

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., KEREFU, J.A., And KIHWELO, J.A.)

CIVIL APPLICATION NO. 168/16 OF 2020

THE REGISTERED TRUSTEES OF

ST. ANITA'S GREENLAND SCHOOLS (T) 1ST APPLICANT

ANDREW PETER MASABILE MUNAZI.....2ND APPLICANT

ANNA MWAKOSYA..... 3RD APPLICANT

PETER RUTAIHWA 4TH APPLICANT

ABEL MWESIGWA5TH APPLICANT

ALEX MWEMEZI6TH APPLICANT

ANITA KISASEMBE.....7TH APPLICANT

VERSUS

AZANIA BANK LIMITED RESPONDENT

**[Application for stay of execution of the decree of the High Court of
Tanzania, Commercial Division at Dar es Salaam]**

(Mruma, J.)

dated 27th day of March, 2019

in

Commercial Case No. 177 of 2017

RULING OF THE COURT

31st May, 2022 9th June, 2022

KWARIKO, J.A.:

Formerly, the respondent sued the applicants in the High Court of Tanzania, Commercial Division at Dar es Salaam in Commercial Case No. 177 of 2017 for recovery of TZS. 105, 036,404.83 being outstanding loan amount extended to the first applicant. In the end, the respondent won the suit in which the applicants were adjudged jointly and severally to pay the said amount, interest of 20% per annum from the date of filing the

suit till payment in full, interest at court's rate of 3% from the date of judgment till payment in full and costs of the suit. Dissatisfied with that decision, the applicants lodged a notice of appeal to this Court on 17th April, 2019.

Meanwhile, by way of a notice of motion taken under rule 11(3) (4) (5) (a) (b) (6) 7(a) (b) (c) & (d) of the Tanzania Court of Appeal Rules, 2009 (henceforth the Rules), the applicants have filed this application for stay of execution of the decree of the trial court pending determination of the intended appeal. The notice of motion is supported by an affidavit deposed by the third applicant, Anna Mwakosya, who introduced herself as the Secretary of the first applicant. In opposition to the application, the respondent has filed an affidavit in reply sworn by one Charles Mugila, the Director of Legal Services of the respondent.

When the application was called on for hearing, the applicants were represented by Mr. Audax Vedasto, learned advocate while the respondent had the services of Mr. Jovinson Kagirwa, assisted by Ms. Neema Richard, both learned advocates. At the outset and before the hearing could begin in earnest, the Court wanted to satisfy itself on whether the application was competent on account of it being supported by the affidavit which appeared to have been sworn by the third applicant on her own behalf and on behalf of the first applicant only.

When he took the stage to address us, Mr. Vedasto was emphatic that the application is properly before the Court since it has complied with the provisions of rule 48 (1) of the Rules. He argued that in terms of that provision, there is no specific number of affidavit(s) required to support the notice of motion and in any case, there is no legal requirement obliging all applicants to file individual affidavit(s) to support the application. He contended that what matters is the knowledge of the deponent on the subject matter involved in the application and not his or her identity.

On that basis, Mr. Vedasto invited the Court to consider the averments under paragraph 10 of the affidavit in support of the application where it is deposed that, the first applicant has volunteered to take full responsibility as far as fulfillment of the decree sought to be stayed is concerned. According to him, even if there is no specific statement in the affidavit covering other applicants, it is not fatal and the same cannot render the application incompetent. He also referred us to paragraph 7 and specifically annexure AA7 to the affidavit, the minutes of the meeting of the trustees of the first applicant which appointed the third applicant to sign court documents on behalf of the board of trustees, which implied that, being trustees of the first applicant, automatically other applicants are bound by anything done by the third applicant.

In the alternative and in his further effort to save the application, Mr. Vedasto urged us to invoke the overriding objective principle and allow the applicants to file supplementary affidavit(s) or amend the existing one to cover all the applicants.

