

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION NO.25 OF 2023

(Arising from the Commission for Mediation and Arbitration (CMA) for Mwanza in

CMA/MZA/NYAM/23/2023)

DANIEL REUBEN MALIMI.....APPLICANT

VERSUS

GRAMBA CO. LTD.....RESPONDENT

RULING

20th March & 2nd April, 2024

KAMANA, J.

When the application was set for a hearing, the applicant raised a preliminary objection that:

1. The counter-affidavit is bad in law for being tainted with false/untruth statements and hearsay.
2. The counter-affidavit offends the Labour Court Rules, 2007 (GN No. 106 of 2017).
3. The respondent's notice of opposition is incompetent for being supported by the defective counter-affidavit.

As the practice demands, the parties were invited to argue the preliminary objection. Mr. Marco Mrikaria represented the applicant as a

personal representative. The respondent had the services of Mr. Venance Kibulika, learned Counsel. The preliminary objection, by order of this Court, was argued orally whereby Mr. Mrikaria abandoned the second limb of the preliminary objection.

On the first limb of the preliminary objection, Mr. Mrikaria contended that the affidavit supporting the application as deponed by Mr. Stanslaus Teophil Mmbaga is defective as it contains false statements. He amplified that in paragraph 1 of the counter-affidavit, the affiant stated to have been the principal officer of the respondent who conducted the matter at the CMA which in his opinion is untrue. He contended further that the principal officer of the respondent who conducted the matter at the CMA is Mr. David Kyamba. By stating the opposite in paragraph 1 of the affidavit, Mr. Mrikaria held that the affidavit is not qualified to be an affidavit for containing untruths. He relied on the case of **Ignazio Messina v. Willow Investments SPRL**, Civil Application No. 21 of 2001 where the Court of Appeal held:

'An affidavit which is tainted with untruth is no affidavit at all and cannot be relied upon to support an application.

False evidence cannot be acted upon to resolve any issue.'

On the third limb of preliminary objection, Mr. Mrikaria contended that the respondent's notice of opposition is incompetent for being

supported by a defective counter affidavit. He augmented his argument by averring that since the counter affidavit contains a false statement, a notice of opposition is also affected by such an affidavit.

He went on to argue that the affiant of the counter-affidavit had verified paragraphs 8(1), (ii), (iii), (iv), (v) and (vi) despite the fact that the counter-affidavit does not contain such paragraphs. On that account, he opined that the counter affidavit is defective.

Based on that, Mr. Mrikaria urged this Court to strike out the counter-affidavit. He further prayed that the matter be heard ex-parte as the respondent has failed to file a counter-affidavit as per the requirements of the law.

Responding, Mr. Kibulika prefaced his arguments by contending that the preliminary objection is devoid of merits. He asserted further that for a preliminary objection to stand, the same must be purely on the point of law. In this regard, he invited the Court to consider the celebrated case of **Mukisa Biscuits Manufacturing Company Limited v. West Ends Distributors Ltd** [1969] EA. 696.

Concerning the first limb of the preliminary objection, Mr. Kibulika contended that the respondent is a company with principal officers, and in that case, any principal officer can sign the pleadings on behalf of the company. He augmented that the fact that in CMA's proceedings, the

principal officer of the respondent was Mr. Kyamba does not make Mr. Mmbaga unaware of the matter in the CMA. He contended further that in such circumstances, whether Mr. Mmbaga knows the case or otherwise is a matter of evidence that does not form a point of law.

On the third limb, Mr. Kibulika contended that the applicant has failed to state provisions of the law that have been infringed in the verification clause. He insisted that the verification clause is not defective to warrant striking out of the counter-affidavit. He associated the anomaly in the verification clause with typing errors.

He summed up his argument by urging the Court to dismiss the preliminary objection.

Having heard the competing arguments, the issue for my determination is whether the preliminary objection holds water.

Trite law is that a preliminary objection must be founded on the point of law. When the preliminary objection is premised on the point of law and facts or facts, that preliminary objection does not fit within the meaning of the preliminary objection. This principle was well accentuated in the case of **Mukisa Biscuits Manufacturing Ltd** (Supra) in which the defunct East African Court of Appeal had this to state:

*'.....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 the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....'***

(Emphasis added)

This position was adopted in our jurisdiction in various cases including the case of **Karata Ernest and Others v. Attorney General**, Civil Revision No. 10 of 2010-CAT (Unreported). In the said case, the Court of Appeal, apart from approving the principle as accentuated by the defunct Court of Appeal in the case of **Mukisa Biscuits Manufacturing Limited** (Supra) stated:

'.....it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arises by dear implication out of the pleadings. Obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions

of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law.'

That being the position, I asked myself whether the contention that the affidavit contains untruth forms a point of law. In my opinion, the answer is negative. To ascertain whether the statement that Mr. Mmbaga conducted the matter at the CMA is true or otherwise, delving into the facts and evidence is inevitable. It would be absurd for this Court to conclude the truthfulness or otherwise of the affidavit at this stage without examining the facts and the evidence when determining the application on merits. **See: Ado Shaibu v. Hon. John Pombe Joseph Magufuli (The President of the United Republic of Tanzania) and Others**, Misc. Civil Cause No. 29 of 2018 (Unreported); and **Alex Dotto Massaba v. The Attorney General and Others**, Misc. Civil Cause No. 30 of 2019. The first limb of preliminary objection is overruled.

Coming to the third limb of the preliminary objection, as a matter of principle, the verification clause is not inconsequential. It is there to enable the Court to ascertain the authenticity of statements stated in the affidavit. When the verification clause is defective, the Court is precluded from relying on the affidavit. This position was pronounced by the Indian Supreme Court in the case of **A. K. K. Nambiar v. Union of India & Anr**, 1970 AIR 652. In the said case, the Supreme Court had this to state:

'The importance of verification is to test the genuineness and authenticity of allegations 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 present case, the affidavits of all the parties suffer from the mischief of lack of proper verification with the result that the affidavits should not be admissible in evidence.'

The position taken by the Indian Court was reverberated by the Court of Appeal in several cases including the case of **Lisa E. Peter V. Al - Hushoom Investment**, Civil Application No. 147 of 2016.

I scanned the verification clause of the counter-affidavit. As rightly argued by Mr. Mrikaria the verification clause verified paragraphs 8(i), (ii), (iii), (iv), (v) and (vi) which are not reflected in the counter-affidavit. Paragraph 8 of the counter-affidavit was not verified. This was not opposed by Mr. Kibulika though he argued that it was caused by typing errors.

It is my considered opinion that by verifying non-existing paragraphs and leaving existing paragraph unverified, the verification clause is defective. This is due to the fact that the unverified paragraph's genuineness and authenticity remain unknown to the Court.

Having concluded that, the question that arises is the effect of the defective affidavit in the circumstances of this case. Before I delve into that, I wish to restate the elementary principle that the Court has discretionary powers to allow a party whose affidavit is defective to amend such an affidavit. Such discretionary powers are exercisable regardless of whether there is a preliminary objection concerning the defectiveness. This principle was accentuated by the Court of Appeal in the case of **Sanyou Service Station Ltd v. BP Tanzania Ltd (now Puma Energy T. Ltd)**, Civil Application No. 185/17 of 2018 where it was held:

'I wish to emphasize that from the foregoing, it can safely be concluded that the Court's powers to grant leave to a deponent to amend a defective affidavit, are discretionary and wide enough to cover a situation where a point of preliminary objection has been raised and even where the affidavit has no verification clause.'

Fortified by that position, it is my holding that though the counter-affidavit is defective, such defectiveness does not warrant its striking out. Given that, the respondent is given seven days to amend the verification clause and file her counter-affidavit. It is so ordered.

DATED at **MWANZA** this 2nd day of April, 2024.



KS KAMANA

JUDGE