

IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

CIVIL APPLICATION NO. 8 OF 2014

1. THE ZANZIBAR SHIPPING CORPORATION
2. THE HON. ATTORNEY GENERAL } **APPLICANTS**

VERSUS

1. MOHAMED HASSAN JUMA
2. KHAMIS MOHAMED KHAMIS
3. MOHAMED NAJIM MOHAMED
4. OTHMAN ABDALLAH OTHMAN
5. ABDALLAH OMAR MJAWIRI
6. MKUBWA HAJI MHINE } **RESPONDENTS**

(Application for extension of time to apply for reference against the ruling of a single judge of the Court of Appeal)

(Mandia J.)

dated 1st day of February, 2013

in

Civil Application No.88 of 2009

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RULING

1st & 3rd December, 2015

KIMARO, J.A.:-

Before the Court is a notice of motion filed by Alhaji Said Hamad El-Maamry under rule 10 of the Court of Appeal Rules 2009 seeking for

extension of time to lodge an application for reference against the decision of a single Justice of the Court of Appeal, (Mandia, J.).

The application is supported by the affidavit of Alhaj Said Hamad El-Maamry himself affirmed before Ndurumah Keya Majembe, Commissioner for Oaths. When the application was called for the hearing, the parties were represented as follows; Mr. Godfrey Ukwong'a, learned advocate for the first applicant, Mr. Juma Msafiri Karibana learned State Attorney for the second applicant and Mr. Ussi Khamisi Haji, learned advocate for the respondents.

The learned advocate for the respondents raised a preliminary objection under Rules 4 and 107 of the Court of Appeal Rules, 2009 and section 129 of the Civil Procedure Decree Cap 8 consisting of three points.

1. The notice of motion has been drawn on 30.12.2014. In its support, there is attached an affidavit affirmed by the deponent ALHAJ SAID HAMAD ELMAAMRY, who has admitted being a Moslem, before the Commissioner for Oaths Nduruma Keya Majembe on the same day of 30.12.2014 at Dar Es Salaam. Both documents have been filed in the sub-registry

of the CA at Zanzibar on the following day i.e. 31.12.2014 and meant for hearing in Zanzibar where the original cause of action had arisen.

2. From the facts given in paras 1 above it is obvious that the Commissioner had fundamentally erred in law in taking an affirmation from the deponent, who as a Moslem, could not have declared to the said Commissioner that his religion Islam forbid him to take an oath or that he did not believe in the existence of Allah. That would be contrary to the teaching of Islam which allows oaths and also presupposes the existence of Allah in the first place. That the deponent ought to have been sworn. Therefore, the affidavit as evidence is unsworn, of no value at all, must be discounted and therefore does not support the prayer. That consequently, the application is unsupported by any prayer and needs to be dismissed with costs.

3. Failure on the part of the Applicants to present written submissions and serving copy thereof upon the respondents within fourteen days from the date of filing as provided under Rule 106(1) and 7 of the Tanzania Court of Appeal Rules, 2009. And there being no application for extension of time within which to file the submission, the Court is asked to dismiss the application with costs.

The preliminary objection has not been raised under an enabling provision of the law. This court has repeatedly said in many occasions that wrong citation of the law, section, sub-sections and paragraphs will not move the court to do what it is being asked to do and accordingly renders the application incompetent. None of the provisions cited in the preliminary objection is an enabling provision for allowing the Court to address it. See the case of **The Project Manager Es-Ko-International Inc. Kigoma Vs Vicent J. Ndugumbi** Civil Application No. 22 of 2009 (Unreported). But the issue involved in the preliminary objection appears of interest to have

the same determined. It is for that reason alone I am going to address the issue raised.

In support of the preliminary objection the learned advocate for the respondents said in respect of the first point of objection that sections 3(a) and 4 of the Oaths Decree Cap. 7 of the Laws of Zanzibar read together with Rule 2(e) of the Zanzibar Oaths and Affirmation Rules, section 4 of the Oaths and Statutory Declaration Act Cap 34 (Mainland Tanzania required Alhaj Said Hamad El-Maamry to swear, and not to affirm when he confirmed having deponed on the facts contained in the affidavit filed in support of the notice of motion. He said short of swearing the affidavit, the application remains without a supporting affidavit and this is a ground for the Court to dismiss the application because the notice of motion will remain without a supporting affidavit.

The learned advocate argued further that the failure by the learned advocate to file written submissions in support of the notice of motion contravened rules 106 (1) and (7) of the Court of Appeal Rules. He prayed that the preliminary objection be upheld and the application be dismissed with costs.

