

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

MISC. CIVIL APPLICATION No. 472 OF 2019

HALFAN MSAWANGA.....APPLICANT

VERSUS

EPHRAIM G. MWAKAPALA.....1st RESPONDENT

HOOD TRANSPORT LTD.....2nd RESPONDENT

RULING

2nd December 2020 & 1st March 2021

Rwizile. J

This application is filed under O.IX Rule 13(1)(2) and section 68(e) of the Civil Procedure Code, asking this court to set aside its dismissal order made in Civil Case No. 212 of 2005 dated 11th July, 2013 (Mwakipesile, J as she then was).

Facts leading to this application are that; the applicant was a plaintiff in Civil Case No. 212 of 2005 suing the respondents for the damages after he was knocked by a Scania bus, owned by 2nd respondent and driven by 1st respondent. He sustained serious bodily injuries. Due to that, he failed to prosecute his case. Consequently, the case was dismissed for want of prosecution.

Since he was out of time, and for this application to be filed he had to seek for extension of time which he did in Civil Application No. 668 of 2018 (Massabo, Judge) who granted the same in 19th August, 2019. The applicant therefore, filed this application by way of chamber summons supported by an affidavit sworn by Bumi Fred Mwaisaka learned advocate.

This application is antagonised by preliminary points of objection filed by 2nd respondent, which sought for dismissal of the application on two points that;

- 1. The affidavit in support of the application is incurably defective by containing a defective verification clause.*
- 2. The affidavit in support of the application is incurably defective by containing arguments.*

At the hearing the applicant was offered legal aid by the Tanganyika Law Society where, Bumi Fred Mwisaka the learned advocate was assigned to represent him, while the 1st respondent never entered appearance, for the 2nd respondent was Mr Kitua, learned advocate. Parties agreed to argue points of objection by way of written submission. Before going to their submission, it has to be noted that, since the 1st respondent never entered appearance this matter will be determined *ex parte* against him.

Submitting in support of the preliminary objection, Mr Kitua learned advocate abandoned the second point of objection and argued on the first point that, the application is incompetent and bad in law. He said, this is due to the fact that, the affidavit in support of the application contains defective verification. He added, that defect is incurable. He asserted further that, the verification has not revealed which paragraphs of the affidavit based on knowledge and those based on information.

It was his submission more that, due to that defective verification, it was his opinion that, the application before this court was not accompanied by a proper affidavit which can be acted upon by this court. According to him, that renders the entire application incompetent. To support his argument, he cited the cases of **Anatol Peter Rwegasira vs The Principle Secretary Ministry of Defence and National Service and another**, Civil Application No. 548/04 of 2018, **Salim Vuai Fom vs Registrar of Cooperative Societies and Three others** [1995] TLR 75 and **Madeni Kipande vs Mkolokolo Hamisi Gayo & Another**, Misc. Land Application No. 1057 of 2017. He argued that, as per cases cited, the only fate to this application is for this Court to strike it out.

Disputing the preliminary objection, Ms Mwaisaka learned advocate firmly argued that, the application is competent, since she said, the verification in the affidavit is not defective. She alleged that; objection raised is the 2nd respondent tactic to delay the applicant to pursue his case. She added that, justice delayed is justice denied.

It was her submission further that, the affidavit is not incurably defective, according to her, what was stated in the verification clause was right. She said, she obtained the information after she perused the court file. She added that, the same were not hearsay information. She therefore, asserted that, failure to specify which information based on knowledge cannot be fatal. She then said, there are some instances the court has allowed amendment of affidavit for the sake of justice. To support the same, she cited the case of **Sanyou Services Station Ltd Vs BP Tanzania Ltd (Now PUMA Energy (T) Ltd)**, Civil Application No. 185/17 of 2018.

She therefore prayed for this court to overrule the objection. In the alternative, she prayed for leave to amend the affidavit if this court will find the same to be defective.

After careful consideration of the submission of learned counsel, the issue to be determined is whether the application before this court is incompetent. To begin with, it is a general rule that, every application made to the court must be by chamber summons supported by an affidavit. This is the wording of O.XLIII R.2 of the Civil Procedure Code. For clarity the same states;

Every application to the Court made under this Code shall, unless otherwise provided, be made by a chamber summons supported by affidavit

As for the matter at hand, it has been argued by counsel for the second respondent that, an affidavit supporting this application has defective verification. Affidavits are known to be statements of facts stated by a person authorised, who wants to prove a particular fact in court. As it is stated under O. XIX r.1 of the CPC which states;

A court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable

It is also the law that affidavits must be confined to the facts which the deponent will be able of his/her knowledge to prove, O.XIX r. 3(1). It is therefore, necessary for the deponent to specify in the verification clause which facts are based on his/her own knowledge and those which are based on information obtained from some other person. The same is provided under O.VI r. 15(2), which states as herein;

*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)*

Depending on the provision above I agree with the respondent that, the applicant failed to specify in the verification clause as required by the law. The affidavit has the verification clause, stating that;

*I **BUMI FRED MWAISAKA**, being the Advocate for the applicant and dully authorised to verify the facts of this matter do hereby verify that all that is stated in paragraphs 1,2,3,4,5,6 (i), (ii), (iii) and 7 above are true to the best of my knowledge and information from the records of the file.*

For that reason, I agree that, this verification is defective, which renders the affidavit defective altogether. Consequently, it is fair to say this application is incompetent before this court, as it was decided by the Court of Appeal in the case of **Anatol Peter Rwegasira (supra)** when dealing with the same situation as in this matter.

However, if this court has to strike out this application, will that accommodate ends of justice. This is a question to be answered in the negative. Depending on the nature of the case which the applicant seeks to be readmitted, I say, it is proper for this court to apply the overriding objective rule introduced by the Written Law (Miscellaneous Amendment) Act No.3, 2018. As provided under section 3B of the CPC which states that;

3B.-(1). For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it with a view to attaining the following-

(a) just determination of the proceedings;

(b) efficient use of the available judicial and administrative resources including the use of suitable technology; and

(c) timely disposal of the proceedings at a cost affordable by the respective parties.

From the foregoing principle and the decision of the Court of Appeal in the case of **Sanyou Services Station Ltd (supra)**, I therefore order that the affidavit be amended so as to cure the defect in verification clause. The applicant is given 10 days from today. Since the applicant is under Legal Aid, I make no orders as to costs.

A.K. Rwizile

JUDGE

01.03.2021



Recoverable Signature

X



Signed by: A.K.RWIZILE

