

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

TAXATION REFERENCE NO. 31 OF 2021

(Originating from Bill of Costs No. 8 of 2021 of the High Court of Tanzania at Tanga and originating from Application for Execution No. 21 of 2019 of the High Court of Tanzania at Tanga)

MOHAMED A. SINGO.....APPLICANT

-VERSUS-

THE REGISTERED TRUSTEES OF

ANSAAR MUSLIM YOUTH CENTRE.....RESPONDENT

RULING

Date of last order: 30/06/2022

Date of ruling: 05/07/2022

AGATHO, J.:

This is an application for reference made by way of Chamber Summons supported by an affidavit. The same is made under Order 7(1) and (2) of the Advocates Remuneration Order, GN. No. 264 of 2015 where the Applicant prays for the following orders;

- (a) That, the Ruling and Order delivered by the Taxing Officer in Bill of Costs No. 8 of 2021 of the High Court of Tanzania at Tanga awarding the Bill of Costs be quashed and set aside.*
- (b) That, costs of the application be provided.*
- (c) Any other order(s) the Court deems fit and just to grant.*

In response to the application, the Respondent filed a Counter Affidavit and a Notice of Preliminary Objection on the following points;

- 1. That, the application is hopelessly out of time as it has been preferred in contravention of Order 7(3) and (4) of the Advocates Remuneration Order, 2015, GN. No. 264 of 2015.*
- 2. That, the application is incompetent and unmaintainable as affidavit in support of the application is fatally defective for containing an incurable defective verification clause; as the Applicant did not verify the source of information in the affidavit and also verified a paragraph which is non-existent.*
- 3. That, the affidavit is incurably defective for contravening the provisions of Order XIX Rule 3 of the Civil Procedure Code [Cap 33 R.E. 2019] as it contains extraneous matters and legal arguments in contravention of the law.*

On the 11th day of May,2022 the court preferred the Preliminary Objections be disposed by way of written submissions. Submitting for the Respondent, Mr. Nehemia Nkoko, Advocate submitted that the application was filed out of the time prescribed by the law; Order 7(2), (3) and (4) of the Advocates Remuneration Order, GN. No. 264 of 2015.

The above provisions require the application to be filed within 21 days from the date of the decision and be served to the Respondent within 7 days of filing a reference. The counsel stated that the application was filed and stamped on the 19th of January 2022, that there was lapse of 51 days and it was served out of time. He added that the affidavit in support of the Taxation Reference was presented for filing on the 17th day of December, 2021 before its admission to the Deputy Registrar.

On his part, the counsel for the Applicant, Mr. Thomas Emanuel Kitundu, Advocate submitted that the application was filed on the 20th day of December 2021 thus within 21 days as per Order 7(3) of the Advocates Remuneration Order GN. No. 264 of 2015 as it was filed electronically through *Judicial Statistical Dashboard System (JSDS)* on the 20th of December 2021 on 09:43:27 and admitted by the Deputy Registrar on the same date. The counsel further stated that the Control Number was generated, the Applicant paid court fees and the payment receipt was issued to evidence payment. The counsel added that the hard copy was presented for filing at the Registry on the 20th day of December 2021 where the Registry Officer stamped and signed the Chamber Summons and Affidavit on the same date.

From the above submission he stated that Rule 2 (1) of the Judicature and Application of Laws (Electronic Filing) Rules, 2018, GN. No. 148 of 2018 provides that;

'A document has to be considered to have been filed if it is submitted through the electronic filing system before midnight, East African time, on the date it is submitted, unless specific time is set by the court or it is rejected.'

He referred the case of **Mohamed Hashil vs National Microfinance Bank Ltd (NMB Bank) Revision No. 106 of 2020 (unreported) at page 3** where the court *inter alia* held that;

From the above cited rule, filing of the document electronically is recognised by our laws as one of the means of filing a document in Court. The document which has been filed through electronic filing system is considered to be filed in court on the date it was filed. It is a practice that after the document is lodged online the party has to file the hard copy too.

He also referred the case of **Mustapha Boay Akuway vs Moses Meimar Laizer (Legal Administrator of Lucia Lektroviki**

Laizer) and 2 Others, Land Reference No,06/2020

(unreported) at page 7 where it was held that;

'The date of filing a document in a court is a day of paying court fees and not receiving of documents. If filing fees is required to be paid, then the date of filing is the date of paying the required fees. It is not enough for an Advocate or a party to the case to submit the document electronically and relax without taking necessary action of paying the fees.'

From the above holding, the counsel submitted that from the 29th day of November 2021 when the ruling subject to this application was delivered to the 20th day of December,2021 filing date, it was exactly 21 days as per Order 7 (2) of the Order. He added that since on 15th December 2021 the Court was on vacation, the Chamber Summons was signed by the Deputy Registrar on 19th January 2022.

In his rejoinder, the counsel for the Respondent maintained that the application is time barred since the Deputy Registrar admitted the Application on the 19th of January 2022.

The counsel further submitted that the documents were paid for before the admission process and then be filed electronically whereby

according to him it was improper. He referred the case of **Ahmed Mohamed Suud and 2 others, Civil Application No. 12/17 of 2019, Court of Appeal of Tanzania at Dar es Salaam** where the court struck out the Application for being out of time. The counsel further submitted that the annexures in the written applicants written submission which are JSDS extracts, payment receipts do not form part of it. They deserve to be expunged since they are not supposed to be annexed in the submission. They were supposed to be on the affidavit.

Regarding the second Preliminary Objection it is the counsel's contention that the counsel for the Applicant did not specifically disclose paragraphs based on the deponent's own knowledge and which are based on the deponent's belief as she did not conduct an application for Bill of Costs. He further stated that the verification clause was general and added that the counsel for the Applicant verified a non-existing verification clause. The counsel proceeded to submit on the third preliminary point of objection stating that the Applicant's affidavit is incurably defective as it contains legal arguments and extraneous matters as per paragraphs 9,10 and 11.

He referred the case of **Jamal S. Mkumba and Another vs The Attorney General, Civil Application No.240 of 2019, CAT at Dar es Salaam** where it was held that;

*'The legal position is now settled that an affidavit which is to be used as evidence before the court should not contain extraneous matters but facts only. The general rule of practice and procedure on affidavits was stated in Uganda v. Commissioner of Prison Ex-parte Matovu (supra) and was restated in **Phantom Modern Transport (1985) Ltd v. DT Dobie (TZ) Ltd; Civil Reference Nos. 15 of 2001 and 3 of 2002**(unreported) as follows:*

As a general rule of practice and procedure on affidavit for use in Court being a substitute for oral evidence, it should only contain statement to which the witness disposes either of his own knowledge or such an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion.'

The counsel concluded by stating that the affidavit supporting the Application was contrary to Order XIX Rule 3 of the Civil Procedure Code [Cap 33 R.E 2019].

With respect to the second preliminary objection which is about defectiveness of the verification clause on paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, the counsel for the Applicant submitted that the Bill of Costs was attended by three advocates including the one who deponed the affidavit and that the counsel was conversant of or had personal knowledge of the facts stated in the affidavit. Regarding the non- existence of paragraph 13, the counsel stated that it was a mere typographical error.

With regard to the third preliminary objection that the affidavit is incurably defective for contravening the provisions of Order XIX Rule 3 of the Civil Procedure Code [Cap 33 R.E 2019] as it contains extraneous and legal arguments and not facts as per paragraphs 9, 10 and 11.

The counsel submitted that the same faults the decision and go to the merit of the application and the rest of the paragraphs which are paragraphs 1,2,3,4,5, 6,7,8 and 12 contain substantive part of the Applicant's affidavit. He referred the case of **Phantom (supra)** where it was held that where defects in the affidavits are inconsequential, those offensive paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it. He was therefore of the view that if the

court finds the complained paragraphs to be offensive then the same should be expunged and the rest of the paragraphs can be considered in determination of the application.

The counsel pleaded the court to invoke the overriding objective principle under Section 3A and 3B of the Civil Procedure Code [Cap 33 R.E 2019] and Article 107(2) (e) of the Constitution of the United Republic of Tanzania, 1977 as amended and further cited the case of **Jacqueline Jonathan Mkonyi and Another vs Gausal Properties Limited, Civil Appeal No. 311 of 2020 CAT at Dar es Salaam** where the Court discouraged improper raising of preliminary objections. From the above submissions, he prayed that the preliminary objections be dismissed.

In his rejoinder, the counsel for the respondent maintained that the verification clause is defective since the counsel did not specify which facts are according to the information supplied by other advocates. The counsel further argued that the case of **Phantom (supra)** is distinguishable since the same is about defects in the affidavit and not verification clause.

The counsel further submitted that the counsel for the applicant conceded that some of the paragraphs are offensive they contain

extraneous matters and legal arguments and that even if such paragraphs are expunged the rest of the paragraphs do not contain substance to support the application, they are inconsequential. He therefore prayed that the preliminary objection be upheld and the application be dismissed.

