IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., MWANDAMBO, J.A. And KENTE, J.A.)

CIVIL APPLICATION NO. 436/16 OF 2022

MOHAMED ABDILLAH NUR ....1ST APPLICANT
UMMUL KHERI MOHAMED .....2ND APPLICANT
WINGS FLIGHT SERVICES LTD.....3RD APPLICANT
AFRICA FLIGHT SERVICES .....4TH APPLICANT

VERSUS

HAMAD MASAUNI ..... 1ST RESPONDENT
ARTHUR MOSHA.....2ND RESPONDENT
JUMA MABAKILA .....3RD RESPONDENT

[Application for Stay of execution of the Ruling and Order of the High Court of Tanzania (Commercial Division) at Dar es Salaam]

(Magoiga, J.)

dated the 8th day of July, 2022
in
Misc. Commercial Cause No. 33 of 2021

RULING OF THE COURT

22nd August, &7th September, 2022

KENTE, J.A.:

This ruling is in respect of a preliminary objection raised by the respondents in terms of rule 107 (1) of the Tanzania Court of Appeal Rules, 2009 (hereinafter referred to as "the Rules"). Briefly stated, the objection is to the effect that, the main application in which the four applicants are seeking an order staying the execution of the order of the High Court

(Commercial Division) in Commercial Cause No. 33 of 2021 is incompetent for not being supported by the affidavits of the first and second applicants contrary to the dictates of rule 49 (1) of the Rules.

Submitting in support of the objection, Mr. Alex Mgongolwa learned advocate who appeared along with Mr. Seni Malimi also learned advocate to represent the respondent maintained with cogency and strong conviction that, the first and second applicants were each required under Rule 49 (1) of the Rules to swear or affirm an affidavit in support of the application. Further that the omission to do so, rendered the application incompetent. Relying on our earlier decisions in the cases of **The Registered Trustees of St. Anita's Greenland Schools (T) and Six Others v. Azania Bank Limited** and **LRM Investment Company Limited and Five Others v. Diamond Trust Bank Tanzania Limited,** Civil Application No. 418/16 of 2019 (both unreported), Mr. Mgongolwa submitted very briefly but with a relative much learning that, the omission by the first and second applicants to swear affidavits in support of the application was an "ailment" which was so grave as to render the application incompetent. He thus invited us to uphold the point of objection and strike out the application.

For his part, Mr. Deogratias Lyimo Kiritta learned counsel teaming up with Messrs Melchisedeck Lutema, Gabriel Mnyele, Mses. Dora Mallaba and Subira Omary learned advocates to resist the preliminary objection on behalf of the applicants was quite disagreed. While conceding the glaring omission by the first and second applicants to file affidavits and admitting his acquittance with the Court's decisions referred to by Mr. Mgongolwa, Mr. Lyimo contended with a steadfast courage that, the said decisions do not reflect the true position of the law. According to him, the only affidavit affirmed by one Abdillahi Nur Guled who is the Principal Officer of the third and fourth applicants was sufficient to cater for the four applicants to this matter in terms of Rule 49 (1) of the Rules. The learned counsel further contended that, for all purposes and intents, it was not necessary for the first and second applicants to swear affidavits in support of the application as the execution sought to be stayed in the present application does not necessarily affect them.

In a bid to convince the Court, the learned counsel took an enormous risk to equate the unequal situation obtaining in the present case with the case of **Tanzania Sewing Machine Co. Ltd v. Njake Enterprises Ltd**, Civil Application No. 238 of 2014 (unreported).

We had a difficult time understanding his analogy but it seems that Mr. Lyimo's argument as derived from the above-cited case was that, rule 49 (1) of the Rules allows any person having knowledge of the facts material to the matter to swear an affidavit for himself and on behalf of others in support of the application. Otherwise, the decision in the above-cited case was not based on the very point now in dispute.

Moreover, without making reference to any particular decision of the Court which conflicts with the two decisions cited by Mr. Mgongolwa, the learned counsel for the applicants contended generally that, there are some conflicting decisions of the Court regarding the interpretation of Rule 49 (1) of the Rules. He thus invited us rather informally, to vacate the two decisions relied on by Mr. Mgongolwa and give Rule 49 (1) an interpretation which in his view, would move forward our jurisprudence in a purposeful way. In another breath, Mr. Lyimo invited us to invoke the overriding objective principle so as to promote the interests of justice rather than give undue preference to the technical rules of procedure at the expense of justice the task with which we are constitutionally entrusted to perform.

When given the opportunity to lend a hand to Mr. Lyimo, Mr. Lutema augmented his learned friend's argument and, while going on in the same discourse, he insisted that, it was not necessary for the first and second applicants to swear their own affidavits in support of the application as the person who was conversant with the facts of the case had done so on their behalf. Before he urged us to dismiss the preliminary objection for what he called "the lack of merit", the learned counsel, in his submission sort of maintained a contradictory position to the one adopted by Mr. Lyimo as to the first and second applicants swearing or not swearing affidavits saying that, the only affidavit sworn by the third and fourth applicants' principal officer should be considered as having been sworn by the first and second applicants as well.

We have considered the arguments articulated by the learned counsel for the respective parties. In order to fully appreciate the context in which the preliminary objection was raised, it is germane and indeed imperative for us to reproduce Rule 49 (1) of the Rules the interpretation of which has already been made through various decisions of this Court. The above-cited rule provides in no ambiguous terms that:

"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".

To start with, we must say that, just like Mr. Mgongolwa, we were disconcerted by the two apparent contradictory positions taken by Mr. Lyimo and Mr. Lutema in their respective arguments as to the presence or the absence of the first and second applicants' affidavits. The only way we could reconcile the two positions is to say that, what the learned counsel impliedly meant and what appears cardinal to them is that, the third and fourth applicants' principal officer had affirmed the founding affidavit not only on behalf of the two companies as his affidavit shows but also on behalf of the first and second applicants. Essentially that is the bone of contention between the parties.

However, with due respect to the learned counsel for the applicants, we do not accept their argument. For, we hold the view that, if he was authorised to swear any affidavit on behalf of the first and second applicants as well, the said Abdillahi Nur Guled who is the principal officer of the third and fourth applicants would certainly have said so expressly

in the first paragraph of his affidavit which, as it turned out, reads as hereunder:

> *"I am the Principal Officer of the 3rd and 4th applicants duly authorised to affirm this affidavit hence conversant of what I am going to depose to about this application".*

What should be undisputed from the above-quoted paragraph is that, upon authorisation, the deponent went forward and affirmed the founding affidavit on behalf of the third and fourth applicants only. It appears to us that the argument that he did so on behalf of the first and second applicants as well is brought in conveniently to counter the otherwise plausible objection raised by Mr. Mgongolwa on the grounds that the first and second applicants did not file any affidavits in support of the application as required by law.

Moreover, we are decisively of the view that, the act of swearing and filing an affidavit in support of, or in opposition to an application duly filed in court, is such a serious undertaking which cannot be left for conjecture by an advocate as Mr. Lyimo and Mr. Lutema would want us to believe. We must quickly observe that, a person purporting to swear an affidavit on

behalf of another person who is a party to a court proceeding must do so after consultation with and obtaining instructions from the party on whose behalf the affidavit is being sworn. We also hasten here to emphasize that, such instructions and authorisation must be expressly reflected in the relevant affidavit. Otherwise nothing must be presumed to the advantage of a party who fails or neglects to file pleadings or affidavits which are of the essence of the matter before a court of law.

Having sniffed no indication that the deponent of the only affidavit in the instant matter was clothed with more authority than he in fact had which was to swear the affidavit on behalf of the third and fourth applicants only, we cannot accept the contention by Mr. Lyimo and Mr. Lutema that Mr. Abdillahi Nur Guled also took up the cudgels on the first and second applicants' behalf. Instead, we agree with the position taken by Mr. Mgongolwa that indeed there is no affidavit filed either jointly or severally by the first and second applicants in support of the application.

Now, as alluded to earlier, in an alternative attempt to deliver the knockout punch to the point of objection raised by Mr. Mgongolwa, Mr. Lyimo invited us to invoke the overriding objective principle otherwise known as the oxygen principle to regularise the situation in this case. For

his part, Mr. Lutema came with an interesting argument belittling the enormity of the concern by Mr. Mgongolwa. Not thinking that this was a fatal defect, he argued that, the omission by the first and second applicants to swear affidavits in support of the application should not have formed the basis of a preliminary objection. The learned counsel contended that, rather than pressing for the application to be struck out, Mr. Mgongolwa should have drawn the said omission to the attention of the Court for remedial purposes. However, Mr. Lutema could not suggest the appropriate remedy in the circumstances of this case and on our part, knowing the position of the law, we could not get him to do so.

With due respect, once again, we are in total disagreement with both Mr. Lyimo and Mr. Lutema. For, it is now settled through various decisions of this Court but in the circumstances of the present case, we can rely on the two decisions from which a useful analogy in any case of this sort can be found. Those are the cases to which we were ably referred by Mr. Mgongolwa. We do so in order to wrap up the correct view of the law that, indeed the omission by the applicant to file an affidavit in support of the notice of motion, is a serious shortcoming which renders the application incompetent.

As to the invitation extended to us by Mr. Lyimo, the pertinent question would be, what, then, does the future hold if we were to accept the said invitation. On this, we need to observe at once that, the rules that govern the proceedings of the courts and the long standing precedents would be facing extinction at some point in time if the courts of law were to disregard them and condone every act of ineptitude by lawyers simply on the flimsy argument that the overriding objective principle which was meant to reduce red tapes on procedural laws was also intended to ameliorate even the downright amateurish works. It is exactly for this reason that, while declining the invitation to invoke the overriding objective principle in the case of **Njake Enterprises Limited v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017 (unreported), we adopted and followed with approval the purposes of the Legislature in introducing the said principle into the Appellate Jurisdiction Act [Cap 141 R.E.2019] (hereinafter "the AJA") as contained in the relevant Bill. We held in consequence that, the proposed amendments to the AJA were not designed to blindly disregard the rules of procedure that are couched in mandatory terms. It is needless to say that, Rule 49 (1) of the Rules is couched in such terms and, as stated above, it can never have been

intended that the overriding objective principle would supersede the mandatory provisions of the law. Otherwise it would amount to exploiting the intendments of the Legislature beyond measure.

Going a little further, it behoves us to remark in passing that, as an officer of the court, any advocate in this country is not only entitled to, but he is also under an indispensable duty to draw the attention of the Court to any decision which in his honest opinion, and to the best of his understanding of the law, is materially in conflict with the established precedents and if necessary, to formally move the Court to depart from its previous decision. However, we must emphasize that, such a course of action has to be followed only in the most fitting and deserving situations in the circumstances which may not necessarily be in favour of the advocate's client.

Even though, we hasten to state that, it is procedurally incorrect and indeed quite unorthodox for an advocate to seek to defeat a preliminary point of objection which has been raised in terms of Rule 107 (1) of the Rules by acts or arguments solely designed to defeat the basis of the said objection. (See also **Minister for Labour and Youth Development and Another v. Gaspar Swai and Sixty-seven Others** [2003] TLR 239. We

feel compelled to make the above remark not without regret. For, we are of the respectful view that, the contention by Mr. Lyimo that there were some conflicting decisions of this Court regarding the interpretation of Rule 49 (1) of the Rules which however the learned counsel could not substantiate, conveys the impression that the argument was artfully designed to defeat the preliminary objection quite rightly raised by Mr. Mgongolwa. It is in this connection that we feel obliged at this juncture, and we think we can do no better as we conclude our ruling, than remind the learned counsel and the entire legal fraternity thus:

> *"In many ways, life is full of conflicts between procedure and substance, as is the law. Lawyers must never solely rely on their knowledge of the substantive law. They must realise that knowledge of the substantive law is equally important as their knowledge of procedural law. Lawyers must respect the fact that law is a combination of both. They must painstakingly acknowledge this combination of substance and procedure or risk failure as attorneys."*

(Quoted from the Article titled *"The Importance of Knowing Procedural Law"* posted by California Desert Trial Academy in cdtalaw.com).

The above-quoted excerpt is self-explanatory; no further interpolation is needed.

The cumulative effect of what we have said so far, is to sustain the preliminary objection and declare the application before us incompetent. We accordingly strike it out with costs to the respondents.

DATED at **DAR ES SALAAM** this 1st day of September, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The ruling delivered this 7th day of September, 2022 in the presence of Ms. Dora Mallaba, learned advocate for the applicants who also holds brief for Mr. Alex Mgongolwa, learned advocate for the respondents is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL