

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

MISC. CIVIL APPLICATION NO. 144 OF 2020

(Arising from RM Civil Suit No. 5 of 2019)

JUNIOUR CONSTRUCTION CO. LTD APPLICANT

VERSUS

MMST TANZANIA LIMITED RESPONDENT

RULING

Date of last order: 24.02.2021

Date of Ruling: 25.02.2021

A.Z.MGEYEKWA, J

The applicant applied for an extension of time to file an appeal to this court against the Resident Magistrates' Court decision in Civil Case No.29 of 2017. The application is supported by an affidavit sworn by Miyasi Samson Mashauri, learned counsel for the applicant.

The application has hit a snag. It has been objected to by the respondent's Advocate by way of preliminary objection whose notice was

filed in this court on 15th February, 2021 which sought to impugn the application on three points, which are conveniently paraphrased as follows:-

- 1. That, the affidavit is incurably defective for containing an incurably verification clause that does not disclose the source of information. Alternatively, Mr. Moyasi Samson Mashauri being an Advocate of the applicant was not competent to swear an Affidavit in support of the application herein.*
- 2. That, the application by the applicant is defective for containing an affidavit whose paragraphs 5, 6, and 7 are offensive and defective for being argumentative containing conclusion and prayers.*
- 3. That, the applicant's application is misconceived and an abuse of the process of the Court for containing an affidavit whose paragraph 5 (2) is time barre. Alternatively, the said paragraph has been delivered out of context.*

Following the global outbreak of the Worldwide COVID - 19 pandemic (Corona virus), the Preliminary Objection was argued via audio teleconference whereas the applicant enjoyed the legal service of Mr. Mashauri, learned counsel and the respondent enjoyed the service of Mr. Mwangia, learned counsel.

In support of the preliminary objection, the learned counsel for the respondent pursued the 1st point of objection challenging the present application to be defective since the verification clause does not disclose the source of information. He referred this court to Order VI Rule 13 (2) of the Civil Procedure Code Cap.33 [R.E 2019]. He added that the law requires the deponent to confine himself to the facts based on his own knowledge for information which he believes to be true.

The learned counsel for the respondent further submitted that statements on paragraphs 3, 4, and 5 of the applicant's affidavit shows that Mr. Miyasi has sworn that the applicant who was lately noticed and that it was the applicant who considered the illegalities. It was his view that the information are not from the learned counsel himself. To fortify his submission he referred this court to the case of **Salima Vuai Foun v Registered of Cooperative Societies** and three Others (1995) TLR 75 and the case of **Anatol Peter Rwebangira v The Principal Secretary, Ministry of Defence and National Service and Another**, Civil Application No. 548/04 of 2018. He urged this court to strike out the application for being incompetent.

Submitting on the second point of objection, the learned counsel was brief and straight to the point that the affidavit is incurable defective for

containing an affidavit whose paragraphs 5, 6, and 7 are offensive. He cited Order XIX Rule 3 (1) of the Civil Procedure Code Cap. 33 [R.E 2019]. He valiantly argued that paragraph 5 does not constitute facts rather legal arguments which are irrational. He went on to argue that paragraphs 6 and 7 contain legal arguments, prayer, and conclusion contrary to the law. To bolster his submission he referred this court to the case of **Lalago Cotech Ginnery and Oil Mills Company Limited v The Loans and Advances Realization Trust (LART)**, Civil Application No. 80 of 2002, and the case of South Freight and Export Company Ltd v CRDB Ltd, Civil Application No. 96 of 2013. He urged this court to strike off the affidavit for containing argumentative paragraphs.

Arguing for the third point, Mr. Mwangia stated that paragraph 5 (2) is time-barred. He stated that section 74 (2) of the Civil Procedure Code Cap.33 [R.E 2019] requires that any decision or order of the District Court and Resident Magistrate Court or tribunal that has the effect of determining the matter is appealable. He argued that the ruling which the applicant is opposing was pronounced on 16th May, 2019 and there was no any appeal until the 90 days lapsed. He added that there was no any application for extension of appeal against the said Ruling. In his view,

paragraph 5 (2) of the applicant's affidavit is an abuse of the court process. He urged this court to expunge paragraph 5 from the affidavit.

On the strength of the above argumentation, Mr. Mwangi beckoned upon this court to strike out the affidavit with costs.

In reply, on the first point, the learned counsel for the applicant was brief and straight to the point and argued that he is the legal officer for the applicant. He added that Order XXVIII shows that in case it is a legal cooperation pleadings are to be signed by others including a Principal Officer. He insisted that he was engaged as a lawyer and he was prosecuting and defending the case therefore he was acquainted with the facts of the case because he was litigating the case. Mr. Mashauri went on to state that in such circumstances he did not require any information from the Company. He contended that he was competent to swear the affidavit since he signed on behalf of the company.

On the second point, Mr. Mashauri strenuously argued that paragraphs 5, 6 and 7 are not offensive nor defective. He added that paragraph 5 phrased what happened at the trial court and illegality was one of the grounds of extension of time. To support his position he referred this court to the case of **Kalunga & Company Advocate v NBC** (2006) TLR 235. He stressed that paragraphs 5, 6 and 7 do not contain

conclusions and prayers. He insisted that he was not concluding instead advancing the case that the applicant had a chance to succeed.

Mr. Mashauri continued to argue that if the court will find that the language used was offensive then the proper remedy is to expunge the paragraph not to strike out the application. He went on to state that the law required pleadings not to be thrown away but rather to order an amendment. To fortify his position he referred this court to the case of **Kiganga and Associate Gold Mine Company Ltd v Universal Gold** NL 2002 TLR 129.

Submitting on the third point, Mr. Mashauri submitted that a paragraph cannot be time barred. He stated that paragraph 5 pinpoints clearly what transpired at the lower court therefore it cannot be time barred. Mr. Mashauri strongly stated that a party can appeal against an order only if it will not determine the case conclusively. He went on to state that the learned counsel for the respondent wants to mislead the court. He valiantly urged that the issue of time barred is baseless.

On the strength of the above argument, Mr. Mashauri beckoned this court to overrule the points of preliminary objection with costs.

In his rejoinder, Mr. Mwangia reiterated his submission in chief and was persistent that he is not opposing that Mr. Mashauri has sworn as a

legal officer neither that he can appear and defend his client. However, he stressed that the Order XIX of the Civil Procedure Code Cap. 16 [R.E 2019] requires a deponent who takes an oath to argue or take oath on facts which he can prove by himself. Mr. Mwangia persisted that the applicant did not disclose any source of information in the verification clause thus the affidavit is defective. He continued to argue that the applicant was required to state the reason for his delay and to show sufficient reasons not as couched in paragraph 5 (2) of his affidavit.

In conclusion, Mr. Mwangia beckoned upon this court to strike out the applicant's application with costs.

After careful consideration of the submission of learned counsels, the point of determination is *whether the preliminary objection is meritorious*.

I think the main issue for consideration in this preliminary objection is the validity of the affidavit deposed by the applicant. I have opted to start to address the second point of objection that the application by the applicant is defective for containing an affidavit whose paragraphs 5, 6, and 7 are offensive and defective for being argumentative containing conclusion and prayers.

A cursory perusal of the Applicant's affidavit which was taken on 19th November, 2020 as well as the submission of the learned counsel for the respondent, it is an undisputed fact that the applicant's affidavit which was an essential part of the applicant's application contains some paragraphs which contain; legal point, prayer and total argumentative. I am saying so because examining paragraphs 5, 6 and 7 clearly that the paragraphs are argumentative, contain legal points and prayers. On paragraph 5 (1) and (2) and 6 the applicant has raised an issue of point of law, he has raised an issue of illegality, the same is explained in length and the same is argumentative contrary to the law and paragraph 6 contains prayers.

From the above, it is clear the next step is to consider the consequences of the paragraphs or statement to be found defective that is paragraphs 5, 6 and 7. The learned counsel for the applicant prayed to the court that if it finds paragraph 5 of the affidavit challenged to be offensive then this court should expunge it and order the applicant to amend the affidavit.

In determining whether this court cannot order the applicant to amend the offensive paragraphs, I had to refer to cases that have developed the law of affidavit among them are; **Phaton Modern Transport (1985)**

Limited v D.T Dobbie (Tanzania) Limited, Civil Reference No. 15 of 2001 and No. 3 of 2002 and **Rustamadi Shivji Karim Merani v Kamalti Bhushan Joshi**, Civil Application No. 80 of 2009 and the case of **In the case of Phaton Modern Transport (1985) Limited** (supra) the Court of Appeal of Tanzania held that:-

" It seems to us that where defects in an affidavit are inconsequential those offensive paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it. If however, substantive parts of an affidavit are defective, it cannot be amended in the sense of striking off the offensive parts and substituting thereof correct averments in the same affidavit."

Being guided by the above authority the remedy is to expunge the offensive paragraphs of an affidavit, the Court of Appeal in **the case of Pahton Modern Transport** (supra) state is that after expunging of the offensive paragraphs in an affidavit, the court are enjoined to examine whether the remaining parts are insufficient to support the application. If the remaining parts are sufficient to support it, the application must also go, but a party may file a fresh affidavit. In my considered view, I find the expunged paragraphs are substantive part of the affidavit. Therefore the same cannot be amended.

Having considered the above point of preliminary objection, as shown above, it is evident that the present application is improper before this Court. Since the second point disposes of the entire application, I find no any justifiable legal reasons to deal with the remaining points of objection, as it will not reverse the decision made above.

In the upshot, I uphold the preliminary objection. The application, accompanied by a defective affidavit is declared incompetent, and accordingly, I strike it out without costs.

It is so ordered.

DATED at Mwanza this 25th February, 2021.




A.Z.MGEYEKWA

JUDGE

25.02.2021

Ruling delivered on 25th February, 2021 via audio teleconference and both learned counsels for the applicant and respondent were remotely present.


A.Z.MGEYEKWA

JUDGE

25.02.2021