

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

**[IN THE DISTRICT REGISTRY OF ARUSHA]**

**AT ARUSHA**

**MISC. CIVIL APPLICATION NO. 125 OF 2022**

(Based on Civil Case No. 07 of 2020 in the Resident Magistrate Court of Arusha at Arusha and in Civil Appeal No. 57 of 2021 High c OURT Arusha District Registry)

**GIDION MEYAN MAKARA.....APPLICANT**

**VERSUS**

**ELKE ROSE MARIE ZINK.....RESPONDENT**

**RULING**

07<sup>th</sup> & 15<sup>th</sup> November, 2022

**J.C. TIGANGA, J.**

On 7<sup>th</sup> November, 2022 when the application at hand was called for hearing parties appeared in person and were also represented by Advocates. While the applicant was represented by Mr. Lengai Loita, Learned Counsel, the respondent was represented by Ms. Frida Magesa, also learned counsel.

On appearance Ms. Magesa addressed the court that, according to the application which they were served together with the Court order directing the respondent to file counter affidavit, they noted that the application was actually defective. The first defect noted by the counsel was that, they were served out of the time within which they were

ordered to file the counter affidavit, that is, within 14 days from 28<sup>th</sup> September, 2022 when the order for service was made. In her view, contrary to that order, they were served on 01/11/2022, when the time within which to file the counter affidavit had already been lapsed.

The second defect is that according to her the respondent was not served with the Notice of Appeal the failure which has made it difficult for them to properly assess the fees to their client. On this, the counsel did not tell the court, the law which has been violated or not complied with and how does that relate to the application at hand. He raised this concern notwithstanding the fact that, the application at hand was attached with a copy of the Notice of Appeal.

The third defect according to her is that, Order XLIII Rule 2 of the Civil Procedure Code [Cap 33 R.E 2019] requires the application to be by way of chamber summons and should be supported by the affidavit. She said the application at hand was filed by the applicant through chamber summons, but that chamber summons was supported by the counter affidavit instead of the affidavit which is the requirement of Order XLIII rule 2 of the CPC. In his view, she submitted that the counter affidavit does not support application but opposes it. She, in the end submitted

that, the application without a supporting affidavit is not an application worthy a name. She asked the same to be struck out with costs.

Called upon to reply, Mr. Lengai Loita, Advocate, submitted with regard to the late service that, the first service was rejected by the respondent, but with the second service the applicant engaged the court process server. Therefore, the applicant should not be blamed for late service.

Regarding the fact that the application was supported by the counter affidavit instead of the affidavit, he actually conceded that to be true.

However, he prayed the court to invoke its powers under the Provision of Article 107A of the Constitution of the United Republic of Tanzania to allow them to amend or rectify the said counter affidavit thereby removing the word counter to remain with the word affidavit. He so prayed in the interest of justice and for the sake of the right of his client. That prayer based on the concept of overriding objective principle which does not allow the mistake of the Advocate, especially clerical errors like the one at hand, to affect or be decided to the detriment of the client.

In rejoinder, the Ms. Magesa insisted that, as a general rule an affidavit cannot be amended, she insisted that, without a proper affidavit then, there will be no application within the meaning of the law. She prayed the application to be struck out with costs.

Now, that being a summary of what the Advocates for parties submitted, I find it in the interest of justice to outright find against the second complaint raised by the respondent which concerns the non-service of the Notice of Appeal. I find so because even the counsel for the respondent did not at all associate the failure of the applicant to serve the respondent with the Notice of Appeal with the application for leave to appeal, In my view, what is important in the application of this matter is to attach the application with the Notice of Appeal so that the court can satisfy itself that the preliminary procedure of filing an appeal have adhered to before the applicant is entitled to the leave to appeal. The applicant has done this, the application at hand is attached with the Notice of Appeal. The complaint is therefore dismissed for being unmeritorious, and inconsequential.

The other complaint is the failure of the applicant to serve the respondent in time, this too should not detain me much as it has not in any way prejudiced the right of the respondent and its remedy cannot be

to struck out the application but to extend time so that the party who was not served in time can be given time to file her defence or counter affidavit as the case may be. Not only that, but also even the order itself which ordered the service, did not fix a date on which the respondent was supposed to file the counter affidavit. It ordered the counter affidavit to be filed within 14 days from the date of service of the application. This means that, the computation of 14 days was to commence on the date the respondent was served with the application. In my considered view, this ground is based on a misconception of the order, it is thus dismissed for being unmeritorious.

Last, is the fact that the document which was filed in support of the chamber summons in terms of Order XLIII Rule 2 of the CPC is the counter affidavit. This has not been disputed, but the applicant's counsel has asked the court to allow him to amend the said word and remove the word counter to remain with the word affidavit. Now, can that be possible? This can be answered by the Provision of Order XLIII Rule 2 of the CPC (supra), which Provides that;

*"Every application to the court made under this code shall unless otherwise provided, be made by a chamber summons supported by affidavit."*