

**IN THE UNITED REPUBLIC OF TANZANIA  
IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 222 OF 2018**  
*(Arising from Misc. Civil Application No. 190 of 2018)*

**MIC TANZANIA LIMITED.....APPLICANT**

**VERSUS**

**HAMISI MWINYIJUMA.....1<sup>ST</sup> RESPONDENT**

**AMBWENE YESAYA.....2<sup>ND</sup> RESPONDENT**

**RULING**

*Date of the last Order 08<sup>th</sup> May, 2018  
Date of Ruling 09<sup>th</sup> May 2018*

**R. K. SAMEJI, J.**

The applicant herein has filed this Application under Sections 68 (e) and 95 of the Civil Procedure Code, Cap 33 [R.E 2002] seeking for both ex-parte and inter-parties orders of this Court as follows: -

**EX-PARTE**

*That, this Honourable Court may be pleased to issue an interim order ex-parte maintaining the status quo by suspending operation of the Garnishee Order nisi issued on 27<sup>th</sup> April 2018 in the District Court of Ilala at Samora*

*Avenue (Hon. Msafiri, RM) in execution of the Judgement and Decree of the District Court of Ilala District at Samora (Hon. Hassan, RM) dated 11<sup>th</sup> April 2016 in Civil Case No. 17 of 2012 and maintain status quo ante pending hearing and final determination of this Application inter-parties.*

## **INTER- PARTIES**

- (i) That, this Honourable Court may be pleased to issue an order that status quo ante issuance of Garnishee Order nisi dated 27<sup>th</sup> April 2018 be maintained by lifting the Garnishee Order Nisi issued on 27<sup>th</sup> April 2018 in the District Court of Ilala at Samora Avenue (Hon. Msafiri, RM) in execution of the Judgement and Decree of the District Court of Ilala District at Samora (Hon. Hassan, RM) dated 11<sup>th</sup> April 2016 in Civil Case No. 17 of 2012 pending hearing and final determination of this Application for interlocutory orders and for extension of time to appeal against the said Judgement and Decree;*
- (ii) Costs to follow the event; and*
- (iii) Any other Order(s) that the Honourable Court may deem fit and just to grant.*

It is on record that, though the applicant prayed for an *ex-parte* order, but for the interest of justice the Court was reluctant to hear the Application *ex-parte* and it thus ordered the respondents to be served and the matter to be heard and determined *inter-parties*.

After being served with the applicant's pleadings the respondents have filed a Counter Affidavit accompanied by three points of Preliminary Objection to the effect that: -

- (a) *the Court has not been properly moved, as the applicant has not cited the enabling provision of the law;*
- (b) *the Application is defective for being accompanied with a defective Affidavit; and*
- (c) *the Application is misconceived since the applicant has not exercised the appropriate remedy for stay of execution hence an Application by the applicant asking the Court to maintain status quo and lifting Garnishee Order Nisi is not an alternative remedy for stay of execution.*

On 08<sup>th</sup> May 2018, when the matter was called for mention, Mr. Rosan Mbwambo and Mr. Victor Kikwasi, both learned Counsel appeared for the applicant, while Mr. Albert Msando, the learned Counsel appeared for the respondents.

Mr. Mbwambo among other things, invoked S. 68(e) and 95 of the Civil Procedure Code and referred to Annexure MIC-5 of the Affidavit and informed the Court that the respondents have already obtained a *Garnishee Order Nisi* to execute the *Judgement and Decree* of Ilala District Court in respect of *Civil Case No. 17 of 2012*. He further submitted that, the time given for the said *Garnishee Order Nisi* is 14 days which will expires on 10<sup>th</sup> May 2018. He thus prayed the Court to intervene by invoking Sections 68 (e) and 95 of the Civil Procedure Code and maintain the status quo of the parties pending the hearing and determination of this Application on merit.

On the other hand, Mr. Msando spiritedly objected the oral prayer by Mr. Mbwambo by stating that, the oral prayer made by Mr. Mbwambo of maintaining the status quo is the same prayer in the main Application herein and also in the *Misc. Civil Application No. 195 of 2018*, which is also

pending before this Court. He said, all these three applications i.e the *Oral Application, Misc. Civil Application No. 222 of 2018* and the *Misc. Civil Application No. 195 of 2018* were brought under similar provisions, Sections 68(e) and 95 of the Civil Procedure Code. Mr. Msando, argued further that, the respondent has already raised preliminary objection that those are not enabling provisions of the law to move this Court to grant the prayers sought. It was therefore the view of Mr. Msando that, since the *Oral Application* was also made under the very same provisions, it will be prudent for the Court before granting the prayer to hear the parties on the points of preliminary objection raised.

It is important to point out that, the issue raised by Mr. Msando is on the jurisdiction of this Court to entertain the application before me. Now, since jurisdiction is fundamental issue to the Court's authority to determine any matter, I decided to hear parties on the main Application and specifically on the point of preliminary objection raised by the respondents. All parties indicated that they are ready to address the Court on the same matter and prayed to be allowed to do so outright.

Submitting in support of the 1<sup>st</sup> and 2<sup>nd</sup> points of preliminary objection, Mr. Msando argued that the provisions cited by Mr. Mbwambo i.e 68 (e) and 95 of the Civil Procedure Code are not enabling provisions to move this Court to grant prayers sought in the Chamber Summons. Mr. Msando referred to the Book of Mulla – Code of Civil Procedure 18<sup>th</sup> Edition 2011 at pages 1387 and the cases of **Sea Saigon Shipping Limited V Mohamed Enterprises (T) Limited**, Civil Appeal No. 37 of 2005 and the **Tanzania Electric Supply Company (TANESCO) V Independent Power Tanzania LTD (IPTL) and 2 Others**, Consolidated Civil Application No. 19 and No. 27 of 1999, (*hereinafter referred to as IPTL case*) and **VIP Engineering and Marketing LTD (VIP) V Independent Power Tanzania LTD (IPTL) and Others**, Consolidated Misc. Civil Cause No. 49 of 2002 and No. 254 of 2003. In the first IPTL case, the Court of Appeal discussed the applicability of sections 68(e) and 95 of the Civil Procedure Code and held that, “*the said provisions do not constitute no authority for the High Court to entertain the respondent’s company’s application*”.

Msando then argued that, in the current Application the applicant is seeking for orders of this Court to uplift the Garnishee Order Nisi made by

the Ilala District Court in execution proceedings. He said, in essence the applicant is seeking *for the stay execution*, because whatever order that will be pronounced by this Court, whether interlocutory or permanent, its total effect is to stay the execution proceedings before the subordinate court. Mr. Msando argued that, the Civil Procedure Code has specific provisions which are exhaustive on which procedures to be followed by a party wishing to stay execution proceedings. He strenuously argued that, in this case section 68 and 95 of the Civil Procedure Code cannot be the enabling provisions to move the Court to grant those orders. To buttress his position Mr. Msando cited the case of **Kibo Executive Lodge Ltd and Another V CRDB Bank Ltd and 3 Others**, Commercial Case No. 16 of 2013 (High Court) at page 14 - 15. It was therefore the view of Mr. Msando that, the applicant in this Application was required to cite proper provisions in the Civil Procedure Code or even if citing Section 68(e) and 95 to also cite section 2(2) of the Judicature and Application of Laws, (*hereinafter referred to as 'JALA'*). He further argued that, since the applicant has cited only section 68(e) and 95 of the Civil Procedure Code in his Application then, the Court is not properly moved and he thus invited

the Court to strike out the Application for being incompetent before the Court.

As for the 2<sup>nd</sup> point of objection Mr. Msando referred to paragraph 6 of the Affidavit in support of the Application and argued that, the information contained in that paragraph are erroneous and contrary to Annexure MIC-1 to the same paragraph. Msando said, in that paragraph the deponent, while referring to the Judgement and Decree issued by the Ilala District Court indicated that the respondents were awarded **Tshs. 2,185,000,000/=, general damages Tshs. 25,000,000/=** and costs of the suit. Mr. Msando referred to the Decree of Ilala District Court and said, the respondent was awarded **Tshs. 25,000,000/= as general damages and Tshs. 2,160,000,000/= as special damages and the costs for the case.** He said the said paragraph is misleading and should be struck out from the record of the case.

He further referred to paragraphs 16 and 17 of the same Affidavit and noted that the two paragraphs contradict each other and do also contain wrong information. He said, paragraph 16 had since indicated that, the Garnishee Order Nisi issued by the Ilala District Court will expire on **27<sup>th</sup>**



**April 2018** and paragraph 17 had indicated that it will expire on **10<sup>th</sup> Many 2018**. Msando argued that these are incorrect information hence misleading. He clarified that, the Garnishee Order Nisi was issued on 27<sup>th</sup> April 2018 and parties were given 14 days which will expire on 10<sup>th</sup> May 2018. He thus prays the Court to also expunge paragraphs 16 and 17 of the Affidavit.

Mr. Msando further referred to the verification clause and argued that the same is defective as not all the paragraphs of the Affidavit were verified. He said paragraph 22 of the Affidavit contain ***sub sections 22.1, 22.2, 22.3, 22.4, 22.5, 22.6 and 22.7***, but all these subsections were not verified, hence the verification clause is defective. He also added that, the said sub-sections should as well be expunged from the Affidavit. He said, after expunging paragraphs 6, 16, 17 and 22 from the Affidavit the remaining paragraphs cannot support the prayers made in the Chamber summons. He said, in the event this is not a fit case for the Court to exercise its discretion. He further lamented that, the entire matter is an abuse of court process as the applicant has filed three similar applications under the same provision and with the same interlocutory prayers. He

informed the Court that, this is a long overdue matter, which started in 2012 and the respondents should be allowed to enjoy the fruits of their decree.

In response Mr. Mbwambo disputed the claim by Mr. Msando that the three applications are similar. He explained that, the *Misc. Civil Application No. 195 of 2018* is on the interlocutory orders, for the *stay of execution proceedings* at the subordinate court pending determination of the, *Misc. Civil Application No. 190 of 2018* which is on the extension of time. He further explained that, the current Application is for interlocutory orders for the maintenance of the *status quo*. He thus insisted that the said applications are not similar.

On the issue that there are specific provisions in the Civil Procedure Code on this matter, Mr. Mbwambo, argued spiritedly that there is no provision in the Civil Procedure Code or in any other law which provides for the application for the maintenance of the status quo or to lift the garnishee Order Nisi pending the determination of the application for the extension of time to appeal or even stay of execution proceedings.

Mr. Mbwambo also strenuously challenged that, the current application is not for the stay of execution. He referred to the prayer in the Chamber Summons and argued that, the application is for the maintenance of the status quo pending the determination of this Application. He said, stay of execution is provided for under Order XXXIX Rule 5 (1) of the Civil Procedure Code, where the appellant Court may stay execution where there is an Appeal filed before the Court. Mr. Mbwambo argued that, there is no appeal before this Court, but only an application for extension of time under Order XXXIX Rule 2 of the Civil Procedure Code. He said, the application for the stay of the execution may be filed at the court that has passed the decree, but there is a limitation and the said application can only be filed before the expiration of that prescribed time. Mr. Mbwambo said, currently, the time for the appeal has already expired and that is why we are seeking for extension of time before this Court. He thus said, in the circumstance the application for the stay of execution cannot be made in this Court or even at the court, which has passed the decree. To buttress his position, he cited the book of *Mulla 'The Code of Civil Procedure Vol. IV at page 3874*. He then said, since there is no provision of the law to be

cited by the applicant in this case, then section 68(e) and 95 of the Civil Procedure Code are applicable and the Court is properly moved.

Mr. Mbwambo supported the authority in the IPTL case cited by Mr. Msando, though he argued that, the Court of Appeal decided that '*where there is no clear provision section 95 of the Civil Procedure Code is applicable*'. Mr. Mbwambo also referred to the Book of Mulla at page 1429 in the same Edition where he said the author has given several illustrations on the kind of orders the court can grant under section 95 and Mbwambo said the list is not exhaustive. He further argued that, the Book of Mulla and even the Civil Procedure have not indicated that, for court to rely on section 95 it has to be cited together with the provision under JALA. He said, the reference to the JALA is only necessary, where the matter prayed for is substantive. He distinguished the CRDB's case cited by Mr. Msando that it is distinguishable with the case at hand and cannot be applied.

As for the section 68(e) Mr. Mbwambo said, the same gives powers to the Court to pass any order, *if it deems fit*'. He thus argued that, if the Court may find that is not moved under section 95 it is properly moved under section 68 (e), unless there is a provision of law prohibiting the said order.

He supported his position with the Book of *Sarkar's 'The Law of Civil Procedure' Vol. 1 8<sup>th</sup> Edition at page 334* where the author discussed Order XXXIX Rule 6 – 10 and section 94 of India Code of Civil Procedure which is pari material with section 68(e) of our Civil Procedure Code which provides that, "*inherent powers of the court under section 151 are not restricted under section 94 and hence the court may pass any interim order if it deems fit in the absence of any provision prohibiting passing of such an interim order*". He also cited the decision of Court of Appeal in **Tanzania Breweries LTD V Edson Dhobe & 18 Others**, Civil Application No. 95 of 2003 and **National Insurance Corporation (T) LTD V Shengena LTD**, Commercial Case No. 75 of 2005. He noted that in all these cases the court *only applied prudence and judicial wisdom* to grant the application. He thus invited this Court to also apply judicial wisdom in determining the matter.

On the issue of defective Affidavit, Mr. Mbwambo said, the point of objection raised in respect of paragraphs 6, 16 and 17 cannot be argued as a Preliminary objection because they need factual averments and not statement from the bar. He said the said preliminary objection does not fit the test in **Mukisa Biscuits Manufacturing Co. Ltd. V. West End**

**Distributors Ltd. 1969 EA.** He further argued that, some of the said matters are only typographical errors which can be discussed during the hearing of the application on merit. As for the sub-paragraphs under paragraph 22 which were not verified, Mr. Mbwambo argued that the verification clause has verified all the paragraphs including 22. He said, if the Court will find the challenged paragraphs to be defective the same can be expunged from the Affidavit, and the remaining paragraphs will still be adequate to support the Application.

In rejoinder Mr. Msando reiterated what he said in chief and insisted that, it is not true that Mulla has not said that JALA should not be cited along with those provisions. He however noted that, even if the Mulla is silent the Court of Appeal, which is the Supreme Court of the land had already pronounced itself on the matter, specifically in the case of **IPTL**, where the two provisions were discussed.

Amplifying further on this point, Mr. Msando argued that, in his submission Mr. Mbwambo has admitted that there is no procedure in the Civil Procedure Code to govern his Application, but he has not cited the provision of JALA, to move the Court properly. However, Mr. Msando

challenged that position and argued that, *Garnishee Order Nisi* which is being challenged by the applicant is on the execution proceedings, where the decree holder is seeking the assistance of the court to execute the decree. He insisted that, the Civil Procedure Code has comprehensive provisions on the matter which could have been invoked and relied by the applicant in this Application.

Mr. Msando also distinguished the authorities cited by Mr. Mbwambo, the **NIC's** case and **TZ Breweries'** case that, they are irrelevant and cannot be applied herein. He said, the NIC's case was on extension of time and there were specific provisions cited to that effect and he also said, in the TZ Breweries' case the Court of Appeal Rules were applied.

On the issue that, the preliminary objection raised are on the issues of fact, Msando said, for the Court to be able to ascertain if the documents filed before it is appropriate, it normally peruse the pleadings and can as well raise the same issues *suo motu*.

I have given a careful consideration to the arguments for and against the preliminary objections advanced by the learned Counsel for the parties. I am settled in my mind that, issues for my determination are *whether the*

*Application has been filed under the proper provision(s) of the law and whether the Affidavit in support of this Application is incurably defective.*

The first issue should not detain me much, as it is settled law in this Country that, an application brought under wrong provision(s) or non-citation of enabling provision(s) of the law is incompetent and ought to be struck out. There are numerous authorities to this effect and some of them have been eloquently cited by Mr. Msando in his submission. Some more authorities under this subject include **Edward Bachwa & 3 others v. Attorney General & others**, Civil Application No.128 OF 2008; **China Henan International Co-operation Group v. Salvand K. A. Rwegasira**, Civil Application (2006) TLR 220 and **Citibank Tanzania Limited v. Tanzania Telecommunication Co. Ltd & 4 Others**, Civil Application No.64 of 2009 Court of Appeal of Tanzania, to mention but a few.

In his submission, Mr. Mbwambo boldly asserted that, the Application is brought under section 68(e) and 95, because the Civil Procedure Code is silent on the prayers for the maintenance of the *status quo ante*. Therefore, according to Mr. Mbwambo, since there is no specific provision



in our laws in respect of granting of such orders, he invited this Court to invoke section 68(e) and 95 of the Civil Procedure Code. I have since perused the cases of *IPTL* and *Sea Saigon* cited by Mr. Msando and I have observed that, in the case of *IPTL* the Court of Appeal considered the applicability of those provisions and categorically stated that, "***the said provisions do not constitute no authority for the High Court to entertain the respondent's company's application***". Furthermore, in *Sea Saigon's* case where again the Court of Appeal considered the applicability of section 68 of the Civil Procedure Code to confer jurisdiction to the High Court, the Court said: -

"It is to be observed that ***Section 68 is supplemental proceeding***. It summarizes the general powers of the court in regard to interlocutory proceedings. This section is similar to section 94 of the Indian Code of Civil Procedure where it is so specified as a supplemental proceeding...***Since Section 68 merely summarizes the general powers of the court in regard to interlocutory proceedings, whoever applies for a specific order must cite the other order under which he is applying for... In that***

***respect, the current respondent company, which had cited only section 68(c) and (e) as rectified by the High Court, had not properly moved the court for the order it was applying for. [Emphasis added].***

Plainly, in the matter at hand, as eloquently argued by Mr. Msando is on the ***stay of execution*** proceedings before the subordinate court, because issuance of *Garnishee Order Nisi* is a model of execution of the decree of the court. I am aware that, in his submission Mr. Mbwambo has tried to use several terminologies to justify that, the Application before me is not on the stay of execution, but on maintenance of *the status quo by suspending operation of the Garnishee Order nisi issued on 27<sup>th</sup> April 2018 in the District Court of Ilala*. With due respect, whatever terminology used, still the Application before me is on the stay of execution and the same has been even mentioned in his prayers, (*See both prayers in the Chamber Summons herein for the exparte and inter-parties*). I do therefore agree with Mr. Msando that, the applicant herein was required to invoke specific provisions of the law on the same and not otherwise. It is also a fact that the said Application is brought under ***Section 95*** of Civil

Procedure Code. Now the issue is *whether those provisions can support this Application and properly move the Court to grant the prayers sought.*

I have perused the decision of this Court in **Hassan Karim & Co. Limited V Africa Import and Export Central Corporation Ltd** [1960] EA 369 commenting on Section 151 of the Indian Code of Civil Procedure as applied to Tanganyika then and now Section 95 of the Civil Procedure Code, where the Court held that Section 95 of the Civil Procedure Code does not independently confer any power on the court nor any rights to the litigants. See also the decision in **Omari Mbuzini Kilama v Nehemiah Jeremiah Makofia**, Civil Case No. 92 of 1995. The same position was also adopted by the Court of Appeal of Tanzania in the IPTL case. In the circumstance, I feel no remorse in saying that, I need not be detained by Mr. Mbwambo's obvious confusion and misconception of the law on the jurisdiction of this Court and the applicability of Section 68(e) and 95 of the Civil Procedure Code in the current Application.

I should state categorically that, even if this Court could have been properly moved, but the Affidavit in support of the Application before<sup>me</sup><sub>λ</sub> is still wanting.

It was submitted by Mr. Msando that paragraph 6, 16 and 17 contains information which are not true. To verify this matter, I have perused the Affidavit together with the Decree issued by the trial court. It is on record that, the amount indicated in the Affidavit is not the same amount awarded to the respondent in the Judgement and the Decree of the Court. Therefore, the deponent in this case was telling lies while under oath, as even some of the dates indicated in the Affidavit are erroneous. To justify those mistakes Mr. Mbwambo has since admitted the same, but only said that, they are typographical errors which can be corrected at the hearing. With due respect, giving wrong information under oath cannot be taken as a minor error. However, Mr. Mbwambo was required to point out all those defects before the respondent has raised a preliminary objection. What Mr. Mbwambo was trying to do before the Court was to pre-empt the preliminary objection already raised by Mr. Msando, which again is not acceptable legal practice.

It is also a well established principle that, an Affidavit contained untrue information cannot be relied upon and likewise, the Court cannot act upon it to resolve any matter. See the decision of the Court of Appeal in **Ignazio**

**Messina V Willow Investments SPRL**, Civil Application No. 21 of 2001, at page 4 where Lugakingira J, as he then was held that: -

***"An affidavit which is tainted with untruths is no affidavit at all and cannot be relied upon to support an application. False evidence cannot be acted upon to resolve any issue" [Emphasis added].***

In addition, the Court of Appeal in **Kidodi Sugar Estate and 5 Others V Tanga Petroleum Co. Ltd**, Civil Application No. 110 of 2009 at page 4, held that: - ***"Surely, no court properly direct its mind to the dictates of justice can act on an affidavit which is based on a falsehood".***

Likewise, in the case at hand, since the Affidavit in support of the Application contain lies cannot be acted upon by this Court.

As for the issue of verification clause, it is on record that paragraph 22 to the Affidavit contains sub-paragraphs, which are clearly numbered 22.1 – 22.7, but all of those numbered sub-paragraphs are not indicated in the verification clause. Pursuant to Order VI Rule 15 (2) of the Civil Procedure Code, all numbered paragraphs must be verified.

The said provision provides that “***the person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verified upon information received and believed to be true***”. [Emphasis added]. In addition, see the case of **Sinani Umba v. National Insurance Corporation Tanzania and another**, Civil Application No.50 of 2003, Court of Appeal of Tanzania, Dar es Salaam (unreported).

Now, since in the case at hand, the verification clause is not properly verified had since violated the provisions of the law and rendered the verification clause before this Court defective *ab initio*, as clearly argued by Mr. Msando. However, I am aware that, the remedy available for a defective verification clause is not to dismiss or strike out the matter, but rather to order for an amendment of the same. However, since the very same Affidavit contains untruth information, as indicated above, I cannot take that move.

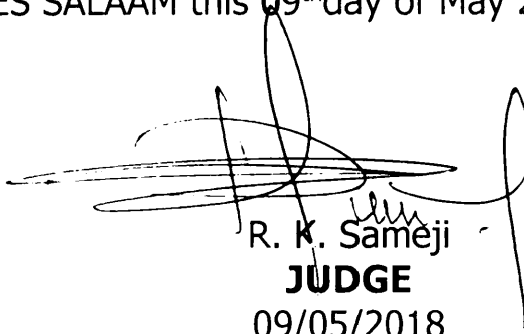
Before penning of, I should point out that, I am mindful of the fact that, Mr. Mbwambo had since invited this Court to apply *prudence and judicial wisdom in this matter*. Though, I do respect the judicial wisdom taken

elsewhere, but with respect, I should remind Mr. Mbwambo that, courts are creatures of the law and procedures, the judicial wisdom of the court can only be invoked after one has complied with the mandatory requirement of the law.

It is therefore my respectful view that, there is considerable merit in Mr. Msando's submission that, the Court has not been properly moved to grant the prayer sought in the Chamber summons and also that, the Application is incompetent for being supported by a defective Affidavit.

In the event and for all defects revealed above in respect of this Application, I uphold the preliminary objection raised by the respondents and I hereby proceed to strike out the Application *Misc. Civil Application No. 222 of 2018* with costs for being incompetent. It is so ordered.

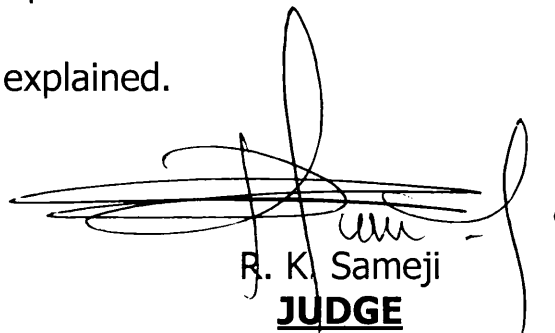
**DATED** at DAR ES SALAAM this 09<sup>th</sup> day of May 2018.



R. K. Sameji  
**JUDGE**  
09/05/2018

**COURT-** Ruling delivered in Court Chambers in the presence of Mr. Victor Kikwasi, the learned Counsel for the applicant and Mr. Ally Hamza the learned Counsel, who was holding brief for Mr. Albert Msando, the learned Counsel for the respondents.

A right of Appeal explained.



R. K. Sameji  
**JUDGE**  
09/05/2018