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

MISCELLANEOUS CAUSE NO. 14 OF 2021

IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF THE NATIONAL PAYMENTS SYSTEM ACT

AND

IN THE MATTER OF CHALLENGING THE LEGALITY, REASONABILITY AND RATIONALITY OF THE NATIONAL PAYMENTS SYSTEM (ELECTRONIC MOBILE MONEY TRANSFER AND WITHDRAWAL TRANSCTIONS LEVY) REGULATIONS, 2021

BETWEEN

ODERO CHARLES ODERO.....APPLICANT

AND

THE MINISTER FOR FINANCE AND PLANNING..1ST RESPONDENT
THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

24 August & 8 September, 2021
MGETTA, J:

Through a legal service of Mr. John Seka, the learned advocate, on 4/8/2021 one Odero Charles Odero, the applicant, did lodge a chamber summons under **Rules 8 (1) (a), (b), 2, 3, 4 and 5 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014** (henceforth the 2014 Rules) praying for leave of court to apply for the orders of mandamus,

prohibition and certiorari to issue against the Minister for Finance and Planning and the Attorney General. He wants to challenge the **National Payment Systems (Electronic Mobile Money Transfer and Withdrawal Transactions Levy) Regulation of 2021, G.N No. 496A of 202**1 (henceforth the Regulations 2021) by way of judicial review. The chamber summons is supported by a sworn affidavit of the applicant and is accompanied by the statement.

Upon being served with the chamber summons, affidavit and statement, along with filing counter affidavit and reply to the statement, the respondents also filed a notice of preliminary objections complaining that:

1. The application and the prayers sought are bad and untenable in law for want of decision to be amenable by way of judicial review.

2. The application is fatally defective for being supported by defective affidavit drawn by the advocate who is a witness to the application

3. The application is fatally defective for want of cause of action/*locus standi.*

As a cardinal principle, whenever there is preliminary objection, the main application or suit has to be stayed so that the preliminary objection

can be heard first. When the preliminary objections were called on for hearing *viva voce,* Hon. Gabriel Malata, the learned Solicitor General assisted by Mr. Stanley Kalokola, the learned state attorney appeared and represented the respondents. The applicant enjoyed a legal service from Mr. John Seka, the learned advocate. I heard their respective oral submissions and have decided first to deal with the 2nd preliminary objection as hereunder.

Now, as regard to the 2nd preliminary objection that the application is fatally defective for being supported by a defective affidavit drawn by the advocate who is also witness to the application, Mr Malata asserted that the centre of the objection is that at paragraphs 14, 15, 16 and the *jurat*, Mr. John Seka has been referred as a source of information which are contained in the affidavit sworn by the applicant. The affidavit which stands for sworn oral evidence is drawn by the advocate who is also a witness which is not allowed in law. The affidavit is equated to oral evidence whereby a deponent is subjected to cross examination, if the need arises. Thus, paragraphs 14, 15 and 16 of the affidavit is hearsay evidence by the applicant who said the source of information is Mr. Seka, but who did not swear an affidavit to confirm that allegation. With respect this is not a position of the law as was observed in the case of **Lalago Cotton Ginnery & Oil Mills**

Company LTD Versus The Loans and Advances Realization Trust (LART); Civil Application No.80 0f 2000 (CA) (DSM) (unreported) at page 4.

Again, he faulted the above paragraphs on the ground of being hearsay. That is to say unless the information that was provided by Mr John Seka is supported by his sworn affidavit to confirm its authenticity, the same will remain as hearsay evidence. He made reference to the case of **Sabena Technics Dar Limited Versus Michael J. Luwunzu;** Civil Application No. 451 /18 of 2020, (CA) (DSM) (unreported) at page 11 whereby the Court of Appeal quoted with approval the decision in **NBC Ltd Versus Suprdoll Trailer Manufacturing Company Ltd**; Civil Application No13 of 2002 (CA) (DSM) (unreported) that an affidavit which mentions another person is hearsay unless that other person swears as well.

In the same vein, Mr. Malata submitted that paragraphs 11, 12, 13 and 17 of the affidavit because it contains the words such as *unreasonable, irrational* etc which amount to *conclusions*. It contains also *opinions* by using words like"I'm in the opinion" as appears at paragraph 12; as well the words "*he does not recall"* as they appear at paragraph 13 refer to mere *comment*. If he did not recall that should

not be evidence. Paragraph 17 was faulted for containing statement of belief; while the same is strictly prohibited by **Order XIX, R 3 (1) of the Civil Procedure Code, CAP 33** (henceforth Cap 33). He further referred to the case of **Alex Dotto Massaba Versus the Attorney General & Three Others;** Miscellaneous Civil Cause No. 30 of 2019 at page 14.

He finally prayed that defective paragraphs 11, 12, 13 14, 15, 16 & 17 to be expunged from affidavit as they offends a good principle of presentation of affidavit. He further observed that if those paragraphs are expunged, the remaining cannot suffice and stand as concluding evidence to support the application. In the circumstance, he prayed the application for leave to be dismissed as there is no affidavit to support it.

In reply, Mr. Seka the learned advocate for the applicant had no much to submit. He insisted that the affidavit must contain facts and not evidence. It becomes only evidence when the judge has reviewed the affidavit. He firmly submitted that he is not a witness to this application, but merely providing legal service to the applicant which it is allowed under **Order XIX R 3(1) of Cap 33**. He substantiated his argument by referring to the case of **Lalago Cotton Ginnery and Oil**

Mills Company LTD (supra). He also referred this court to the case of **DPP Versus Dodoli Kapufi & Paston Tusalile**; Criminal Application No. 11 of 2008 (CA) (unreported) whereby an affidavit is defined. It was his opinion that the discussion on the competence of the affidavit in light of paragraphs 16, 17 and 18 of the affidavit does not violate the principle enumerated in the case of **Mukisa Biscuits Manufacturing Ltd. V. West End Distributors Ltd**, [1969]1 EA 696 which says that preliminary objection should be raised on point of law only and not fact.

I have heard the rival submission of both counsel with regard to the 2nd preliminary objection. The issue to resolve here is whether the affidavit drawn by applicant's advocate is defective or not. Mr. Malata submitted that the affidavit is defective because it contains hearsay, conclusion, opinions and general comments; while Mr. Seka submitted that the affidavit does not offend any law and therefore cannot form a bases for any preliminary objection. Their rival arguments necessitated the reproduction of paragraphs 11, 12, 13, 14, 15, 16 & 17 of the affidavit as hereunder:

11. *That I am now aggrieved with the impugned law and have approached this court for assistance. That my complaints that*

necessitated the decision to approach the court are that impugned law that introduced the scale of the charges was ***irrational, unreasonable; unlawful; unprocedural and unconstitutional****. That I am further complaining that the procedure used to enact the impugned law was not proper nor consultative and that the time span to enact the legislation was too short.*

12. *That as I pleaded in paragraph 2 and 4 of this affidavit, I formed an* ***opinion*** *that it was highly improbable; given the shortness of the period between the signing of the Finance Act, 2021 and the gazetting of the impugned law; the same being on the same day; that the First Respondent did consult the Minister Responsible for Communication as per the requirement of the parent act. I aver further, in alternative if the mandatory consultation was undertaken; then it was done before the law was signed by the President.*

13. *That I state that I was not personally consulted prior to the enactment of the impugned law. I state that as I can recall, there was no draft regulation that was shared publicly for comments. I state further that I am not aware of any announcement made by the First Respondent officially or unofficially to invite persons who*

are likely to be affected by the impugned law to submit comments and observations on the proposed scale of charges.

14. *That I am **informed by my legal advisor, Mr. John Seka**, that given the likely impact of the charges to the citizens; the First Respondent was under statutory and Constitutional obligation to conduct meaningful consultations with the people likely to be affected. I am further **informed** that such procedure while not expressly documented has been followed by the Parliament of Tanzania and it is a common and accepted procedure in majority of democratic commonwealth countries.*

15. *That I am further **informed by my legal advisor, Mr. John Seka**, that the consultation pleaded in paragraph 12 of this affidavit could also be done through constructive consultative discussions with important stakeholders and experts such as Telecom Companies; consumer protection organisations such as the TCRA Consumer Consultative Council as well as other enlightened civil society bodies that have embraced electronic money transfers as means of collecting their revenues such as the Tanganyika Law Society.*

16. *That I am further **informed by my legal advisor, Mr. John Seka**; that there is high likelihood that the First Respondent did not take into consideration; efforts of the Government of Tanzania to deepen and expand financial inclusion; a strategy that focuses on ensuring majority of Tanzanians use and embrace use of financial tools including mobile phone payments. I am **informed** that is the concept of financial inclusion were taken on board; the scale of charges would not have been higher in some instances to the charges levied by mobile phone operators.*

17. *That I **believe**, unless my above mentioned grievances are addressed, I will continue to complain on the legality and impact of the impugned law.*

Admittedly, surely as provided by law the affidavit as a substitute to oral evidence should not contain hearsay, conclusion, opinions and general comments. This position is supported by **Alex Dotto Massaba** case (supra) where it was observed that an affidavit is written statement on oath which must be free from extraneous matters such as objection, hearsay, legal arguments, opinion, prayers, comments and conclusion.

As to the general rule of practice and procedure, an affidavit for use in court, being a substitute of oral evidence, should only contain

statement of facts and circumstances to which the witness deposes either of his own personal knowledge or from information he believes to be true. That an affidavit should not contain extraneous mattes by way of objection or prayer or legal argument or conclusion. Likewise, an affidavit which violates those precepts should be struck out. Vide: **Jumuia ya Wafanyakazi Versus Shinyanga Region Cooperative Union** [1997] TLR, and **Jayantkumar Chandubhai Patel@ Jeetu Patel Versus The Attorney General;** Misc. Civil Case No. 30 of 2002.

I am therefore in agreement with Mr. Mallata that paragraph 11 contains conclusion and opinion by using words like "*irrational, unreasonable, unlawful, unprocedural and unconstitutional";* paragraph 12 contains opinion and statement of general comment; paragraph 14, 15 & 16 contains hearsay whereby the deponent therein stated that some facts do not come from his own knowledge, but received from Mr. John Seka; and, paragraph 17 contains statement of belief of the applicant.

In the same vein, it is a matter of prudence that one cannot be referred as a source of information of the contents of the affidavit at the same time he is acting as an advocate to the same affidavit. It was

observed in the case of **Lalago Cotton Ginnery and Oil Mills Company LTD** (supra) that

> *"an advocate can swear and file an affidavit in proceedings in which he appears for his client, but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during those proceedings."*

Mr. Seka is mentioned at paragraphs 14, 15 & 16 of the affidavit as source of the information. This is vividly appears at the verification which read and I quote that:

> *"I, odera Charles Odero, being the applicant herein do verify that what I stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 17, and 18 is to the best of my knowledge, true. I also state that the facts in paragraphs 14, 15 & 16 are true according to the information relayed to me by my legal advisor, John seka Esq and whose information, I verily believe to be true"*

It was held by the Court of Appeal in the case of **Sabena Technics Dar limited Versus Michael J. Luwunzu,** (supra) at page 11 and I quote that:

> *"..an affidavits which mention another person is hearsay unless that other person swears as well"*

Toward that end, I have no any other option but to expunge from the affidavit all defective paragraphs 11, 12, 13, 14, 15, 16 and 17 of the affidavit. The question is now that do the remaining paragraphs hold the application. This has been the current trend adopted by the courts to expunge the offensive paragraphs, and the consider if in the eyes of the law, the remaining paragraphs can still hold the application as it was in the cases of ***Stanbic Bank Tanzania Limited Versus Kagera Sugar Limited,*** Civil Application No. 57 of 2007; **Phantom Modern *Transport (1985) Limited* Versus D. 7. *Dobie (Tanzania) Limited;*** Civil References Nos. 15 of 200 and 3 of 2002. ***Peter Lucas Versus Piii Hussein & Another***, Misc. Civil Application No. 33 of 2003 and that of ***MMG Gold Ltd v. Heartz Tanzania Limited,*** Misc. Commercial Cause No. 118 of 2015.

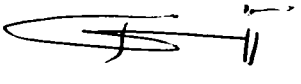
In the application at hand however, the facts constituting the cause of action for seeking leave to apply for judicial review are mainly

contained under the expunged paragraphs of the affidavit. It follows therefore that, as argued by Mr. Malata, after those paragraphs have been expunged, the application shall have no strong legs to stand upon in pursuing the application at hand. This is because the expunged paragraphs contains facts which will present arguable case on judicial review. Therefore the 2nd point of objection is sustained.

By and large, for reasons given herein in respect to the 2nd objection, I find that the application could not stand without affidavit. The applicant's affidavit is found to be defective for reasons given herein. As a result the application for leave is rendered incompetent as it cannot stand by itself without affidavit. As this upheld preliminary objection disposes of the application completely, I find it proper not to waste the court's precise time pondering on the 1st and 3rd preliminary objections. Hence, the incompetent application is accordingly struck out. No orders as to cost.

It is accordingly ordered.

Dated at **Dar es Salaam** this 8th day of September, 2021.



J.S. MGETTA

JUDGE

COURT: This ruling is delivered today this 8th September, 2021 in the presence of the applicant and his lawyers namely Mr. John Seka assisted by Ms. Graceanna Assenga, both learned advocates and in the presence of Mr. Stanley Kalokola assisted by Mr. Erigh Rumisha, both learned state attorneys for the respondents.

J.S. MGETTA
JUDGE
8/9/2021