IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CASE NO. 135 OF 2018

(Arising from Commercial Case No. 11/2017)

GODGIVES TRANSPORT LTD.....1ST APPLICANT

ERNEST MKEYA MWASHIMAHA.....2ND APPLICANT

VERSUS

COMMERCIAL BANK OF AFRICA.....RESPONDENT

RULING

B. K. PHILLIP, J.

On the 16th May 2018 Hon. Songoro, J as he then was entered a default judgment against the applicants. The applicants herein have lodged this application under the provisions of Rule 23(1) of the High Court Commercial Division Procedure Rules, 2012 praying for orders to set aside the aforesaid default judgment and costs for the application.

This application is supported by an affidavit sworn by the learned Advocate for the applicant, Mr. Samson Rusumo. In his affidavit Mr. Samson Rusumo has stated the following; That, the applicants filed their written statement of defence on 14th March 2018 following the court's order granting the applicants leave to defend the suit, since the suit was filed under a summary procedure. Unfortunately the advocate who was handling the

case by then, the learned Advocate Ayoub Sanga secured employment in the Ministry of Labour and employment and overlooked to serve the respondent a copy of the written statement of defence, as he was in a hurry to report to his new employer. On 18th April 2018, he was served with an application for default judgment by the respondent's advocate. When he appeared in court, he informed his Lordship, Songoro, J. that the applicants had filed their defence on 14th March 2018. Upon being asked by Hon Songoro, J the court clerk recognized the signature that appeared on the written statement of defence and said that the clerk whose signature appeared on the written statement of defence had been sick for a longtime. The court never agreed that the written statement of defence was filed as ordered by the court as a result proceeded to grant the default judgment as prayed by the respondent's advocate. Hon. Songoro, J did not take into consideration the applicants' right to be heard and acted wrongly by thinking that there was unfair pray on part of the applicants, while it was not true. It was unfair to punish the applicants' for a mistake committed by the Court Clerk who received the written statement of defence. The applicants' denial for right to be heard will cause irreparable loss unto the applicants.

A counter Affidavit drawn and sworn by the learned Advocate Omari Msemo of Tan Africa Law firm was filed in court in opposition to the application together with a notice of preliminary Objections on three points to wit;

i) That the application is bad in law for wrong citation of the name of the court contrary to High Court Registries Rules, hence the jurisdiction of the Court is not invoked.

ii) That the application is fatally defective in that the affidavit thereof contains legal arguments and opinion.

iii) That the application is fatally defective in that the attestation clause in the affidavit does not show whether the deponent is known to the attesting officer or not.

In the Counter Affidavit the learned Advocate Omary Msemo stated as follows; That, the averment made by the applicants' advocate that the written statement was filed as ordered by the court is a hear say and the same is not supported by an affidavit of the clerk who is said to have received the same. The applicants were granted leave to file the written statement of defence on or before 15th March 2018.When the case was called for necessary orders on 22nd March 2018, there was no any written statement of defence filed in court and the court proceeded to order the respondent to file an application for default judgment. The respondent complied with the court order by filing the application for default judgment on 9th April, 2018. The court entered the default judgment after satisfying itself that there was no written statements defence filed as ordered by the Court. The court clerk who was present in court did not give any assurance to the court that the written statement of defence was filed in time as ordered by the court as he was not responsible for indorsing the same and

there is no any affidavit sworn by the said clerk to support what is stated in the applicants affidavit. The applicants' were accorded the right to be heard by being granted the leave to defend the suit but willfully defaulted to file the defence as per the order of the court, hence must bear the legal consequences.

This application was heard by way of written submission. Due to time constraints counsels filed their written submission both for the preliminary objection and on the merits of the application as ordered by the court.

On the first point of preliminary objection, the learned advocate Peter Kibatala, submitted that the name of the court is wrongly cited in both the chamber summons and affidavit in support of the application. He contended that the proper citation of the name of the court is 'The High Court of Tanzania, Commercial Division'. He referred this court to Rule 8(2) of the High Court Registries Rules, 2005 and was of the view that failure to cite properly the name of the Court is a defect which goes to the Jurisdiction of the Court, since the rules are framed in a mandatory manner.

Submitting on the second point of preliminary objection, Mr. Peter Kibatala contended that paragraphs 8, 9, 10, and 11 of the applicants' affidavit contain legal arguments/opinion contrary to the well laid down legal principles which require affidavits to be confined to matters of facts only. He referred this court to the case of **Uganda Vs. Commissioner of Prisons Ex Parte Matovu 1966 1 EA 514** and **Leandri Leonard Tairo**

Urassa Vs. The Commissioner for Lands, Misc Land Application No 1 of 2010 (Unreported). Mr. Kibatala prayed that paragraphs 8, 9, 10 and 11 of the affidavit should be expunged. He submitted further that the effect of expunging the aforesaid paragraphs in the affidavit will be to render the application incompetent since the remaining paragraphs will be not sufficient to support the application.

As regards the third point of preliminary objection, Mr. Peter Kibatala submitted that the affidavit in support of the application is fatally defective since it contravenes the provisions of section 10 of the Oaths and Statutory Declarations Notaries Act, Cap 34 which requires the attesting officer to indicate in the Jurat whether he/she knows the deponent personally or he/she has been identified to him by a person whom he/she knows personally. The learned Advocate referred this court to the following cases; **Seth Japhet vs. Nicholaus Mero, Misc Application No 457/2015** (unreported) and **Commissioner General (TRA) Vs. Pan African Energy (T) LTD (CAT) ,Civil Application No 277/20 of 2017** (Unreported) in which the Court of Appeal pointed out the requirement of the Commissioner for Oaths to indicate in the Jurat whether he /she knows the deponent personally or has been indentified to him/her. Mr. Kibatala contended that since section 10 of Cap 34 is couched in mandatory terms, violation of the same is fatal as it renders the affidavit to be struck out.

In rebuttal, the learned advocate Mussa Kiobya submitted that the first Point of preliminary objection is not a pure point of law as it requires the court to look into the documents filed in court to ascertain whether the name of the court is not properly cited as alleged by the respondent's advocate. Mr Kiobya referred this court to two cases to buttress his arguments to wit; **Soitsambu Village Council Vs Tanzania Breweries Limited and another, Civil Appeal No. 105 of 2011** (unreported) and **Mukisa Biscuits Manufacturing Company Ltd Vs. West End Distributors LTD (1969) EA 696.** Mr. Kiobya submitted further that section 8 (2) of the High Court Registry Rules that has been relied upon by the respondent is applicable in economic crimes cases only not in Commercial cases. It was the contention of Mr. Kiobya that the High Court (Commercial Court) Procedure Rules, 2012 is the only one applicable in Commercial Cases, which under Rule 3, defines Court to mean Commercial Division of the High Court of Tanzania. In addition to the above Mr. Kiobya submitted that, should this court find that the name of the court is not properly cited then, he invited this court to take the alleged omission in the citation of the name of the Court as a slip of a pen which is not fatal. To cement his argument, he referred this court to the case of **Victor Sungura Toke Vs. P.S.R.C & Board of Internal Trade, Civil Appeal No. 134 of 2002**, (unreported) in which His Lordship Mlay, J as he then was, held that the applicant's wrong citation of the law, that is, instead of citing Order XLII rule 2 of the Civil Procedure Code, Cap 33 (R.E 2002) the applicant cited Order XLVIII Rule 2, may have been a slip of a pen

which is not fatal since the application was made by way of Chamber summons.

As regards the second point of Preliminary objection, Mr. Kyoba submitted that paragraph 9 of the Affidavit is based on the facts which the deponent believes to be true and the same is reflected in the verification clause. Mr. kiobya was of the view that, if this court finds that paragraph 9 of the affidavit is offensive then, the remedy is to expunge or ignore it, since the remaining paragraphs can sustain the application. He distinguished the decision in case of **Leandri Leonard Tairo Urassa**, (Supra) from the application at hand on the reason that it was based on the presence of legal arguments in the affidavit while in the instant application there are no any legal arguments in the affidavit.

