

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
CIVIL CASE NO. 82 OF 1997

ABDI ALI MUMIN

- PLAINTIFF

VS

1. M\S GS. MOTORS LTD.

)-

2. G. SCHNOOR

)-

DEFENDANTS

R U L I N G

KALEGEYA, J.

This ruling is in respect of a Preliminary objection raised by the Defendants\Respondents following a chamber application by the Plaintiff\Applicant praying for an order of attachment before judgement of the Defendants\Respondents' various motor vehicles and trucks lying inside and outside showrooms at plots Nos. 10,11\1, 11\2, 12A, 12B and 12C Pugu Road. The said vehicles and trucks include 2 Mercedes Benz TZD 6018, TZH 3267; 4 pick-ups Skoda not yet registered and one Pick-up not yet registered. I should point out at this point that all this is centred on a Civil Case filed by the Plaintiff against the defendants jointly and severally, claiming among others, a total of shs. 35,280,000/= allegedly being a balance and compound interest due to him from a trade agreement between them, and which business transaction involved fridges and freezers.

Mr. Bwahama Advocate appeared for the Plaintiff\Applicant while Mr. Msemwa Advocate appeared for the Defendants\ Respondents.

In the affidavit in support of his chamber application, the plaintiff in 9 paragraphs deponed that he is an investor in Tanzania (Para 1); that between 2nd and 10th Sept. 1994 he delivered to defendants fridges and freezers under a trade agreement for sale on his behalf (Para. 2); that the contract letter with prices was signed by him and 2nd defendant while delivery notes were signed by 2nd defendant's Manager at Tanga (Para 3); that the total value of the goods received was 21,380,000/= out of which 5,000,000/= was paid leaving a balance of Shs. 16,380,000/= which the 2nd defendant has failed to settle (Para 4); that in early January, 1997, the 2nd defendant through his company, 1st defendant, were reported to have been involved in vehicle Import fraud as reported by the Guardian, of 13th Jan, 1997, front page, thus "a new wave of theft has gripped the city in which five people have been swindled a total of shs. 200 million by conmen pretending to import new vehicles from South Africa" (para. 5); that the Respondents have already been sued before the Kisumu RM's Court in Civil Cases Nos. 212 of 1996 for refund of shs. 90 million, and 132 of 1996 for refund of shs. 3.5 million by Landrover Exports Ltd. and Aloys Mwakanga respectively and that this is apart from other cases in which 2nd Respondent was refused bail for alleged frauds\thefts as per

the Guardian's report (para. 6); that the Respondents having fallen victims as indicated in the preceding examples appear to have built a reputation of amassing wealth by defrauding their clients (Para. 7) and that for 2 and half years the respondents have used the fridges\freezers proceeds to enrich themselves (8).

I have deemed it necessary to paraphrase all the paragraphs in the relevant affidavit for clarity regard being had to the nature of the preliminary objection presented. And for the same reasons, paragraph 9 is herebelow quoted in whole,

"That the applicant is reliably informed that with the impending civil and criminal cases facing the Respondents they intend to dispose of the newly imported motor vehicles at their Pugu Road showroom\remove them from the jurisdiction of this court to avoid paying their creditors". and finally, the applicant verified his affidavit as follows:-

"What is stated in paragraphs 1,2,3,4,8 and 9 are to the best of my knowledge and what is stated in paragraphs 5,6 and 7 is based on the Guardian newspapers press reports of the 13th Jan.1997"

Mr. Msemwa, Advocate, for defendants, took up a preliminary objection challenging the affidavit filed in support of the plaintiff's application as being deplorably defective in that it does not disclose what is on own belief and for those on information does not disclose the source. Secondly, it was submitted that plaintiff has no locus standi as the defendants traded with his Company, Mumin Trading Coy of Cologne and not in

his personal Capacity and cited, Aron Salmony Vs Salmony and coy Ltd (1847) Ac 32 and that there is no rights violated under 0.36, R.6 CPC: Auto Garage and others vs Motor (1973) E.A 514 at 519. For the former submission regarding defective affidavits, Mr. Msemwa cited Uganda vs Commissioner of Prisons Ex-parte Matovu, 1966 EA 514 at page 520; Bombay Flour Mills vs Patel (1962) EA 802; Nanda vs Lyeip (1962) CA 603; Phakey vs World Wide Agencies (1948) 15 EACA 1; Jan Mohamed vs. Mathani (1953) 20 EACA 8 and Standard Bank vs. Nathu (1950) 17 EACA 99. Mr. Msemwa prayed to have the chambers summons and its supporting affidavit struck off.

In response, Mr. Bwahama for the Plaintiff\Applicant, briefly, maintained that the affidavit was proper as the source of information was disclosed, and further that, as for deponents' belief this would be disclosed when circumstances necessitate. He insisted that defendants were trading with Plaintiff in his personnel capacity.

I will start with the question of the validity or otherwise of the Plaintiff's\Applicant's affidavit.

Under order 19, Rule 3(1) of the Civil Procedure Code what should be contained in an affidavit is prescribed, "Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: Provided that the grounds thereof are stated".

Authoritative and persuasive decisions (as considerably revealed by Mr. Msemwa for the Applicants\Defendants) regarding what an affidavit should contain are abound. To the long list of such cases we can add just a few as follows-

The National Bank of Commerce vs Manubhai Shankarbhai Desai and others, (1969) HCD 206; Kubach & Saybook Ltd v Hasham Kassam & Sons Ltd (1972) HCD 228 and Mtale v January Kapembwa (1976) LRT N.7.

Principles pronounced in all these cases are now settled - an affidavit should clearly show which matters are deposed to from the deponent's knowledge, information and belief, and on each of these categories the sources thereof should be disclosed.

- an affidavit which does not qualify as above should not be acted upon by Court.
- however the court can act on those parts of the affidavit which qualify the test and strike out those which do not.

Now turning to the present case I should hurriedly add that it slightly differs from the authorities above enlisted because while in those cases the courts were deciding simultenously on preliminary objections (which partly concerned alleged defective affidavits) and the main chamber applications, in the present case we are dealing with just a preliminary objection.

Applying the above stated principles to the affidavit before us, and having considered the same in light of the arguments presented by both learned Counsel I am satisfied that Para 1 - 7

qualify within the Rules. Only para. 8 and 9 fall short of what is required.

In the verification the Applicant\Plaintiff states, "what is stated in paragraphs 1,2,3,4,8 and 9 are to the best of my knowledge and what is stated in paragraphs 5, 6 and 7 is based on the Guardian Newspaper press reports of the 13th January 1997". Now let us look at the various paragraphs contained in the relevant affidavit.

Paras 1 - 4 assert the dealings between the parties so saying that this is within his knowledge can't be challenged in anyway, for who else would know better what transpires between parties if not the parties themselves. Para 5, 6 and 7 are matters deposed to have been published in the Guardian Newspaper and the relevant cuttings have been attached. Who can doubt this kind of source of information (here we are referring just to source, to what was reported, and we are yet to get proof of the truth of the report - the latter is not relevant at this stage).

As regards para 8 which states:

"That for the last 2 and half years the respondents have used the applicants proceeds from the fridges\freezers to enrich themselves" while it could be probable it is not supported and its is accordingly struck off.

Para 9 can't stand either because, first while it opens up by providing, "the applicant is reliably informed that", the source of this information is not disclosed, and secondly, to make matters worse, in the verification,

the applicant asserts that it is "to the best of his knowledge"

- and the latter could mean either from his own observation or in accordance with received information but does not specify nor disclose source. Ambiguity shelled in this non-disclosure can only earn one consequence for this paragraph: be struck off as I hereby do.

As I have already indicated, a court can strike off those offending paragraphs in an affidavit and proceed to act on the remaining parts. Having struck off para 8 and 9 we remain with para 1 - 7, and whether or not, standing alone, these can support the main application is a question not to be determined at this stage.

I now turn to the second ground of the Preliminary objections: that the applicant\Plaintiff has no locus standi.

Mr. Msemwa learned counsel for the Respondent\Defendant strenuously argued that the trading agreement was between the Defendants and Mumin Trading Coy of Cologne and not Abdi Ali Mumin, and that his being a Director notwithstanding he can't sue in his personal capacity, and referred to Ann. A to the Affidavit which is also Ann. A to the plaint.

Ann. A to the Affidavit and plaint is a copy of a letter from the 1st Defendant signed by the 2nd Defendant and addressed to MUMIN TRADING GMBH, and which seems to be in respect of business transactions concerning

(a) fridges and freezers

(b) Motor vehicles - 2 Mercedes Benz cars and
a Nissan Laurel.

Paragraphs 1, 2 and 3, read as follows:-

"Dear Mr. Mumin,

after studying the actual market situation in

Dar es Salaam we have for the Tanga sales fixed as
per attached list.

We are confident that based on these prices the units
will be sold rapidly which is actually the intention of
all parties".

As rightly submitted by Mr. Msemwa who called to his aid the
decision in *Salmony vs Salmony and Coy Ltd.* (1897) AC 32, a
limited liability company is a separate entity and should be
treated like any other independent person with its rights and
liabilities which include suing and being sued. Indeed if the
business transaction was between Defendants and Mumin Trading
GMBH the applicant\plaintiff can't sue or claim any rights
pursuant to such transactions in his personal capacity. On those
premises I was prepared to go with Mr. Msemwa's submission if it
weren't for another factor revealed in the annexures both to the
affidavits and plaint. Apart from Ann. A, there is also Ann. "B"
which is the list of items referred to in para. 2 of Ann. A
quoted above. This is a list of fridges and freezers. There is
yet Ann. C and D, copies of delivery notes. Not only that,
attached to the Applicant\Plaintiff's reply to

Respondents\Defendants' Counter affidavit there are Annexures G1-10. In all these Annexures save Ann. A and B the applicant\plaintiff is addressed in his personal name, Abdi Ali Mumin.

While a casual focus at Ann. A (relevant part quoted above) may prompt one to conclude that its contents are addressed to a Company (MUMIN TRADING GmbH), an inclusion of the words "Dear Mr. Mumin" cast some reservations. This reservation is compounded by Ann. C and D, delivery notes (which seem to refer to fridges related to Ann. B, a list referred to in Ann. A) bearing the names

"GS Motors

P.O. BOX 40154 DSM.

Abdi Ali Mumin

P.O. BOX 10544";

and Ann. G1-10, which are NBC remittance pay-in-slips and showing that the payee is Abdi Ali Mumin.

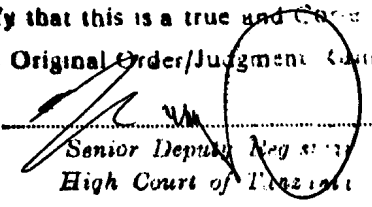
As the Applicant\Plaintiff's pleadings indicate the name of Abdi Ali Mumin as plaintiff, and as all the Annexures indicate that same name to be at the heart of all that is alleged to have taken place between the parties it would not be proper to conclude at this stage that he has no locus standi. This will be canvassed during the hearing of the main suit where each party will strive to establish and disclaim liability.

On the whole therefore the preliminary objection is over-ruled.
save to the extent that paragraphs 8 and 9 of the
Applicant\Plaintiff's affidavit are struck off.

AT DAR ES SALAAM
25TH AUGUST, 1997

(L. B. Kalegeya)
JUDGE

Delivered to day the 26th August, 1997, in the presence of
Mr. Bwahama and Mr. Msemwa learned Counsel for the Applicant\
Plaintiff and Respondent\Defendants respectively.

I certify that this is a true and correct copy of the Original Order/Judgment being.

Senior Deputy Registrar High Court of Tanzania
Dated <u>26-8-</u> at <u>97</u>

(L. B. Kalegeya)
JUDGE
26\8\1997