

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

MISC. CIVIL APPLICATION NO. 390 OF 2015
(Arising from Civil Case No. 115 of 2012 of Temeke District Court)

TERRESTRIAL TANZANIA LIMITED.....APPLICANT

VERSUS

RAJAB KINGO.....1ST RESPONDENT
KIMANYI BERUYE.....2ND RESPONDENT

RULING

24 May & 20 July, 2018

DYANSOBERA, J. :

The applicant hereinabove, did, on 9th day of June, 2015, file a revision which was registered as Civil Revision No. 19 of 2015 against the judgment/ruling in Civil Case No. 115 of 2015. However, while the said matter is pending before this court, the same applicant has preferred this application seeking for stay of execution. The application is, as usual supported by an affidavit.

Resisting the application, the two respondents through the legal services of Pato Legal Consultants and advocates, have filed a joint counter affidavit.

The applicant, through Mr. Kerario, has filed a notice of preliminary objection on the ground that:

TAKE NOTICE THAT on the first day of hearing the applicant herein shall raise a point of preliminary objection on matters of law that the counter affidavit is incurably defective for containing extraneous matters in form of prayers in paragraph. Thus we will pray for its being struck out with costs.

Submitting in support of the preliminary objection, Mr. Kerario told this court that the counter affidavit contains extraneous matters some of which are arguments, conclusions and prayers. He said that under paragraph 11 of the counter affidavit, the phraseology "**hence we pray the file to be returned to District Resident in charge to force the applicant comply with court orders ...**" is a prayer and that the same applies to paragraph 14. Learned counsel further contended that paragraphs 12 and 13 of the same counter affidavit contain arguments and conclusions. Reliance was made to the case of **Uganda v.**

Commissioner of Prisons Ex parte Matovu (1966) EA 514.

Counsel for the applicant concluded that the counter affidavit is incurably defective and cannot withstand and should be struck out.

Mr. Tonya, replying to the submission of counsel for the applicant said that the move taken by his fellow advocate of raising a preliminary in the same application is unusual and that counsel has not supported his objection by legal provision. According to him, the stated facts are material facts and that even if the objection is sustained, it cannot dispose of the case. On the case cited by counsel on part of the applicant, Mr. Tonya said that the facts are not supportive of the said case. He ended his submission that even if the counter affidavit is found defective, that cannot end the case. He, therefore, prayed the preliminary objection to be dismissed with costs.

In his rejoinder, Mr. Kerario informed the court that O. XIX of the CPC is clear on affidavits and that this is common. He further said that the cited decision is

binding upon this court and that if the preliminary objection is sustained, the applicant can be heard ex parte.

I have considered the submissions of either side *vis a vis* the raised preliminary objection. The issue is whether the preliminary objection raised by the applicant can be sustained in this application. This issue need not detain me. The aim of the preliminary objection was succinctly elaborated in by the **Court of Appeal in the case of Bank of Tanzania Ltd v. Devran P. Valambia**: Civil Application No. 15 of 2002 (unreported) in the following words:

“the aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of the application because there is a point of law that will dispose of the matter summarily”.

In the present application, learned counsel will agree with me that the preliminary objection raised is not intended to save time of the court and of the parties as, if the same preliminary objection is sustained, the

court and the parties will still go into the merits of the application and there is no point of law which will dispose of the matter summarily. The same preliminary objection does not also meet the test given in the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd** [199] EA 696.

With those observations, the preliminary objection fails and is overruled. The application to be heard on merits.

Order accordingly.





W.P. Dyansobera

JUDGE

20.7.2018

Delivered this 20th day of July, 2018 in the presence of Mr. Kerario, learned counsel for the applicant and in the presence of both respondents in person.




W.P. Dyansobera

JUDGE