

**IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA
CIVIL REFERENCE NO. 08 OF 2023**

(Originating from Bill of Costs No. 9 of 2022, High Court in Civil Appeal No. 17 of 2020)

FELICIAN MUHERE MGOYO APPLICANT

VERSUS

DAVID JOSEPH MLAY RESPONDENT

RULING

19th September & 04th October, 2023

M. L. KOMBA, J;

This is a ruling on a preliminary objection raised by the counsel for respondent with regard to the decision of Taxing Master in Bill of Costs No. 9 of 2022 requesting this court to examine the ruling of the Taxing Master (Hon. F. L. Moshi) in above mentioned Bill of Cost which was delivered on 16th February, 2023 for the purpose of satisfying itself as to the correctness, legality or propriety of the said ruling. Applicant chamber summon is accompanied by affidavit deponed by himself. Upon being served with chamber summons, as tradition, counsel for respondent filed counter affidavit therein raised a Preliminary Objection on point of law which pray to be heard on the date scheduled for hearing of Application that;

1. *That the third paragraph of the affidavit offends the rules that govern affidavits.*

When the matter was scheduled for hearing, applicant stood solo, fended for himself while the respondent was represented by Mr. Baraka Makowe, the learned Advocate. As the tradition of the court that Preliminary Objection should first be entertained as was in the case of **Khaji Abubakar Athumani vs. Daudi Lyakugile TA D.C Aluminium & Another**, Civil Appeal No. 86 of 2018, CAT at Mwanza, this court allowed counsel for the respondent to submit over the preliminary objection.

Mr. Makowe said he has an issue with the 3rd paragraph of affidavit by the applicant that according to Order XIX rule 3(1) of the Civil Procedure Code, Cap 33 R. E. 2019 (the CPC) the affidavit must have facts which deponent is able to prove. He said applicant is not able to prove contravention of Advocates Remuneration Order. So far as it cannot be proved therefore, it violates the stated provision of the law. He submitted further that if this court will eliminate the 3rd paragraph, the affidavit will be disturbed and the 3rd and 4th paragraphs were not included in verification clause. He said the verification was in para 1, 2, 5 and 6 paragraphs which are to the best of his knowledge.

Counsel expounded that, because the two paragraphs were not verified it is difficult for this court to know if is to the best of his knowledge, belief or what. For that matter he prays this court to test if the 3rd and 4th paragraph will be removed the remaining paragraphs will carry the message intended. Finally, he prays the affidavit and application to be struck out due to its defectiveness. He prayed for the costs too.

Affidavit is evidence so a person is allowed to state everything so that he can prove, that was the argument of the applicant when given a chance to respond. He submitted that what he knows is to state something which was not deponed is not allowed under the law. He said counsel for the respondent agreed with paragraphs 1, 2, 4, 5 and 6 as of the applicant's affidavit except paragraph 3 which he found to be important as he is allowed under the law to state what he believes to be wrong. He asked this court to read counter affidavit where respondent supports applicant's affidavit and pray the PO to be dismissed and the matter be heard on merit.

In rejoinder Mr. Makowe insisted that they objected paragraphs 3 and complained of the verification clause which is not proper.

I am called upon to determine if the preliminary objection has merit. I find the center issue is content of the affidavit which is supporting chamber application that is in contravention of Order XIX rule 3. The relevant provision reads;

'XIX Rule 3(1) Affidavit 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.' [Emphasis is mine]

The contested paragraph in the affidavit reads;

3. *That there are point of law to be determined by this honorable court as bill of costs No. 9/2022 at the High Court of Tanzania at Musoma,*
 - i. *Contravened order 55 (c) and (d) of the Advocates Remuneration Order, 2015.*
 - ii. *Contravened order 64 (1) of the Advocate Remuneration order, 2015.*

The provision of the CPC as cited demand deponent to be able to prove the content of affidavit. The applicant complained of the contravention of the law by the Taxing Master by mentioning specific order. I find thinking that he will never prove that fact is pre judgment. However, for it to form part of the affidavit must be verified. Mr. Makowe submitted that paragraph 3

and 4 were not verified. The applicant had nothing to explain over that allegation. The issue now is whether verification of affidavit is import.

'Order VI Rule 15(2) the person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verified upon information received and believed to be true.'

It is therefore a settled principle of law that, a verification clause in an affidavit should clearly state which paragraphs contains facts which are true to the deponent's own knowledge and which ones are true to his information and belief.

Visiting verification clause of the applicant affidavit I find the following;

VERIFICATION:

*'I, **FELICIAN MUHERE MUGOYO** do hereby verify that what have been stated above in paragraphs 1,2,5 and 6 is true to be best of my knowledge.'*

From the excerpt it shown that paragraphs 3 and 4 were not verified. The law necessitated verification clause by the deponent by specifying facts according to the knowledge of deponent and information which he believe to be true. Without specifying the respective paragraphs, then the verification clause is rendered defective and automatically the whole

affidavit is defective. In the case at hand, deponent did not verify the content of paragraphs 3 and 4. This is contrary to the law.

This position has been vehemently elaborated in the case of **Anatol Peter Rwebangira vs. The Principal Secretary, Ministry of Defence and National Service vs. The Hon Attorney General**, Civil Application No. 548/04 of 2018 CAT where the Court held that it is against the rule governing the modus of a verification clause in affidavit and without specification, neither the Court nor the respondents can safely gauge as to which of the deponed facts are based on applicant's own knowledge and which ones are based on his belief. The same was so held in the case of **Prosper Ndyamukama vs. The Board of Trustees of TANAPA and TANAPA, Lab. Div., MRGR**, Revision No. 04 of 2014 reported as case No. 28 LCCD 2015 [Part I].

Furthermore, in In the case of **Yohana Nasambuda Ndaki vs. Caspian Ltd**, Lab. Div.,[Shy], Revision No. 202 of 2015, reported as case No. 94 LCCD 2015 (Part I) Mipawa , J held that:-

*'On the source of information in the verification clause is upheld from its roots. **The deponent ought to have shown or stated the source of the information clearly, what are facts from his own knowledge and what ate facts from his beliefs as per***

law requirement, Order XIX Rule 3(1) of CPC. Failure of that above makes the affidavit defective and cannot be dealt unto by the court. [Emphasis is mine]

In the circumstances of the matter at hand, I agree with the Counsel for the respondent that the verification clause in the applicant's affidavit is defective. It is not possible for this Court nor the respondent to decode paragraphs 3 and 4 of the deponed facts are based on the deponent's own knowledge or his information and belief.

The remedy for the defective paragraphs of affidavit is to be expunged. When I expunge paragraphs 3 and 4 which were not verified the remaining will not have any value in this reference. Basing on cited authorities, the only remedy is to strike out the application for being incompetently filed. I thus sustain the preliminary objection raised and strike out the application accordingly. Applicant is at liberty to file a proper application within fourteen (14) days from the date of receipt of this Order.

Due to the nature of the matter, I did this without costs.

DATED at **TARIME** this 4th day of October, 2023.



NK
M. L. KOMBA
Judge