

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISC CIVIL APPLICATION NO 01 OF 2023

BASILISA SALITI APPLICANT

VERSUS

DANIEL REUBEN RESPONDENT

Date of Order: 27/04/2023

Date of Ruling: 02/05/2023

RULING

BADE, J.

This matter was filed as an application to set aside a dismissal order and readmit PC Civil Appeal No 42 of 2022. The application was supported by the sworn affidavit of Basilisa Saliti deponed on 07th January 2023. Meanwhile, the respondent filed its counter affidavit in opposition sworn by Daniel Reuben and deponed on 23rd March 2023, ahead of the court schedule which was 29th March. This matter came up on a clean-up session since it originated from Manyara, and thus its previous date that was scheduled for hearing

(25/04/2023) was rescheduled to 27th April 2023. When the application was called for hearing, both parties had representation by legal counsel; the Applicant through the services of Ms. Caroline Mollel of LHRC and the Respondent through the services of Mr. Raymond Joachim Kim. Mr. Joachim Kim notified the court that there are preliminary points of law that he thought the court should dispose of first, for which he had two of them, but when called to argue the same, he dropped one of them. He thus raised the preliminary point of objection that the affidavit contains hearsay, particularly in paragraph 6 of the sworn affidavit. He argues that the deponent had deponed that her advocate was unwell and went to see a specialist for which she attached a copy of the hospital report and receipt. These he maintains are hearsay, and thus they go against the law as affidavits are supposed to be direct evidence, section 62 (1) (a, b, c, and d) of the Tanzania Evidence Act Cap 6 RE 2019 is at issue here.

He submits further the said paragraph is the one carrying the whole application, and if the said paragraph is struck out, the application will not be supported at all. He cites in authority a decision of this court sitting in Dar es Salaam in the case of **Vehicle & Equipment Ltd vs Jeremia Charles Nyagawa**, Misc Civil Application no 246 of 2022, had an opportunity to look

and discuss issues around an affidavit that contains hearsay, and the same was thrown out. On the basis of the said authority, he urged this Court to hold the same way and have the matter dismissed as it is not supported by an affidavit as it stands now.

In response, Counsel for the Applicant countered that Paragraph 6 of the Applicant's affidavit deponed has two sets of facts, and she insisted that the applicant has explained that her financial situation is difficult and she had no money that would enable her to come to court.

On the other hand, she retorts that the affidavit does not contain hearsay as the applicant is explaining the reasons for her advocate not being able to attend. In further rescue of the affidavit, she argues that in verification, the deponent only verifies what she has been told by the advocate. She maintains her views that the deponent is deponing that her advocate could not attend because she was unwell, and that does not make the affidavit containing hearsay as that is knowledge she has of why her advocate did not attend the court on a fateful day. She prayed for the court to dismiss the objection so they can proceed to hear the application on merit.

In rejoinder, the respondent's counsel had nothing further to add from his previous position.

The issue to be determined is whether the affidavit is maintainable. Looking at the offending paragraph 6 of the affidavit, I have no doubt in my mind that it does contain hearsay. If anything, the person who attended the hospital and those reports were on their behalf should have been the one swearing an affidavit and presenting the same in Court. There is no gain saying that the applicant would be correct in presenting facts about another person.

The only saving position would be if, by looking at the contention that the deponent was only deponing to the fact as related to her by her advocate, as contended by the Applicants counsel, and see if the verification clause is supportive of this contention. The verification clause is thus written:

"I, Basilisa Saliti do hereby verify that what is stated in paragraph 1, 2, 3, 4, 5, and 6 above are true and correct to the best of my knowledge, save for paragraph 6, 7 and 8 which are based on the information received from my advocate Caroline Mollel which I believe to be true."

The deponent has stated the source of her information in the verification clause. But it is clear that the said paragraph 6 is double-referenced on the quoted verification. But that is not something that should detain us for now as soon it will become obvious, and in any case, if it was so, it would have been saved by an amendment under the oxygen principle.

