

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DISTRICT REGISTRY OF MOSHI**

AT MOSHI

MISC. CIVIL APPLICATION NO. 2 OF 2021

(C/F Civil Appeal No. 8 of 2019, High Court of Tanzania at Moshi).

FRANCIS EUGEN POLYCARP APPLICANT

VERSUS

MS PANONE & CO LTD RESPONDENT

RULING

7/9/2021, 28/10/2021

MWENEMPAZI, J

The applicant has preferred this application under Section 5(1) (c) of the appellant Jurisdiction Act, Cap. 141 RE 2019 and Rule 45(a) of the court of Appeal Rules of 2009, read together with Section 19(2) of the law of Limitation Act, Cap 89 RE 2002. He is praying for leave to appeal to the court of Appeal of Tanzania against the decision of the High Court of Tanzania dated 13th October, 2020 and also he prays for the costs of this application to be provided for.

The application is supported with an affidavit sworn by the applicant, Francis Eugene Polycarp. In it the applicant has stated that he intends to challenge the decision of the High Court on the grounds mentioned under paragraph 13.



The respondent is opposing the application. She has filed the counter affidavit sworn by Mr. Julius Autipas Semali her advocate. Also, the respondent has filed a notice of preliminary objection raising the ground that the application is bad in law and incompetent as the affidavit in support of the application is incurably defective.

Parties agreed to proceed and present the hearing by way of written submission, leave was granted by this court and a scheduling order was issued. Both parties duly complied to the order.

The respondent in the written submission has submitted that an affidavit supporting the application has not been drafted following legal requirements. It should contain only statements of facts, it should not contain extraneous matters by way of objection or prayer and it should not contain legal arguments or conclusions.

The affidavit filed by the applicant does not meet the standard required by law. It contains arguments supported by the provisions of law and therefore taking a form of a written submission.

The counsel has submitted that the settled position of law is that an affidavit should not contain extraneous matters by way of objection, prayer or legal arguments or conclusion. He has cited the case of **Attorney General Versus National Housing Corporation and 5 others** Misc. Land Case Application No. 945 of 2017 (Unreported) at page 2 the court made reference to the case of **Uganda Versus Commissioner for Prisons, Exparte Matovu** (1966) E.A 514 where it was held, inter alia;



"..... as a general rule of practice and procedure, an affidavit should not contain extraneous matters by way of objection or prayer or legal arguments or conclusion."

The counsel prays the application to be struck out with costs.

The applicant, in the written submission has written a lot materials irrelevant to this objection. The only relevant part is at page 3 of the written submitted and the applicant has submitted that the objection should be dismissed as it does not meet the essential pre-requisites of a preliminary objection on the point of law which are:-

- a) The said objection must consist of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which
- b) If argued as a preliminary objection it may dispose of the suit as a whole. He prays the objection to be overruled.

I have read the record and I must confess that clearly it is open that the applicant has missed the point as to what the affidavit should be.

Order XIX Rule 391) of the CPC, Cap 33 RE 2019 provide that:

"Affidavits 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".

Reading through Order XIX Rule 1 and 2 of the CPC, clearly shows that affidavit is evidence in a form of a written statement. The court may order a fact to be proved by way of an affidavit and the deponent may be ordered to enter appearance in court at the instance of either party for cross

examination. In the case of ***Uganda Vs. Commissioner for Prisons, Ex-parte Matovu*** (1966) E.A. 514 it was held that:

" Again, as a 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 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 argument or conclusion."

The affidavit by the applicant is clearly defective. It has legal arguments which the applicant has shown intention to rely in the appeal in the court of Appeal of Tanzania. In this case paragraph 7 – 15 are relevant. As a general rule, a defective affidavit should not be acted upon by a court of law, but in appropriate cases where the defects are minor, the courts can order an amendment by way of filing fresh affidavit or striking out the affidavit.

The circumstances of the affidavit in this case compel me to strike out the affidavit. That has an effect to the whole application as every chamber summons must be supported with an affidavit. Thus the application is struck out with costs. It is ordered accordingly.




T.M. MWENEMPAZI
JUDGE