IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A., And MASSATI, J.A.)

CIVIL APPLICATION NO. 80 OF 2009

RUSTAMALI SHIVJI KARIM MERANI ..... APPLICANT
VERSUS
KAMAL BHUSHAN JOSHI ..... RESPONDENT

(Application for Revision of the whole of the decision of the High Court at Dar es Salaam)

(Makaramba, J.)

dated the 28th day of May, 2009
in
Commercial Case No. 64 of 2008

RULING OF THE COURT

20th & 27th February, 2012

MASSATI, J.A.:

The respondent had filed a suit in the High Court – Commercial Division, against the applicant. It was Commercial Case No. 64 of 2008. Whether or not the applicant was served is a subject of contention between the parties but we would not go into that yet. What is apparent is that there was an application before the High Court for extension of time within which to file a written statement of defence under Order VIII Rule 1(2) of the Civil Procedure Code (the Code). That application was disposed of by Makaramba, J. on

28.5.2009 where it was dismissed. As a result, the respondent was allowed to proceed ex parte.

The applicant was not amused by that ruling. So he has come to this Court by way of a Notice of Motion to ask the Court to call for and examine the records of the proceedings of the trial court. The application is brought under Section 4(3) of the Appellate Jurisdiction Act (Cap 141) and Rule 3(1), (2)(a)(b) and (c) of the Tanzania Court of Appeal Rules, 1979 (the old Rules)

The application is supported by the affidavit of Mr. RUGAMBWA CYRIL JOHN PESHA, counsel for the applicant. There was no affidavit in reply, but in addition to the affidavit, Mr. Pesha also filed a written submission to support the application. On the other hand, Ms. Jessie Mnguto, learned counsel appeared for the respondent. She had earlier on filed a Notice of Preliminary Objection to challenge the competency of the application and along with it, filed a written submission in its support. Of the two objections she had preferred Ms. Mnguto abandoned the second one in which she had complained that the application was time barred.

At the hearing of the preliminary objection, Ms. Mnguto adopted her written submission. The substance of her remaining objection was that the affidavit filed in support of the application was incurably defective and could not support the Notice of Motion. She took us through her written submission and pointed out that the whole of paragraph 3 of the affidavit which is the operative part, contains nothing but hearsay and legal arguments, except paragraphs 3(vi) and (vii) which can boast of the deponent's own personal knowledge. The other paragraphs except (1) and (2) which are introductory only, contain facts based on information, but the applicant had sinned against the law by not disclosing the source(s) of that information. The learned counsel referred us to case law in support of her legal stance **(SALIMA VUAI FOUM Versus REGISTRAR OF COOPERATIVE SOCIETIES AND THREE OTHERS** (1995) TLR. 75 **UGANDA Versus COMMISIONER OF PRISONS, ex parte MATOVU** (1966) EA 514, and **BOMBAY FLOUR MILL Versus CHUNIBHAI N. PATEL** (1962), EA 803). Ms. Mnguto, wound up by praying that if the preliminary objection was

upheld, the application should also collapse because it would be incompetent, and so, should be struck out with costs.

Mr. Pesha, learned counsel also adopted his written submission in whole. In reference to the contents of his affidavit, he was emphatic that all that was deponed to, was within his knowledge. He referred us to the matrix of events, detailing in which way they came to his knowledge; particularly paragraphs 3(i) (ii) (v) (x) which were strenuously controverted by the respondent. He branded the respondent's arguments as mistaken and erroneous. As to the law, Mr. Pesha, submitted that even if that were the law, the remedy was to strike out the offending paragraph(s) and proceed to dispense justice on matters that are uncontroverted. He submitted that the wholesome rejection of an entire affidavit was not acceptable. Besides, he argued further, since the record is already in court the Court could examine the proceedings independently of the contents of the affidavit even if the affidavit was defective.

