

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 197 OF 2021

(Arising from Civil Appeal No. 100 of 2019)

BETWEEN

MWAJUMA MTUNZI.....APPLICANT

VERSUS

JANETH NICHORUSRESPONDENT

RULING

MRUMA,J.

This is a ruling in respect of preliminary objections raised by the Applicant's counsel against the Respondent's counter affidavit filed in opposition to the application for restoration of an appeal which was struck out for want of prosecution on 30.3. 2021. The notice of preliminary objection as filed by the counsel for the Applicant contains three points namely:

1. That the counter- affidavit has been filed in a wrong court.
2. That the counter affidavit contains arguments which is contrary to the law and,

3. That the counter – affidavit contain improper verification clause.

The points were argued by way of written submissions. For the Applicant the written submissions were filed by Ms. Maria Mushi, learned advocate. The Respondent though duly represented by counsel Sudi Mzoa, didn't file any submission in response.

Submitting in support of the 1st preliminary objection Ms. Mushi contended that the Respondent's counter- affidavit were filed in the main registry of this court while these proceedings are before the Dar es Salaam District Registry of the High Court. The learned counsel submitted that Rule (2) of the High Registry Rules, GN No. 96 of 2005 does not give power to the main registry of the High Court to deal with cases of this nature. On that ground only the learned counsel has argued this court to expunge the Respondent's counter affidavit.

Submitting in support of the second preliminary objection, the learned counsel contended that paragraphs 5,6,8 of the Respondent's counter affidavit contain arguments contrary to the provisions of Rule 3(1) of the Civil Procedure Code which requires affidavit to be confined to facts which deponent is able of his own knowledge to prove and it must legal arguments, objections, prayers and conclusions.

On the third preliminary objection, the learned counsel submitted that in the Respondent's counter affidavit there are arguments which make it defective.

I have carefully gone through the impugned counter- affidavit. The fact that the counter affidavit cited. " Registry" as the registry before which the matter is proceedings cannot be disputed. Similarly, the fact that the proceedings of this matter are before the High Court at Dar es Salaam registry is discernible. The question is whether, this defect is fatal to the proceedings. In my view it is not fatal. It is not fatal because no party has or will suffer prejudice or injustice on the mere ground that the Respondent has indicated that the proceeding is before the main registry which is actually and physically in the same building with the Dar es Salaam District registry offices while it is not. It is not fatal particularly so when I take into consideration the fact that at the time of drawing and filling of the counter – affidavit, the Respondent had no legal representation. This is a fit case to apply the principle of overriding objective. Section 3B (1) of the Civil Procedure Code [cap 33 RE 2019] provides that:

“For the purpose of furthering the overriding objective specified in section 3A, the Court shall handles all matters presented before it with a view to attain the following;

- (a) Just determination of the proceedings
- (b) Efficient use of the available judicial and administrative resources including the use of technology and
- (c) Timely disposal of the proceedings at a cost affordable by the respective parties

The overriding objective of the law is embodied under section 3A of the Civil Procedure Code and provides that;

“The overriding objective of this Act shall be to facilitate the just, expeditious proportionate and affordable resolution of civil disputes governed by this Act”

Facilitation of just, expeditious and proportionate of civil disputes cannot be achieved if courts will be tied up with simple procedural technicalities like an error in citing the registry. In my view such an error is civilable under section on 3A (2) and in giving effect to the overriding

Objective, court may direct or orders removal of the words " Main Registry" and in its place insert the Word " Dar e salaam District Registry". Such correction may even be done by "ink pen" and will not cost a coin to any of the parties.

Regarding defective affidavit, I have gone through the complained paragraphs that is to say paragraphs 5, 6, and 8 of the Respondent's Counter affidavit and I find nothing argumentative.

What is deponed in paragraphs 5,6, and 8 are mere facts. A deposition is said to be argumentative if it contains statements expressing not only facts but also inferences and conclusion drawn from those facts but also inferences and conclusion drawn from those facts. [see Black's Law Dictionary Tenth Edition by Bryan A. Garner page 128]. There is no inferences, and/ or conclusions that could be drawn from the facts deponed under paragraphs 5,6 and 8 of the Respondent's counter-affidavit. What is deponed therein are factual matters only.

Finally on the improper verification. I find this point to be itself improperly raised. Verification clause is required to enable the court to find out as to whether it will be safe to act on such affidavit evidence or not. In the absence of proper verification clause, affidavits cannot be admitted as evidence.

That said, the preliminary objection raised fails and are dismissed. The counter- affidavit of the Respondent should be rectified by ink pen by removing Word " *Main Registry*" and instead insert the words "Dar es Salaam District Registry." To show the registry at which these proceedings are being conducted.

Order accordingly.




A. R. Mruma

Judge

27/7/2022