

IN THE HIGH COURT OF TANZANIA

DODOMA SUB – REGISTRY

AT DODOMA

MISCELLANEOUS CIVIL APPLICATION NO. 48 OF 2023

EX. B.6954 WDR SAID MUSTAPHA ISSA APPLICANT

VERSUS

COMMISSIONER GENERAL OF PRISONS1ST RESPONDENT

**ATTORNEY GENERAL OF
THE UNITED REPUBLIC OF TANZANIA.....2ND RESPONDENT**

RULING

12th & 29th April, 2024

MUSOKWA, J.

This ruling is in respect of preliminary objections raised by the respondents against an application preferred by the applicant, for extension of time to file an application for leave to apply for orders of certiorari against the 1st respondent. Before the date scheduled for hearing of the application, the respondents filed a notice of preliminary objection containing the following points of law: -

- 1. That the application is incompetent for being supported by a defective affidavit containing extraneous matters.*
- 2. That the application is incompetent for being supported by a defective affidavit which is not supported by an affidavit of another person mentioned in the said affidavit.*

The affidavit in support of the application, counter-affidavit of the 1st and 2nd respondents, and other record provide the background to the matter as narrated herein under: -

The applicant was an employee of the Ministry for Home Affairs, under the Commissioner General of Prisons, the 1st respondent herein. Being employed as a prison officer with the rank of WDR, the applicant who was stationed at Isanga Prison in Dodoma region, held this post for a period of six (6) years, from 2011 to 2017. The applicant asserts unlawful termination which was allegedly done on 28th July, 2017. Upon preferring an appeal to the 1st respondent, the applicant further alleges that he received no response thereto despite several reminders. In the alternative, the applicant filed a complaint to the Minister of Home Affairs on failure by the appellate authority, the 1st respondent, to neither acknowledge receipt of; nor take any measures in determining the said appeal.

Finally, it is stated that after the lapse of approximately four (4) years since the alleged unlawful termination, he received a response from the 1st respondent contending his grievances and asserting that the termination was lawful. The remedy that the applicant now seeks is judicial review, preceded by an application for extension of time to apply

for leave. However, the required statutory time within which to file an application for leave to apply for judicial review is six (6) months from the date the cause of action arose. The applicant, being time-barred since 15th January 2022, has preferred this instant application.

As indicated earlier, the competency of this application was challenged by the respondents through a notice of preliminary objection. Submitting in support of the 1st point of preliminary objection, Mr. Omary Ngatanda, state attorney representing the 1st and 2nd respondents, stated that the affidavit in support of the application before this court is defective as it contains extraneous matters by way of arguments and conclusions. Mr. Ngatanda, referred to paragraph 5 of the affidavit, whereby the applicant depones that: -

"...after the said dismissal on the 1st August 2017....no full right to be heard was afforded to me such as to be given reasonable time to write my defense towards the charges against me and not being given a chance to question witnesses."

The state attorney asserted that the aforementioned statement amounts to an argument and does not qualify as a mere fact. Further, the state attorney prayed the court to refer to paragraph 10 of the affidavit. The applicant depones that: -

"...even after going through such answers to my appeal it generally stated that such decision to dismiss me was correct without elaborating as to why the same was correct. Nevertheless, such answers did not respond anything as far as my right to be heard before such punishment was imposed on me, of which I still maintain that I was denied the same. Hence, such decision to dismiss me was procured illegally."

