

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

MISC. CIVIL. APPLICATION NO 317 OF 2019
(Originating from Civil Case No 47 of 2019)

DR. HAMISI S.KIBOLA.....1ST APPLICANT
HSK SAFARIS CO LTD.....2ND APPLICANT
GILDER F. KIBOLA.....3RD APPLICANT

VERSUS

SALEH SALIM AL AMRY.....RESPONDENT

RULING

MASABO, J.L:-

Before me is an application for injunctive orders. Upon the same being served to the Respondent, his learned counsel, one Mr. Jamal, filed a notice of preliminary objection in a point of law in which he seeks to impeach the affidavit filed in support of the Application for being incurably defective.

Submitting in support of the preliminary objection Mr. Jamal contented that the affidavit is incurably defective as it contravenes Order XIX Rule 3 of the Civil Procedure Code [Cap 345 R.E 2002] which require affidavits to be confined to the facts the deponent is able to prove. He also argued that the application is incompetent as it filed contrary to Order 43 Rule 2 of the Civil Procedure Code which require every application to be supported by an affidavit. Further, he submitted that, the instant application has three applicants, namely, Dr. Hamis Kibola as 1st Applicant, HSK Safaries Co. Ltd as 2nd Applicant and Gilder F Kibola as 3rd Applicant but, it is accompanied

by only one affidavit sworn by Dr. Hamisi S. Kibola the 1st Applicant. That, in the 1st paragraph of the affidavit the said Dr. Hamisi S. Kibola states that he affirms the affidavit in his capacity as 1st Applicant, shareholder and director of the 2nd Applicant and the husband of the 3rd Respondent. Mr. Jamal argued that the content of this paragraph is defective because legally, the said Dr. Hamisi S. Kibola is not competent to affirm an affidavit on behalf of the 3rd Respondent as he is not her legal representative. He reasoned further that since paragraphs 2,3,4,5,11,12,13,14 and 15 of the affidavit contain information related to the 3rd Applicant who has neither entered appearance in court nor affirmed any affidavit the affidavit has been rendered incurably defective.

On his party, Mr. Zacharia Daudi learned counsel for the Applicant vehemently resisted the submission by Mr. Jamal. He argued that the PO raised by the respondent is not on a purely point of law. He further submitted that there is no any paragraph in the affidavit which states that the 1st Applicant affirmed the Affidavit on behalf of the 3rd Applicant. He argued further that in the impugned paragraph the 1st Applicant states that he is dully instructed by the 3rd Applicant and that since there is no law which prohibits what has been done by the 1st Applicant, the affidavit is not defective. He argued further that, Order 19 Rule 3 (1) Civil Procedure Code (Supra) is irrelevant hence the PO should be dismissed with costs.

In rejoining Mr Jamal submitted that the PO is purely on point of law and Order XIX R 3 CPC (Supra) is relevant and can dispose of this application.

He rejoined further that, the 1st Applicant acted on behalf of the 3rd Applicant meaning that he did not act on the information based on his own knowledge but from the information received from the 3rd Applicant.

I have dispassionately considered the brief submission by the parties. The main issue to be determined before this court is *whether or not the affidavit affirmed by the 1st Applicant is incurably defective.*

Before I proceed to determine the merit of the Preliminary Objection considering that the propriety of the point raised by preliminary objection has been questioned, I will pose for a moment and address myself to this issue because, its findings will determine whether or not I will proceed to the merit.

Seeking to impeach the preliminary objection raised, the counsel for the Applicant has submitted the same is not on the point of law. To address this, one has to retreat to the definition of "preliminary objection". According to the land mark case of **Mukisa Biscuits Manufacturing Company LTD v West End Distributors LTD (1969) EA 696** which have been cited with approval in a string of decision by the Court Appeal of Tanzania as well as by this court, a preliminary objection :

".....consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the

parties are bound by the contract giving to the suit to refer the dispute to arbitration.”

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion.”

For appoint to qualify as preliminary objection it should be capable of being disposed of by exclusively looking at the law and the pleadings made by the parties without indulging on evidence. The question for this court is whether the preliminary objection raised by the Respondent is of this nature. With all fairness, I find the preliminary objection be squarely within the purview of the definition above. The point raised by the respondent is based on the purely point of law and its determination will not require this court to indulge on evidence. All what the court will be preoccupied with is whether or not the affidavit complies with the provision of Order XIX Rule 3 of the Civil Procedure Code and this will not require any proof aside from looking at the content of the impugned affidavit vis-a vis- the provision of Order XIX Rule 3. Accordingly, I find the reasoning advanced by Mr. Daudi to be devoid of merit as the preliminary objection is purely on point of law and if sustained it can dispose off the application.

Regarding the merit of the Preliminary Objection raised, Order XIX Rule 3(1) of the Civil Procedure Code [Cap 33 RE 2002] clearly stipulates that, an affidavit

"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".

For better appreciation of the rationale behind this requirement, the definition of the term affidavit is of essence. In the case **OTTU vs AG and others**, HC at Dar Misc. Civil Application No. 15/1997, Katiti J (as he then was) defined the term "affidavit" as "*... a sworn statement in writing, made especially under oath, or affirmation before an authorized Magistrate or Officer.*"

Literally, affidavit is a written evidence hence the general rule that it must be confined to such statements ***as the deponent is able of his own knowledge to prove***. This rule has been articulated in numerous authorities the landmark of which being the case of **Uganda vs Commissioner of Prisons, Ex-parte Matovu [1966] EA514 at 520** where the court stated that:

" as a rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only contain elements of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true. Such an affidavit must not contain an extraneous matter by way

of objection or prayer or legal arguments or conclusion
[emphasis added]

In the same spirit, the Court of Appeal of Tanzania in **Juma Busiga V Zonal Manager TPC (Mbeya)**, Civil Application No 8 2004 CA held that;

“As the general rule of practice and procedure, an affidavit for use in, court, being a substitute for oral evidence, should only contain statements of facts and circumstances to which the witness deposes either his own knowledge or such an affidavit should not contain extraneous matter by way of objection or prayer or legal argument or conclusion.” [emphasis added].

In the impugned affidavit, the opening paragraph and the 1st paragraph reads as follows;

I, Dr. Hamisi Saidi Kibola, Adult, Muslim and resident of Dar es Salaam DO HEREBY AFFIRM and STATE as follows:

1. That, I am the 1st Applicant, shareholder and director of the 2nd Applicant dully instructed and the Husband of 3rd Applicant dully instructed to affirm this affidavit in of support the prayers in the chamber summons.

In my strong view, the wording of the two paragraphs above do not entertain any interpretation other than that, the deponent Dr. Hamisi S. Kibola, while swearing the affidavit he was acting for himself, for the 2nd Applicant to which he is the shareholder and director and for the 3rd Applicant having being dully instructed by the 2nd and 3rd applicant to affirm on their behalf. The question that comes to my mind is whether or not a husband can

swear/affirm an affidavit on behalf of the wife or vice versa. The answer to this is obviously in the negative. Under the law, husband and wife are separate beings. The husband cannot give evidence on behalf of the wife and vice versa unless, and save only if the one swearing on behalf of a spouse holds a power of attorney authorizing him or her to act on the other's behalf. The submission by Mr. Daudi that the law does not prohibit a husband to be instructed to swear/affirm on behalf of his wife and vice versa, is, with respect, seriously misguided. Just as the deponent herein cannot appear in court to testify on behalf of his wife without having a power of attorney, he cannot swear or affirm an affidavit on her behalf since, as earlier stated, affidavit is just a substitute or oral evidence.

The impugned affidavit contains a total of 15 paragraphs. A scrutiny of these paragraphs reveal that, save for paragraph 6, 7, 8, 9 and 10 which make specific reference to the 1st and 2nd Applicants, the rest of the paragraphs contain which is not attributed to any of the three Applicants implying that, the facts therein are in the knowledge of all the three applicants. Pursuant to the Order XIX rule 3, the information from a person other than the deponent is hearsay. In **NBC Ltd V Superdoll Trainer Manufacturer Co Ltd** Civil Application No 31 of 2000, the Court of Appeal of Tanzania held that affidavit which mention another person is hearsay unless that other person swears as well. Considering that the 3rd Applicant did not swear an affidavit and the 1st Applicant is not in possession of a power of Attorney, the affidavit has been rendered incurably defective.

Based on what I have stated above, I sustain the preliminary objection and
stuck out the application for being accompanied by an incurably defective
affidavit. Costs to follow event.

DATED at DAR ES SALAAM this 31st day of March 2020.



J.L. MASABO

JUDGE

Ruling delivered this this 31st day of March 2020 in the presence of Mr.
Henry Mngwala representing Mr. Jamal for the Respondent and in the
absence of the Applicant.



J.L. MASABO

JUDGE