the contents of paragraphs 1,2,3,4,5,6,7,8,9,10,11 and 12 are true to the best of my knowledge and belief.*

Notably, from the above excerpt of verification clause in the applicant's affidavit there is no disclosure of the source of information and advice rendered to the deponent by the persons mentioned in paragraphs 5 and 8. Non-disclosure in the verification clause of the source of information and advice rendered to applicant and absence of sworn affidavits by the two registrars in support of the applicant's averments in paragraphs 5 and 8 no

doubt makes her evidence hearsay one, which defect I hold renders the affidavit defective.

Next for determination is whether the contents of paragraphs 10 and 11 of the affidavit are argumentative and consist of opinions and conclusion, hearsay evidence, sentiment, speculations and suppositions. In order to properly consider that issue I find prudent to display contents of the said paragraphs herein. The same read:

10. That, the delay to file the application for review is not deliberate but it has been caused by the court itself after it issued an order which the Resident Magistrates Court at Kisumu did not comply.

11. That, in the intended application for review we intend to inform the court that even if this court had no pecuniary jurisdiction to entertain this suit, the assertion which we do not subscribe, the remedy was not to transfer the case to Kisumu but to struck it out.

My reading of the contents of paragraph 10 of the affidavit has failed to find any fact substantiating Mr. Kiobya' assertion that, the same contain either arguments, opinions and conclusion, hearsay evidence, sentiments, speculations and suppositions. The contrary is true when it comes to the

averments in paragraph 11 of the affidavit. In my opinion use of the words *'...even if this court had no pecuniary jurisdiction to entertain this suit, the assertion which we do not subscribe, the remedy was not to transfer the case to Kisutu but to struck it out'* are nothing but arguments, opinion and conclusion, in that in the appellant's opinion the remedy for findings that the court had no jurisdiction to entertain the suit is not to transfer the case but rather to strike it out, the opinion and argument which also contain conclusion. I therefore find the same to be defective for containing extraneous matters. It is settled law that, an affidavit should contain only statement to which the witness disposes either of his own knowledge or belief as is fatal when it contain extraneous matters by way legal argument or conclusion. See the case of **Phantom Modern Transport (1985) Ltd (supra)** when referred to **Commissioner of Prison Exparte Matovu (supra)**. As paragraph 11 contain extraneous matters I proceed to expunge it from the affidavit.

Now having found paragraphs 5 and 8 of the affidavit to be hearsay which I disregard and that paragraph 11 contain extraneous matters hence expunged from the affidavit and in the premises where the verification clause is also rendered defective for non-disclosure of the source of information and

advice deposed by the applicant in paragraphs 5 and 8 of the affidavit, the follow up question is whether this application can survive. It is Mr. Kitale's submission that it can while Mr. Kiobya is of the contrary view that it crumbles. I subscribe to Mr. Kiobya's proposition that under the circumstances the application cannot survive. I am aware of the position of this Court and Court of Appeal that, verification clause can be subjected to amendment and allow the application to be heard on merit upon employing the principle of overriding objectives. See the case of **Sanyou Service Station LTD v. BP Tanzania LTD (Now PUMA Energy (T) LTD)**, Civil Application No. 185/17 of 2018 (CAT-unreported). Likewise it is now settled that an offensive paragraph can be expunged or disregarded and the Court can continue to determine the application based on the remaining paragraphs if the expunged paragraph is inconsequential. See the cases of **Jamal S. Mkumba and Another Vs. Attorney General**, Civil Application No. 240/01 of 2019 (CAT-unreported) It is a common knowledge that, the decision whether or not to allow a party to amend an affidavit with a defective verification is a matter in the discretion of the Court. See also the case of **DDL Invest International Limited Vs. Tanzania Harbours**

Authority & Two Others, Civil Application No. 8 of 2001 (CAT-unreported).

Further to that, every case is decided basing on its own merit.

In this matter as alluded to above paragraphs 5 and 8 of the affidavit that, carries the heart of this application for intending to explain what happened after the decision sought to be reviewed upon extension of time, follow up of transfer of the suit by the applicant and the steps taken before the same allegedly reverted back to this Court. In disregard of the same for being hearsay and expunge of paragraph 11 of the affidavit, I do not find how the application can survive without the said intended facts being deposed therein. I would have exercise the discretion of this Court and order for amendment of the verification clause but for the defects in paragraphs 5 and 8 already disregarded and the expunged paragraph 11 of the affidavit containing vital material facts in support of the application, I refrain from so doing.

All said and done, I find the raised legal point or point of objection has merit as I sustain the same and proceed to struck out the application with leave to the applicant to file a proper one and in accordance with the law.

I order, Each party to bear its own costs.

Ordered accordingly.

Dated at Dar es Salaam this 28th July, 2023.



E. E. KAKOLAKI

JUDGE

28/07/2023.

The ruling has been delivered at Dar es Salaam today 28th day of July, 2023 in the presence of Mr. Kelvin Lubago, advocate for the applicant who is also holding brief for Mr. Mussa Kiobya, advocate for the respondent and Mr. Oscar Msaki, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

28/07/2023.