Mr. Ngatanda proceeded to submit that such statements are arguments. Further that the last sentence in that paragraph is a conclusion, to wit; *"Hence, such decision to dismiss me was procured illegally"*. In addition, the state attorney prayed the court to refer to paragraph 13, the last sentence, whereby the deponent states that *"...though such point was raised and determined by the court suo motu"*. The counsel for the respondent contended that the above statement is an argument. He further pointed out another anomaly under paragraph 15 of the affidavit which provides that: -

*"...hence when he got such answers he was already with empty pocket while he had a family to take care, thus, he started to work as an assisting mason in the building activities as a sole means of gaining money so as to hire an advocate as well to care for himself and his family. This is owing to the experience he experienced from the time of termination until receiving such appeals, **thus, having an advocate to assist him was very important**". [emphasis added]*

The aforementioned paragraph, Mr. Ngatanda argued, contains arguments as well as conclusions. Finally, he referred to paragraph 18 of the affidavit at the last sentence. The deponent avers that "*...if the same is not granted it will be detrimental to me and to my family*". The learned state attorney submitted that the aforementioned statement amounts to both an argument and a conclusion.

Mr. Ngatanda submitted that Order 19 R. 3 (1) and (2) of the Civil Procedure Code, Cap. 33 R.E 2019 (CPC), provides that an affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove. The implication of this provision is that an affidavit shall not contain extraneous matters which the deponent is unable to prove.

In respect to the 2nd point of the preliminary objection, the state attorney submitted that the application before this court is incompetent for being supported by an affidavit which mentions another person; while the affidavit of the mentioned person has not been availed before the court.

Referring to paragraph 14 and 17 of the applicant's affidavit, the deponent mentioned an advocate namely Erick Christopher, who provided him with legal assistance. However, despite mentioning the said advocate, there is no affidavit of the said advocate before this court. The position of the law as provided in various decisions of this court and the Court of Appeal of

Tanzania (CAT), is to the effect that if an affidavit mentions another person, that affidavit of such person must form part of the application. In support of this legal position, Mr. Ngatanda cited the case of **Joram Biton Sanga vs. District Executive Director of Momba, and Others, Misc. Civil Cause No. 02 of 2022**. In this case, this court refers to the CAT case of **Elihaki Giliad Mbwambo vs. Mary Mchome Mbwambo & another**, Misc. Civil Application No. 449 of 2019. In line with the position above, the learned state attorney submitted that the affidavit is defective for failure to contain the affidavit of the learned counsel, Erick Christopher.

For the reasons stated herein, Mr. Ngatanda submitted that since the affidavit is defective by containing extraneous matters; including the omission of the affidavit of Advocate Erick Christopher; he prayed the court to declare the application to be incompetent and accordingly order the application be struck out with costs.

Mr. Erick Christopher, learned counsel representing the applicant, commenced his reply by addressing the 1st point of the preliminary objection to the effect that; the affidavit is defective for containing extraneous matters. In this regard, he referred to paragraph 5 of the affidavit. Mr. Christopher adamantly disputed the argument advanced by

Mr. Ngatanda, state attorney, that the said statement is deemed to be an argument. The learned counsel for the applicant asserted that the statement, in essence, is a fact.

Mr. Christopher proceeding further, concurred with the observation made by the learned state attorney that paragraph 10 of the affidavit contains arguments and conclusions. The counsel for the applicant also admitted that the last sentence of paragraph 13 that "*such point was raised and determined by the court suo motu*" is indeed an argument.

Proceeding to paragraph 15 of the affidavit, the counsel admitted that the paragraph contains statements that amount to arguments and conclusions. The same applies to paragraph 18 of the affidavit of the applicant.

Mr. Christopher conceded that evidently, the affidavit contains extraneous matters. However, it was his submission that the remedy, in such circumstances, is to expunge such extraneous matters from the impugned affidavit. Further, he argued that the disputed paragraphs each contain a number of sentences apart from the disputed ones. In this regard, he prayed that the court should expunge only the sentences containing extraneous matters from the given paragraphs. Thereafter, determination

of the matter should proceed on the basis of the remaining statements or paragraphs in the affidavit that are non-contentious.

On the 2nd point of the preliminary objection, Mr. Christopher referred to paragraph 14 of the affidavit, admitting thereto that while his name is mentioned therein, the affidavit in support thereof was not duly filed in court. However, in the case of **Joram Biton** (supra) which was preferred by learned counsel for the respondent, the remedy provided is to expunge the paragraphs which contain statements that are hearsay. Conclusively, he prayed the court to salvage the paragraphs that are undisputed and proceed with the hearing of the application on merits.