For his part, Mr. Kagirwa argued that the application is incompetent for want of a proper supporting affidavit deponed on behalf of all seven applicants. He contended that, since the supporting affidavit in this application is in respect of the first and third applicants only, it contravened rule 48 (1) and 49 (1) of the Rules which require an application to be supported by an affidavit or affidavits. He argued that this scenario connotes that the second, fourth, fifth, sixth and seventh applicants have not filed affidavits to support the application.

He equally opposed the idea of resorting to annexure AA7, the minutes of the meeting which according to him related only to the trustees of the first applicant. He contended that the affidavit ought to have stated clearly that it was deponed on behalf of all seven applicants which information cannot be obtained in the minutes of the said meeting.

As regards the invocation of the overriding objective, Mr. Kagirwa argued that the same cannot be applied blindly to overlook mandatory

procedural rules. He added that, the issue of amendment cannot arise because an affidavit is a sworn statement which cannot be amended.

Mr. Kagirwa also opposed the prayer to file supplementary affidavit(s) as he argued that the same can only be done where there is a proper existing affidavit, which is not the case in the instant application.

As to whether paragraph 10 of the affidavit can save the situation, Mr. Kagirwa argued that the same is in respect of security for the due performance of the decree sought to be stayed in compliance with the conditions for the grant of stay of execution, hence does not relate to the format of an application. Based on his submissions, Mr. Kagirwa urged us to strike out the application with costs for being incompetent.

In his rejoinder, Mr. Vedasto emphasized that there is no requirement under rule 49 (1) of the rules for every applicant in an application to file an affidavit. He went on to argue that the trustees undertook to bind themselves and asked the first applicant through the third applicant to take responsibility of the application on behalf of all applicants. As regards the issue of amendment of the affidavit, Mr. Vedasto argued that it will not be the first time for the Court to allow amendment of an affidavit as it has done so in its previous decisions.

Lastly, he insisted that the third applicant's affidavit taken on behalf of the first applicant is adequate to cover all applicants and support the application. Otherwise, he argued that, the application in respect of the first and third applicants can be saved because they have filed their affidavit.

Having considered the contending submissions by the learned counsel for the parties, the issue which poses for our determination is whether the application is properly before the Court.

To answer this issue, we propose to look into the format of an application of this nature as stipulated under rule 48 (1) of the Rules, thus:

"Subject to the provisions of sub-rule (3) and to any other rule allowing informal application, every application to the Court shall be by way of notice of motion supported by affidavit and shall cite the specific rule under which it is brought and state the ground for the relief sought."

Likewise, rule 49 (1) thereof provides as follows:

"Every formal application to the Court shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts."

Therefore, in terms of the above cited provisions of the law, for an application of this nature to be proper, it should be made by way of a notice of motion supported by an affidavit. The application can also be supported by one or more affidavits of the applicant or of some other person or persons who are knowledgeable about the facts at issue.

Now, having perused the instant application, it is clear that the same has been made by way of a notice of motion supported by the affidavit of the third applicant, Anna Mwakosya. However, the deponent only stated that the first applicant has instructed her to swear the affidavit in her capacity as the Secretary of the first applicant. For ease of reference, we find it apposite to reproduce paragraph one of the affidavit thus:

"That I am the 3^d Applicant in this matter and the 3^d judgment debtor in the decree of the High Court (Commercial Division) at Dar es Salam in Commercial Case no. 177 of 2017 dated 27th March, 2019 (hereinafter this court called 'the High Court' and this decree called 'the decree'). I am swearing this affidavit also in my capacity as Secretary of the 1st Applicant herein/1st judgement Debtor in the decree, duly instructed by the said 1st Applicant/judgment debtor to swear this affidavit, and conversant with the facts I am stating herein."

The above quotation clearly shows that the third applicant swore the affidavit on her own behalf and on behalf of the first applicant only. This means, the second, fourth, fifth, sixth and seventh applicants have not filed any affidavit to support their application as required in the above cited provisions of the law.

The above stated scenario is not new, because it has been dealt with by the Court in its previous decisions including the case of **LRM Investment Company Limited & Five Others v. Diamond Trust Bank Tanzania Limited & Another**, Civil Application No. 418/18 of 2019 (unreported). In that application two affidavits were filed by the third and fourth applicants on their own behalf and on behalf of the first and second applicants. There were no affidavits on behalf of the fifth and sixth applicants and the Court observed thus:

"The ailment of the application not being supported by the affidavit of the fifth and sixth applicants renders the application incompetent".

-see also **Haidar Thabit Kombo & Ten Others v. Abbas Khatib Haji & Two Others**, Civil Application No. 2 of 2006 and **NBC Holding Corporation and Another v. Agricultural & Industrial Lubricants Supplies Limited & Two Others**, Civil Application No. 42 of 2000 (both

unreported). Going by the cited authorities, failure by the applicants to file affidavit or affidavits to cover all of them is fatal to the application.

We are mindful of the fact that, in a bid to save the application, Mr. Vedasto has implored us to consider the following: First, he referred us to paragraph 10 of the affidavit which he claimed to have been crafted to include all applicants. We have perused the said paragraph and found that, as correctly argued by Mr. Kagirwa, it relates to the first applicant's firm undertaking to fulfill the conditions for the grant of the stay of execution of the impugned decree. That paragraph in our view, has nothing to do with the averment to cover all applicants in the affidavit supporting the application.

Secondly, reference was made to the minutes of the meeting by the trustees of the first applicant (*annexure AA7 to the affidavit of the third applicant*). In our considered view, this also is not an affidavit since it relates to the trustees of the first applicant giving authority to the third applicant to sign court documents on their behalf. An affidavit being a sworn statement by a deponent cannot be equated with minutes of any meeting.

Thirdly, Mr. Vedasto urged the Court to invoke the overriding objective principle and allow the amendment of the third applicant's

affidavit to insert proper words to cover the second, fourth, fifth, sixth and seventh applicants. Again, we are in all fours with the learned counsel for the respondent that, the overriding objective principle cannot be applied blindly in disregard of the mandatory rules of procedure. We are supported in this view by the Court's earlier decision in the case of **Njake Enterprises Limited v. Blue Rock Limited & Another**, Civil Appeal No. 69 of 2017 (unreported). In that case, the Court was asked to invoke the overriding objective principle in the case of limitation period for filing an appeal. In refusing to apply that principle, the Court directed its mind to the objects and reasons of introducing the said principle in the Appellate Jurisdiction Act [CAP 141 R.E. 2019]. The Court referred to the relevant Bill which stated thus:

"The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms...."

Similarly, as rule 48 (1) and 49 (1) of the Rules have been couched in mandatory terms, the principle of overriding objective cannot be applied.

Lastly, Mr. Vedasto prayed for the applicants to file supplementary affidavits so as to cure the ailment. It is our considered view that, like its name, 'supplementary affidavit', can only be filed to supplement a proper existing affidavit. In the instant application since there is no affidavit(s)

for the second, fourth, fifth, sixth and seventh applicants, there is nothing to be supplemented on their respect.

Consequently, as it was decided in the cited authorities, the omission renders the application incompetent and thus it cannot be partly saved as urged by Mr. Vedasto. In the event, the incompetent application is hereby struck out with costs.

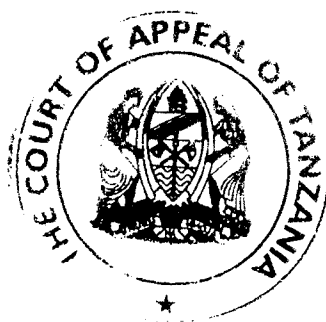
DATED at DAR ES SALAAM this 6th day of June, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

This Ruling delivered on 9th day of June, 2022 in the presence of Mr. Mvano Mlekano for the Respondent also holding brief for Mr. Audax Vedasto, learned counsel for the Applicants, is hereby certified as a true copy of original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL