

**IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)**

AT SUMBAWANGA

MISC. CIVIL APPLICATION No. 24 OF 2022

(Arising from Civil Case No. 02 of 2022. Pending at the District Court of Mpanda at Mpanda)

BULAMATA AMCOS APPLICANT

VERSUS

MISIGALO COMPANY LIMITED.....RESPONDENT

RULING

03/08/2023 & 25/09/2023

MWENEMPAZI, J.:

This application is an outcome of the ruling delivered in the Civil Case No. 02 of 2022 pending at the Mpanda District Court at Mpanda, where the respondent has sued the applicant for breach of contract in which, she prays for judgement in her favour under the orders that;

- i. The applicant pays her the sum of Tshs. 97,692,100/= being specific damages.
- ii. The applicant pays Tshs. 20,000,000/= being 15% of an accrued interests for the breach of contract.

- iii. The applicant pays Tshs. 20,000,000/= being 15% of an accrued interests of the outstanding money from the date of filing the Original Civil Case to its disposal.
- iv. The applicant pays Tshs. 50,000,000/= being general damages.
- v. Costs of the Original Civil Suit, and
- vi. Any other relief the trial court may deem fit and just to grant.

However, the applicant herein during scheduling orders at the trial court, raised preliminary objections that;

- i. The suit is incompetent before the trial court as it has been filed without the Plaintiff's Board of Directors' resolution which contravened the mandatory practice and procedure of the Companies Act Cap 212 R.E. 2002.
- ii. The trial Court has no jurisdiction to determine the suit.
- iii. The suit is Res judicata.

After submissions from both camps, the trial magistrate overruled all the points of objections as raised by the applicant herein for being meritless, hence this application to this court.

In this application before me, the applicant filed a chambers summons being supported by an affidavit, made under Section 95 of Civil Procedure

Code Cap 33 of 2019, Section 2(3) of Judicature and Application of the Laws Act, Cap. 358 R. E. 2019 and any other enabling provision of the laws.

In his application, the applicant seeks to be heard for the orders that;

1. This Honourable Court be pleased to use its inherent powers to call and examine legality of the proceedings in Civil Case No. 02 of 2022 pending at the Mpanda District Court between the parties herein as the same has contravened the Regulation 83 (1) – (10) of GN. No. 272/2015, since the decision entered by the Registrar of Cooperative Society cannot be challenged in a District Court.
2. The Respondent be ordered to pay the cost of this application.
3. Any other relief(s) which this honourable court may deem fit and just to grant.

Nevertheless, before this application was scheduled for hearing, the respondent filed a notice of preliminary objection opposing this application which consisted of three (3) points of law which are as hereunder;

1. That, the application is incompetent for challenging the decision of the preliminary objection dated 13/10/2022 which was interlocutory.
2. That, the application is incompetent for being supported by a defective affidavit in the aspects;
 - a. The verification clause is defective

b. The jurat of attestation is defective.

3. That, the application is incompetent for failure to attach impugned proceedings which the applicant sought to challenge them.

For the foregoing reasons, the respondent moved this court to struck out this entire application with costs.

As the hearing of the preliminary objections was scheduled, the applicant was represented by Mr. Alex Enock learned Advocate meanwhile the respondent had no legal representation but Mr. Teonas Revocatus Kinyonto who had the power of attorney appeared on behalf of the Respondent. Both sides agreed on battling out these objections by way of written submissions, a mode which was gladly granted by this court.

It was the respondent who submitted first for the preliminary objection he raised. Starting with 1st ground of preliminary objection, the Respondent contends that the impugned decision was interlocutory in nature hence not amenable to revision and that the orders the applicant sought, the complaints of the applicant particularly on the chamber summons and paragraph 6(a),6(b),6(c) of the affidavit complains about the decision of the trial court on preliminary objections delivered on 13/10/2022.

It was the respondent's submission that, the decision on preliminary objection is not appealable, or revisable unless it has effect of disposing the

final case. The respondent referred me to the case of **Standard Chartered Bank & 3 Others vs VIP Engineering & Marketing Limited**, Consolidated Civil Application No. 76 And 90 Of 2016, CAT (T) DSM (Unreported) at page 22 and page 23.

In addition to that, the respondent again referred me to a case with a similar position in **Prime Catch (Exports) Limited & 5 Others vs Diamond Trust Bank Tanzania Limited**, Civil Application NO.296/16 OF 2017, CAT, DSM (Unreported) at Page 10,13,14 and 17.

On that basis, the respondent urges me to take similar stance and strike out the present incompetent application because the main suit is still pending at Mpanda District Court as Civil Case No.2/2022 and that final rights of the parties have not been determined. The respondent also reminded me that the main suit is not proceeding at Mpanda District Court because the case file has been called to this court because of this application filed by the applicant.

Coming to the 2nd ground of objection, the Respondent contended that the application is supported by a defective affidavit in the aspect that, **firstly** the verification Clause is defective, that in the verification clause by the applicant it has omitted to verify subparagraphs of paragraph 6(a),6(b),6(c),7(a),7(b) and 7(c) contrary to the decision of this Honourable court in the case of **Anatol Peter Rwebangira vs Principal Secretary**,

Ministry Of Defence And National Service [2019]1 T.L.R 142 which held that;

"It is thus settled law that, if the facts contained in the affidavit are based on knowledge, then it can be safely verified as such, however the law does not allow a blanket or rather general verification that the facts contained in the entire affidavit are based on what is true according to knowledge, belief and information without specifying the respective paragraphs"

The respondent again referred me to a case with a similar stance in the case of **Jonester Trazeas Rwagibendela © Jonester Jones vs Elizabeth Nelson Ngaiza**, Application for Revision No:6/2022, HC(T) SUMBAWANGA, (Unreported) - at page 12 and 13. Whereas the court ruled out that failure to verify sub-paragraphs is fatal and incurable.

The respondent then proceeded further on the second subpoint that the jurat is defective, and submitted that Section 8 Of The Notaries And Commissioner for Oaths Act CAP 12 R. E. 2019 was violated because in the applicant's affidavit it shows the principal officer sworn the same before one S. L. SILANDA, the rubber stamp also proves the same.

That, the commissioner for oaths did not insert his full name as required by Section 8 of the above cited law. That, worse enough in the judiciary

system (E-wakili) of commissioner for oaths and advocates, there is no such name S.L. SILANDA in which it makes the affidavit fatal and incurable, hence cannot support the present application.

Submitting for the 3rd ground of objection, the respondent submitted that the applicant's application is plain and blank and therefore incompetent for failure to attach the proceedings complained of in the chamber summons and affidavit at paragraph 7(a),7(b) and 7(c) also at paragraph 8. In which, the respondent insists that, this court cannot revise the proceedings which has not been pleaded by the applicant.

The respondent added that, the failure to attach proceedings in applications of this nature is fatal and I was referred to the case of **Hyasintha Malisa Versus John Malisa**, Civil Application No. 167/01 of 2021, CAT(T) DSM (Unreported) at page 9 and 10.

Respondent again referred me to a case of a similar position in **Mohamed Rabii Honde vs Hamida Ismail Honde And 11 Others Civil Application No. 461/2017**, CAT (T) IRINGA (Unreported) at page 5,6,7,8 and 9.

In strengthening further, the respondent added that the importance of attaching the proceedings is that this court will be in the position to determine what irregularities are complained of by the applicant, whether the whole

proceedings or only part of, and that failure to do so is fatal as this court will be placed on guess-work manner of not understanding what proceedings exactly are complained of by the applicant.

For the submissions as adduced by the respondent, it is the respondent's humble prayer that this court be pleased to strike out this incompetent application with costs.

In response to the submission made, the applicant submitted that the present application is not aiming to challenge the decision entered by the trial court in the preliminary objection, rather it is aimed at seeing the legality of the Civil Case No. 2 of 2022 pending at the trial Court as the same has been determined by another authority with competent jurisdiction to try the same to its finality and no any appeal was preferred in challenging the same in according with the law.

The applicant then proceeded that, it should be considered the present respondent's preliminary objection is not maintainable in law as the present application was filed under section 95 of Civil Procedure Code CAP 33 of 2019, section 2(3) of Judicature and application of the laws Act, Cap. 358 R. E. 2019 and any other enabling provision of the laws, based on the fact that the said Civil Case No. 02 of 2022 contain issues which is not covered by Civil Procedure, hence leading to resort to the general principles.

Submitting further, the applicant stated that if one goes through the applicant's application there is nowhere in the application indicating that the applicant has filed the application at hand for revision, rather the applicant has moved the court based on the matters of general principles: which is not covered by our laws.

It is the applicant's submission that the position discussed in the case law relied upon by the respondent in supporting the 1st preliminary objection has no relevance to the applicant application as the applicant's application is not an appeal or revision with aim of challenging the ruling or order of the trial court in Civil Case No. 02 of 2022.

The applicant added that the 1st preliminary objection has no legal merits and the same deserves to be overruled, as the respondent's submission is based on matter which is not in the applicant's application and since the preliminary objection is needed to be on pure point of law, the applicant then referred me to the case of **Mukisa Biscuit Manufacturing Company Ltd**, where it was held that;

"... a preliminary objection consists of a point of law which if has been pleaded; or which arises by clear implication out of pleadings, and which if urged a preliminary point of law may dispose of the

suit.....and further A preliminary objection is in the nature of what used to be a demurrer it raises a pure point of law which is argued on that all the facts pleaded by other side are correct."

The applicant then submitted even more that if one goes through the 1st preliminary objection, the respondent has submitted on the matter which is not in the applicant's application and therefore the applicant prays for this Honorable court to overrule the said 1st preliminary objection.

Submitting against the 2nd preliminary objection, the applicant conceded that, it is correct that paragraph 6(a), 6(b), 6(c), 7(a), 7(b) and 7(c) was not verified accordingly. That, despite the non-verification of the said paragraph in the affidavit, it does not warrant the whole application to be incompetent, but that, where there is offensive paragraph, such paragraph may be expunged so as the remaining paragraph to assist in determination of the application on merits. The applicant obtained this position from the case of **Jamal S. Mkumba & Another vs Attorney General**, Civil Application No. 240/01/2019, Court of Appeal of Tanzania at Dar es Salaam, (*Reported on Tanzlii*) at page 9, paragraph 2, 3 and 4 where the Court held that:

"Where the offensive paragraphs are inconsequential, they can be expunged leaving the substantive parts of

the affidavit remaining intact so that the court can proceed to act on it"

The applicant then added further that, the position taken in the case referred by the respondent in his submission, has been affected by modification of the precedent as the defect in verification clause can be cured by allowing the amendment of the affidavit so as to allow the application to be determined on merits. Again, the applicant stated that this position was clearly stated in the case of ***Jamal S. Mkumba & Another Vs. Attorney General (supra) from page 10 to 16***, where at the end the court allowed the applicant to make amendment of the affidavit so as to file the affidavit with proper verification clause.

The applicant referred me more on the same position as seen in the case of ***Sanyo Service Station Ltd vs BP Tanzania Ltd (Now Puma Energy (T) Ltd)***, Civil Application No. 185/17 of 2018, Court of Appeal of Tanzania, at Dar es Salaam (Reported on Tanzlii), at page 7 to 11; where the court, decided that the deponent be allowed to amend the affidavit so as to cure the defects as to numbering and insert a proper verification clause.

The applicant's conclusion on this ground is that the respondent objection be overruled and proceed to allow the applicant to file the amended affidavit as the respondent will not be prejudiced by an order of amendment

of affidavit so as to allow the applicant to insert a proper verification and parties to be heard on merits.

It is the applicant's submission on 2nd preliminary objection, paragraph (b) that, the said objection has no legal merits as what the law requires under section 8 of the Notaries Public and Commissioners for Oaths Act CAP 12 R.E 2019 is as here under reproduced;

"Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall insert his name and state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made"

The applicant submitted that when one goes through the applicant's affidavit the jurat of attestation has complied to the provision of the law as the same was signed by the commissioner for oath whose **Roll Number is 4878**, and at the **E-Wakili** there is no any other with the Roll Number apart from **Mr. Samuel Lawrence Silanda**. The applicant referred me to the court of appeal case in **Oswald Philip Silwamba vs Tanzania Zambia Railway Authority**, Civil Application No. 70 of 2016, at Dar es Salaam (Reported of Tanzlii) at page 4 to 6 the court had discussed similar position and at the end the preliminary objection was dismissed as the jurat of attestation had

complied with the requirement of section 8 (supra). And therefore, the applicant prays for this preliminary objection be dismissed and the cost be in cause.

Submitting against the 3rd preliminary objection, the applicant submitted that this application is not a revision application as it can be observed even through the enabling provision of the law.

It is the applicant's submission that the case laws relied upon by the respondent in their submission in supporting their objection, to be precise, the cases **Hyasintha Malisa Vs John Malisa** and **Mohamed Rabii Honde vs Hamida Ismail Honde And 11 Others**, both being Court of Appeal cases, in which the decisions in both cases were dealing with revision and not the application such as this matter at hand.

Further to that, the applicant added that the procedure in the court of Appeal of Tanzania is different to other court since every matter are being Guided by the Court of appeal Rules to which the said rules are not applicable in the High Court of Tanzania. And therefore, the said case law was a good case law if the present application was a revision application, but the applicant insists that this application is not a revision application.

Nevertheless, it was the applicant's submission that if this court finds that the proceedings of the lower court are vital in this application, then the

applicant will pray for this Court to allow her to amend her application so as to include the missing proceeding or proceedings. The applicant again referred me to the case of which had a similar position as submitted, that in the case of **Juma Marumbo, Maulid Fundi, Aisha Sariko, Asha Muhagama & 99 Others vs Regional Commissioner, Dar Es Salaam Region & 2 Others**, Civil Appeal No. 73 Of 2016, At Dar Es Salaam (Reported on Tanzlii), At Page 3. Where the court allowed the appellant to file the supplementary record based on the overriding principle.

The applicant proceeded further that, under the Civil procedure Code Cap 33 R:E 2019, the overriding principle is covered under section 3A (1) and (2); 3B (1) (a), (b) and (c), (2) and (3), in which if the need arises that the proceeding was necessary to be annexed to the application, then the applicant be allowed based on 3B (1) (c) to file supplementary record so as to include such proceeding for the matter to be determined on merits. As submitted, the applicant prays that the respondent's 3rd preliminary objection be overruled and the cost be in the cause pending determination of the applicant's application on merit.

In rejoinder, the respondent submitted that, on the **1st ground of preliminary objection**, the respondent reiterates what was submitted earlier in submission in chief, and further states that the applicant is beating around

the bush but the gist of the whole application before this court is to challenge decision of the trial court on preliminary objections delivered on 13/10/2022 which was interlocutory and not challengeable by the way the applicant tries to do.

The respondent added that, it doesn't matter whether it is revision/appeal or whatever the applicant wants to call it, but the fact that the main case is still on going at the District Court of Mpanda makes this present application untenable in law, further to that all what the counsel for the applicant submitted in that regard was also presented in the trial court but the points were overruled.

Adding further, the respondent submitted that the claim that the 1st limb of preliminary objection is not a point of law is unmerited, because the same is misleading, the fact that the orders handled by the trial court were interlocutory in nature is visible on the face of record by applying **nature of order test** and does not need a long-drawn process to discover the same, and that the case of **Mukisa Biscuits (Supra)** is distinguishable in that regard.