We think that the law on this subject is settled. There is no serious dispute between counsel here that the statement on the law on affidavits propounded in **UGANDA v COMMISSIONER OF**

PRISONS ex parte, MATOVU (supra) represents the prevailing position of the law and that is:-

> *"..... as a general rule of practice and procedure an affidavit for use in court being a substitute for oral evidence, should only contain statement of facts and the circumstances to which the witness deposes either of his own knowledge or such affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion."*

In **PHANTOM MODERN TRANSPORT (1985) LIMITED vs D.T DOBIE (TANZANIA) LIMITED** Civil References No. 19 of 2001 and 3 of 2002 (unreported), this Court accepted that position of the law as sound, and also proceeded to hold that an affidavit which violates these conditions should be struck out. This position has been religiously followed ever since (see for instance **STANBIC BANK TANZANIA LIMITED versus KAGERA SUGAR LIMITED,** Civil Application No. 57 of 2007 (unreported) and the cases cited therein.

But the two decisions above, are also authority for another statement of the law, that:-

> *"..... where defects in an affidavit are inconsequential, those offensive paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it. If however, substantive parts of an affidavit are defective, it cannot be amended in the sense of striking off the offensive parts and substituting thereof correct averments in the same affidavit. But where the court is minded to allow the deponent to remedy the defects, it may allow him or her to file a fresh affidavit containing correct averments."*

(See **PHANTOM MODERN TRANSPART** (1985) **LIMITED's** case at p. 10. (supra)

With due respect to Mr. Pesha, it is not therefore correct to argue that the remedy to a defective affidavit, is merely to strike out the offending matters or paragraphs, and "to proceed to dispose justice on matters that are free from controversy." It is equally wrong for him to attribute that statement as " a cardinal principle of courts of East Africa and Tanzania in particular....." At least we have

shown above that it is not so in Tanzania. In Tanzania, after expunging the offensive paragraphs of an affidavit, courts are enjoined to examine whether the remainder of the affidavit can support the application. If the remaining parts are insufficient to support it, the application must also go, but a party may file a fresh affidavit.

After setting out the law, we now turn to the present case. There is only one affidavit filed in support of the application. That application has 3 substantive paragraphs. We agree with Ms. Mnguto learned counsel, that paragraphs 1 and 2 are merely introductory and neither substantive nor controversial. The substantive paragraph is paragraph 3, which has a total of 10 sub paragraphs. We have looked at those sub paragraphs carefully.

In his verification, Mr. Pesha, deposes that what is stated in paragraphs 1 to 3 is true to the best of his knowledge except subparagraph 3(vi) which is based on information from his client. Ms. Mnguto criticized that verification too. She said, that even that was not true, because a client could not have informed Mr. Pesha himself to file a defence, but rather he must have instructed him and so that

was entirely within his own knowledge. We agree with Ms. Mnguto there, and so hold that sub paragraph 3 (vi) is only half true. What about the rest of the sub paragraphs. ?

In sub paragraph (i) Mr. Pesha depones that the Applicant was outside Tanzania in October 23, 2008 and had no office in Haidary Plaza. We do not believe that Mr. Pesha could have "personal knowledge" of this information. In sub paragraph (ii) it is sworn that the person upon when the summons was allegedly served is neither an agent, employee or relative of the applicant. We are not convinced that Mr. Pesha could have personal knowledge of this. Similarly sub paragraph (iii) could not have been sourced from Mr. Pesha's personal knowledge because it relates to non service on Ms. Haki Law chambers. In sub paragraph (iv) Mr. Pesha alleges that both Ms. Mnguto and one Paul John Mnkai concede that service was not effected. Our own perusal of the two affidavits shows that Ms. Mnguto made no such concession, while that of Mr. Mnkai apparently shows so. So, this allegation is only partly true but as we shall show below it is not entirely free from difficulty. We are also convinced that the contents of sub paragraph (v) could only be personally known to

the applicant, and so what Mr. Pesha said there is no more than hearsay. We have already commented on the contents of paragraph (vi). We are prepared to accept that what is stated in sub paragraphs (vii) (viii) and (ix) is true to the best of his knowledge. But sub paragraph (x) is certainly argumentative .

> *"The applicant is aggrieved of the denial of his natural right to defend himself but no notice of appeal was lodged or any appeal filed because section 5(2) (d) of the Appellate Jurisdiction Act, Chapter 141 of the Revised, (sic) was. 2002 precludes such an appeal, hence this application for revision as the only remaining leeway to have the ex parte orders set aside and the Applicant afforded the opportunity to contest the case."*

The sub paragraph is also prayerful. In his oral submission, Mr. Pesha strenuously argued that, as a legal expert, he was entitled to express his legal opinion there. Learned counsel may have felt so, but certainly, as we have tried to demonstrate above, the law frowns against that practice.

So, with the exception of sub paragraphs (vi),(vii) (viii) and (ix) of paragraph 3 of the affidavit the rest are legally objectionable and should be axed from the affidavit. The next question is whether there is any substance left (after expunging the offending sub paragraphs,) to support the Notice of Motion. ?

The gist of the application was to ask this Court to fault the decision of the High Court, refusing to grant extension of time within which to file a written statement of Defence "after holding that the Applicant had been served on 23rd October, 2008." The issue was therefore whether the applicant was served. It was therefore essential for the Court to be seized with relevant and admissible facts on the question of service on the applicant. In our view, the contents of sub paragraphs (i)(ii)(iii)(iv) and (v) were very crucial for the determination of that finding. Although we observed that part of sub paragraph (iv) could be true as far as the affidavit of PAUL JOHN MNKAI could go, it does not support the allegation made by Mr. Pesha, that the deponent conceded that service was not effected on the Applicant or his agent. On the contrary, Mr. Mnkai, went on to depone that he left the summons with one Joseph after an

instruction from a person whom he believed to be the Applicant. This, by any stretch of imagination, cannot mean, that he agreed that he left the summons with an unauthorised, agent. So even that part of the concession does not advance the applicant's case any further.

It follows therefore, as the affidavit is replete with offending paragraphs, and as the repugnancies are substantial, we have to agree with Ms. Mnguto, that the affidavit is incurably defective. Since the affidavit is incurably defective, it cannot support an application. Since an affidavit is an essential supporting document to every Notice of Motion under Rule 46(1) of the old Rules, an application without one is equally incurably defective.

Mr. Pesha has urged us to take up the matter, ignore the affidavit and proceed to examine the proceedings suo motu if we find that the affidavit is defective. We think this is no more than a fishing expedition.

It is true that this Court has revisional powers vested in it under section 4(2) and 4(3), but there are three ways in which such powers may be exercised. The first one is when it is exercising its appellate

powers under section 4(2). The other two are incorporated in section 4(3). So, the second one is when for any reason, the Court exercises its inherent powers and suo motu decides to call for and examine the record of any proceedings of the High Court. This normally (but not necessarily) presupposes that the records are still in the possession of the High Court, and the latter is still seized of jurisdiction (See **KOMBO MKABARA v MARIA LOUISE FRISCH** Civil Application No. 3 of 2000 (unreported) But the third way is by an application by a party in restricted cases. This is now regularized by Rule 65 of the Court of Appeal Rules 2009. Rule 65(3) requires such an application to be supported by an affidavit.

In the present case, the applicant has chosen to proceed under the third option. We have already shown that the affidavit filed in support thereof is incurably defective. Legally there is nothing left for us to revise anymore. As this Court observed in **KOMBO MKABARA's** case (supra) it might appear to be fictional, but legal fictions are not unknown. There is no doubt that this Court has inherent powers under certain circumstances to put things right in the interests of justice, but that power should not be used to advance

abuse of process. In our view, it is an abuse of process to invoke the Court's inherent powers to correct counsel's error or mistake, or condone a flagrant breach of the law or rules of the Court as was the case here. In fine therefore, we hold that this is not a proper case for the exercise of the Court's powers, suo motu.

In the event we sustain the preliminary objection. The application is accordingly struck out with costs.

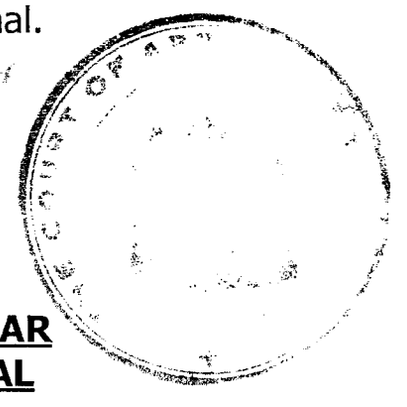
DATED at **DAR ES SALAAM** this 23rd day of February, 2012

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL