

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 44 OF 2016

MILLICOM (TANZANIA) N .VAPPLICANT

VERSUS

1. JAMES ALAN RUSSELL BELL.....1ST RESPONDENT

2. GOLDEN GLOBE INTERNATIONAL

SERVICES LIMITED.....2ND RESPONDENT

3. QUALITY GROUP LIMITED.....3RD RESPONDENT

**(Application for extension of time to apply for revision against the
orders of the High Court of Tanzania at Dar Es Salaam)**

(Mazengo, P.- DR.)

dated 10th 11th and 13th November 2016

in

Civil Case No.306 of 2002

.....

RULING

24th Oct. & 20th December, 2016

KIMARO, J.A.:-

The notice of motion before the Court is filed under Rules 10, 48 (1) and (2) and 49 (1) of the Court of Appeal Rules 2009. The Court is moved to grant extension of time to the applicant so that it can apply for a revision against orders of the High Court issued by Mazengo P.S. a District Registrar of the High Court. The grounds given to support the application are the following. One, the applicant has reasonable explanation for the delay in not filing the application in time. Two, the orders intended to be challenged in the revision are illegal. Lastly, a colossal amount of money is involved.

The application is supported by the affidavit of Martin Frechette sworn and attested in London England, on 9th February, 2016.

A good starting point for better understanding of the grounds giving rise to the application is giving a brief history of the application. In the year 2002, James Alan Russell Bell (the first respondent in this application) instituted in the High Court of Tanzania a labour dispute (Civil Case No. 306 of 2002). The defendants were MIC UFA LTD, MILICOM INTERNATIONAL-CELLULAR S.A. and MIC (TZ) LTD. He was claiming for a total sum of USD 67, 560 being terminal benefits and damages for termination of contract of employment. A default judgment was entered for him against MIC UFA LTD and MILICOM INTERNATIONAL –CELLULAR S.A. who defaulted filing a written statement of defence to the claim.

In the process of execution of the decree, 34,479 shares of MILLICOM INTERNATIONAL CELLULAR S A/MILLICOM TANZANIA N.V in MIC TANZANIA LTD were sold by public auction. It is the sale of the 34,479 shares in MIC TANZANIA to Golden Globe International Services Limited (the second respondent) which has given rise to this application. Quality Group Limited, (the third respondent) was joined in the application because she bought the shares sold to the second respondent in the execution process.

The applicant contends that the shares were unlawfully sold and that is why it wants to seek for a revision so that the sale of the shares can be set aside.

The appearance of the parties in Court during the hearing of the application was as follows. The applicant was represented by Mr. Ishengoma Gaudious, Audax Vedasto and Mr. Fayas Bhonjani, learned advocates. The first respondent defaulted appearance but service to him was done by publication; twice in the Daily News and twice in the Guardian both local Papers. The Court having been satisfied that the notice of hearing was published in the Daily Papers mentioned, allowed the applicant to proceed *ex parte* against the first respondent. Mr. Mpaya Kamara and Mr. Joseph Ndanzi, learned advocates, represented the second respondent while Mr. Herbert Nyange and Mr. Nduruma Majembe, learned advocates, represented the third respondent.

Both the second and third respondents raised points of preliminary objections against the application. Since the procedure of hearing requires the Court to determine the preliminary objection first, that is what I am now set to do.

Points of objection raised are:

1. The application is incompetent and hence bad in law since revision is not available for decisions made by the Registrar of the High Court.
2. The application is bad in law since the notice of motion is supported by an affidavit which was attested by a person not qualified to practice as a Commissioner for Oaths in Tanzania Mainland thus contravening sections 3(1)(b) and 4 of the Notaries Public and Commissioner for Oaths Act [Cap 12 R.E. 2002].
3. The application is bad in law for having been made against the second and third respondents who were not parties to the proceedings in the matter sought to be revised without a prior leave of the High Court being sought and granted.
4. The application is an abuse of the process of the Court for being preferred parallel to and in concealment of other proceedings prior filed by the Applicant to challenge the self- same auction, the subject matter hereof. The said prior proceedings are Civil Application No. 248 /2016 before this Honourable Court and Claim No. BVIHC (COM) 2016) before the Eastern Caribbean Supreme Court in the High Court of Justice, Territory of Virgin Islands(Commercial Division).

5. The third respondent added another point that the application if competent is otherwise time barred. It should have been made immediately the applicant became aware of the decision of the High Court by which the shares were sold.

Having heard the learned advocates on their submissions in support of and against the preliminary objections, and considered the law applicable in respect of preliminary objections, my considered opinion is that the application can be disposed of on the point of objection concerning the attestation of the affidavit which supports the application. While I thank the learned advocates for efforts made in dealing with the other points of objection, I will not make a determination on them because they are not matters which can be argued as preliminary objection. See principles laid down in the case of **Mukisa Biscuits Comapany Ltd Versus West end Distributors Ltd** [1969] E.A. 696.

