IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

MISCELLANEOUS CIVIL APPLICATION NO. 9 OF 2022

MIGO CIVIL & BUILDERS CONTRACTORS CO. LTD. .... 1st APPLICANT

AYUBU NYAULINGO .... 2nd APPLICANT

VERSUS

MNANGE GENERAL STORE COMPANY LTD .... REPONDENT

(Arising from the Ruling of the District Court of Sumbawanga at Sumbawanga)

(O. Ndira, RM)

Dated

In Bill of Costs No. 9 of 2021

RULING

Date: 11/08 & 19/09/2022

NKWABI, J.:

The respondent's Counsel's bid to feast for this application at the preliminary stage was not welcomed by the counsel for the applicants, Mr. Laurence John. The counsel for the respondent, Mr. Samson Suwi, raised a preliminary objection which has four legal points of objection against the application for extension of time within which to file a reference against the decision of taxing master in bill of costs application No. 9 of 2021. The applicants, too, prefer this Court to order the respondent to bear the costs of the Application. The bill of cost had its origin in Civil Case. No. 12 of 2019.

Expounding the preliminary objection, Mr. Suwi argued that Mr. Laurence John did swear affidavit on behalf of his clients without disclosing the circumstances as required by the law. He faulted the basis of having knowledge that being retained to know facts which are purely known to the applicants themselves, as such the chamber summons is not supported by an affidavit as legally required. That was in respect of Paragraphs 2, 3, 4, 5, 6 (a, b, c, d, e). He equated such facts deponed upon as hearsay evidence because in the court proceedings, the advocate was not an advocate for the applicants. He pointed out that the annextures M1, M2, M3, M4 and M5 in which the applicants, he argues, were represented by Anthony Mwashubila, learned advocate. There was no disclosure of source of information by Mr. Laurence, Mr. Suwi added.

Even the averment that the applicants are still determined to challenge the decision is hearsay evidence because the verification clause is silent, Mr Suwi added. It is also defective. He cited Order XIX Rule 3 (1) and (2) of the Civil Procedure Code, Cap. 33 R.E. 2019 which provides:

> *"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."

The learned counsel for the respondent also cited among other cases the case of **Lalago Cotton Ginnery & Oil Mills Company Ltd v. The Loans and Advances Realization Trust,** Civil Application No. 80 of 2002 CAT (unreported) where it was ruled:

> *"An advocate can swear and file an affidavit in proceedings which he appears for his client, but on matters which are in Advocate's personal knowledge only."*

Mr. Suwi further maintained that, though the affidavit show that the counsel personally knows what he averred, are matters obtained from clients for the counsel did not represent the applicants in the proceedings. He insisted that the affidavit supporting the chamber summons is defective. He backed his argument by citing **Salima Vuai Foam v. Registrar of Cooperative Societies and three others** [1995] T.L.R. 75 where it was held that:

> *"Where an affidavit is made on information, it should not be acted upon by any court unless the sources of information are specified."*

Mr. Suwi did not end there because he added that the affidavit is bad in law for containing hearsay evidence, argumentations and conclusions contrary to Order XIX rule 3 of the Civil Procedure Code, Cap. 33 R.E. 2019. He said paragraphs which are thus offensive are 5, 6(a), 6(b), 6(c), 6(d), 6(e) and 8 and tried to indicate as such. He cited among other case laws the case of **Jamal S. Mkumba & Another v. Attorney General,** Civil Application No. 240/01/2019 CAT (unreported) to the effect that an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion. He concluded by praying that the application be struck out with costs.

The above submissions were answered by Mr. Laurence to the effect that the preliminary objection on point of law is not worthy it because it requires evidence to prove that Mr. Laurence John did not have the knowledge of the depositions. He cited **Jackline Hamson Ghikas v. Mlatie Richie Assey,** Civil Application No. 656/01 of 2021 CAT (unreported) where it was ruled that:

> *"As a consequence, therefore, we are of the respectful view that, inasmuch as proof of service on the respondent*

requires the parties to lead some evidence showing the particular date on which the said service was effected, the raised point by Mr. Msuya does not fall within the realm of the preliminary objection properly so called as to deserve our determination. It can only be rejected for the failure to attain the threshold prescribed by law."

He added that the knowledge was within the deponent because he has in his custody all legal documents pertaining to the application. He thus distinguished the case of **Salima Vuai Foam** (supra) urging that there was no need of specifying source of information because they were within deponent's knowledge. He cited **Tanzania Breweries Ltd. V. Herman Bildad Minja,** Civil Application No. 11/18 of 2019 CAT (unreported) where it was underscored that:

> *"From the above, an advocate can swear and file an affidavit in proceedings in which he appears for his client but on matters which are within his person knowledge.*
>
> *In the matter at hand, the learned counsel for the applicant deposed on internal affairs of its client which affairs are only within the knowledge of the principal officer*

of the applicant and not within the advocate's personal knowledge. As rightly submitted by Mr. Materu, that internal affair ought to have been supported by an affidavit of the principal officer of the applicant."

He rejected the submissions of Mr. Suwi and said that the affidavit neither contains hearsay evidence nor extraneous matters in the same vein.

He also implored this Court to consider allowing amendment of the affidavit, by following **Jamal S. Mkumba & Another v Attorney General,** Civil Application No. 240/01 of 2019 CAT (unreported) which stated thus:

"On account of facts presented to us and for the interest of justice, we think this is one of those case which demands for substantive justice in its determination. But further to that, we are satisfied that the respondent will not be prejudiced by an order of amendment of the affidavit so as to accord a chance to the applicant to insert a proper

verification clause according to law and parties be heard on merit."

He also supported his prayer by the decision of the Court of Appeal in **Sanyou Services Station Ltd v. BP Tanzania Ltd [Now Puma Energy (T) Ltd,** Civil Application No. 185/17 of 2018 CAT (unreported) where it was stated:

> *"I wish to emphasize that from the foregoing, it can safely be concluded that the Court's powers to grant leave to a deponent to amend a defective affidavit, are discretionary and wide enough to cover a situation where a point of preliminary objection has been raised and even where the affidavit has no verification clause. Undoubtedly, as the rule goes, the discretion has to be exercised judiciously. On the advent of the overriding objective rule introduced by the Written Laws (Miscellaneous Amendments) (No. 3, Act, 2018, the need of exercising the discretion is all the more relevant. Turning to the affidavit in question, it seems to me that what I have before me is a case of wrong*

numbering of the affidavit indicating the first paragraph as number 6 instead of Number 1, then going about to verify the paragraphs whose numbers are wrong. Again, some of the paragraphs, Number 10 to 13 have not been verified. Does this justify striking out of the application? I ask myself? I think it does not. I find the decision and reasoning in ***DOL Invest International*** *(supra), well grounded. True, rules of procedure should be followed as rightly submitted by Mr. Rwazo but not without some sense of reasoning and justice.*

He prayed the application be heard on merits and this Court refrains from respondent's frivolous objections. He prayed the preliminary points of objection be dismissed with costs.

In rejoinder submission, Mr. Suwi insisted on the submission in chief that the affidavit of the Counsel for the applicants is hearsay and argumentative as it is silent on the source of information. He is also of the view that the claim of the counsel for the applicant that he is knowledgeable of the case because he had even appeared before Ndunguru, Judge, to him that

comes from the bar. He insisted, basing on the case of **Lalago Cotton Ginnery** (supra) and quoted to have ruled 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 advocates personal knowledge only. For example, he can swear an affidavit to state that the appeared earlier in the proceedings for his client and that he personally knew what transpired during these proceedings."*

Mr. Suwi also quoted other decisions of this Court to fortress his assertions. He continued to challenge the argument of Mr. John that appearance on another civil application related to this application does not make Mr. Laurence knowledgeable of the facts and make him eligible to swear on behalf of his clients. He also rejected the prayer by the counsel for the applicants that I could see for myself on the JSDS as it is the party and not the duty of the Court to make a case for litigants.

He pressed the verification is still defective and this Court should not allow the counsel for the applicants to amend the affidavit and file one with correct verification clause. He added, the defects are so many as such

incapable of being amended citing **Frances Eugen Polycarp v. MS. Panone & Co. Ltd.,** Misc. Civil Application No. 2 of 2021 HC. He further maintained that the overriding objective principle be rejected as was held in the case of **Mondorosi Village & 2 Others v Tanzania Breweries Ltd & 4 Others,** Civil Appeal No. 66 of 2017 CAT (unreported). He rested his submission by praying the application be struck out with costs.

I have seriously considered the preliminary objection on points of law. I have also keenly gone through the case laws and the provisions of laws that were referred to by the counsel. I am thankful to both counsel for their powerful submissions. However, I intend not to be detained much by this preliminary objection. To be straight forward, I am not impressed by it. Be that as it may, the preliminary objection is based on two main limbs, the first being that the evidence in the affidavit is hearsay for lack of proper verification clause and the second being that the affidavit is incurably defective for containing arguments, conclusions contrary to the law.

As to the complaint (a legal point of objection) that the affidavit comprises hearsay evidence due to the bad verification clause, I think the position of the law now is that defects on a verification clause may be amended and parties be heard on merits. Indeed, in this application,it could be presumed that the counsel for the applicants has the case file in his possession, but courts of law do not act on presumption unless the law provides for that and courts of law are not there to assist any party to prove their case. The counsel for the applicants could, if he so wishes, pray before the Court to amend the affidavit in respect of the verification clause because that is permissible as per **Sanyou Services Station Ltd v. BP Tanzania Ltd [Now Puma Energy (T) Ltd,** (supra).

As to the complaint that the affidavit is defective for comprising arguments and conclusions as outlined by the counsel for the respondent, I am of the view that, that is a short in the air done indiscriminately looking for lucky encounter. I am, with respect, not impressed. This is an application for extension of time within which to file an application for reference out of time. One ground for that application is illegality or illegalities in the decision of the trial court in the bill of costs. Whether illegalities are

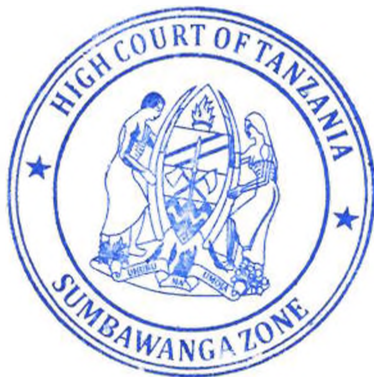
established or not, that is not to be determined at this stage, it is to be determined on merits. I am of the view, however, that establishing illegality or illegalities will be done only by outlining matters that will ultimately be argued or which could be contentious or even appear to be conclusions. The authority, that I believe, vindicates by position is the case of **Mekefason Mandali & 8 Others v The Registered Trustees of the Archdiocese of Dar-es-Salaam Civil Application No. 387/17 f 2019** (CAT DSM) (Unreported) where it was ruled that:

> *"I would add that it must also be apparent on the face of the record, such as the question of jurisdiction, (but) not one that would be* ***discovered by a long-drawn argument or process.****" [Emphasis mine].*

It is apposite to point out here that each case must be decided according to its peculiar circumstances. In this application, I do not see the circumstances that would warrant me to accept the preliminary objection on the claim that it contains arguments and conclusions.

The above discussion disposes the preliminary objection on points of law as argued by the parties in their submissions duly filed by their respective advocates. As such all the preliminary objection on points of law is overruled. The circumstances of the preliminary objection warrant me to order that, each party shall bear their own costs of disposing the preliminary objection.

It is so ordered.



J. F. NKWABI

JUDGE

19/09/2022