

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

MISC. CIVIL APPLICATION NO. 54 OF 2023

(C/F Misc. Civil Cause No. 2 of 2023, Misc. Civil application No. 36 of 2023)

MOHAMED SAAD BIN JUNG.....1ST APPLICANT

ASMA SANGEETA JUNG.....2ND APPLICANT

VERSUS

ALLY KEA ALLY.....1ST RESPONDENT

SARAH MOSSES KAISOE.....2ND RESPONDENT

AFRICA UNDER CANVAS SAFARIS LIMITED.....3RD RESPONDENT

NYUMBU LUXURY COLLECTION LIMITED.....4TH RESPONDENT

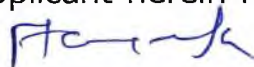
BASHIRI IBRAHIM MALLYA.....5TH RESPONDENT

27/07/2023 & 03/08/2023

RULING

MWASEBA, J.

This ruling is in respect of the consolidated preliminary objections raised by both parties. On 24th day of July, 2023 the applicant herein filed one point



of preliminary objection that the counter affidavit is incurably defective (bad in law) for being sworn by an advocate who is representing the respondents which makes it a hearsay and ought to have been struck out with cost.

On the other side, the respondent raised two points of objection; the first point is to the effect that the application is fatally defective for being omnibus. The second point is that the affidavit in support of the application is bad in law for containing a defective jurat of attestation which is incurable defective contrary to the Notaries Public and Commissioners for Oaths Act, Cap 12 R.E 2019.

During the hearing of the preliminary objection Mr. Boniface Joseph learned counsel represented the applicant while Mr. Daniel Lyimo learned counsel appeared for the respondent. The hearing was conducted orally.

Submitting in support of the preliminary objection raised by the applicant, Mr. Boniface challenged the competence of the counter affidavit as it was sworn by Mr. Daniel Lyimo as an advocate of the respondent. He argued that, **Order 19 rule 3 (1) of the CPC** provides that an affidavit should be confined to such facts that the deponent is able on his own knowledge to

prove. Thus, an advocate can only swear an affidavit on the proceedings which he appeared for his client and on the matters which are on advocate's personal knowledge only. He supported his argument with the case of **Lalago Cotton Ginnery and Oil Mills Company Limited vs The Loans and Advances Realization Trusts** (LART), Civil application No. 80 of 2002 (CA- unreported) and **Said Salim Hamdun and two others vs The Administrator General**, Misc. Civil Application No. 267 of 2022. Mr. Boniface stated that the counsel for respondent has just been engaged. He has no any capacity in the 3rd and 4th respondent's companies so, all the paragraphs of the counter affidavit are the facts which has been supplied to him by the respondents. He prayed for the counter affidavit to be expunged for being incurably defective.

Replying to this point of objection, Mr. Lyimo submitted that the raised preliminary objection by the counsel for the applicant does not meet the principles set in the case of **Mukisa Biscuits Manufacturing Company Ltd vs West and Distributors Ltd**, (1969) EALR No. 696 as it would not dispose of the suit. However, he argued to the gist of the Preliminary objection that this matter is originated from Misc. Civil Application Cause No. 2 of 2023 and Misc Civil application No. 36 of 2023 in which he



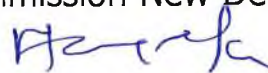
represented the 1st, 2nd and 3rd respondent. So, the facts deponed are within the knowledge of the respondent's counsel as he appeared on the proceedings made on 5/4/2023. He supported his argument with the case of **Lalago Cotton Ginnery and Oil Mills Company LTD vs The Loans and Advances Realization Trust (LART)**(Supra) and prayed for the raised preliminary objection to be struck out with costs.

Regarding the preliminary objection raised by the respondent, Mr. Lyimo submitted on the first point of objection that the application is omnibus for lumping up distinct prayers in the same application. He cited the case of **Rev. Dr. Getrude Rwakatare and another vs Zithay Kabuga**, Civil Reference No. 12 of 2016 in which the Court of Appeal held that the procedure to combine the two prayers in one application is not proper and the application ought to be struck out. He further referred this court to the case of **NIC Tanzania Limited vs Minister for Labour and Youth Development and another**, Civil appeal No.103 of 2004 in which the Court of Appeal insisted that omnibus application is bad in law and the consequence was to struck out the application.



Responding to the first point of objection, Mr. Boniface learned counsel argued that the law allows putting related prayers in the same application between the same parties. He supported his argument with the High Court decision in the case of **Amina Issah vs White Sand Hotel**, Civil Revision No. 55 of 2020 in which this court held that, putting more than one prayer in one application is not bad in law as the court does not encourage the multiplicity of suits or application. He averred that the prayers contained in the chamber application are all related in dispute between the parties herein. Further to that he distinguished the cited cases of **Rev. Rwakatare and another vs Zithay Kabuga** (supra) and **NIC Tanzania Ltd** (Supra) with the case at hand as in the cited cases the Court of Appeal was talking about combining two different applications and not two prayers in the same application. So, he was of the view that the counsel for the respondent misconceived the position of law hence he prayed for the first point of objection to be overruled.

Coming to the second limb of preliminary objection, Mr. Lyimo learned counsel challenged the affidavit to be defective with regard to the jurat attestation. The same has been attested by the Minister and the rubber stamp placed there is of the Tanzania High Commission New Delhi which is



contrary to **Section 8 and 10 (1) of the Notaries Public and Commissioners for Oaths**. To support his argument, he referred this court to the Court of Appeal decision in the **Director of Public Prosecution vs Faruku Mushenga**, Criminal application No. 4 of 2015. Therefore, he was of the stand that the affidavit is incurably defective.

Replying to the second limb of objection Mr. Boniface asserted that the jurat attestation was properly taken in accordance with **Section 11 (1) of the Notaries Public and Commissioners for Oaths**. He clarified that the deponent of the affidavit is based in India. So, the administration of oath was taken by a foreign service officer who is based in that particular country due to the fact that the law empowers the foreign service officer to administer oath or affirmation. And such oath shall be lawful in Tanzania. So he was of the view that the jurat is proper hence objection be overruled with costs.

I have heard the rival submissions from both sides and gone through the pleadings with regard to the preliminary objections raised by both parties.

Before dealing with the preliminary objection challenging the competence of the counter affidavit, I find it worthy to start with the competence of the

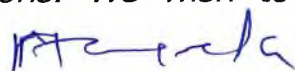


application by itself which initiated this matter. In considering the same, the pertinent issue to be determined is whether the application is proper before the court or not.

Starting with the first point of objection with regard to the competence of the application, Mr. Lyimo learned counsel challenged the act of lumping up a number of distinct prayers in the same application. He further argued that omnibus application is bad in law so deserves to be struck out with costs. On his side, Mr. Boniface learned counsel for the applicant stated that the law allows putting related prayers in the same application.

As rightly argued by Mr. Boniface, the law does not bar omnibus application when it comes to related prayers. It is an established principle that omnibus applications are encouraged. In the case of **NIC Tanzania Limited vs Minister for Labour and Youth Development and Another**, Civil Appeal No. 103 of 2004, CAT at DSM (unreported) the Court of Appeal had this to say:

"Therefore, unless there is a specific law barring the combination of more than one prayer in one chamber summons, the court should encourage this procedure rather than thwart it for fanciful reasons. We wish to



*emphasize, all the same that, **each case must be decided on the basis of its own peculiar facts.**"*

(Emphasis is added)

Through the said legal position it is clear that the court encourages to combine several prayers in the same chamber application. However, each case must be decided on its own peculiar facts.

In the application at hand, the applicant has moved this court under Order **XXXVII Rule 1(a) and Rule 2 (2) and Rule 4, Section 68 (b), (c) (d), (e)** and **Section 95 of the Civil Procedure Code**, Cap 33 R.E 2019 and **Section 233 (1) (a) of the Companies Act**, Cap. 212 R.E 2019 for the following prayers:

(a) Restraining the 4th Respondent, their agents, servants, workmen officers, representatives and or any other person acting in her instructions and on their behalf from using any of the assets, licenses, permissions, information or the 3^d respondent.

(b) Restraining the 4th Respondent from conducting any tourism business activities until final determination of the main petition.

(c) Directing the 1st, 2nd and 4th Respondent to deliver a true account of all the receipts, expenditures, asset register, and all financial and



operational information pertaining to the 3rd and 4th Respondent including its bank accounts, VAT registration, and any other licenses, permissions, accreditations, and registrations.

- (d) Appointing a receiver/caretaker for all assets and properties of the 4th Respondent until final determination of the main petition.*
- (e) Appointing an inspector to identify, take inventory, value the assets and properties of the 3rd and 4th respondent*
- (f) Considering the 1st, 2nd and 5th respondents as civil prisoner for being in contempt of the court order issued on 5th April 2023 by this Honourable Court in High Court Miscellaneous Civil Application number 36 of 2023.*
- (g) Costs of this application follow the event.*
- (h) Any other relief(s) this Honourable Court shall deem fit to grant.*

Looking at the prayers above, I concur with Mr. Lyimo learned counsel for the respondent that they are not related. Its procedure for determining the same is not similar. For instance, the prayer to take the respondents as civil prisoners. It has its procedure distinct to the injunction order. Thus, they cannot be combined as they are not related. The law allows omnibus application on related prayers. The law is settled that the prayers qualify to

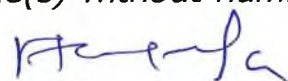


be combined in one application if they are not opposed to each other or made under different laws. This stance was taken by my learned brother Hon. Ismail, J in the case **Rutunda Masole vs Makufuli Motors Limited**, Misc. Labour Application No. 79 of 2019, HCT at Mwanza (unreported) when he stated that:

"The condition precedent for applicability, of this rule is that the application should not be diametrically opposed to each other or preferred under different laws, complete with different timelines and distinct considerations in their determination."

I associate myself to the above position. the prayers to be lumped in the same applications must be related. In our present application the prayers are not related and it has been rightly submitted by Mr. Lyimo learned counsel that such kind of application is bad in law. The Court of Appeal has insisted repeatedly that combining two or more unrelated applications renders the application incompetent. This was well stated by the Court of Appeal in the case of **Mohamed Salimini vs Jumanne Omary Mapesa**, Civil Application No. 103 of 2014 (Reported in the TanzLii) that:

"There is one other difficulty relating to this application. As it is, the application is omnibus for combining two or more unrelated applications. As this Court has held for time(s) without number




*an omnibus application renders the application incompetent and is liable to be struck out – See **Bibie Hamad Khalid V Mohamed Enterprises (T) Ltd; J.A. Kandonga and Hamis Khalid Othman**, Civil Application No. 6 of 2011 (unreported)."*

Being guided accordingly by the above principle I hereby find merit on the first point of preliminary objection raised by the respondent. So long as this point disposes of the matter there is no need to determine other points of preliminary objection as they will not change anything.

In view of the foresaid, the preliminary objection raised by the respondent is hereby sustained for being meritorious. The application is struck out for being incompetent. Each party to bear its own costs.

It is so ordered

DATED at **ARUSHA** this 3rd day of August, 2023.


 **N.R. MWASEBA**
JUDGE