

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM SUB-REGISTRY
AT DAR ES SALAAM**

MISCELLANEOUS CIVIL APPLICATION NO. 2028 OF 2024

(Originating from Civil Case No. 47 of 2022 Before Hon. Mgonya. J. [as she then was])

KILIMANJARO TRUCK COMPANY LIMITED 1ST APPLICANT
ROWLAND SAWAYA 2ND APPLICANT

VERSUS

LEONARD PAUL KISENHA 1ST RESPONDENT
MJAHID MOHAMED 2ND RESPONDENT

RULING

Date of Last Order: 14/05/2024

Date of Ruling: 12/06/2024

NGUNYALE, J.

The Applicants herein moved this court by way of chamber summons supported by affidavits sworn by the applicants together with their advocate, praying for orders of extension of time to institute an application to set aside an ex-parte judgement and decree given in Civil Case No. 47 of 2022 dated 20th December, 2022. The application is brought under section sections 14(1) of the **Law of Limitation Act**, Cap 89 R.E 2019.

Before the application could be heard on merit the 1st respondent filed preliminary points of objection to wit:

- 1. This Honourable Court lacks the prerequisite jurisdiction to entertain this Application, as it raises matters over which this Court is functus officio.*
- 2. The Affidavits in support of the Application are defective for being argumentative and containing extraneous, false, and conclusory matters, particularly in paragraph 10 and 11 of the affidavit of Rose Rowland Sawaya, paragraphs 10, 13, 14, 19, and 20 of Rowland Sawaya, and paragraphs 14, 21, 22, 23(a)-(h), 24, 25, 26, 27,28, 29, 32, 33(a)-(h), 34, and 35 of Michael Joachim Ngalo.*
- 3. The Chamber Summons is legally flawed for being authored and signed by the Counsel for the Applicants and the Honourable Registrar on inconsistent dates.*
- 4. The matter is incompetent before you for being filed in a non-existent registry, which contravenes Rule 2 of The High Court Registries (Amendment) Rules, 2024, GN No 61 of2024.*
- 5. The Affidavits and chamber summons are defective for failing to be signed and dated by the registry' officer upon filing.*
- 6. The Application is entirely defective and incompetent for moving this Court with an Affidavit and Chamber summons with inconsistent case registration numbers or year.*
- 7. The suit is legally flawed for contravening Rule 4(1) (a) of the Interpretation of Laws (Use of English Language in Courts) (Circumstances and Conditions) Rules, GN NO. 66 of 2022.*

In view of the above raised points of objection the Court is invited by the 1st respondent to sustain the objections and dismiss the application with costs.

The applicants were enjoying the service of Michael Ngalo, advocate while the 1st respondent was represented by Aloys Rugazia, advocate.

As it is a practice of the court, preliminary objections raised on points of law are disposed first, parties were heard by way of written submissions which were filed in compliance with scheduled order.

Submitting in support of the 1st raised objection Mr. Rugazia submitted that this court lacks jurisdiction to entertain the matter at hand for being functus officio. He referred to paragraph 10 of the affidavit of Rose Rowland Sawaya, and paragraphs 9 of Rowland Sawaya and submitted that both paragraphs raised the matter of being improperly joined as parties in Civil Case No.47 of 2022, a matter which was addressed and determined before Hon. Mgonya J, as she then was. He also referred to paragraphs 32, 33, 34 and 35 of the applicant affidavit, and submitted that the same contains matters which were already determined by the court and the applicant never appealed against the decision. He cited the case of **Bibi Kisosko Medard Vs. Minister for Land, Housing and Urban Development** [1983] T.L.R 250 and the case of **CRDB Bank PLC Vs. The Registered Trustees of Kagera Farmers Trust Fund and Others**, Civil Appeal No. 496 of 2021, CAT, at Dar es Salaam [Unreported] to support his view on functus officio.

Regarding the 2nd objection, he submitted that the affidavits supporting the application contain conclusive matters as the court had already determined the said matters reflected in the affidavits, he pointed to paragraphs 10 and 11 of the affidavit of Rose Rowland Sawaya, Paragraphs 10, 19, and 20 of Rowland Sawaya's affidavit also he made reference to paragraphs 23(a)-(h), 32, 33(a)-(h), 34, and 35 of Michael Joachim Ngalo. It is his averment that if an affidavit is defective then the application it supports is incompetent. He cited the cases of **Mustapha Raphael Vs. East African Gold Mines Ltd**, CAT - Civil Application No. 40 of 1998 and the case of **Phantom Modern Transport [1985] Limited vs. D.T. Dobie [Tanzania] Limited** Civil References No. 19 of 2001 and 3 of 2002 to substantiate his position.

On the 3rd point of objection he submitted that the chamber summons filed by the applicants is flawed as it is signed by the counsel, this contravenes the proper way that a chamber summons ought to be authenticated. The chamber summons is a court document which the law required it to be issued by the court, as such, if the same is signed by the counsel it implies that he is the one who issues summons and fixes the court dates for hearing of the suit and not the court itself, which is improper. He added that the same chamber summons has been

signed by the Counsel for the applicants and the Registrar on inconsistent dates, the counsel signed the same on December 2023, (without indicating the date) however the Registrar signed the same on the 15th March, 2023, to him this does not make sense.

On the 4th point of objection, he submitted that the applicants have filed an application addressing a non-existent registry which contravenes rule 2 of **The High Court Registries (Amendment) Rules, 2024**, GN No 61 of 2024, which states:

"The principal rules are amended by deleting the words "district registry" wherever they appear in the principal rules and substituting for them the word sub-registry"

Reverting to the 5th objection, he submitted the chambers summons and affidavit are defective for not being signed and dated by the registry officer. He added that the jurat of attestation of the affidavits in question are not dated which is contrary to the provision of Section 8 of the **Notary Public and Commissioners for Oaths Act**, CAP 12 R.E 2019. Also, in the verification clause there is no date of verification which contravenes the provisions of Order VI Rule 15 of **The Civil Procedure Code** Cap 33 R.E 2022. He prayed the court to struck out the application as the supporting affidavits are fatally defective.

On the 6th objection, he submitted that the application is defective for having an affidavit and chamber summons with inconsistent case registration numbers or year. He averred that it is basic knowledge that cases must bear case number which provide the year and the date it was filed. Since it is clear that the Affidavits have different filing dates and registration identity then the entire application is incompetent before the court.

On the last ground of objection, he submitted that the application is legally flawed for contravening rule 4(1) (a) of the **Interpretation of Laws (Use of English Language in Courts) (Circumstances and Conditions) Rules**, GN No. 66 of 2022 which requires a party to file in English and their corresponding translation in Kiswahili. Clearly the said application did not adhere to this rule, hence the same should be struck out with costs. Cited the case of **Ibrahimu Pius Kangasha and Gilbert G. Mahumba Vs Bera Karumba and Kigoma/ Ujiji Municipal Council**, HC Land Appeal No. 8 of 2022 to cement on his view.

In his rebuttal to the objections raised Mr. Ngalo regarding the 1st objection submitted that it is not a pure point of law as the 1st respondent misconceived, misplaced and crooked point of objection as

there is no any statutory provision or precedent which bars or restricts a party from disposing facts on a concluded matter. He added that the application at hand is for extension of time to apply for setting aside the ex- parte judgement. There has not been any other application for extension of such time in court between the parties hence the court cannot become functus officio.

On the 2nd objection he rebutted the submissions of Mr. Rugazia that the affidavits supporting the application are defective for containing extraneous matters, false and conclusions. It was his submission that there is no any conclusion stated in the paragraphs which the 1st respondent refereed. He added that the 1st respondent advocate did not do his homework well by (a) pointing out what are conclusive matters and how are those extraneous (b) explaining the mischief in form of prejudice or injustice occasioned to the respondent and (c) explaining the extent of the defect to enable the court to decide whether it is trivial or substantial, curable or incurable.

While replying on the 3rd objection, he submitted that every application to courts under the Civil Procedure Code is initiated by a chamber summons drawn by or for and on behalf of an applicant by his/her advocate and then filed in court on a certain date. The filing date

(whether digitally or otherwise) and its admission is the date on which an application considered to have been duly initiated. From there onwards, the same is retained by the court to be acted upon for further purposes regardless of when it was signed or addressed by the applicant or his/her advocate. He added that Mr. Rugazia did not explain what prejudice the 1st respondent suffered or any injustice occasioned to him. He cited the case of **National Bank of Commerce Limited versus Millo Construction Company Limited & Two Others**, Miscellaneous Commercial Application No. 102 of 2015 where this court while dealing with an objection like this held that:

"Does this impairment make the chamber summons incurably defective? I have serious doubts. In my considered view, a chamber summons which is at variance with the date of the affidavit cannot be rendered incurably defective to be struck out. The defect is, in my considered view curable by an amendment and no injustice will be occasioned if an amendment of the date is allowed. This is but trivia ailment to which the provision of article 107 A (2) (e) of the constitution most apply".

On the 4th objection, he rebutted the submission by Mr. Rugazia by stating that the raised objection is trivial because naming the court as "District" instead of "sub-Registry" does not amounts to no-existence of the Dar es Salaam High Court Registry. He added that assuming without admitting that the Dar es Salaam District Registry is non-existence what

has the 1st respondent's counsel cited prescribing any sanctions for that misdescription? The answer is obvious no and he could not because there are no any sanctions. The sanction the counsel suggests is that the application should not be recognized by the court because it is not properly addressed. Again, no provision or authority is cited for such suggestion by counsel.

On the 5th objection he submitted that this objection is obviously not a pure point of law but are requiring ascertainment of factual evidence whether the affidavits and/or the chamber summons are signed by the Registry Office or not does not and as such does not neither constitute pure point of law capable of disposing of the application summarily nor render the same incompetent, much as the copy of the chamber summons and affidavit served on the 1st respondent may not be the one endorsed by the registry office we think and hope that the ones on the record of the application before the high court are duly signed and/or endorsed. All these need to be verified and/or ascertained from the court's systems and the physical record of the application. In the alternative he submitted that even if there is an omission the same does not occasion any injustice or prejudice the 1st respondent in any way.

Replying on the 6th objection that the application is defective for bearing different case numbers and years. He submitted that registration of cases is an internal matter which is done by the court administratively so parties to such matters do not play any role in that process and cannot be blamed for errors or omissions committed by others. Again, there is no any law cited by the 1st respondent counsel that has been infringed by the applicant.

On the last objection that the application contravened rule (4) (I) (a) of the **Interpretation of Laws (Use of English Language hi Courts) (Circumstances and Conditions) Rules** GN 66 Of 2022. ("GN 66/2022"), submitted that the 1st respondent equally breached the cited rule by filing his pleadings in court in English language without corresponding in Swahili version. He insisted that filling correspondences in Swahili version is not mandatory in every case or matter in court and following the rule will lead to loss of substantive justice.

In the end, the applicants prayed the court to find the raised objections lacking merit and dismiss the same with costs.

Rejoining on the submissions made by Mr. Ngalo, the 1st respondent advocate Mr. Rugazia almost reiterated his submission in chief and

insisted that the raised objections are pure point of law hence they are not trivial as submitted by the applicant council.

Appreciating the rival submissions from both parties, it is now opportune for this Court to determine the points of objections raised. In deciding on the merits of the objections the 1st, 2nd, 4th and 7th objection will be argued separately while the 3rd, 5th and 6th will be argued jointly to avoid repetitions.

