

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 67 OF 2023

CAPITAL RADIO 1ST APPLICANT

SOFIA RAJAB 2ND APPLICANT

INDUSTRIAL PRODUCTION PROMOTIONS (IPP MEDIA) 3RD APPLICANT

WILBERT DEOGRATIAS MASONA 4TH APPLICANT

VERSUS

CATHERINE HENRY MALILA RESPONDENT

(Arising from the decision of this Court in Civil Appeal No. 342 of 2021)

RULING

27th June & 4th August, 2023

KISANYA, J.:

This Court is moved to be pleased to grant leave to the applicants to appeal to the Court of Appeal against the judgment and decree of this Court (Mruma, J) dated 31st October, 2022 in Civil Appeal No. 342 of 2021. The application is by chamber summons made under Rule 54(a), 48 and 49(3) of the Tanzania Court of Appeal Rules, 2009 (as amended) and section 5(1)(c) of the Appellate Jurisdiction Act, Cap. 141, R.E. 2019. It is accompanied by an affidavit duly affirmed by the applicant's advocate, one Mr. Kassim Mmbaga Nyangarika.

Apart from filing a counter affidavit to contest the application, the respondent has greeted the application with a notice of preliminary objection on the points of law to the effect that: -

- (a) That the verification of affidavit is fatally defective for containing information and not identifying the paragraphs of which are within the knowledge of the deponent and which paragraphs are information from the applicants, contrary to Order XIX Rule 3(1) of the Civil Procedure Code (Cap, 33, R.E. 2019);*
- (b) The affidavit is incurably defective for being affirmed by a person who is not conversant with the facts of the affidavit and also there is no paragraph 14 as stated in the verification clause hence defective verification clause for verifying un-existing paragraph.*

With leave of the Court, the preliminary objection was argued by way of written submissions. The applicants had the legal service of Mr. Kassim Nyangarika, learned advocate while the respondent was unrepresented.

Arguing in support of the preliminary objection, the respondent started by referring the Court to the case of **Bank of Tanzania vs Devran P. Valambia**, Civil Appeal No. 15 of 2002 (unreported), where it was held that the aim of a preliminary objection is to save time of the court and of the parties without going into the merit of the matter. She invited the Court to consider the cases of

Shahida Abdallah Hassanali Kasim vs Mohadi Mohammed Gulamali Kanji, Civil Application No. 42 of 1999, **COTWU (T) OTTU Union and Another vs Hon Idd Simba, Minister of Industries and Trade and 7 Others**, Civil Application No. 40 of 2020, **The Registered Trustees of Tanzania Labour Party vs Augustine Lyatonga Mrema and Others**, Civil Application No. 34 of 2023, **Mukubaganyi Mulumwa vs TRC and 2 Others**, Misc. Civil Appeal No. 8 of 2006 and **Gosbert Kakwaya vs Hadija Salum**, Civil Appeal No. 6 of 2005 (all unreported). It was her argument that the points of law under consideration meet the underlying objective of preliminary objection.

As for the points of preliminary objection, the respondent submitted that the supporting affidavit is defective due to the following reasons: *One*, the deponent verified paragraph 14 of the affidavit which does not exist. *Two*, the verification clause is defective as the deponent has not verified information which is to his own knowledge and information received from the applicants. *Three*, the verification clause does not disclose the applicants who gave information to the deponent because some applicants are legal persons. *Four*, the applicant's counsel has verified information from the applicants while he is not allowed to depone on every fact of the case. To expound her argument on the said ground, she cited the cases of **Martha George Kilimo vs NCBA Bank Tanzania Limited and 2 Others**, Misc. Land Application No. 207 of 2022,

Commissioner General TRA vs Rodgers Mhina and Captain Ally Mageessa, Civil Appeal No. 135 of 2014 and **Clayton Opiyo vs Eshen M. Mutarambirwa, Land Case Application No. 534 of 2022 (all unreported)**. In conclusion, she referred me to case of **M/S Rubya Saw Mill Timber vs Ms Consolidated Holding Corporation**, Commercial Case No. 297 of 2002 (unreported) and went on moving the Court to strike out the application with costs.