Responding to the preliminary objection, the learned advocate for the first applicant submitted that the points of preliminary objection raised by the learned advocate for the respondents have no merit. He said the Oaths and Statutory Declarations Act, Cap 34 provided that a Muslim should affirm and not swear. In this respect, said the learned advocate, Alhaji Said Hamad El-Maamy's affidavit is properly affirmed in accordance with the law which governs affidavits. He said no law was contravened by the deponent of the affidavit in stating that he was affirming to the facts contained in the affidavit. He said the objection has no merit and it should be dismissed and the application be heard on merit.

As regard the applicants' failure to file written submission to support the application, the learned advocate conceded to have failed to file written submissions. Accounting for the reasons of his failure, the learned advocate said he was engaged to defend the applicants after the time for filing the submissions had elapsed and this is his first appearance in this case. He prayed that the Court uses its discretion to dispence with written submissions and the parties be allowed to make oral submissions in support of and against the application. He prayed that the preliminary objection be dismissed and the application be heard on merit.

The learned State Attorney for the second applicant supported the submissions made by the learned advocate for the first applicant. He too prayed that the preliminary objection be dismissed and the application be heard on merit.

The issue is whether the preliminary objection has merit. With greatest respect to the learned advocate for the respondent I will say the first two points of preliminary objection have no merit and they cannot even be raised as preliminary points of objection. The reason for saying so is because the issue raised touches on the deponent's own religious belief and that is not a question of the law. It is the deponent himself who can tell why he opted to take an affirmation and not an oath.

I do agree with the learned advocate for the respondent that that section 3(a) of the Oaths Decree and Rules 2 (e) of the Oaths and Affirmation Rules which are made under section 5 of the Decree requires a Mohammedan to swear. The said Rule says that the oath of a Mohammedan while holding a Quran in the right hand shall be administered in the following manner:-

"I swear by Almighty God that I will speak the truth, the whole truth and nothing but the truth."

The above position covers the situation in Zanzibar. The affidavit which is contested was affirmed in Tanzania Mainland. The situation there is different. Oaths, affirmations, and declarations are governed by the Oaths and Statutory Declarations Act, [CAP 34 R.E.2002]. Section 5 of the Act provides that:-

"Every oath or affirmation made under the Act shall be made in the manner and in the form prescribed by the rules made under section 8"

The First Schedule to the Rules made under Rule 8 expounds on Rule 2 which provides for a format for administration of oaths and affirmation in judicial proceedings. Rule 1 says specifically that Christians take oath. Rule 2 covers Moslems. They take affirmation. The following is a format for the affirmation.

"Wallahi, Billahi, Ta "Allah": I solemnly affirm in the presence of the Almighty God that what I shall state shall be the truth, the whole truth and nothing but the truth. "

The content of the affirmation which the Moslems in the Mainland Tanzania take defeats the preliminary point of objection raised by the learned advocate for the respondents that Alhaji Said Hamad El-Maamry does not believe in existence of "Allah." "Allah" is included in the content of the affirmation.

Rules 3 covers an affirmation for a Hindu. It says:-

"I solemnly affirm in the presence of Almighty God that what I shall state shall be the truth, the whole truth and nothing but the truth."

Rule 4 which cover pagans show the affirmation for the pagans:

"I solemnly affirma that what I shall state shall be the truth, the whole truth, nothing but the truth."

In as far as the affidavit of Alhaji Said Hamad El-Maamry is concerned it was administered in accordance with law applicable at the place where the affidavit was taken. It was taken at Dar es Salaam. It would have not been taken in the formant which the learned advocate for the respondent suggests. But as said earlier, the issue raised cannot fall under the category of preliminary objections for the reason already shown. The first two points

of preliminary objection have no merit and they are dismissed.

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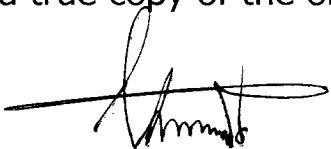
[1998]T.L.R.175 is distinguishable from the facts of this application. The two points of the preliminary objections are dismissed.

As regards the second point of preliminary objection my considered opinion is that it is not open for a party to raise a preliminary objection in respect of the matter. The Court reserves the right under Rule 106(19) of the Court of Appeal Rules 2009 to make appropriate orders as it deems fit under the circumstances of the case. With the observation made, I dismiss the preliminary objection with costs and order the application to be heard on merit.

DATED at **ZANZIBAR** this 2nd day of December, 2015

N.P.KIMARO
JUSTICE OF APPEAL

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


J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL