IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 643 OF 2019

(Arising from Miscellaneous Civil Application No. 44 of 2019 at the High Court and originating from Civil Case No. 306 of 1999 at Kisutu RM's Court)

Mohamed A. Wadi ---------- **APPLICANT**

VERSUS

Amir R. Abdallah ---------- **RESPONDENT**

RULING

Date of last order: 06.05.2020

Date of Ruling: 05.06.2020

Ebrahim, J.:

The applicant lodged an application before this court seeking for condonation to lodge an appeal out of time in this court. The applicant was a defendant in Civil Case No. 306 of 1999 which proceeded exparte against him and declared the respondent herein (plaintiff) as the rightful owner of the disputed premises. The judgement at the trial court was concluded on 21st February 2011. The applicant claims that he came to know about the decision of the

trial court in November 2018. Thereafter, he unsuccessfully filed an application for extension of time in this court. Aggrieved by the decision of this court and believing that there were legal and procedural irregularities during the trial, he has now come to this court again. This time he seeking for leave to appeal against the decision of this court of refusing to extending time.

The instant application has been made under **section 5(i)(c) of the Appellate Jurisdiction Act, Cap 141 RE 2002 and Rule 45(a) of the Tanzania Court of Appeal Rules, 2009**; and it is supported by the affidavit of Mohamed A. Wadi, the applicant.

Upon being served with the application, the respondent through his Counsel, Mr. Richard Rweyongeza filed notice of preliminary objection that the affidavit has contravened the provisions of **Order VI Rule 15(1) and (2) and Order XIX Rule 3(1) of the Civil Procedure Code Cap 33 RE 2002** on the grounds that:

I. The affidavit contains arguments and embarrassing paragraphs and prayers.
II. The affidavit contains defective verification clause

III. The affidavit does not disclose source of information in the verification clause.

When the matter was called for hearing, the applicant was represented by Advocate Tesha Florence and advocate Theodory Primus appeared for the respondent holding brief of advocate Katuzake. The court ordered the points of objection to be argued by way of written submission and set a schedule thereat.

In his submission Counsel for the respondent pointed at paragraphs 2, 9 and 10 of the affidavit as argumentative; and that paragraphs 2,4,5,6,10 and 11 of the affidavit makes reference to information obtained from another source but the applicant does not disclose the source in verification clause. He submitted further that para 6 and 8 of the affidavit are embarrassing and are not understood. He added that para 12 of the affidavit contains prayers. To cement his argument he cited the provisions of **Order XX Rule 3(1) of the CPC read together with Order IV Rule 15(1) and (2)** that the affidavit shall be confined to facts which the deponent is able of his own knowledge to prove; and that the deponent shall specify by

reference in numbers facts that are of his own knowledge and facts that he received from another source and believed to be true.

I must point out here that it is not **Order XX** that caters for affidavit as reflected in the submission by the Counsel for the respondent but **Order XIX.** I would take the mistake as *elapsus calami.*

Counsel for the respondent prayed for the court to struck out the application with costs for want of valid affidavit. He fortified his stance by the principle held by the Court of Appeal in the case of **South Freight and Export Company Ltd Vs CRDB Bank Ltd**, Civil Application No. 96 of 2013 that where the affidavit in support of the application is incurably defective the application is incompetent and should be struck out.

Opposing the points of preliminary objection, Mr. Tesha argued that paras 2,9 and 10 are not argumentative but rather are sequence of facts and the words ***however***, ***but*** and ***so that*** are used semantically and lexical in formation of a sentence. As for 2,4,5,6,10 and 11, Mr. Tesha argued that the same have disclosed source of information because it has been stated that the application has been taken in the instance of Advocate Florence Aloyce Tesha the one who signed

the pleadings. He distinguished the cited case of **South Freight and Export Company Ltd (supra)** with the circumstances of the instant matter because in the cited case no affidavit accompanied the application; the jurat of attestation did not indicate the name of the attesting officer; and it had a different date. He prayed for the points of objection to be dismissed with costs.

