

IN THE HIGH COURT OF TANZANIA  
DAR ES SALAAM DISTRICT REGISTRY  
CIVIL CASE NO. 201 of 1996

MTIBWA SUGAR ESTATE LIMITED ..... PLAINTIFF  
VERSUS

1. ZEGE TRANSPORT SERVICE ..... DEFENDANTS
2. NATIONAL INSURANCE CORPORATION LTD. ....

R U L I N G

BUBESHI, J:

The applicant in this matter, Mtibwa Sugar Estates Ltd, have filed an application for review under Order XLII (1) and also for a stay of the execution pending hearing of the review of the decision of this court made on 5/8/1995 the 2nd respondent/defendant had prayed for and judgment entered against the plaintiff in terms of O8 Rule 14 (1). The respondent has filed four grounds in form of preliminary objections on points of law, namely

that the application for stay is bad in law in that it has been brought under the wrong provisions of the law;

that the affidavit in support of the chamber application is inaurably defective offending O XIX Rule 3 of;

that the affidavit sworn by one G Kitange is defective in that it offends the provisions of Section 3 of the Notary Public and Commissioner for Oaths Ordinance, Cap.12;

that the same affidavit quoted above is defective in that it offends Section 8 of Cap 12.

To substantiate his submissions, Mr. Msemwa for the respondent submitted that the application has been brought under Order XXI Rule 24 instead of being brought under Order XXXIX Rule 5 (1), where the court has powers to order stay of execution on condition there is sufficient cause (s) for so doing . On second objection Mr. Msemwa

stated that the affidavit filed in support thereto contains extraneous matters by way of prayers. The case of UGANDA vs COMMISSIONER OF PRISON - EX PARTE MATOVU (1966) E.A. 514, at page 520 was quoted in support of the proposition. He stated that the affidavit filed by the applicant contained extraneous matters by way of prayers - hence it ought to be struck off from the record.

Thirdly, Mr. Msemwa stated that the applicants filed affidavit does not show where the oath was sworn and lacks the proper date.

Fourthly, Mr. Msemwa added that the applicants affidavit was sworn by one G. Kitange before E E Wamunza in her capacity as commissioner for oaths and yet it is this same E.E.Wamunza who is the applicants counsel in the matter. Mr. Msemwa submitted that by so doing, the provisions of Section 7 of Notary Public and Commissioner for Oaths Ordinance, Cap.12 were clearly violated. He prayed that the affidavit being so clearly defective should not be acted upon and the application be dismissed.

I reply Mrs. E. E. Wamunza while conceding that the application was brought under the wrong law, was of the view that the defect could have been cured if the counsel for the respondent had not prayed for written submissions.

I must confess I am at a loss of what Mrs. Wmunza is up to in this regard. She was represented by Mr. Ngalo when Mr. Msemwa asked for leave to file his objections by way written submissions. She cannot certainly blame Mr.Msemwa for what transpired in court on that date when she was represented.

Further she concedes that the affidavit was attested by herself and prays for leave to amend the application.

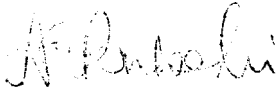
With respect to Mrs.Wamunza she has not put up convincing reasons to sway this court to her side? With all the flaws that have been stated by Mr. Msemwa can this court allow for an amendment of the affidavit? What I note is that the whole affidavit must be struck off and re written a fresh and not only parts thereof.

The case of SABAYANOS FARMERS CO-OPERATIVE SOCIETY LTD  
vs ANTONY MWITA (1968) H.C.D. NO.354 is clearly distinguishable  
in my view, Of the points considered by the court in the  
SABAYANOS case (supra) was one that the defendant's officer  
was a man of limited education, with no legal experience.

In the application at hand the application has been filed  
by a qualified counsel.

Having considered the arguments put forward by both  
counsel I have come to the conclusion that, the filed  
affidavit was incuriably defective that to order for its  
amendment would mean, in actual fact rewriting the whole.  
In the premises I decline the invitation extended by  
Mrs. Wamunza and order that the affidavit be struck off.  
And there being no affidavit in place, the application for  
stay of execution therefore fails. Preliminary objections  
are hereby upheld.

Delivered in  
absence of Parties who  
were duly served to appear.

  
A. G. BUBESHI

JUDGE

18/2/99