

IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWANDAMBO, J.A., KITUSI, J.A., And MGONYA, J.A.)

CIVIL APPEAL NO. 48 OF 2020

LEGAL AND HUMAN RIGHTS CENTRE APPELLANT

VERSUS

THE MINISTER OF HEALTH, COMMUNITY DEVELOPMENT,

GENDER, ELDERLY AND CHILDREN 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

**(Appeal from the Ruling and Order (Decision) of the High Court of Tanzania,
District Registry of Mbeya at Mbeya)**

(Mongella, J.)

dated the 7th day of October, 2020

in

Misc. Civil Case No. 1 of 2019

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JUDGMENT OF THE COURT

12th & 15th December, 2023.

KITUSI, J.A.:

This is an appeal from the ruling of the High Court (Mongella, J) striking out Miscellaneous Civil Cause No. 1 of 2019 on the ground that it was incompetent for want of a properly verified supporting affidavit. There is no dispute that prior to that, the learned judge had considered a point of Preliminary Objection (PO) on the competence of the same affidavit and

dismissed it, ordering the parties to address the merit of the case. Subsequently however, the respondent brought up the issue of the supporting affidavit again, this time arguing that since paragraph 6 of the affidavit had sub-paragraphs, it was incumbent upon the deponent to verify each sub-paragraph separately.

The learned judge sustained this PO, and struck out the cause. By way of some brief background, the cause was for leave to file for judicial review under section 2 (3) of the Judicature and Application of Laws Act (Cap 358), section 18 (1) and 19 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act Cap 310 and Rule 5 (1) and (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act (Judicial Review Procedure and Fees) Rules, 2014. It aimed at challenging a parliamentary legislation the description of which is not a matter of our concern presently.

The appellant was aggrieved by that decision and has appealed to the Court raising two grounds. Considering the brief background, we have given above and the written submissions which the parties had filed ahead of the date of hearing, we are satisfied that we are going to have to consider two related issues namely;

- (i) whether, having earlier dismissed the PO on the competence of the supporting affidavit it was open for the learned judge to reopen that inquiry.*
- (ii) whether verification of a paragraph in an affidavit which has subparagraphs is not sufficient unless each of the sub paragraphs are separately verified.*

Mr. Jebra Kambole, learned advocate represented the appellant whereas Ms. Alice Mtulo, learned Senior State Attorney appeared for the respondents assisted by Messrs. Joseph Tibaijuka and Erasto Baluwa, both learned State Attorneys.

Initially, we had invited the counsel for both sides to address the competence of the appeal bearing in mind that the case before the High Court was struck out not dismissed by it. Ms. Mtulo argued that the order striking out the case was interlocutory therefore not appealable as the appellant could go back to institute a fresh cause. However, we agree with Mr. Kambole that after striking out the matter there is nothing left at the High Court to make the impugned decision interlocutory. For that reason, we

hold that the appeal is not barred by Section 5 (2) (d) of the Appellate Jurisdiction Act Cap. 141 (the AJA).

Arguing the substance of the appeal, Mr. Kambole submitted that having dismissed the first PO it was an error for the learned Judge to entertain another PO when it was not touching on the question of the court's jurisdiction. He then argued that, verification of sub paragraphs is not a legal requirement. The learned counsel was of the view that if the learned Judge considered the verification of paragraph 6 inadequate, she could have ordered an amendment as it was done in the case of **Sanyou Service Station Ltd v. BP Tanzania Ltd (Now Puma Energy (T) Ltd** Civil Application No. 185/17 of 2018 (unreported).

Responding, Ms. Mtulo submitted that even if the point of verification is not a jurisdictional issue, that would not justify the Court acting on an incompetent cause. The learned Senior State Attorney took the view that the learned judge was correct in entertaining the second PO. On the option to order an amendment so as to cure the inadequate verification, she submitted that the judge had the discretion to order or not to order amendment, so she cannot be faulted for exercising her discretion. In a short rejoinder Mr.

Kambole pointed out that the judge had a duty to exercise her discretion judicially.

We wish to resolve the first issue. It is worth a reminder that the celebrated decision in **Mukisa Biscuits Manufacturing Company Limited v. West End Distributors Limited** [1966] EA 696 which has since illuminated our path on matters of preliminary objection, came about as the erstwhile East Africa Court of Appeal felt the time to discourage the trend of raising unnecessary Po, had come. In **Mount Meru Flowers Tanzania Limited v. Box Board Tanzania Limited**, Civil Appeal No. 260 of 2018 (unreported) we pointed out that for a preliminary point of objection to qualify as one it should be on ascertained facts according to the case of **Mukisa Biscuits** (supra). We then made the reminder which we are compelled to reiterate in the instant case that:-

*"... we must remind counsel that the decision in **Mukisa Biscuits** (supra) came as it occurred to the court that increasingly, parties had taken to raising as points of preliminary objection, issues that could be argued in a normal course of hearing substantive matters."*

In our view, within the spirit of discouraging unnecessary points of preliminary objections, the learned judge should have demonstrated the court's distaste by refusing to entertain the second PO, let alone granting it. It is true as it was stated in **DDL Investment International Limited v. Tanzania Harbours Authority & Two Others**, Civil Application No. 8 of 2001 (unreported), cited in **Sanyou Service Station** (supra), that whether to order an amendment of an affidavit or not is a matter of discretion. However, we agree with Mr. Kambole that, having dismissed the earlier PO challenging competence of the same affidavit, the learned judge should not have entertained the second PO and that when she did so, the learned judge did not exercise her discretion properly in refusing to order an amendment. It was not correct for her to desist from ordering amendment just because, according to the learned judge, she was composing her ruling. We therefore answer the first issue in the negative, that having dismissed the first PO, it was not open for the learned judge to entertain another PO on the same point of competence of affidavit, because that was not in keeping with the established trend since **Mukisa Biscuits** (supra).

We wish to pronounce ourselves on the second issue albeit briefly. This is on the need to verify sub paragraphs. The relevant affidavit has this verification clause :-

"I, Felista Mauya, being principal Officer for the Applicant herein do hereby verify that all what is stated in paragraphs 1, 2, 3, 4, 5, 8 and 9 is true to the best of my own knowledge and believe, save for what has been stated in paragraph 6 the information of which I received from our counsel Jebra Kambole and I verify believe the same to be true."

The learned judge cited cases decided by the High Court which abhor general verification clauses. In our view, the above verification clause is not what can be called general, while it refers to paragraphs 1, 2, 3, 4, 5, 8 and 9 as being true to the best of the deponent's knowledge and paragraph 6 as true according to information from the applicant's counsel known as Jebra Kambole. Demanding more than this is, in our view, stretching the principle too much. For these reasons we do not go along with Ms. Mtulo that it is a rule of general application that whenever a paragraph in an affidavit consists of sub paragraphs, each of such sub paragraphs must be verified separately. It may depend on the circumstances of each case.

As a result, from the above discussion, we allow this appeal. We quash the ruling and order of the High Court and remit the record to it for the application to be heard and determined on its merit.

Considering the nature of the case, we do not order any costs.

DATED at **MBEYA** this 14th day of December, 2023.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Ruling delivered this 15th day of December, 2023 in the presence of Mr. Joseph Tibaijuka, learned State Attorney for the Respondent and also holding brief for Mr. Jebra Kambole, learned counsel for the Appellant is hereby certified as a true copy of the original.

