

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**DAR ES SALAAM DISTRICT REGISTRY**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 25793 OF 2023**

**JOHN MTEI.....APPLICANT**

**VERSUS**

**IBRAHIM MARIJANI GAMA..... RESPONDENT**

**RULING**

*Date of last Order: 12<sup>th</sup> February 2024*

*Dat of Ruling: 16<sup>th</sup> February 2024*

**MTEMBWA, J.:**

When this matter was called up for necessary orders on 6<sup>th</sup> February 2024, **Mr. Samson Mbamba**, the learned counsel, appeared for the Applicant while **Mr. Willium Anthon Changoma**, the learned counsel, appeared for the Respondent. When prompted, Mr. Mbamba, orally, raised a preliminary objection to the effect that the Counter Affidavit filed by the Respondent is incurably defective for inclusion of legal matters. He continued to note that, in the Counter Affidavit, the Respondent raised preliminary objections contrary the

salutary principles enunciated in the everlasting decision of ***Uganda Vs. Commissioner of Prisons Exparte Matovu (1966) EA 514***

Placing hard, Mr. Mbamba cited the case of ***Abrogast C. Warioba Vs. National Insurance Cooperation Tanzania Limited & Another, Civil Application, No. 24 of 2011, Court of Appeal at Dar es Salaam***, where it was observed that affidavits should include facts and not matters of law or legal arguments. He lastly implored this Court to sustain the objection and struck out the Counter Affidavit.

Mr. Changoma, who seemed to have been taken by surprised, resisted the objection and submitted further that the learned counsel for the Applicant very unfortunate, did not cite the law which seems to have been contravened. He insisted that the filed Counter Affidavit does not include matters of law as alluded by Mr. Mbamba. In the course, he made a U-turn and observed that, to him, like what has been done when filing Written Statement of Defense, the combination of the preliminary objections and the Counter affidavit in the same document has no problem at all. He beseeched this Court to overrule the objection.

In his brief rejoinder Mr. Mbamba submitted that it is a trite law that affidavit should not include matters of law because the same is the substitute of the evidence unlike the Written Statement of Defense. He insisted that the Counter Affidavit is incurably defective.

I had an opportunity to ponder the Counter affidavit by the Respondent filed on 20<sup>th</sup> December 2023 and noted that the same has two headlines. The first part (fore part) is headed "**Notice of Preliminary Objections**" under which the four preliminary objections were analyzed. The second part is headed "**Counter Affidavit**" under which the Respondent deponed his facts. It is for this reason Mr. Mbamba raised the objection that the alleged Counter Affidavit is incurably defective.

In Tanzania, the law is now settled regarding Affidavits. This area, as correctly put clear by Hon. Shahidi, J in *Dawasco Vs. Rombo Green View Investment LTD, High Court Dar es Salaam, Civil Appeal No. 183 of 2006*, is no longer a Virgin land. There is a plethora of authorities to refer for guidance. *Order XIX rule 3 of the Civil Procedure Code* provides that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove. In this regard, only facts are allowed in Affidavits. Matters of

law, evidence, legal conclusion, arguments are not allowed in the Affidavits. In ***Uganda Vs. Commissioner of Prisons Exparte Matovu (1966) EA 514*** the Court noted 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 circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true, **such an affidavit must not contain an extraneous matters by way of objection or prayer or legal argument or conclusion.***

*(Emphasis supplied)*

To cement the obvious, the Affidavit filed by the Respondent is defective for inclusion of legal matters. The question would then be whether the whole document should be struck out for having offensive parts. In ***Phantom Modern Transport (1985) Limited Versus D.T. Dobie (Tanzania) Limited, Civil Reference No. 19 of 2001***, (unreported) the court accepted the position in **Matove** and further proceeded to hold that an affidavit which violates those conditions should be struck out. However, this decision also is an authority to the position that;

*Where the defect is inconsequential, those paragraphs can be expunged or overlooked leaving the substantial parts of it*

*intact so that the court can proceed to act on it. If however substantial part of an affidavit is defective, it cannot be amended in the sense of striking off the offensive parts and substituting thereof correct averments in the same affidavit.*

Guided by the above position of my brethren, in my conviction, I will only strike out the first part headed **"Notice of preliminary objection"** and spare the second part headed **"Counter Affidavit"**. In other words, the Counter Affidavit is maintained while striking out the Notice of preliminary objection. To that end, it is as good as the Notice of preliminary objection has never been filed. However, the same can be filed at anytime if the Respondent so wishes.

In the result, the preliminary objection raised by the Applicant is sustained to that extent. The part headed "Notice of Preliminary Objection" is hereby struck out. The rest of the document headed "Counter Affidavit" is hereby maintained. There will be no order as to costs.

I order accordingly.

**DATED at DAR ES SALAAM** this 16<sup>th</sup> February 2024.



A stylized blue ink signature of H.S. Mtembwa, consisting of a large 'S' and 'M' intertwined.

**H.S. MTEMBWA**

**JUDGE**