Mr. Nyangarika began by expressing his position that both points of objection lacked merit. On the first point of objection, he submitted that the source of the information was duly disclosed as the court's records and briefing from the applicants which the deponent verily believed to be true. It is his further submission that paragraph 1 of the affidavit shows that the deponent is the applicants' advocate and that he was instructed and authorized by the applicant to affirm the said affidavit. The learned counsel pointed out that Order XIX Rule 3(1) of the Order XIX Rule 3(1) of the Civil Procedure Code (Cap, 33, R.E. 2019)(the CPC) allows an affidavit to be made on information provided the source of such information is disclosed. He also referred the Court to the book of Sarkar's, the Civil Procedure, 8th Edition, 1992 reprinted in 1996, Vol. 1 at page 886, where the author states that verification of affidavit enables the court

to find out which facts can be said to be proved on the evidence of rival parties and that allegation may be true information received from or based on record.

Mr. Nyangarika was in agreement with the respondent that the aim of a preliminary objection is to save time of the court. However, he was of the view that the cases cited in support of the preliminary objection do not meet the underlying objective principles for the purpose of disposing of this application.

Responding to the second point of objection, Mr. Nyangarika submitted that it lacked merit as the defect, if any, was minor and curable in the eyes of law. To expound his argument, he cited the cases of **A.K.K Nambiar vs Union of India** [1970] 35 CR 129, **Omary Rashid vs Zainabu Kaisi, Capital Authorities** [2010] TLR 338, **Sanyou Service Station Limited vs BP Limited**, Civil Application No. 185/17 of 2018, **University of Dar es Salaam vs Mwenge Gas and Lub Oil Limited**, Civil Application No. 76 of 1999.

The learned counsel reiterated his argument that verification clause aims at testing the genuineness and authenticity of the facts stated in the affidavit and to make the deponent responsible for the said facts. Therefore, he argued that the issue whether the court can act on the deposed facts is purely on discretion of the court taking into account the overriding objective. In conclusion, Mr. Nyangarika urged this Court to overrule the objection with costs.

In her rejoinder, the respondent submitted that the learned counsel for the applicants had admitted that he got information from the applicants. However, she submitted that the applicant(s) who gave him the information was not disclosed. Contending that the 1st and 2nd applicants are legal entity, she submitted that the applicant's counsel was duty bound to mention the name of the person who gave him the information and identify the paragraphs under which are based on his own knowledge or information from the applicants. Therefore, the respondent reiterated that the verification clause is defective.

As for the second point of objection, the respondent reiterated her argument that the affidavit is defective for verifying non-existing paragraph. Relying on the case of **Erick Raymond Rowberg and 2 Others vs Elisa Marcos and Another**, Civil Application No. 571/02 of 2017 (unreported), she submitted that the defect cannot be cured by invoking the oxygen principle.

I have examined the supporting affidavit and considered the contending submissions of the learned counsel. The main issue from both points of preliminary objection is whether affidavit in support of the application is incurably defective; if the answer to the said issue is in the affirmative, what is the proper recourse.

It is common ground that, from the provision of Order XIX Rule 3(1) of the CPC, an affidavit should be confined to facts which the deponent deposes of his own knowledge save for interlocutory applications on which statements of his belief may be admitted. This stance was stated in the case of **Uganda vs. Commissioner of Prisons Ex parte, Matovu** (1966) E.A. 514 which was cited with approval by the Court of Appeal in **Chanha and Company Advocate vs. Arunaben Chaggan Chhita Mistry and 2 Others**, Civil Application No.25 of 2013 (unreported) in which the then East African Court of Appeal held that:

"As a general rule of practice and procedure an affidavit for use in Court, being a substitute for oral evidence, should only contain statements of facts and the circumstances for which the witness deposes either of his own knowledge."

In the case of **The Director of Public Prosecutions vs Dodoli Kapufi and Another**, Criminal Application No. 11 of 2008 (unreported), a verification clause was listed as of the ingredients of an affidavit. In the verification clause, the deponent is mandatorily required to verify on what is true to his own knowledge, belief or information whose source must also be disclosed. I am fortified by the case of **Jacqueline Ntuyabaliwe Mengi and Others vs Abdiel Reginald Mengi and Others** (Civil Application No 332 of 2021) 2022 TZCA 748 (1 December 2022) where the Court of Appeal held:

"On top of that, the affidavit must be verified by the deponent on what is true based on knowledge, belief or information whose source must be disclosed in the verification clause."