In the response to the third point of preliminary objection Mr Kiobya submitted that at the jurat of attestation the attesting officer struck out the words '*identified to me by*' and left the words '*Known to me personally*' showing that the deponent is known to the attesting officer personally. It is was the contention of Mr. Kiobya that the attesting officer complied with the requirement under section 10 of the Oaths and Statutory Declaration Act, Cap 34, (R.E 2002)

Mr. Kiobya contended that the paramount overriding objective of this court is to render Substantive justice and it should be not be carried away by unnecessary technicalities. To cement his arguments, he referred this court to the case of **Yakob Magoiga Gichere Vs. Penihan Yusuph, Civil**

Appeal No 55 of 2017 (Unreported), in which the Court of Appeal said that the Principle of overriding Objective brought by the Written Laws (Miscellaneous Amendment) (N0.3) Act 2018 (Act No 8 of 2018) now requires the Courts to deal with cases justly and to have regard to substantive justice. In addition to the above Mr. Kiobya referred this court to Article 107 A (2) of the Constitution which, he contended that requires the courts to decide cases without being tied up with rules leading to technicalities. He referred this court to the case of **Samson Ngwalide Vs. The Commission General TRA, Civil Appeal No 86 of 2008** to buttress his argument.

I have read and subjected to critical analyses all the rival arguments presented by the learned Advocates. First and foremost let me point out from the outset that, as regards the first preliminary objection, with due respect to the Plaintiff's advocate, I do not agree with his contention that the first Preliminary objection is not a pure a point of law and that needs evidence to be proved. It is my settled view that the issue of citation of the name of the court do not need evidence to be proved as the same can be seen on the face of the documents filed in court. No evidence is need to prove what is clearly written at the title of the Chamber summons or an affidavit. Likewise, It is my settled view that the contention that rule 8(2) of the High Court Registries Rules, 2005 (Hence forth 'the Rules') is applicable on matters of Economic Crimes only is not correct. Rule 8(2) of the Rules is self explanatory, as it clearly refers to any matter or cause such as Criminal Appeals, Civil Appeal and Civil cases, apart from Matters on Economic Crimes which are referred to in rule 8 (1) of the rules.

The respondent's advocate in his submission did not point out clearly the alleged defect in the citation of the name of the court. The Name of court in the chamber summons and the supporting affidavit is written as follows;

"IN THE HIGH OF TANZANIA

(COMMERCIAL DIVISION)"

By reading the name of the court as shown herein above, it is clear that there is an omission of the word 'Court' .With due respect to the respondent's advocate, I decline to agree with his contention that the omission of the word 'Court', using his own words, goes to the jurisdiction of the court hence the application has to be struck out. I am inclined to agree with the argument raised by the applicant's advocate that the omission of the word 'Court' is not fatal. The applicant has clearly indicated that the application is made in the Commercial Division, so omission of the word 'Court' is a mere slip of a pen. At this juncture I would like to associate myself with the findings of His Lordship Mlay, J (as he then was) in the case of **Victor Sungura Toke** (Supra), that a slip of a pen is not fatal. I am of a settled opinion that striking out this application for an omission of the word 'Court ' as alleged by the respondent's advocate will be defeating the achievement of substantive justices in this matter. Therefore, I hereby dismiss the first preliminary objection.

As regards the second Preliminary Objection, let me start by reproducing paragraphs 8, 9, 10 and 11 of the applicant's affidavit hereunder;

8. *'That Hon. Songoro, J, did not take into consideration the rights of the Applicant despite the fact that the Applicant had really filed the written Statement of Defence within time ordered by the court.*
9. *That Hon. Songoro, J acted wrongfully by thinking that there was unfair play committed by the Applicants while it was very untrue thinking.*
10. *That it was unfair to punish the Applicants for mistake committed by the court officers/clerks who received the said Written Statement of Defence.*
11. *That due to wrongful denial of rights to be heard the Applicants stand to suffer irreparable loss."*

The applicant's advocate in his submission made response in respect of paragraph 9 of the affidavit only. His response was that paragraph 9 of the affidavit is based on the deponent's own knowledge of the law and what he believes.

I have noted that both counsels are in agreement that affidavits have to be confined to statements of facts as the deponent is able of his own knowledge to prove, except on interlocutory application on which statements of his belief may be admitted. This is provided under Order XIX Rule 3(1) of the Civil Procedure Code Cap 33, R.E 2002 and there are several decided case on this principle including the case of **Leandri Leonard Tairo Urassa** (supra) that has been cited by the respondent's advocate in his submission. The question to be determined by this court as

far as this preliminary objection is concerned is whether the above mentioned paragraphs 8,9,10 and 11 in the applicant's affidavit are in compliance with said legal principle.

I entirely agree with Mr. Kibatala that paragraphs 8,9,10 and 11 of the affidavit contravenes the legal principle I have mentioned here in above, since they contain arguments and opinions. Taking for example paragraph 9 of the affidavit, it is judgmental as it conclusively states that Hon. Songoro, J acted wrongly while paragraph 10 condemns in a conclusive way, that the court punished the applicant unfairly for mistakes committed by the court officers/clerks who received the applicant's written statement of defence. Likewise paragraph 8 is argumentative as well as paragraph 11.

I am in agreement with the argument raised by the applicant's advocate that the offensive paragraphs have to be expunged and I hereby expunge paragraphs 8,9,10 and 11 of the affidavit.

The next issue is whether in the absence of paragraphs 8,9,10 and 11 in the affidavit the remaining paragraphs can support the prayers made in the chamber summons. As I have indicated at the beginning of this ruling, in this application the applicant seeks for an order to set aside the default judgment entered by this court. It follows therefore that the supporting affidavit need to have grounds for failure to file the written statement of defence as provided in Rule 23 (2) of the High Court (Commercial

Division) Procedure Rules, 2012. For clarity, let me reproduce the whole of Rule 23 (1) (2) hereunder.

Rule 23

(1) Where a judgment has been entered in pursuant to Rule 22 the Court may, upon application made by the aggrieved party, within twenty-one days from the date of the judgment, set aside or vary such a judgment upon such terms as may be considered by the Court to be just.

(2) In considering whether to set aside or vary the judgment under this rule, the Court shall consider whether the aggrieved party has;

(a) Applied to the court with the period specified under sub rule (1); and

(b) Given sufficient reasons for failing to file a defence.

I have read the remaining paragraphs and noted that they are unable to support the prayers made in the chamber summons as there is no any paragraph giving the grounds for failure to file the written statement of defence.

In addition to the above, let me point out here that, I have noted an anomaly in this application. The affidavit filed by the applicant's advocate as it was even before expunging paragraphs 8,9,10 and 11, was presenting a position to the effect that the applicant filed the written statement of defence as ordered by the court. It has to be noted that this court (Hon. Songoro, J) had already made a ruling that no written statements of defence was filed in court as per the court order. All the points stated in

the affidavit were already decided by this court, hence this court is *functus officio*. It cannot make any order again on the issue as to whether the written statement of defence was filed as ordered by the court or not?. It is my settled view that the contents of the affidavit was not in line with the requirement of rule 23 (2) of the High Court (Commercial Division) Procedure Rules, 2012 which sets the criteria for setting aside the default judgment. In other words this application, in addition to the legal defects pointed out in the affidavit by Mr. Kitabala in the second point of preliminary objection, it is incompetent for the reasons I have just explained herein above.

Having made the above findings, I do not think that it is worthy going on determining the last point of preliminary objection. Consequently, this application is struck out with costs.

Dated at Dar es Salaam this 17th day of January 2019.

B. K. PHILLIP

JUDGE