In rejoinder Counsel for the respondent in showing what the term argumentative means, referred to **The Black's Law Dictionary, 10th Ed.,** and **Oxford Advanced Learners Dictionary** on the use and meaning of the terminologies believing to make the statement argumentative. He insisted that the cited case of **South Freight and Export Company Ltd** falls squarely within the circumstances of this case as it covers scenarios where the affidavit is argumentative and based on information or beliefs whose source has not been disclosed.

I have carefully followed the submissions by both parties on the raised points of objection. I shall however begin to address the 3rd point of objection.

Indeed the law on affidavits i.e. **Order XIX Rule (3)(1) of the Civil of the Civil Procedure Code**, **Cap 33 RE 2002** has put a requirement that

affidavits shall be confined to facts as the deponent is able of his own knowledge to prove. Again, as for the verification clause, the law i.e. **Order VI Rule 15(1) and (2) of Cap 33** requires every pleading to be verified by the party to the pleading and the person verifying should specify by reference to numbered paragraphs of the pleading what he verifies of his own knowledge and what is upon information received and believed to be true.

From the above provisions of the law, facts pleaded in an affidavit must specifically and in numbered paragraphs be owned by the deponent otherwise it should be stated what facts have been received from another source and believed to be true.

Counsel for the applicant has argued in his submission that the mere fact that he signed the pleadings for the purpose of showing that he prepared and endorsed the documents and he is representing the applicant would suffice to show that the applicant disclosed his source. I totally disagree with this assertion and find it as either a deliberate misconception or naivety. Endorsing and representing a party is one thing and a party verifying the information that he swore in an affidavit is another. Much as Mr. Tesha is representing the

applicant he is not the one who swore the affidavit to own the pleaded facts. I therefore entirely disagree with such an absurd argument!

Going through the affidavit of the applicant, it is true that in paragraphs 2, 4, 5 and 10 he averred to have been informed by his advocate of the existence of a case against him; and that his plot was not in dispute. He averred at para 5 that he was informed by the court clerk that the case has been decided in his favour; and in para 10 he was informed of the reasons for the refusal of his application for extension. However, in his verification clause, the applicant has owned this information as his own without acknowledging that he received the information from either the court clerk or his advocate contrary to the requirement of the law.

The law has put such a requirement to verify the pleadings so as to fix the responsibility to the one who seeks to establish the truth, accuracy or validity of what the court should believe.

Furthermore, **Section 53(2) of the Interpretation of Laws Act, Cap 1** provides that where the word **"shall"** is used it is obligatory and the function so conferred must be performed. This position of the law has

been interpreted by the Court of Appeal in the case of **Herman Henjewele V R**, Criminal Appeal No. 164 of 2005, when referring to **section 53(2) of the Interpretation of Laws Act, Cap 1** where it was held that where the word "shall" is used it means it is obligatory.

It follows therefore that, the verification clause in the instant application is incurably defective for having contravened with the mandatory provisions of the law. The application is therefore not supported by a valid affidavit and consequently it cannot stand. I associate myself with the holding of the cited case of the Court of Appeal – **South Freight and Export Company Ltd (supra)** when they said that *"an affidavit can be incurably defective on account of many aspects. It may be argumentative or* ***primarily based on information or beliefs whose source(s) is/are not disclosed****; it is not signed by the deponent; if it has no jurat of attestation; if it is not affirmed or sworn before Commissioner for Oaths, etc..."* (emphasis is mine).

Certainly verification clause of the affidavit in support of the application before this court has not disclosed source of information or beliefs. Thus it falls squarely with the findings of the apex court of our land.

This point of objection is enough to dispose of this application, I would therefore do not address other two points of objection.

Ultimately, I struck out the application with costs.

Nevertheless in consideration of the ends of justice that originally this is a long time case, I grant leave to the applicant to re-file a proper application if he so wishes within 14 days from today in adherence to the law, set procedure and practice.

Accordingly ordered.

THE HIGH COURT OF TANZANIA

R.A. Ebrahim

Judge

Dar Es Salaam

05.06.2020