Coming to the **2nd limb of preliminary objection**, the Respondent reiterates what was submitted in submission in chief and further hold that for **defective verification clause**, her side does not join hands with the

applicant as she cited the case of **Jamal Mkumba (Supra)** where it was held that unverified clauses can be expunged and the main application be heard, but that could only be done if the expungement would leave the affidavit intact. The applicant submitted that, in this application if this court would expunge paragraph 6(a),6(b),6(c)7(a),7(b) and 7(c) would leave the affidavit in place incompetent to support the present application, hence the whole application would collapse because even the paragraphs being complained of illegalities 7(a),7(b) and 7(c) would be expunged.

The respondent submitted further that the case of **Jamal Mkumba [Supra]** cannot be applied in the present circumstances because of two reasons **firstly** the position of that case was that expungement of defective clauses will be allowed only if it leaves the affidavit intact (which is not the case here) because after expungement of the offensive paragraphs the whole affidavit will collapse a natural death, that the reason is simple because the whole application depends on those paragraphs, even the ruling which is complained of is attached on paragraph 6(c) as "**Annexure BA-3^M**" will be expunged, leaving the application without even the ruling which is complained off. That, **secondly**, the Court of Appeal of Tanzania has now moved from the position of the case of **Jamal Mkumba (Supra)** and the **current position** stated in the recent cases that affidavit cannot be amended, the

respondent urged this court to take judicial notice of the case of **The Registered Trustees of St. Anita Greenland Schools (T) vs Azanta Bank Limited**, Civil Application No.168/16 of 2020 ,CAT(Dar -Es- Salaam) (Unreported) available at tanzlii.org, that this case is a recent one which cements that defective affidavit cannot be amended.

The applicant added further that in another recent case which was decided on 25/7/2023 of **Jenga Said and 258 Others vs Blanket Manufacturer and 2 Others Civil Application No.668/01 /2021 CAT(T) DSM** (Reported at Tanzlii.Org), Court of Appeal of Tanzania found that the affidavit was incurably defective and that the court did not order any amendment instead the application was struck out as seen at page 6 of the ruling, further the court observed that because the affidavit was defective, means that the application was not supported by an affidavit which makes it incompetent. This situation is akin to the case at hand because the affidavit is defective means the application is not supported by an affidavit.

Submitting on the second sub- point on **defective jurat**, the respondent reiterates what was submitted in submission in chief and note that even the name mentioned by the applicant and roll number mentioned are of no use as the same are not reflected in his application **hence are new evidence defeating the meaning of preliminary objection**. That, what

the respondent urged this court to view was if **S.L. SILANDA** was a proper commissioner for oaths found in the Judiciary system (**E-wakili**) of commissioner for oaths and advocates, and in absence of such name, it cannot be safely concluded that the affidavit was sworn before a commissioner for oaths.

Coming to the **3rd ground of objection**, the respondent reiterates the previous position submitted that failure to attach the proceedings is fatal, the **prayer of the applicant to file amended application is not tenable** for being made in order to circumvent the preliminary objection raised as seen in the case of **Jamal Mkumba [Supra]** at page 14 which underscored that;

*"Accommodating the plea to remove some words in the verification clause especially after the respondent has raised the objection concerning it **will amount to pre-empting the PO raised to which we are not prepared to do**"*

[Emphasis Supplied]

The respondent proceeded further that, the case of Juma Marumbo (Supra) is also not applicable because the overriding objective cannot be allowed to be used where the complained off omission goes to the root of the case and cause injustice to the party like the complained off omissions. And

therefore, the respondent prays that this court be pleased to strike out the incompetent application with costs.

After keenly reading the submissions made by both sides for and against the Preliminary Objection, it is my fortified reasoning that the only determinant issue is ***whether the preliminary objection has merits before this court.***

Going through the grounds for objections as raised by the respondent herein, it is my fortified holding that the second ground of the preliminary objection suffices to reach a justifiable decision as far as the objections are concerned.

The particular objection as raised by the respondent reads as here under;

"That, the application is incompetent for being supported by a defective affidavit in the aspects;

a. The verification clause is defective"

It is undisputed that the verification clause is a very crucial part of an affidavit as it assists the Court to be aware of the statement of the facts which the deponent is able to prove, and if it contains some other information, the source from where the deponent derived the said other information.

The Court in **Director of Public Prosecution vs Dodoli Kapufi and Patson Tusalile**, Criminal Application No. 11 of 2008 (unreported) simply defined verification clause as that part of an affidavit which *"shows the facts the deponent asserts to be true of his own knowledge and those based on information or beliefs"*.

A similar definition was also given in **Paul Makaranga vs Republic**, Criminal Application No. 3 of 2010 (unreported). As to the rationale of verifying an affidavit, the Court in **Lisa E. Peter vs Al- Hushoom Investment**, Civil Application No. 147 of 2016 (unreported) quoted with approval the Indian case of **A.K.K. Nambiar vs Union of India (1970)** 35 CR 121 which explains the importance of a verification clause in affidavit as follows:

"The reason for verification of affidavits is to enable the court to find out which facts can be said to be proved on the affidavit evidence or rival parties' allegations may be true to information received from persons or allegation may be based on records. The importance of verification is to test the genuineness and authenticity of allegation and also to make the deponent responsible for allegations. In essence verification is required to enable the court to find out as to whether it will be safe to act

on such affidavit evidence. In the absence of proper verification clause, affidavits cannot be admitted as evidence."

Basing on the above cited cases, verification clause is one of the essential ingredients of any valid affidavit which must show the facts the deponent asserts to be true of his own knowledge and those based on information or beliefs. On further instance on the importance of a verification clause, the Court in **Anatol Peter Rwebangira** (supra) quoted the book in Civil Procedure by **C.K. Takwani 5th Edition** where it was stated at page 21:-

"Where an averment is not based on personal knowledge, the source of information should be clearly disclosed."

As the matter of fact, the applicant too conceded that the verification clause is defective and urged me to take the position which was applied in the case of **Jamal S. Mkumba** (supra) by allowing the applicant to amend the affidavit so that the application he filed to be determined on merits.

Accommodating the applicant's prayers especially after the respondent has raised the objection concerning the same, it will amount to pre-empting the PO raised to which I am not prepared to do. To that fact, I do agree with the respondent that the verification clause is defective. Basing on the above, what remained is the consequence.

Nevertheless, I have noted and appreciated the stance taken by the Court in various cases as outlined herein, and I have also noted that the Court in other cases in likewise situation where the verification clauses were found to be defective, allowed the applicant to amend it as submitted by the applicant herein. See: **DDL Invest International Limited vs Tanzania Harbours Authority & Two others**, Civil Application No. 8 of 2001 (unreported) wherein the Court has also observed that whether or not to allow a party to amend an affidavit with a defective verification is a matter in the discretion of the Court.

Much as I appreciate the stance taken in various cases as cited, it is the cherished legal principle that every case is to be decided on its own merits; that is, having regard to all the circumstances of each particular case. See: **Amos Kabota vs The Republic**, Criminal Application No. 24/11 of 2017 (unreported). On account of the facts presented to me and for the interest of justice, I think this is one of those cases which demands for substantive justice in its determination. But further to that, I am satisfied that the respondent will not be prejudiced by an order of amendment of the affidavit so as to accord a chance to the applicant to insert a proper verification clause according to law and parties be heard on merit.

In the circumstances, the Preliminary Objection raised succeeds only to the extent explained above. The applicant is therefore given 30 days from the date of this ruling within which to file an amended affidavit with a proper verification clause. Costs to be in the cause.

Dated and delivered at Sumbawanga this 25th day of September, 2023.



A handwritten signature in black ink, appearing to read "T. M. Mwenempazi".

T. M. MWENEMPAZI

JUDGE

ORIGINAL