

**IN THE HIGH COURT OF TANZANIA**  
**MUSOMA DISTRICT REGISTRY**  
**AT MUSOMA**

**REFERENCE NO. 02 OF 2023**

*(Originating from Taxation Cause No. 356 of 2022 of the District Land and Housing  
Tribunal for Mara at Musoma)*

**SYLVESTER WARIOBA ..... APPLICANT**

*VERSUS*

**JUMA OMARY KISABA ..... RESPONDENT**

**RULING**

*07<sup>th</sup> & 09<sup>th</sup> August, 2023*

**M. L. KOMBA, J.:**

This is a reference to this Court from a ruling of a Taxing Officer, Hon. Kitungulu, E., in a Taxation Cause No. 356 of 2022 which was before him. The applicant prays this court to set aside the taxed bill of costs by the taxing officer dated 22 May, 2023 and its extract order due to material error and irregularity. Reference is filed by way of chamber summons supported by affidavit sworn by the counsel for the applicant.

During hearing day, applicant was represented by Mary Joakim while the respondent had a legal service of Mr. Emmanuel Gervas both advocates.

When served with a copy of reference, Mr. Gervas, counsel for the respondent filed a Preliminary Objection (PO) on two grounds that;

- 1. That the affidavit accompanying the application is incurably defective for containing legal argument contrary to Order XIX rule 3 (1) of the Civil Procedure Code, Cap 33 R. E. 2019.*
- 2. That the affidavit supporting the application is incurably defective for containing prayers contrary to Order XIX rule 3 (1) of the Civil Procedure Code, Cap 33 R. E. 2019.*

When given time to submit on objection raised, Mr. Gervas submitted that affidavit was prepared contrary to Order XIX rule (3) of the Civil Procedure Code, Cap 33 R. E 2019 (the CPC). It was his submission that paragraph 4, 5 and 6 of the applicant's affidavit explain about the law, giving example of paragraph 6 the affidavit of applicant's counsel, the deponent mentioned the Advocates Remuneration Order and went on analysed the law which, according to him was not right as it was supposed to contain the information that she know and believe and not argument of law.

It was his submission that under normal circumstance when the affidavit is found with paragraphs which are defective, the remedy is to expunge the paragraph. In the case at hand when the defective paragraph removed then, the rest of paragraph will not carry the message intended to form a

chamber summons as the remaining paragraph is introduction paragraph with background information and the paragraph 7 which is the closure. When expunged the defective paragraph there will be no affidavit. He prays this court to find the objection has merit.

On the second limb of objection, it was his submission that the affidavit is omnibus as it has facts and prayers which is contrary to the law. He cited paragraph 7 of the affidavit that has prayers and he said the remedy is to expunge and then there will be no affidavit in support of the application. He prayed this court to find the PO has merit and allow it.

On the other side, Ms. Joakim submitted that the affidavit has been prepared in line with the requirements of the law and that what has been deponed in paragraph 4 is facts which contravene the law and not citation of the law. further she submitted that paragraph 5 has facts and finds the counsel for the respondent is misleading this court. She was of the submission that the PO has no qualities as it must be purely on point of **law as was in Mukisa Biscuits case** that PO must finalize the matter. The filed PO will not finalize the matter. If at all I will find defects, she said the remedy is to struck out the defective paragraph and not dismiss the matter.

Ms. Joakim cited the case of **Yakobo Magoiga Gichele vs. Penina Yusuph**, Civil Appeal No. 55 of 2017 where Hon. Chief Justice insisted on the principle of overriding objective and do away with technicalities to deny applicant rights to be heard. She prays this court to order correction in case it finds any defect. On other point she submitted that paragraph 7 is the closing paragraph and has no prayers. She prays the PO to be dismissed.

During rejoinder, Mr. Gervas reiterated his submission in chief that paragraph 4, 5 and 6 contravene the law and cited the case of **Uganda vs. Commissioner of Prisons Exparte Matovu (1966) EA 514** (cited with authority by the court) that affidavit for use in court should only contain statement of facts. He said the complained paragraph has extraneous matter as the principles of law as they are in paragraph 5 are not facts. He insisted that the PO is on point of law as it was in the case of **Standard Chattered Bank & 3 Others vs. PIV Engineering** Consolidated Appeal No. 76 & 90 of 2016 CAT and pray this court to find the PO is Meritorious.

This court is called upon to determine on whether the application has accompanied with defective affidavit or rather some paragraph in sworn

affidavit are defective need to be struck out or amended. For easy of reference I have decided to recite the condemned paragraph

- 4. The said taxation cause the taxing master awarded the respondent TZS. 2,200,000/= as instruction fees and other costs without taking into account that the said bill of cost contravene the law.*
- 5. It is principle of law that once more than 1/6 of the bill are taxed off even after disregarding the sum of instruction fee claimed the claimant shall not be entitled to the costs of such taxation.*
- 6. That the applicant is aggrieved by the decision of the said bill of costs which was improperly filed and violates the provisions of the Advocates Remuneration Order GN No. 264 of 2015. **Copies of the judgement and decree are hereby attached as Annexure SL-1 collectively to form part of this affidavit.***
- 7. It is in the interest of justice that the orders sought in the chamber summons succeed.*

It is settled that affidavit has to be confined on facts which is to the knowledge of deponed. This is provided under Order XIX Rule 3 (1) thus;

*'3.-(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted:*

*Provided that, the grounds thereof are stated.'*

The above order was analysed in the case of **Uganda vs. Commissioner of Prisons Exparte Matovu** (supra), the Court stated that: -

*"As a general rule of practice and procedure **an affidavit for use in court, being a substitute for oral evidence, should only contain statements of facts and the circumstances to which the witness deposes either of his own knowledge... such affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion**' [Emphasis supplied].*

Reading the condemned paragraph, starting with paragraph 5 I find there is a principle of law complained of. I find that paragraph has both facts and law which is contrary to the cited Order above. Similarly, paragraph 6 has cited the law and paragraph 7 to my analysis is a prayer. The condemned paragraphs could not be kept in record they are worth to be expunged as I hereby do.

Having expunged paragraph 4, 5, 6 and 7 the remaining paragraphs cannot be said they are worth to support chamber application. In record there remains chamber application which cannot move this court. Affidavit are governed by Order XIX of the CPC and the counsel who raise objection

referred this court to the same order. I find the PO is purely on point of law.

Ms. Joakim cited the case of **Yakobo Magoiga** (supra) that courts should not dwell much on technicalities and apply overriding objective Principle. I agree with that position but circumstance of this case does not warrant that as the same Court of Appeal in some of its cases declared this legal position in respect of the extent in which the rule of overriding objective can be invoked, that this court should not apply blindly in disregard of the rules of procedure coached in mandatory terms. Some of those cases include **Mondorosi Village Council & 2 Others vs. Tanzania Breweries Limited & 4 Others**, Civil Appeal No. 66 of 2017 CAT at Arusha (unreported) in which it was held;

*'Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case.'*

Oder XIX Rule 3 explain what is supposed to be in affidavit. It must contain facts which deponent is able to prove. That is the law. I find there is no technicalities to warrant the use of overriding principle as provisions of law

need argument and is not facts which need to be proved by the deponent or best known to her knowledge.

All said, I find the remaining paragraphs in affidavit cannot support chamber application and I hereby struck the application with costs.

It is so ordered.

**DATED** at **MUSOMA** this 09<sup>th</sup> day of August, 2023.



*NK*  
**M. L. KOMBA**  
**Judge**