

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

AT DAR ES SALAAM

CIVIL APPEAL NO. 147 OF 2019

BETWEEN

GODREJ CONSUMER PRODUCTS LTD..... APPELLANT

AND

HB WORLWIDE TARGET LIMITED.....1ST RESPONDENT

**THE REGISTRAR OF TRADE AND
SERVICE MARKS2ND RESPONDENT**

Date of last order: 16/11/2022

Date of ruling 10 /03/2023

RULING

MGONYA, J.

This ruling is in respect of an oral application for leave to withdraw the affidavit deposed by one Shabbir Sumar to prove the Appellant's *locus standi* in the instant appeal.

With leave of this court, hearing of the said application proceeded by way of filing written submissions.

Both the Appellant, the 1st Respondent and 2nd Respondent appeared represented by **Mr. Francis Kamuzora**, learned Advocate, Mr. Gulamhussain Yusuf Hassan, learned Advocate and Mr. Daniel Nyakiha State Attorney respectively.

While submitting in support of the application Mr. Francis Kamuzora who acted for the Applicant submitted that, they made an application for leave to withdraw the affidavit of Shabbir Sumar which was filed on 18th May 2022 and to refile the same. The grounds for this application were as follows;

Firstly, the Affidavit of Shabbir Sumar relies upon foreign public and private documents which had not been authenticated as required under **Section 87(f) and 93(c) of the Law of Evidence Act, Cap. 6 [R. E 2019]**. The said documents are;

- i) Exhibit Godrej 1-the letter of Authority,
- ii) Exhibit Godrej 3-scheme of Amalgamation;
- iii) Exhibit Godrej 4-Letter of 21 March 2011 and accompanying Company Form 21 notifying the Registrar of Companies at Mumbai of the Amalgamation.

Secondly, pursuant to the Order of this court dated 04th May 2022, the Appellant was required to file an affidavit within 14 days in order to prove it has locus *standi* for purposes of the present appeal. The said 14 days were not sufficient for the Appellant to complete the procedure of authentication of the Foreign Public and Private documents. The procedure for authentication requires the documents to pass through the Foreign Service Officers of the two countries of India, where the

documents originate and Tanzania where the documents intend to be used.

According to Mr. Kamuzora, there will be no prejudice to the Respondent if the prayer is granted and fresh affidavit with proper documents is filed.

On the other side Mr. Gulamhussain Yusuf Hassan, learned Advocate for the 1st Respondent, submitted that the Applicant's prayer is made belatedly. It is an afterthought as it surfaces after the said Affidavit had been served to the Respondents and they have already acted upon it. The Respondents applied to this court to cross examine Mr. Shabbir Sumar the deponent regarding its contents and the annexures thereto with a view to expose the falsity and fraud contained therein.

It is Mr. Hassan's further submission that, if at all the Appellant was to bring authenticated document, the appropriate thing to do is to file supplementary Affidavit with authenticated documents annexed thereto. If the Appellant appears not inclined to file a supplementary Affidavit, its prayer should be refused and Respondents be allowed to proceed with cross examining the deponent. The authenticity of the documents had been brought into spotlight hence it would be prejudice to the Respondent to allow the Appellant to withdraw the Affidavit.

Mr. Hassan disputed the Appellant's argument that the Respondents will not be prejudiced if the Affidavit is withdrawn with leave to refile because they will have the opportunity to cross examine the deponent. It is Mr. Hassan's assertion that the Respondents will lose the opportunity to cross examine the deponent on the current Affidavit and annexures thereto.

Likewise, the 2nd Respondent in his submission filed by Mr. Nyakiha, State Attorney, at the outset he opposed the application on the point that the prayer was a means to circumvent allegations of forgery which were raised in counter affidavit of one Seka Kasera. To bolster his argument, he invited the court to read the case of ***PEPONI BEACH RESORT LIMITED V. LODGE CREATION LIMITED AND ANOTHER, Commercial Case No. 89 of 2018 (HC)***.

According to Mr. Nyakiha the prayer is misplaced given the fact that the counter arguments in respect of the said Affidavit are already in this court and the court has already issued an order for cross examination of the said deponent. To bolster his stance, he cited the case of ***CLARKE V. LAW (1855) 2 K.& J.28 69 E.R 680 at page 682***.

It is Mr. Nyakiha's further submission that the Affidavit filed has already placed a deponent into a witness and his testimony is already in question at the court.

In his rejoinder, Mr. Kamuzora while responding to the 1st Respondent's submission he commenced by complaining that he was served with the submission out of the scheduled time hence he argued the court to expunge the same from the court record.

He went on to state that, the 1st Respondent's counsel having applied his mind to **Order XXII Rule 6** he would probably have appreciated their arguments. He contended that failure to apply for extension of time is not the reason to reject their prayer. He referred **Article 107(A)(1) (e) of the Constitution of the United Republic of Tanzania** and state that circumstances in this case warrant the application of overriding objection under ***Section 3A of the Civil Procedure Code, Cup 33 [R. E. 2019]*** because the Appellant was not present during the trial from which these proceedings originates.

In his rejoinder in response to the 2nd Respondent's submission, Mr. Kamuzora stated that the Advocate of the 2nd Respondent has not made any comment regarding to application of **Order XXII Ruled 6 CPC** to the present proceedings. Appellant is facing a peculiar scenario where he must prove that she has ***locus standi***. By referring to the case of ***PETER ERICK MRINA V. REPUBLIC, Misc. Criminal Application No.1 of 2022 HC-Dar es Salaam***, he submitted that the

courts in Tanzania have permitted the amendment of an affidavit time and time again.

I have had enough time of going through the Applicant's Affidavit, Counter Affidavit, the written submissions as well as the authorities cited by both parties in this Application. In essence, the issue subjecting the parties to contest is whether the court to allow the applicant to withdraw the filed affidavit already acted upon will prejudice the Respondents.

As indicated above, the Applicant advanced two reasons to warrant this court to grant the application. However, having keenly going through those reasons I find that, it is only one reason stated which is failure to attach the authenticated documents while the other one is just an explanation as to why he filed unauthenticated documents which are due time limitation. According to the Appellant, 14 days were not enough to finalise the process.

Now the precise question here is whether insufficient time is the justification for filing improper documents before the court. As much as am aware of **Section 93**

of the Civil Procedure Code, Cap. 33 [R. E. 2019]

provides that:

"93. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Code, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

Being guided with the above provision of the law, I am of the view that insufficient time is not the justification for filing improper documents before the court as the law allows the court to enlarge the time when a need arises. Having that provision in my mind, I am unable to agree with Mr. Kamuzora's submission that due to time limitation he decided to file incomplete document. I wish to remind the learned Counsel on the ***duty of diligence*** imposed to the parties and their Counsel on the documents to be lodged before the court. The court in several occasions has reminded parties and Advocates to ensure documents lodged in court do not contain errors, See.

UMOJA GARAGE V. NATIONAL BANK OF COMMERCE [1997] TLR 109, THE ATTORNEY GENERAL V. JACKSON OLE NEMETENI @ OLE SAIBAI @ MJOMBA AND 19 OTHERS, CONSOLIDATED CIVIL APPEAL No.35 AND 41 OF 2010 and ANTHONY NGOO AND ANOTHER V. KITINDA KIMARO, CIVIL APPEAL No. 33 of 2013(Unreported).

In the instant matter, having closely reflected the submission made by the parties I am at one with the Respondents' submission that the Appellant's application to withdraw the Affidavit came as an afterthought and the same is made with an intention to avoid the deponent to be cross examined on the errors spotted in annexed documents. The reason for my finding is not far to get. The same goes thus; if it is true that it is due to insufficient time, the Appellant was forced to file unauthenticated documents that fact was supposed to be deponed in the filed affidavit. Nowhere the Appellant stated about it in the filed affidavit.

That apart, it is the Appellant who has the duty to prove his *locus standi* in this Appeal. Hence, he has the duty to collect and prepare (authenticate) the documents to be relied upon before filing the same. Failure to do that, portrays negligence on the Appellant's party of which he is the one to bear the costs. Therefore, this court to allow the Appellant to withdraw the Affidavit is tantamount to pre empt the Respondents to challenge the filed documents. In the event therefore, the raised issue is answered in affirmative that the Respondents will be prejudiced when the court will allow this Application.

The Appellant argued this court to apply **Section 3A CPC** and **Article 107 of the Constitution of the United Republic of Tanzania** to allow the application. With due respect, I am not ready to buy his version as it has been stated by the court several times without number that; **the principle of overriding objective cannot be blindly applied at the expense of established rules of procedures.** See. **MONDOROS VILLAGE COUNSEL AND 2 OTHERS V. TANZANIA**

BREWRIES LTD & OTHERS, Civil Appeal No. 66 of 2017 (Unreported).

Much of that, the Appellant's counsel in a bid to show that the Application is peculiar, he referred the court to **Order XXII Rule 6 of the CPC**. I had enough time to traverse through the said provision which provides that no abatement by reason of death after hearing. However, this provision of the law did not relate with the application at hand.

All said and done, I am satisfied that this **application is devoid of merit, thus is hereby dismissed. I order the matter to proceed with cross examination.**

Costs in due cause.

It is so ordered.



L. E. MGONYA

JUDGE
10/3/2023

ORIGINAL