"A preliminary objection consist of a point of law which can be pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit."

The rest points of preliminary objections are matters which require evidence and they lead to asking questions why, what, how and so forth. In such a situation they are not limited to matters of law only. See also the case **Citibank Tanzania Ltd V Tanzania Telecommunications Co Ltd and 4 others** Civil Application No. 64 of 2003 CAT (unreported) where the Court held that:

“To locate and examine a document which does not form part of the record would be to task the Court to fish ascertainment of facts and evidence, which is beyond the remit of a point of law, which a preliminary objection is all about.”

As stated earlier, the application is filed under Rules 10, 48(1) and (2) and 49 of the Court of Appeal Rules 2009. While Rule 48(1) requires the applicant to cite a specific provision which enables the Court to deal with the application, Rule 49 requires the application to be supported by an affidavit or affidavits of a person or persons having knowledge of the facts.

On the point of preliminary objection, in respect of the affidavit sworn in support of the application, Mr. Nyange, learned advocate submitted that the affidavit ought to have been attested by a Commissioner for Oaths based in Tanzania and not by Robert Scott Kerss who is shown to be a Notary Public London in England. The learned advocate said section 3(1) allows an advocate and a person entitled to practice as a notary public in England, Scotland, Northern Ireland or Republic of Ireland to practice as Notary Public in Mainland Tanzania. However, under section 4 of the Act, such person must have a practicing certificate issued by the Registrar of the High Court upon payment of the prescribed fees, and must sign in the Roll of Advocates kept by the Registrar. Because Mr. Kerss has not complied with such a requirement, said the learned advocate, his name does not appear in the Roll of Advocates. The learned advocate said the defect makes the affidavit not to meet the presumption of the Law of Evidence Act section 93(c) [Cap 6 R.E.2002]. He concluded that the none compliance of section 4 of Cap 12 makes the attestation of the affidavit invalid and hence the notice of motion is not supported by an affidavit. He prayed that this point of preliminary objection be upheld and the application be dismissed with costs.

On his part Mr. Joseph for the second respondent abandoned the preliminary points of objection on the application being filed in abuse of the process of the law and that the second respondent was not a party in Civil Case No. 306 of 2002 because he considered them being no longer valid.

He concurred with Mr. Nyange on the attestation of the affidavit filed in support of the notice of motion that it is attested by a person not qualified under the Notaries Public and Commissioner for Oaths Act,[CAP 12 R.E 2002]. Since a notice of motion has to be supported by an affidavit and in this application such affidavit is not valid, argued the learned advocate, the application is incompetent and should be struck out with costs.

Mr. Audax, learned advocate for the applicant in his reply to the preliminary objection on the attestation of the affidavit, said the person who attested the affidavit is a qualified one under section 3(1) of the Notaries Public and Commissioner for Oaths Act. He requested the Court to take judicial notice of this fact under section 59 (1) (d) of the Law of Evidence Act, Cap 6. Moreover, said the learned advocate, the seal of

the Commissioner for Oaths appears vividly on the “jurat” of the attestation. He said this point of objection too has no merit.

He prayed that this point of preliminary objection be dismissed as it lacks merit.

In a brief rejoinder on the validity of the attestation on the affidavit of Martin Frenchette, sworn to support the application, the learned advocate for the third respondent did not dispute that the said Robert Scott Keress could be practicing lawfully in England. His opinion was that his lawful practice in England “per se” did not confer upon him an automatic right of recognition as a Notary Public and Commissioner for Oaths in Tanzania under the Notary Public and Commissioner for Oaths Act, Cap 12. In order for him to have that recognition he had to apply to the Registrar of the High Court of Tanzania for registration in the Roll of Advocates and be issued with a Practicing Certificate upon payment of requisite fee. Since that has not been done, the Attesting Commissioner is not recognized as Commissioner for Oaths in our Tanzanian laws. This legal omission, said the learned advocate, makes the application incompetent. As regard the presumption which the Court is empowered to make under section 59(1) of Cap.12, the learned advocate said the law does not say

that the courts in Tanzania have to presume that all seals of the world are authentic. Rather, the section is limited to the presumption of seals originating from Tanzania only. Since the seal of Notary Public and Commissioner for Oaths of Robert Scott Keress is not Tanzania in origin, it has no legal effect in the Tanzania Notary Public and Commissioner for Law Act, Cap 12 of the Laws.

The learned advocate for the third respondent reiterated that the omission to have the affidavit attested in accordance with the Tanzanian laws makes the application incompetent. The affidavit cannot be said to be valid under the circumstances. He prayed that the preliminary points of objection be upheld and the application be struck out with costs.

On his part Mr. Joseph agreed with the submission made by Mr. Nyange. He emphasized that affidavits is evidence and the law of Evidence Act would directly apply. Since the affidavit of Martin Franchette lacks attestation because of the defects already pointed out, said the learned advocate, the preliminary point of law must be upheld and the application for extension of time to apply for revision be struck out with costs.

A perusal of the affidavit of Martin Frechette filed in support of the application shows that it is attested by Robert Scott Kerss, Commissioner for Oaths. It has a seal which reads **ROBERT SCOTT KERSS**. It is also indicated that he is a Notary Public London, England (Robbert S. Kerss). He also indicates that his Commission expires at Death. There is also a seal of the company. It is "SAVILLE & CO, Notaries, One Carey Lane, London EC2V, 8AE Tel + 44(0)20 7820 0000." This is the description of Mr. Robert Scott Kerss, the Commissioner for Oath who attested the affidavit of Martin Frenchette. The description of Robert Scott Kerss is his qualification to practice in England as Notary Public and Commissioner for Oath until his death.

The issue the Court has to answer is whether this application which is accompanied by an affidavit attested in England is competent? Section 3(1) of the Notaries Public and Commissioner for Oaths Act says:

*"Any of the following persons shall, except as provided for under sub section (2) **be entitled to practice as a notary***

public and Commissioner for Oaths in Mainland

Tanzania in accordance with the provisions of this Act and to levy fees in accordance with the First Schedule-

(a) An advocate; and

(b) A person entitled to practice as a notary

public in England, Scotland, Northern Ireland or Republic of Ireland.”(emphasis added).

Section 3(2) gives category of persons not entitled to practice as notary public and commissioner for Oaths. These are advocates suspended from practice, an advocate who has been removed from the Roll of Advocates, or any person removed from the roll of notaries public or commissioner for oaths in any reciprocating commonwealth country. An advocate has the meaning given in the Advocates Act and the roll of advocates means the roll of advocates kept by the Registrar of the High Court.

Under section 4(1):

“Any person mentioned in section 3 who is entitled to practice as a notary public and commissioner for oaths

shall, on application to the Registrar of the High Court and payment to him of the prescribed fees , and upon signing a roll to be kept by the Registrar, be granted a certificate in the form of the Second Schedule, which certificate shall, subject the provisions of section 5 entitle him to practice as Notary Public and Commissioner for Oaths in Mainland Tanzania so long as it is in force.”

Reading from the provisions of section 4 of Cap. 12 of the Tanzanian laws, much as Mr. Robert Scott Kerss is qualified to practice in England as Notary Public and Commissioner for Oath, he has no reciprocal rights to practice automatically in that capacity in Tanzania. He has to comply first with the provisions of section 4(1) of Cap. 12 by seeking a practicing certificate from the Registrar of the High Court and upon signing the Roll of advocate and payment of the requisite fees. It is only after complying with that requirement of the law that Mr. Robert Scott Kerss will have the status to practice as Notary Public and Commissioner for Oaths under the Tanzania laws. Since such a compliance has not been met, the affidavit of Martin Frechette is defective for not being attested by a Commissioner for Oaths recognized under the Tanzanian Laws.

The learned advocate for the applicants thought that the Court can take judicial notice of the seal of Notary Public and Commissioner for Oath for Robert Scott Keress. With respect to him, the law does not allow the Court to do so.

Section 58 of the Law of Evidence Act, [CAP 6 R.E.2002] provides that:

“No fact which a court takes judicial notice need be proved.”

Among the facts the courts in Tanzania are entitled to take judicial notice of, is section 59 (1)(d). The section reads that:

*“A court shall take judicial notice of the following facts –**all seals of all the courts of the United Republic duly established and all notaries public, and all seals which any person is authorized to use by any written law.**”*

(Emphasis added).

In as far as the seal of the notary public and Commissioner for Oaths of Robert Scott Keress is concerned, the courts in Tanzania would take judicial

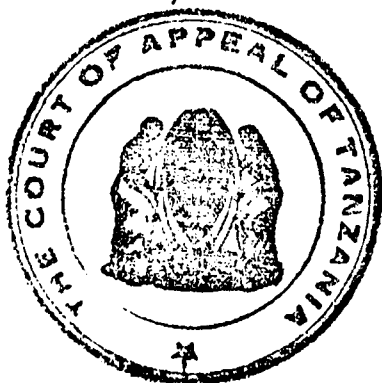
notice of the same, if only he had complied with section 4 of the Notaries Public and Commissioner for Oaths Act, Cap.12 R.E. 2002. Since there was no compliance with the section, in the context of the Tanzanian law, Court cannot take judicial notice of the seal of Notary Public and Commissioner for Oath of Robert Scott Kerss as a person lawfully entitled to attest the affidavit of Martin Frechette. The affidavit of Martine Frechette is therefore defective for having an invalid attestation.


I uphold the point of preliminary objection on the attestation of the affidavit of Martin Frechette and struck out the application seeking for extension of time to file a revision with costs.

DATED at DAR ES SALAAM this 13th day of November, 2016

N. P. KIMARO
JUSTICE OF APPEAL

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




E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL