

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

MISC. CIVIL APPLICATION NO 44 OF 2006

BETWEEN

BIBITI GINNERIES LIMITED.....APPLICANT
VS.

TANZANIA RAILWAYS CORPORATION...1ST RESPONDENT
PARASTATAL SECTOR REFORM
COMMISSION (PSRC).....2ND RESPONDENT

R U L I N G

Date of final submission April 4, 2007

Date of ruling May 10, 2007.

MJASIRI, J

The Applicant Bibiti Ginneries Limited is seeking leave to sue the Tanzania Railways Corporation under Section 43(1) of the Public Corporations (Amendment) Act No.16 of 1993; section 9 of the Bankruptcy Act, Cap 25 and section 95 of the Civil Procedure Act Cap.33.

Mr. Nyangusu appeared for the Applicant. Mr. Mbamba and Mr. Fungamtama appeared for the first and second Respondents.

Mr. Mbamba learned Counsel for the first Respondent raised a preliminary objection on a point of law that the affidavit in support of the application contravenes the provisions of Order XIX Rule 3 of the Civil Procedure Code [cap 33 R.E. 2002].

Mr. Mbamba submitted that the application is supported by the affidavit of George Nyangusu an Advocate of the Applicant. According to Mr. Mbamba the law does not allow Counsel to swear an affidavit on matters which he cannot prove on his own. The sources of grounds of belief are not disclosed. The requirement under the law is that the affidavit should be based on information the deponent can prove save on interlocutory application where an affidavit can be based on matters of belief provided that the grounds for such beliefs are disclosed.

Counsel for the first Respondent cited the case of **Mrema V Attorney General and Others** 1996 TLR 273 whereby the court rejected the affidavit sworn by an advocate because it did not conform to statutory requirements. According to Counsel Order 19 Rule 3 requires that affidavits should be confined to such facts as the deponent is able of his own knowledge to prove; the only exception being on interlocutory applications where statements of belief are given.

Mr. Mbamba also argued that Counsel for the applicant did not comply with the court order dated March 14, 2007 as the amended application filed in court is not marked “amended” and it is therefore a fresh application.

Mr. Fungamtama Counsel for the second Respondent supported the submissions made by the Counsel for the first Respondent.

Mr. Nyangusu learned Counsel for the Applicant asked the court to disregard Mr. Mbamba’s submission on the amended chamber application as no prior notice was given to the Applicant or the court on his objection.

Mr. Nyangusu argued that though the affidavit was sworn by him as Advocate for the Applicant, the verification clause clearly states that there are matters within the knowledge of the Advocate and other matters within the knowledge of the Applicant.

Learned Counsel for the Applicant also submitted that the affidavit concerned an application on interlocutory matters. The orders sought by the applicant does not determine conclusively the right of the parties. Counsel submitted that the case of **Mrema V Attorney General** supra is distinguishable.

Counsel further stated that even if the court finds that the affidavit contravenes the provisions of Order 19 Rule 3 the defect in question is curable and the court can allow an amendment. The defect complained of is a defect in form, it is a procedural matter and should not be used to defeat the decisions on substantive issues. Courts should administer substantive justice without regard to technicalities. Counsel cited Section 107 (A) 2 of the Constitution of the United Republic of Tanzania.

Counsel also cited the case of **DT Dobie Tanzania Limited V Phantom Modern Transport Limited** (civil application No.141 of 2001) unreported where Lugakingira JA ordered amendment of the affidavit.

With regards to the objection raised by the Counsel for the first Respondent on the amended application, I agree with the learned Counsel for the Applicant, that he was entitled to notice before the date of hearing. However I am of the view that the absence of the word “amended” does not amount to non compliance of the court order dated March 14, 2007.

Order 19 Rule 3(1) of the Civil Procedure Act (Cap.33) R.E 2002 provides as under:

“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.”

The application before this court is not an interlocutory application. It is a substantive application seeking leave of the court to file a suit against a specified public corporation. The application cannot be regarded as interlocutory in nature when there is no suit in existence within the framework of which it is brought. I am therefore inclined to agree with the submissions made by the Counsel for the first Respondent.

The requirements under Order XIX Rule 3 have not been met. Even if an application is interlocutory, an Advocate’s affidavit may be rejected by the court.

In **Kenya Horticultural Exporters [1977] Ltd V Pape (trading as Osirua Estate** 1986 KLR 705 it was held as under:

- (1) *“Order XVIII Rule 3(1) of the Civil Procedure Rules is not to be understood to provide that an affidavit in interlocutory proceedings may be sworn by a deponent who is unable of his own knowledge to*

prove facts, or that such an affidavit may be confined to statements of information and belief even if the sources and grounds are shown. The words “may contain” suggest that the main body of such an affidavit has to be confined to facts which the deponent is able of his own knowledge to prove.

(2) In the absence of an affidavit sworn by the Respondent himself, it was doubtful whether the Respondent’s Advocate could by his own affidavit prove all the statements of information and belief.”

In view of the fact that the affidavit in support of the application has been sworn by a wrong person, the court cannot give a direction for amendment. What is required is an affidavit sworn by the Respondent. The **DT Dobie** case is therefore not applicable under the circumstances.

In view of the requirements under Order XIX Rule 3(1) and what has been stated hereinabove the application is hereby struck out with costs.

Sauda Mjasiri

Judge

May 9, 2007

Delivered in Chambers this 10th day of May 2007 in the presence of Mr. Nyangusu Advocate and in the absence of Mr. Mbamba and Fungamtama Advocates.

Sauda Mjasiri

Judge

May 10, 2007

1,677 – words

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I Certify that this is a true and correct
of the original order Judgement Rulling
Sign [Signature]
Registrar Commercial Court Dsm.
Date 11/5/2007