Mr. Ngatanda, appreciating the fact that the counsel for the applicant had conceded to most of the issues that had been raised by the respondent, proceeded to adopt his submission in chief. Regarding the way forward, Mr. Ngatanda submitted that the prayer by the applicant to expunge the erroneous statements will not serve the intended purpose and the application will crumble. This is due to the fact that the remaining paragraphs will not, among other things, provide facts which account for each day of delay, being one of the legal requirements for applications relating to extension of time.

For reasons stated herein, the state attorney reiterated his prayer that the application should be struck out in its entirety with costs.

The issue for determination by this court is whether or not the contentious paragraphs are inconsequential to the application. To start with, the law on what the affidavit should contain is well settled. For instance, Order 19 Rule 3(1) and (2) of the CPC provides that: -

*“(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.***

(2) The costs of every affidavit which unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall (unless the court otherwise directs) be paid by the party filing the same”. [emphasis added]

In the case of **Uganda vs Commissioner of Prison, Exparte Matovu**

[1966]1 EA 514, it was held as follows: -

*"As a general rule of practice and **procedure an affidavit for use in court being a substitute of oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of his own knowledge or from information which he believes to be true” [emphasis added]***

Similarly, it is a general principle that when an affidavit mentions another person, this amounts to hearsay unless that other person swears an

affidavit in that regard. The CAT case of **Sabena Technics Dar Limited vs Michael J. Luwuzi, Civil Application No. 451/18 of 2020** deliberated the said principle and it was partly held that

"...an affidavit which mentions another person is hearsay unless that other person swears as well".

Based on the legal principles indicated above, the affidavit in support of the application suffers a number of anomalies as rightly submitted by the respondents and readily conceded by the applicant. In particular, paragraphs 5,10,13,15 and 18, among others of the applicant's affidavit contains unnecessary arguments and conclusions. In addition, paragraphs 14 and 17 of the applicant's affidavit mention the advocate namely Erick Christopher, who provided him with legal assistance but Erick Christopher did not swear an affidavit in that respect. This amounts to hearsay as held by the CAT in the case of **Sabena Technics Dar Limited (supra)**.

Notably, it is an established principle of law that where the offensive paragraphs of the applicant's affidavit are inconsequential, they can be merely expunged leaving the substantive parts of the affidavit remaining intact to support the application thereof. In the CAT case of **Mantrac Tanzania Limited vs Goodwill Ceramics Tanzania Limited Civil Appeal No. 269 of 2020, it was held that: -**

*"We say so because it is settled law that **where the offensive paragraphs of the affidavit are inconsequential**, they can be expunged leaving the substantive parts of the affidavit remaining intact".
[emphasis added]*

Coming to the case at hand and the sole issue as to whether or not the contentious paragraphs are inconsequential to the application; I have carefully reviewed the contentious paragraphs in question as well as the applicant's affidavit as a whole and found that the contentious paragraphs contain fundamental and substantial contents relating to the application. Therefore, if the contentious paragraphs are merely expunged, it will render the remaining affidavit inconsequential, as such the application will have no limbs to stand on. For that reason, the applicant's prayer to expunge the offensive paragraphs is declined.

Consequently, the preliminary objections are meritorious and are hereby sustained. Accordingly, the entire application is struck out with costs for being incompetent.

It is so ordered.

Right of appeal is explained.

DATED at DODOMA this 29th day of April, 2024.



I.D. Musokwa
I.D. MUSOKWA
JUDGE

Ruling delivered in the presence of Mr. Erick Christopher, learned counsel for the applicant; and in the presence of Ms. Kumbukeni Kondo, state attorney, representing the 1st and 2nd respondents.



A handwritten signature in black ink, appearing to read "I.D. Musokwa".

I.D. MUSOKWA
JUDGE

