

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 16 OF 2006

MR. JOSEPH OBETTO.....PLAINTIFF
VERSUS
ALI SULEIMAN KHAMISDEFENDANT

R U L I N G

MASSATI, J:

There is an application for leave to appear and defend a summary suit filed by the Respondent under O. XXXV of the Civil Procedure Code 1966. Mr. Mkali and Mr. Lutema learned Counsel appeared for the Applicant and the Respondent respectively.

At the beginning of the hearing of the application, Mr. Mkali raised a preliminary objection. He said that the counter affidavit filed by the Respondent lacked a verification clause and rendered the affidavit defective and incompetent subject to being struck out. Mr. Lutema readily conceded to the objection.

However I overruled the objection and ordered the parties to argue the application for leave. I reserved the reasons for overruling the objection to this ruling.

I overruled the objection because it was not preceded by a notice.¹ Secondly although the law on affidavits lacking verification is clear, as rightly pointed out by Mr. Mkali, the defect is curable (See THE UNIVERSITY OF DAR ES SALAAM VS MWENGE GAS AND LUBOIL LTD (CAT Civil Application No. 76 of 1995, (Unreported)). However guided by Article 107 A (2) (e) of the Constitution, I was of the view that this was one technicality which if adhered too closely could lead to the defeat of substantial Justice. So rather than derail the road to justice I let the parties argue the application as none of the parties will be prejudiced.¹

The Applicant's case is hinged on paragraph 4 of his affidavit. In short, he alleges that the cheque was issued post dated in consideration of

the Respondent selling to him a motor vehicle which was to be delivered before 10th January 2006. He said the motor vehicle was not supplied so there is a failure of consideration. Besides, the Respondent has already collected from him Tshs.12/= million as part payment of the price of 30/= million shillings. Much as it is not verified but duly sworn to, the Respondent's counter affidavit opposes this assertion; labeling them as concoctions.

This is not the time for the Court to decide which of the parties is telling the truth. However, looking at the plaint and the affidavits, the Court cannot dismiss the Applicant's assertions off hand. I think the application discloses triable issues fit to go for trial.

I would therefore allow the application for leave. Costs to be costs in the suit.

Order accordingly.

S.A. MASSATI

JUDGE

23/5/2006