It is the respondent's complaint in the first limb of objection that the verification clause is defective for contravening the provision of Order XIX Rule 3(1) of the CPC. Her complaint is based on the contention that the verification clause contains information and that the deponent did not identify the paragraphs of which are within the knowledge of the deponent and which paragraphs are information from the applicants, contrary to Order XIX Rule 3(1) of the CPC.

At this juncture, I find it appropriate to reproduce the verification clause which is subject to the discussion. It reads:

"I, KASSIM MMBAGA NYANGARIKA, AN ADVOCATE DULY INSTRUCTED BY THE APPLICANTS DO HEREBY verify that what I have deposed to in paragraphs 1,2,3, 5,7,8,9,10,11,12,13,14 and 15 are true according to the court records and briefings from the applicants, which court record and briefings which I verified believed to be true."

As it can be glanced from the above verification clause, the source of information deposed in the affidavit was duly disclosed. It was stated that the

deposed facts were based on the court records and briefings from the applicants. The deponent further stated that he believed the said court record and briefings to be true. This being an application for leave to appeal to the Court of Appeal, I am of the view that the facts deposed in the affidavit may be obtained from the court record and briefing from the applicants themselves. In his submission, the respondent has not pointed out facts which cannot be based on the court record or briefings from the applicants to their counsel. For the foregoing reasons, I find that the provision of Order XIX, rule 3(1) of the CPC was complied with.

As for the respondent's contention that the persons who gave information to the deponent were not named, the verification clause bears it out that the deponent named all applicants. I am of the view that the fact that the specific name from the legal persons (1st and 3rd applicants) was not stated in the verification clause does not render the affidavit incurably defective. This is so because the deponent stated to have been instructed by the applicants to depose the supporting affidavit on their behalf. In the circumstances, the respondent's arguments on this point lacks merit.

Another complaint is to the effect that the affidavit the applicant's counsel has verified information from the applicants while he is not allowed to depone

on every facts of the case. Pursuant to Order VI Rule 5(1) of the CPC, a pleading may be verified by the party or by one of the parties or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case. That being the position, an affidavit may be verified by a person who is not a party to the case. However, that person must do so after obtaining instruction and authorization from the respective party or parties. Furthermore, it must be stated that the affidavit is made after obtaining the said instruction and authorization. This position was stated in the case of **Mohemed Abdlallah Nur Others vs Hamad Masauni Others** (Civil Application 436 of 2022) 2022 TZCA 546 (7 September 2022) when the Court of Appeal underlined that:

"We must quickly observe that, a person purporting to swear an affidavit on behalf of another person who is a party to a court proceeding must do so after consultation with and obtaining instructions from the party on whose behalf the affidavit is being sworn. We also hasten here to emphasize that, such instructions and authorisation must be expressly reflected in the relevant affidavit. Otherwise nothing must be presumed to the advantage of a party who fails or neglects to file pleadings or affidavits which are of the essence of the matter before a court of law."

It is common ground that the supporting deponent was deposed by the applicant's counsel. The facts that the applicants authorized him to affirm on their behalf features in paragraphs 1 of the affidavit which reads:

1. That, I am an advocate of the High Court and court's subordinate thereto duly instructed and authorized by the applicants to affirm this affidavit in support of an application for leave to appeal to the court of Tanzania...

The above excerpt of the affidavit displays that the deponent was authorized by the applicants to affirm on their behalf. As stated earlier, the deponent stated to have read the court record and made briefings with the applicants. Given the nature of this application in which the applicants are required to demonstrate that there is triable issue in the intended appeal, I find no merit in the respondent's argument that, the deponent was not conversant with all facts deposed in the affidavit.

Last for consideration is the respondent's argument that the applicant deposed paragraph 14 which is not in the affidavit. This fact was not disputed by Mr. Nyangarika. Having considered that all paragraphs of the affidavit were verified, I am of the humble view that the said defect does not render the affidavit incurably defective. The Court may make its decision basing on the facts which were deposed in the affidavit and verified by the deponent.

For the reasons I have endeavoured to demonstrate, I find no merit in both points of preliminary objections. I accordingly dismiss them for want of merit. Costs to follow the event.

DATED at DAR ES SALAAM this 4th day of August, 2023.



A handwritten signature in blue ink, appearing to be "S.E. Kisanya".

S.E. KISANYA
JUDGE