IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISC. CIVIL APPLICATION NO 51 OF 2022

(Originating from Misc. Civil Application No. 44 of 2022, from Civil Case No. 20/2022 in the High Court of Tanzania, in the District Registry of Mbeya at Mbeya)

IMANI ANDONGOLILE MWAISUNGA..... 1ST APPLICANT

JACKLINE STEPHEN MASANGULA

(A Co-Director of HAD CO.LTD..... 2ND APPLICANT

HAD COMPANY LIMITED..... 3RD APPLICANT

VERSUS

LVC COMPANY LIMITED..... RESPONDENT

RULING

11th January & 7th February 2023

Nongwa, J.

This ruling comes upon preliminary objection raised by the respondents after being served with the application, the respondent through the learned advocates, Ms. Jalia Hussein and Mr. Ibrahim Athuman advocate raised a preliminary objection on point of law to the effect that;

i. That the Court is not properly moved, hence the Application is unmaintainable, bad in law and abuse of court process.

ii. That the application is incompetent for having been supported by incurable defective affidavit which containing hearsay, arguments, opinions and extraneous matters.

This follows an application which led to an order of the attachment in respect of the Applicants' accounts vide Misc Civil Application No. 44 of 2022 which was heard ex parte in favor of the Applicant LVC Company Limited and an Order of Garnishee Order Nisi restraining the Applicants' bank accounts while waiting to hear the application inter parties. The applicants' application is for grant of an order for lifting an attachment order in respect of bank accounts in the name of Imani Andogolile Mwaisunga. The application has been supported by an affidavit of Ms. Joyce Kasebwa, advocate for the Applicants.

The parties agreed that the preliminary objection be disposed of by way of written submissions.

Submitting for the first limb of the preliminary objection Mr. Ladislaus Rwekaza learned counsel for the respondent submitted that an ex parte order given in Misc Civil Application No. 44 of 2022 is an order from one part without waiting from a response from the other side and the said order is not absolute but temporary pending the determination of the said application inter parties in order to ascertain whether to issue a permanent order to restrain the Applicants' bank accounts. That the court is not properly moved, hence the Application is unmaintainable, bad in law and abuse of court process. That, the applicants are praying that the court grants an order for lifting an attachment order in respect of the first Applicant's bank accounts while moving the court under Order XXXVI Rule 9 of the Civil Procedure Code CAP 33 R.E 2019 which is only applicable when there is an independent claim against a property attached before judgment either by third party or judgement debtor in execution, but in the present Misc. Civil Application No.

44 of 2022 there is only an ex parte order of restraining the Applicants' bank accounts pending the determination of the said application inter parties. That the proper remedy to the applicants was to move the court under Order XXXVI Rule 10 of the Civil Procedure Code CAP 33 R.E 2019 which provides that;

> *"Where an order is made for attachment before judgment, the court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed."*

That, this would be a proper remedy as it would allow this court to withdraw the said Garnishee Order nisi when the applicants who are defendants in Civil Case No. 20 of 2022 in the High Court of Tanzania at Mbeya, furnish the required security which are costs pending the determination of the said civil case.

Mr. Rwekaza submitted further that in the alternative, the applicants were to move the court under certificate of Urgency so as court determines the said Misc Civil Application No. 44 of 2022 inter parties so as to determine the issue of restraining the applicants' bank accounts in respect of the Garnishee Order Nisi issued ex parte on 16th December 2022.

On the contention that the application is bad in law and unmaintainable, the learned counsel argued that the applicant has moved the court by irrelevant provisions of law which is an abuse of court process by the applicants and that, the proper remedy is to dismiss the present application with costs in favor of the respondent.

As to the second limb of the preliminary objection to the extent that the application is incompetent for having been supported by incurable defective affidavit which containing hearsay, arguments, opinions and extraneous matters the learned counsel argued that is the requirement of law that an affidavit should not contain opinions, arguments or irrelevant facts which are not subject to the application.

Mr Rwekaza insisted that as it can be traced in the affidavit at paragraphs 3-12, have not been couched in the first person narration, as they speak other person's averments, wishes, sentiments and opinions which render the contents nothing but hearsay which are prohibited in an affidavit.

Citing Regulation 96(4) of the Advocates Profession (Conduct and Etiquette) Regulation 2018 (GN No. 118 of 2018) the learned counsel stated that an advocate practicing in proceedings is prohibited to express personal opinions or beliefs, assert in those proceedings anything that is subject to legal proof, cross examination or challenge; and become an unsworn witness or put his own credibility in issue.

Referring the affidavit in question, the counsel pointed out that under paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 contain arguments, opinions and hearsay which are prohibited to be enshrined in an affidavit.

For easy reference, he reproduced the said paragraph 5 of the affidavit;

> *'that the applicants were not accorded a chance to be heard and the same had no information that there are matters against them before the high court'*

Paragraph 7 of the affidavit states *'that the applicants are using the said accounts to run their day to day business and now their business has also been stopped'.*

Paragraph 9 of the affidavit states *'that the applicants has never made any transaction from stolen or illegal money to the accounts attached. And the same have no intention of transferring any amounts from the accounts except continue with their day to day transactions as per their business function involving daily transactions to those accounts'.*

Mr. Rwekaza insisted that the above quoted paragraphs contain arguments, personal opinions and hearsay which are matters requiring proof and which render the affidavit incurably defective and hence the remedy is to expunge the said paragraphs of the affidavit.

That paragraphs 3, 4 and 6 of the affidavit contain information which is hearsay and not supported by an exhibit to proof the same hence making the said paragraphs unfit to be used as evidence to support the affidavit and the remedy is to expunge the said paragraphs.

The learned counsel supported his argument with the case of **JACQUELINE NTUYABALIWE MENGI & 2 OTHERS VS. ABDIEL REGINALD MENGI & 5 OTHERS, CIVIL APPLICATION NO. 332/01 OF 2021, CAT AT DAR ES SALAAM** (unreported) on defectiveness of the verification clause in the affidavit, the counsel submitted that some paragraphs have not been verified to wit paragraphs 11 and 12 hence making them not qualify to be part of the said affidavit together with other paragraphs which contain arguments and opinions, as such the offending paragraphs be expunged or disregarded and allow the court to proceed with

the remaining paragraphs. The counsel prayed for the court to uphold the second limb of the preliminary objection and hence dismiss it with costs in favor of the respondent.

In reply, Ms Joyce Kasebwa, learned counsel for the Applicants argued that, the Court has been properly moved under the provisions cited in the application, and that the objection still is devoid of merit as it is not capable of disposing the matter in *limine* and in the advent of overriding principle, moving a Court with an improper provision is a curable defect which does not go to the root of the matter.

Ms. Kasebwa argued further that, the defect that does harm the roots of the case, that the case should go to its merits in order to secure the substantive part of the case, as such since the Court has Jurisdiction to grant what is sought before it, it should do so regardless of the improper citation, as it was discussed in the case of **ZAMLAT AYUBU VS. SAMWEL MANUMBU, LAND APPLICATION NO. 27/2021, (HC)** page 5 *(Unreported)*

Ms. Kasebwa referred the court to the case of **DANGOTE CEMENT LIMITED VS. NSK OIL GAS LIMITED, MISC. COMMERCIAL APPLICATION NO. 08/2020, CAT at ARUSHA,** which ruled that wrong citation is curable since what is prayed for is within the Jurisdiction of the Court to grant. Hence, the same is a current position of law and in this matter.

That, the issue of wrong citation is no longer an objection for the Court to decide as the same is curable which enables the Court to remain with its

Jurisdiction to determine the matter on merits, she supported her argument with the decision in **BIN KULEB TRANSPORT COMPANY LIMITED VERSUS REGISTRAR OF TITLES, COMMISSIONER FOR LANDS, ATTORNEY GENERAL and CARGO STARS LIMITED CIVIL APPLICATION NO. 522/17 OF 2020 IN THE COURT OF APPEAL OF TANZANIA at PAR ES SALAAM** (Unreported) at page 7 the court held that;

> *'In the first place, we think the citation of rule 4(2) of the AJA, must have resulted from a slip of the pen. The applicant must have meant section 4 (2) of the AJA rather than rule 4 (2). Be that as it may, the citation of section 4 (2) of the AJA was improper because the Court is not hearing any appeal which is what section 4 (2) of the AJA is all about. The appropriate provision for an application such as this one should have been section 4 (3) of the AJA. That means that the applicant has not properly moved the Court to exercise its revisional power.* ***However, mindful of the proviso to rule 48 (1) of the Rules and considering that the Court has the requisite jurisdiction to entertain applications for revision such as the instant one, we shall disregard the error and proceed to determine the application on merit'.***

As to the second ground of defectiveness of the affidavit, learned Counsel for the Applicant argued that only paragraph 6 of the affidavit which in their opinion see contains hearsay and if this Court finds it offensive too, the same be expunged and allow the application to proceed to hearing with the remaining paragraphs.

She contended further that it is not in every circumstances that whenever information in an affidavit is based on information of another person, that person should depone to that effect as long as the same has been disclosed in the verification clause. The counsel referred the case of **ELLY LUNANILO MKOLA VS. THE DISTRICT EXECUTIVE DIRECTOR OF MOMBA & 3 OTHERS, MISC. CIVIL CAUSE NO. 2/2022 HC AT MBEYA** *(Unreported)* and that **YOBU SIKILO's case** cited by the Counsel is distinguishable in the circumstance and that every case has to be treated on its own fact.

Ms. Kasebwa concluded by submitting that the Respondent's counsel's objection is premature and it has not met the test of preliminary objection which should be on a pure point of law able to dispose the suit within the rule enunciated by the defunct Court of Appeal for East Africa in the landmark case of **MUKISA BISCUITS CO. LTD VS. WEST END DISTRIBUTORS [1969] EA 696**. In the circumstances she prayed that the preliminary objections be dismissed to its entirety with costs

Rejoining, Mr. Rwekaza submitted that, the defect goes to the root of the matter as even the prayers advanced by counsel for the applicants in Misc. Civil Application No. 51 of 2022 are not proper before this honourable court

since they move this court to invoke the provisions of Order XXXVI Rule 9 of the Civil Procedure Code Cap. 33 R. E. 2019. Therefore, the principle of overriding objective cannot be applied in the present application since the court has not been properly moved neither are the prayers set not proper hence making the present application not to be proper before this honourable court.

That, the proposition of overriding objective principle cannot be used to disregard mandatory procedural requirements going the root of the case like the present application where the defect is not on the non-citation of the proper provision but the way the court is moved and the prayers are not proper making the application defective and this Honourable Court not to have jurisdiction to entertain it.

That, all the cases cited by the counsel for the applicant are not relevant to the present case because the applicants have not properly moved the court and the prayers are not proper making their application not curable under the objective overriding principle.

In light of the above arguments, the counsel maintained that the present application before this honourable court is bad in law and unmaintainable since the court is moved by irrelevant provisions of law and constitutes an abuse of court process by the applicants and the proper remedy is to dismiss the present application with costs in favor of the respondent.

In reply to the second ground, it can be seen under paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 contain arguments, opinions and hearsay which are prohibited

to be enshrined in an affidavit, and therefore the remedy is to expunge the said paragraphs from the affidavit on record.

That, from the present affidavit supporting Misc. Civil Application No. 51 of 2022 has a defective verification clause whereby it can be seen that some paragraphs have not been verified to wit paragraphs 11 and 12 hence making them not qualify to be part of the said affidavit together with other paragraphs which contain arguments and opinions and with the golden rule that the offending paragraphs which contain such extraneous matters is to be expunged or disregarded and allow the court to proceed with the remaining paragraphs.

Having examined the objections raised and the submission form both sides, I find that the issues for determination are;

1. *Whether the Court is not properly moved, hence the Application is unmaintainable, bad in law and abuse of court process.*
2. *Whether the affidavit in support of the application is incurably defective containing hearsay, arguments, opinions and extraneous matters*

The applicants are praying that the court grants an order for lifting an attachment order in respect of the first Applicant's bank accounts while moving the court under Order XXXVI Rule 9 of the Civil Procedure Code which provides inter alia;

Rule 9. Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore

provided for the investigation of claims to property attached in execution of a decree for the payment of money.

As argued by the **Mr. Rwekaza,** this is only applicable when there is an independent claim against a property attached before judgment either by third party of judgement debtor in execution, but in the present Misc. Civil Application No. 44 of 2022 there is only an ex parte order of restraining the Applicants' bank accounts pending the determination of the said application inter parties. The applicants ought to have moved the court under Order XXXVI Rule 10 of the Civil Procedure Code CAP 33 R.E 2019 which provides that;

> *'Where an order is made for attachment before judgment, the court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed'*

It is clear that the orders prayed to be uplifted are only temporary pending hearing inter parties, filing another application to that effect is abuse of court process, the applicant should appear and enjoy the right to be heard in the pending application concerning the same issue which is pending before the court, that is Misc. application no. No. 44 of 2022.

I agree with Ms. Kasebwa's contention that that wrong citation is curable since what is prayed for is within the Jurisdiction of the Court to grant, however, in the present application the prayers are not proper and it is abuse of court process as argued by Mr. Rwekaza. There is an application

pending to be heard inter parties where the applicant can exercise his right to be heard instead of overlapping application over another on the same issue.

As to the defectiveness of the affidavit, I am not agreement with the argument by Mr. Rwekaza that paragraphs 11 and 12 as seen in the records that they have not been verified, as stated by Ms. Kasebwa, Mr. Rwekaza has misdirected himself because it is clearly shown that all the twelve paragraphs have been verified.

However, it is very clear that paragraphs 3, 4, 5, 6, 7, 8, 9 and 10th contain arguments and opinions hence subject to be expunged from the affidavit, doing so leaves the particular affidavit with no substantive paragraphs of which is as good as no affidavit at all, as there is no application that is valid before the court. As argued and elaborated by the counsel for the respondent and from the records, the affidavit in the support of the application contains defective paragraphs which contain hearsay, arguments, opinions and extraneous matters.

It is the position of the law as stated in **JACQUELINE NTUYABALIWE MENGI** (supra) that the remedy for defective paragraphs in an affidavit is to expunge them, in the case at hand the offending paragraphs are 3, 4, 5, 6, 7, 8, 9 and 10th, these are subject to be expunged hence remaining with 1st ,2nd ,11th and 12th paragraphs which cannot stand to support the application as the very substantive paragraphs have been expunged.

It is the findings of this court that, the preliminary objection is upheld, the application is struck out with costs.

It is so ordered.

Dated and delivered at Mbeya, this 7th February 2023.

V.M. NONGWA
JUDGE
7/2/2023