

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB - REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 132 OF 2022

TANCOAL ENERGY LIMITED APPLICANT

VERSUS

**THE BOARD OF TRUSTEES OF
THE PUBLIC SERVICE SOCIAL SECURITY FUND RESPONDENT**

RULING

12th and 25th August, 2022

KISANYA, J.:

This is a ruling in respect of a preliminary objection against the application filed by Tancoal Energy Limited, the applicant herein. The notice of preliminary objection lodged by the respondent has three points which read: -

- 1. That, the Application is misconceived and bad in law.*
- 2. That, the Application is bad in law for lack of Zawadi's Affidavit.*
- 3. That, the Application is incurably defective and bad in law for containing legal argument, conclusion and opinions contrary to Order XIX, Rule 3(1) of the Civil Procedure Code [Cap. 33, R.E. 2019]*

When the matter came up for hearing, Mr. Erick Kamala, learned advocate appeared for the applicant, while Mr. Godfrey Ngwembe, learned

State Attorney appeared for the respondent. As the practice demands, the notice of preliminary objection was disposed of first before dealing with the merits of the application.

Submitting in support of the first limb of objection, Mr. Ngwembe argued that the application is misconceived and bad in law. He contended that the proper recourse was for the applicant to apply for restoration of the application for leave to defend the suit in lieu of the present application to set aside the summary decree. According to the learned State Attorney, the applicant was intending to re-litigate the application for leave to defend the suit vide the present application. For the foregoing reason, he was of the view that the application is bad in law and incompetent before this Court.

As regards the second limb of objection, Mr. Ngwembe restated the principle of law that a person named in the affidavit must swear an affidavit. He was of the firm view that failure to file an affidavit of the persons named in the affidavit renders the facts in respect of that person to be hearsay and thus, extraneous. To cement his argument Mr. Ngwembe cited the case of **Sabena Technics Dar Limited vs Michael Luwunzu**, Civil Application No. 451/18 of 2020 (unreported) and **Uganda vs Commissioner of Prison ex-parte Matovu** (1996) EA 514.

With regard to the third limb of objection, Mr. Ngwembe submitted that paragraphs 8, 9 and 14 of the supporting affidavit contain personal opinion

and suggestion and that paragraph 10 thereto has arguments and conclusions. It was his further contention that paragraph 16 contains a prayer. In that regard, the learned State Attorney submitted that the foresaid paragraphs have extraneous matters. Making reference to the case of **Jumuiya ya Wafanyakazi vs Shinyanga Region Cooperative** [1997] TLR 22, he argued that the affidavit is defective. He, therefore, moved me to expunge the said paragraphs. His plea was premised on the case of **Godgives Transport vs Commercial Bank of Africa**, Commercial Case No. 135 of 2017. He was of the view that upon expunging the said paragraphs, the application is incompetent. In conclusion, Mr. Ngwembe prayed that the application be struck out.

Mr. Kamala resisted the preliminary objection. Responding to the first limb of objection, he argued that the proper recourse was for the applicant to file the present application under Order XXXV, Rule 8 of the Civil Procedure Code, Cap. 33, R.E. 2019. It was therefore his submission that the application is not bad in law.

Countering the second limb of objection, he argued that it was not a point of law within the meaning stated in the case of **Mukisa Biscuit Manufacturing Co. vs West End Distributors Ltd** (1969) E.A. 696. It was also his contention that the case of **Sabina** (supra) is not relevant to the case at hand on the account that the Court of Appeal did not hold that failure to

file affidavit of the person named in the affidavit renders the application incompetent.

Opposing the third limb of objection, Mr. Kamala conceded that paragraph 9 of the supporting affidavit contains argument and thus, liable to be expunged. With regard to paragraphs 8, 14 and 16 of the affidavit, the learned counsel contended that they contain facts known to the applicant and not conclusion or prayers. Referring the court to the case of **Jamal. Mkumba & Another vs Attorney General**, Civil Application No. 240/01 of 2019 (unreported), the learned counsel argued that the substantive part of the affidavit remain intact upon expunging the offensive paragraphs. Mr. Kamala thus implored the Court to dismiss the preliminary objection.

In a brief rejoinder, Mr. Ngwembe reiterated that the applicant's recourse was to apply for restoration of the application for leave to defend the suit. As to the second objection, he argued that the case law requires that the applicant to file an affidavit of the person named in the affidavit. He further reiterated that paragraphs 10, 14, and 16 of the affidavit contains arguments, future events and prayers, respectively and thus, liable to be expunged.

Having considered the rival argument by the learned counsel for either side, the duty of this Court is to determine whether the points of preliminary objection are meritorious.

It is a cherished principle of law that, preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but on stated legal, procedural or technical grounds. Any alleged irregularity, defect or default must be apparent on the face of the application. In other words, a preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the preliminary objection is sustained, it should dispose of the matter. [See the case of **Mukisa Biscuit Manufacturing Co. Ltd** (supra) and **Selcom Gaming Limited Vs Gaming Management (T) Limited and Another**, Civil Application No. 175 of 2005 (unreported)]. It is the foresaid principle which governs this Court in determining the objections raised by the respondents.

The first limb of objection raises the issue whether the application is misconceived and bad in law. It is Mr. Ngwembe's contention that the applicant ought to have filed an application for restoration of application for leave to file her defence. I respectfully disagree with the learned State Attorney. In terms of the record, when the said application was called on for hearing on 13th December, 2021, the respondent moved this Court to dismiss the same on the account that it had been overtaken by event. The said prayer was also premised on the fact that this Court had set the date of judgment on the understanding that the applicant had not filed the application for leave to defend the suit.

Much as this Court proceeded to enter the summary judgment, I am at one with Mr. Kamala that the applicant was inclined to make use of Order XXXV, Rule 8 of the CPC and lodge the present application to set aside summary judgment. It is my considered view that the applicant could not file an application for restoration of the application for leave to defend the suit which had been determined. Thus, the first limb of objection is devoid of merits.

Moving to the second limb of objection, I agree with Mr. Ngwembe that in terms of the settled law, if an affidavit names another person, that person must swear an affidavit. It is also trite law that unless the persons mentioned in the affidavit swears as well, an affidavit which names another person is hearsay. See also the case of **NBC Ltd vs Superdoll Trailer Manufacturing Company Ltd**, Civil Application No. 13 of 2002 (both unreported) which was cited with approval in **Sabena Technics Dar Limited** (supra). However, it is my considered view that the issue whether the failure to file the affidavit of a person named in the affidavit cannot render the affidavit incompetent. It goes to the weight to be accorded to the facts deposed in the affidavit. That being the case, the effect of failure to append the affidavit of the person mentioned in the affidavit cannot be determined at the stage of preliminary objection. This is so when it is considered that the fact required to be proved by the said person might have been deposed in

other paragraphs. Therefore, the issue pertaining to the second limb of objection will be determined when considering the merits of this application.

Last for consideration is the third limb of objection that the affidavit contains legal arguments, conclusions and opinions. At the outset, I am at one with Mr. Ngwembe that, an affidavit must be confined to the facts which are to the knowledge of the applicant. Thus, an affidavit which containing legal arguments, conclusions or opinions is defective. However, the law is settled that, the remedy is to expunge the offensive paragraphs of the affidavit and proceed to determine the matter basing on the remaining paragraphs.

In the present case, the applicant conceded that paragraph 9 of the affidavit contains argument. Having read the said paragraph, I agree with both parties that it contains arguments and conclusion.

With regards to paragraphs 10, 14 and 16 of the affidavit, I find no legal arguments, conclusion or opinions. As rightly argued by Mr. Kamala, they are based on the facts. It is the duty of the applicant to prove the facts depose therein. I have also considered Mr. Ngwembe argument that paragraph 14 and 16 of the affidavit contain future event and prayer. It is trite law that parties are bound by their own pleadings. The ground that the affidavit contains future events and prayers was not stated in the notice of preliminary objection. Therefore, it was wrong for the learned counsel to raise

the same without leave of the court. Even if I was to consider the same, I have held herein the said paragraphs contain facts. As a result, the third limb of objection lacks merit save for paragraph 9 of the affidavit which is hereby expunged.

In view thereof, I find the preliminary objections are not meritorious to the extent shown above. Consequently, the application will be heard on merit but without considering paragraph 9 of the affidavit. Costs to follow the event.

DATED at DAR ES SALAAM this 25th day of August, 2022



S.E. Kisanya
JUDGE
25/08/2022