

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF TANGA)**

**AT TANGA**

**CIVIL REFERENCE NO. 24 OF 2021**

*(Originating from the District Land and Housing Tribunal for Tanga at Tanga in Application for Bill of Costs No. 18 of 2020 originating from Application No. 35 of 2016)*

**IDRIS MUNTANSIR ABDULHUSSEIN**

**t/a BOCHA SHOPING CENTER.....APPLICANT**

**-VERSUS-**

**SEFU HEMED SEFU.....RESPONDENT**

**RULING**

*Date of Last Order: 27/05/2022*

*Date of Ruling: 31/05/2022*

**AGATHO, J.:**

This is an application for revision. In this application, the Applicant prays this Honourable Court to call and reverse the decision of the District Land and Housing Tribunal in an Application for Bill of Costs No. 18 of 2020. The Applicant also prays for costs of the application against the Respondent and any other orders that the Court deems fit. The application is made under Order 7 (1) of the Advocates Remuneration Order, 2015 G. N. No. 264 of 2015 and as the law directs, the same is supported by an affidavit of the Applicant.

Before hearing of this Application, the Respondent raised three points of Preliminary Objection namely;

- 1) *That, the application is misconceived and incompetent as it is supported by an affidavit of which contain assumptions.*
- 2) *That the application is misconceived and incompetent for being inconsistency with provision of the law.*
- 3) *That the application is misconceived and incompetent as it is supported by an affidavit of which mentioned the name of another person without attaching his affidavit.*

But before determining the Preliminary Objections, it is worthwhile to restate the guiding principle of Preliminary Objections as articulated in the case of **Mukisa Biscuits Manufacturers vs West End Distributors Ltd (1969) EA. 696** where it was held that;

*"A preliminary objection is in the nature of what used to be called demurrer. It raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of*

*judicial discretion."*

Thus, a Preliminary Objection is a point of law that can dispose the matter without going into the substance of the case. Also, it is a point of law that does not require evidence to be adduced but that does not mean without that the pleadings should not be considered. Certainly, even the law of limitation or jurisdiction will require one to look at relevant facts constituting delay or facts showing that the court lacks jurisdiction.

Regarding the third Preliminary Objection and without wasting time, it is immaterial that the Applicant merely referred the name of the advocate of the respondent in the affidavit. That is not against the law. What matters is that the deponent averred facts that are within his own knowledge.

Regarding the first and the second Preliminary Objections these are worthy to be considered. Starting with the first Preliminary Objection, the law on affidavits under Order XIX Rule 3(1)(2) of the Civil Procedure Code [Cap 33 R.E 2019] is clear on the contents of affidavits. I thus reproduce the relevant provision to appreciate what it provides:

*3(1) "Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory application on which statements of his belief may be admitted."*

An affidavit should not contain assumptions or prayers. In the present case Tshs 9,420, 000/= is nowhere in the ruling of the Taxing Master in Bill of Costs No. 18 of 2020. It means this is an assumption. It requires evidence. Hence, the Preliminary Objection is overruled.

In **Mustapha Raphael vs. East African Gold Mines Limited, Civil Application No. 40 of 1998 (HC-DSM) (unreported)** it was stated:

*"An affidavit is not a kind of superior evidence. It is simply a written statement on oath. It has to be factual and free from extraneous matter such as hearsay, legal arguments, objections, prayers and conclusions."*

In the case of **Uganda Vs Commissioner of Prisons, Ex-parte Matovu (1966) EA 514** the High Court of Uganda stated as follows:

*"...as a general rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only contain elements 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 arguments or conclusion"*

Similarly in **Khalid Simba v L.H. Maleko, Misc. Land Application No. 502 of 2020, High Court – Land Division at Dar es Salaam** (unreported), the application failed because the Court was satisfied that the Affidavit in support of the application was defective.

While a claim by the Respondent that the amount of Tshs 9,420,000/= is an assumption which offends the law on affidavits requiring the facts averred to be that of deponent's own knowledge or information acknowledged being from another person which is believed to be true but the same requires evidence to be proved. That may be determined in the main application. I thus decline from sustaining the said Preliminary Objection.

The second Preliminary Objection is that the application is

misconceived and incompetent for being inconsistent with the provision of the law. This refers to serving of reference upon the Respondent out of time. The Applicant served the latter on 16/09/2021 which is more than 25 days from the date of filing reference. The limitation of time set by the law must be adhered to. If the applicant is required to serve the application upon the Respondent after a certain period of time, then upon expiry of the prescribed time the matter is out of time. Order 7(1) and (3) of the Advocates Remuneration Order, 2015, G.N. No. 264 of 2015 states as follows:

*7(1) "Any party aggrieved by a decision of the Taxing Officer, may file reference before a judge of the High Court..."*

*(3) The applicant shall within seven clear days of filing reference save copies all entitled to appear on such taxation."*

In the present application there is an allegation that the Applicant delayed serving upon the Respondent. He served upon the latter on 16/09/2021 which is more than 25 days from the date of filing. The same is claimed to be visible on the summons (service effected on the Respondent). Understandably, it is the interest of substantive justice

that matters be determined without being hindered by procedural technicalities.

The Applicant disputed attachment of the summons as that amounts to proof which is contrary to **Mukisa Biscuits' case** requirement of Preliminary Objection not to require proof. But law of limitation in my view is a point of law. To substantiate that there was delay then evidence is required to that effect. I find the same may be offending **Mukisa Biscuits' case** position. Summons is a court document. But while the Respondent claimed to have attached the service summons. I have not seen it. It is also against the law for submissions to contain attachments. The second Preliminary Objection is therefore overruled for contravening law on Preliminary Objections as enshrined in **Mukisa Biscuits**.

Having so said, all the Preliminary Objections are overruled for lacking merits. The Applicant shall have his costs.

**DATED at TANGA this 31<sup>st</sup> Day of May 2022.**



**U. J. AGATHO**

**JUDGE**

**31/05/2022**

**Date: 21/04/2022**

Coram: Hon. Agatho, J

Applicant: Yona Lucas, Advocate

Respondent: Tumaini Bakari, Advocate

B/C: Zayumba

JLA: Ms. Husna Mwiula

**Court:** Ruling delivered on this 31<sup>st</sup> day of May, 2022 in the presence of both the Applicant's counsel Yona Lucas, and the Respondent's counsel Tumaini Bakari.



**U. J. AGATHO**

**JUDGE**

**31/05/2022**

Right of Appeal explained.



**U. J. AGATHO**

**JUDGE**

**31/05/2022**