See **Anatol Peter Rwebangira vs The Principal Secretary, Ministry of Defence and National Service and Attorney General**, Civil Application No. 548/04 of 2018 (unreported), **Yobu Sikiio & 16 Others versus Furahini Vahaye**, Miscellaneous Land Application No. 105 of 2018 (unreported) and **Octavian Kaitan Mbungani (EXE. 8648 CPL) vs The General of Police & Honourable Attorney General**, Civil Application No. 21 of 2018, (unreported). In all these referred cases above, the Courts insisted on stating sources of information in the verification clause where the same is not within the deponent's knowledge/ the applicant.

The remaining issue then becomes does stating the source of one's information makes the information not hearsay and or if still defective, is it curable?

The proposition that an affidavit should not contain hearsay is provided under Order XIX Rule 3(1) and (2) of the Civil Procedure Code, where it is

stated that Affidavits should confine to facts, not fabrications, speculations, arguments, legal reasoning and or law. Specifically, sub rule 1 is clear that

"Affidavit shall be confined to such facts as deponent is able of his on knowledge to prove,....."

In this contention, the cases of **Sabena Technics Dar Limited vs Michael J. Luwunzu**, Civil Application No. 451/18 of 2020, the Court of Appeal (unreported) when cross referring to a decision of the same Court in **Benedict Kim Wag vs Principle Secretary Ministry of Health**, Civil Application No, 31 of 2000 as well as the case of **NBC Ltd vs Superdoll Trailer Manufacturing Co. Ltd.**, Civil Application No. 13 of 2002, (Both Unreported) the Court had this to say:-

"An affidavit which mentions another person is hearsay unless that person swears as well'

In the instant case it is indisputable that the Applicant had mentioned another person in the paragraph at issue, and whose facts, as argued by the Counsel for the Respondent, is the one carrying the application, short of which the affidavit will be unsupported, as there is no any other affidavit of the person mentioned by the deponent that has been

appended to the Applicant's Affidavit so as to render credence to the application.

It is my view and finding that in the absence of any other affidavit, the affidavit of the applicant becomes hearsay, since the fact it has disclosed the source of information does not absolve the defect. The said affidavit is incapable of supporting the application in question as the defect in the said Affidavit is incurable. There are many Court of Appeal decisions which provide to this effect. See the case of **Benedict Kimwaga vs Principal Secretary, Ministry of Health**, (Supra) where it was held that:

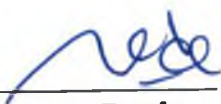
"If an affidavit mentions another person, then that other person has to swear an affidavit. However, I would also add that that is so where the information of that other person is material evidence because without the other affidavit, it would be hearsay. Where the information is unnecessary, as is the case here, or where it can be expunged, then there is no need to have the other affidavit or affidavits."

Furthermore in the case of **NBC Ltd vs Superdoll Trailer Manufacturing Co. Ltd.** (Supra) the Court of Appeal held that:

"Affidavit which mentions another person is hearsay unless that other person swears as well. One Mr. Mkongwa, advocate, asserted that he commenced and prosecuted this suit on the instructions of Dr. Nkini who in turn had been authorized or instructed by NBC (1997) Ltd to commence the proceedings.....Dr. Nkini however, did not file an affidavit in reply to confirm the averment by Mr. Mkongwa. Therefore, Mr. Mkongwa's averment was clearly hearsay, and it could not be relied on as proof of the assertion that the proceedings and this judgment was given, with the knowledge of the applicant Bank".

Where does this leave the instant application? It is my firm view that the application becomes unsupported and bad in law as the said affidavit cannot be relied upon by this court to support the application on its own. Thus, it is my finding that the preliminary objection has merit, and I so hold. The application is struck off. Each party to bear their own costs.

Dated at Arusha this 02nd day of May 2023


A. Z. Bade
Judge
02/05/2023

Judgment delivered in the presence of parties / their representatives in chambers /virtually on **02nd** day of **May 2023**.



A handwritten signature in blue ink, appearing to read "A. Z. Bade".

A. Z. Bade
Judge
02/05/2023