The counsel further argued that overriding objective principle cannot be applied blindly against the mandatory provisions of the procedural law which goes to the very foundation of the application and that the preliminary objections raised are based on pure points of law.

When it comes to determination of preliminary objections, we are guided by the case of **Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors LTD (1969) EA 696 at pages 700 and 701** where the East African Court defined a preliminary objection as follows;

'.....a preliminary objection consists a point of law which has been pleaded, or which arises by dear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit Examples are the jurisdiction of court, or a plea of limitation or a submission that the parties are bound by contract giving rise to the suit to refer

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

Similarly in the case of **COTWO (T) OTTU and Another Vs Honourable Iddi Simba Minister of Trade and Others, T.L.R [2002] 88** it was held that;

'A preliminary objection should raise a point of law which is based on ascertained facts, not on a fact which has not been ascertained and, if sustained, a preliminary objection should be capable of disposing of the case.'

In the instant application, the Respondent submitted that the application is time barred in his first preliminary objection. Order 7 of the Advocates Remuneration Order, GN. No. 264 of 2015 provides that:

7.-(1) Any party aggrieved by a decision of the Taxing officer, may file reference to a judge of the High Court.

(2) A reference under order (1), shall be instituted by way of chamber summons supported by an affidavit and be filed within 21 days of from the date of the decision.

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

(4) For purpose of service under sub order (3), it shall be sufficient if the chamber summons has been endorsed and stamped by the Registry Officer.

Having read the ruling which is the subject of this application it appears that the ruling was delivered on the 29th day of November 2021. The Application as per the Chamber Summons was filed on the 20th day of December 2021 and was admitted by the Deputy Registrar on the 19th day of January 2021 though there is a typographical error as it has been written 19th day of January 2022. The Exchequer Receipt indicates that payment thereof was made on the 20th day of December 2021. At that juncture, I concur with the counsel for the Applicant basing on the case of **Mohamed Hashil and Mustapha Boay Akunay and Rule 2 of the Electronic Filing Rules (supra)** that the application was timely filed and that is to say the preliminary objection is of no merit. It is hereby overruled. Further, the fact that

the Applicant annexed documents in the submission, the same are expunged since they should be annexed to the affidavit in support of the application and not in the written submission.

Regarding the second and the third preliminary objection, in fact paragraphs 9,10 and 11 of the Affidavit in support of the Application are defective for containing matters of law and arguments. Also, the verification clause is defective for being general because the deponent has not stated which facts are in her own knowledge and which facts are within the knowledge of other advocates. Again, there is no paragraph 13 in the affidavit, though I regard it as a typographical error.

In the case **Omari Ally Omary v Idd Mohamed and Others, Civil Revision No. 90 of 2003 High Court of Tanzania at Dar es Salaam** (unreported) at page 7 it was held that:

"As a general rule a defective affidavit should not 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 by striking out the affidavit. But if the defects are of a substantial or substantive nature,

no amendment should be allowed as they are a nullity, and there can be no amendment....."

The counsel for the Applicant stated that the entire affidavit is not defective. That if paragraphs 9,10 and 11 are expunged, the rest of the paragraphs contain substance of the application. The counsel for the Respondent however had a different view that the entire affidavit is incurably defective though, having read the rest of the paragraphs which are paragraphs 1,2,3,4,5,6,7,8 and 12, I am of the view that they contain substance. With the above position it is my view that the irregularity is curable.

In that position, the second and third preliminary objections are of no merit, they are also overruled and this court invoking overriding objective principle which requires courts among other things to provide a just determination and timely disposal of proceedings do hereby order that the amendment be done to exclude defective paragraphs and rectify the verification clause. This is pursuant to the case law as in the case of **Jamal S. Mkumba and Another vs Attorney General, Civil Application No. 240/01 of 2019 CAT at Dar es Salaam**. The Applicant is given 14 days from the date of receiving a copy of the ruling to file an amended affidavit excluding defective paragraphs and correct a verification clause. Costs to be in the cause.

It is so ordered.



DATED at **TANGA** this 5th Day of July 2022.


U. J. AGATHO
JUDGE
05/07/2022

Date: **05/07/2022**

Coram: Hon. Agatho, J

Applicant: Present with his advocate Thomas Kitundu

Respondent: Ahmed Makallo Advocate

B/C: Zayumba

Court: Ruling delivered on this 5th day of July, 2022 in the presence of the applicant, his counsel, and advocate for the Respondent.




U. J. AGATHO
JUDGE
05/07/2022

Court: Right of Appeal is available as per the law.




U. J. AGATHO
JUDGE
05/07/2022