Starting with the first point of objection that this court lacks the prerequisite jurisdiction to entertain this application, as it raises matters over which this court is functus officio. I find it pertinent to address as to when the court is said to be functus officio. This Court in the case of **Cipex Tanzania Limited Vs. Tanzania Investment Bank**, Civil Appeal No. 127 of 2018 (HC-unreported) had an opportunity to define the term functus officio to mean:

"The term functus officio in a judicial context, simply connotes that once a judge or magistrate has performed his official duty, he is precluded from reopening the decision."

With the above definition in mind the next question is when does the court become functus officio? There is a litany of authorities on the subject, to mention a few include the case of **Kamundi Vs. R** [1973] EA 540, **James Kabalo Mapalala Vs. British Broadcasting**

Corporation [2004] TLR 143, **Scolastica Benedict Vs. Martin Benedict** [1993] TLR 1, **Bibi Kisoko (supra)**, **Kagera Farmers (supra)** also the case of **Yusuf Ali Yusuf @ Shehe@ Mpemba & 5 Others V The Republic**, Criminal Appeal No. 81 of 2019. In the case of **Yusuf Ali Yusuf (supra)** the CAT held that:

*"... a court becomes functus officio over a matter **if that court has already heard and made final determination over the matter concerned.**"*(Emphasis added)

From the above cited principle which is the trite law, I can simply say that a court becomes functus officio when a matter has been decided to its finality regarding the same subject matter and parties being the same. Now applying the above principle of law to the facts of this matter, I agree with Mr. Ngalo that the matter at hand the court is not functus officio as what is before the court is an application of extension of time to apply for setting aside the ex- parte judgement. There has not been any other application for extension of such time in court between the parties. What the 1st respondent refereed in the applicants' affidavit is distinct from the application at hand as they were matters not relating to extension of time. Therefore, the 1st objection is hereby overruled.

The second objection that the affidavits in support of the application are defective for being argumentative and containing extraneous, false, and

conclusory matters, particularly in paragraph 10 and 11 of the affidavit of Rose Rowland Sawaya, paragraphs 10, 13, 14, 19, and 20 of Rowland Sawaya, and paragraphs 14, 21, 22, 23(a)-(h), 24, 25, 26, 27,28, 29, 32, 33(a)-(h), 34, and 35 of Michael Joachim Ngalo.

It is a trite law that an affidavit being a substitute of oral evidence should be free from extraneous matters, prayers, arguments or conclusions they should only contain facts. There is a plethora of authorities supporting the position including: the case of **Uganda v. Commissioner of Prison Exparte Matovu** [1966] EA 514, **Phantom Modern Transport (1985) Ltd v. DT Dobie (TZ) Ltd**; Civil References Nos. 15 of 2001 and 3 of 2002, **Jamal S. Mkumba & another versus A.G**, Civil Application No. 240/01 of 2019 and the like.

I have managed to glance on the paragraphs refereed by Mr. Rugazia stating that they contain conclusions, I find the same misconceived. What is stated in the paragraphs are just facts on what had been transpired and the same cannot be termed to be conclusions in the affidavits.

Reverting to the 3rd,5th and 6th grounds of objections the 1st respondent contented that:

3. The Chamber Summons is legally flawed for being authored and signed by the Counsel for the Applicants and the Honourable

Registrar on inconsistent dates.

5. *The Affidavits and chamber summons are defective for failing to be signed and dated by the registry' officer upon filing.*

6. *The Application is entirely defective and incompetent for moving this Court with an Affidavit and Chamber summons with inconsistent case registration numbers or year.*

Without going into details of what the parties had submitted on the objections. I should first state that as of now the Judiciary of Tanzania is under a huge transformation from working on papers to paperless through electronic case management system (e-CMS). The raised objections were derived from the document which the respondent was served but I should make it clear that the document which was presented to the court online does not indicate the case numbers which the respondent claims to be inconsistent, the same is not signed by the registry officer nor the Deputy Registrar. Therefore, being guided by the principle of law the court records are deemed authentic and cannot be easily impeached. In the case of **Halfani Sudi v. Abieza Chichili** [1998] TLR 527 it was held that:

"(ii) There is always a presumption that a court record accurately represents what happened."

This means that as the raised objections are derived from a document with different information from what is in court, then the document in court prevails.

I should make it clear that as of now filing pleadings in court currently is

a process whereby the maker or party intending to file has to submit it online for admission to the Deputy Registrar and once admitted it won't be returned to the registry officer to sign it and dating it. For that reason, I don't find any merit in the 3rd, 5th and 6th objections.

On the 4th objection, Mr. Rugazia contented that the matter is incompetent for being filed in a non-existent registry, which contravenes Rule 2 of The **High Court Registries (Amendment) Rules**, 2024, GN No 61 of 2024. It is true that the cited rules require the High Court Registry to be named as SUB REGISTRY in leu of DISTRICT REGISTRY which was used before. To me the error of filling under DISTRICT REGISTRY is not fatal taking into account that the application seems to be prepared before the coming into operation of the rules but, the rules being of procedure which does not touch substantive justice of the parties the said error can be rectified by the court instead of using DAR ES SALAAM DISTRICT REGISTRY we use DAR ES SALAAM SUB REGISTRY as it is seen in this ruling.

Finalizing on the last objection that the suit is legally flawed for contravening Rule 4(1) (a) of the **Interpretation of Laws (Use of English Language in Courts) (Circumstances and Conditions) Rules**, GN NO. 66 of 2022. Again, I agree with Mr. Rugazia that GN NO. 66 requires a party who file pleadings in English language to file their

corresponding translation in Kiswahili. Generally, it should be noted that Interpretation of Laws (Use of English Language in Courts) (Circumstances and conditions) Rules, G.N. No. 66 of 2022 cited by the counsel for the respondent was enacted under section 84A (5) of the Interpretation of Laws Act, (Cap. 1 R.E. 2019) as amended by the Written Laws (Miscellaneous Amendments) Act No. 1 of 2021. Section 84A (1) and (5) reads

as follows:

*84A. -(1) Notwithstanding any other written law, the language of courts, tribunals and other bodies charged with **the duties of dispensing justice shall be Kiswahili.***

*(5) **The Chief Justice may, in consultation with the Minister responsible for legal affairs, make rules for the better carrying out of the provisions of subsections (2), (3) and (4).***" (Emphasis added)

It is from the above quoted provisions particularly subsection (5) the Chief Justice enacted the Interpretation of Laws (Use of English Language in Courts) (Circumstances and conditions) Rules, G.N. No. 66 of 2022. Rule 3 of the cited Rules provide that:

"3. Subject to the provisions of subsection (2) of section 84A of the Act, pleadings, proceedings or decisions may be in English language where it relates to matters stipulated in the Schedule to these Rules."

According to the schedule to the cited Rules, the circumstances and conditions for the use of English language in courts one of them includes where the law governing the matter subject of litigation, and the practice and procedure thereto are not available in Kiswahili language. As for the matter at hand the laws to be used in determining the application are in English language, therefore the applicability of Rule 4 (1) (a) which requires a party who files pleadings in English to file corresponding translation in Kiswahili comes at use.

It is true that the applicant did not heed the requirement of the rules. However, it is my humble view that the same is not fatal since the parties were in court even before the coming into operation of the rules and they were using English language only and neither of the party was prejudiced for the use of English Language as they were all represented by advocates. That said, I find no merit on the 7th objection I hereby proceed to dismiss it accordingly.

Having said and done, the raised objections lack merits, they are hereby dismissed. Costs to follow the event. Order accordingly.

Dated at Dar es Salaam this **12th** day of **June, 2024**.



D. P. Ngunyale

JUDGE

Ruling delivered this **12th** day of **June, 2024** in presence of the learned Counsels Mr. Amon Ndunguru for the applicants and Mr. Mngumi Samadani holding brief for Dr. Aloys Rugazia for the respondents.



D. P. Ngunyale

JUDGE

