IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 33 OF 2011

MILLENIUM BUSINESS PARK LIMITED ---------- PLAINTIFF

VERSUS

MTURE EDUCATIONAL PUBLISHERS LIMITED --------- DEFENDANT

RULING

BUKUKU, J.

Subsequent to the filing of the plaint, which was filed as a summary suit under order XXXV of the Civil Procedure Code, 1966, the defendant/applicant filed a chamber application seeking for the following orders:

(i) That this Honourable Court be pleased to grant the application unconditional leave to appear and defend the suit;

(ii) Costs of this application be provided for; and

(iii) Any other relief(s) this Honourable Court may deem fit and just to grant.

Mr. Henry Sato Massaba, learned Advocate appearing for the plaintiff/respondent has raised three points of preliminary objection as follows:

(i) That, this Honourable Court has not been moved properly for wrong citation of the enabling provisions.

(ii) That the application before this Honourable Court is fatally defective for being drawn contrary to the Advocates Act; and

(iii) That, the Affidavit of the Application is defective which renders the whole application to be incompetent.

Submitting in support of the preliminary objection, Mr. Massaba submitted that, the Court of law is normally moved by the citation of the moving and or enabling provisions of the law which a party seeks to rely, otherwise the Court stands unmoved. Submitting further, Mr. Massaba submitted that, there are a number of Court of Appeal cases that have settled down this principle. According to him, such cases include **Citibank (T) Ltd V. TTCL & others, Civil Application No.64/2003 (Unreported)**; **China Hennan International Corporation Group V. Salvand K.A Rwegasira, Civil Reference No.22 of 2005**; **NBC V. Sadrudin Meghji, Civil Application No.45 of 1997** and **Rukwa Auto Parts Ltd V. Justina G. Mwakyoma, Civil Application No.45 of 2000**.

Mr. Massaba forcefully submitted that, the chamber application filed by the applicant suffers from wrong citation of the enabling provision of the law. Quoting section 68 of the CPC, Counsel for the respondent submitted that, this section contains a total number of five subsections from (a) to (e) all dealing with different situations and circumstances. Either, with regard to O. XXXV R.2 (2) and (3) of the CPC, order 2 (a) to (c) of sub rule 2 and 3(1) (a) to (c) of sub rule 3, all deal with different cases and or instances. He therefore surmised that, applicant ought to have cited the relevant sub rule or subsection.

As to the second limb of objection, respondent submitted that, the application is defective in that, it was drawn contrary to the Advocates Act.

He argued that, it is the requirement of the law that pleadings are drawn by a party or duly instructed advocate. Citing the case of **Proper Consult (T) limited & Others V. Receiver Manager Tanzania Sewing Thread Manufacturers Limited & Tanzania Gender Networking Programme, Civil case No.215 of 1997**, Counsel for respondent submitted that, the chamber application and affidavit is drawn and filed by Seka and Associates Advocates. In the roll of advocates kept by the Registrar of the High Court, no such name exists.

He therefore urged this Court to take judicial notice of this fact, and since the summons and affidavits are drawn by persons not authorized to draw documents, they pray that the application should be struck out in its entirely with costs.

Finally, arguing on the third and final point of preliminary objection, Counsel for respondent submitted that, it is a requirement of the law that, the matter in each affidavit shall be confined to facts which a person swearing it must be able to prove. Citing order XIX Rule 3(1) of the CPC, Counsel for respondent surmised that, looking at the affidavit sworn by one Elibariki Mosha, it is evident that, he has proved his facts in paragraph 16 of the same affidavit and not in the verification clause as required by law. According to the Counsel, the law on how verification shall be, is clearly provided in O.VI R.15 (1) and (2) of the CPC. Since paragraph 16 of the filed affidavit does not at all stand the test as laid down in O.VI R.15 (2) of the CPC, it renders the application incompetent. Cementing his arguments, Counsel for respondent relied on the case of **D.B Shapriya & Co. Ltd V. Bish International, Civil application No.53 of 2002**; and the case of **Mohamed I.A AbdulHussein V. Pita Kempap Limited, Civil Revision No.66 of 2004, High Court of Tanzania at Dar Es Salaam (2005 TLR)** page 383, where in this case it was held that, an application which is supported by defective affidavit lacks necessary support and is incompetent.

In view of the above submission counsel for respondent humbly prayed that the affidavit be struck out with costs and consequently the entire application be rendered incompetent for want of proper affidavit.

In rebuttal, Counsel for applicant forcefully defended his position. As to the first point of objection on wrong citation, he conceded that, he did not quote exactly the sub sections of the said laws and as for section 68, he, in good faith forgot to cite the subsection (e) which is relevant. However, he maintained that, the omission is curable since it is not always in every circumstance that wrong citation of the law renders the application to be struck out, even if the substance of the matter remains understood to the Court of law. Citing the case of **Abubakar Mohamed Mlenda V Juma Mfaume (1989) TLR 145**, Counsel for applicant submitted that, omission to cite a proper provision of the law in chamber summons is not fatal to the application since Courts can order simple amendments provided they do not prejudice the other party. He also relied in the case of **Phillemon M. Kleruu V. NHC Misc. Civil Cause No. 29/1996** where it was held that, quoting a wrong subsection is not fatal to the application, and that what is important is that substantial justice must be done.

Summarizing this point, Counsel for applicant stated that, as it was held in **Saggu V Road Master Cycles (U) Ltd (2002) EA pg 258**, procedural irregularity should not vitiate proceedings if no injustice has been occasioned to the other party. He therefore prayed that the omission is not fatal and that should not be allowed to defeat the substantial justice and since the Court has jurisdiction to order amendment so that the problem can be corrected if any, for interest of justice, let the matter be heard on merit.

With regard to the second point, Counsel for applicant argued that, a preliminary objection consists of a point of law which has been pleaded. He referred to the case of **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd (1969) EA** at page 700.

Submitting further, Counsel for applicant said that, the issue of ascertaining whether the drawer of the pleadings is an advocate as per the law or not, requires evidence. He therefore surmised that, at this junction, the objection does not merit the criteria of the preliminary objection as per the law. In the alternative, Counsel for the applicant invited this Court to adopt the wisdom of Honourable Mihayo, J (as he then was) in the case of **Proper Consult (T) Ltd & others (supra)** by this Court taking judicial notice of the advocate on the record as advocates who have filed their chamber application, and that, Counsels should use their proper names and refrain from using the law firm names.

Finally, arguing on the third point, Counsel submitted that, as it is, the CPC does not define what is verification and the style of how to be placed in the pleadings. But it is generally understood that verification clause is essentially to fasten the party verifying or on whose behalf verification is made accountable for the statement that it contains; and to ensure that the party is having full knowledge about the statement of facts stated in the pleadings.

Counsel for applicant admitted that, paragraph 16 of the affidavit attempted to verify the correctness of the averments deponed in the affidavit so as to conform to the requirements of the laws. He further submitted that, even if it is assumed that the verification clause is not proper, the remedy available is not to strike out the application, since the Court has the power to order amendment if it will not prejudice the other party. In expounding this, he cited the case of **Isaya Mwakilasa & 6 others V. East Africa Television & 3 others, Commercial case No.46 of 2008** in which the Court in making its ruling regarding the absence of verification clause, referred the Court of appeal case of **D.T. Dobie (T) Ltd V. Phantom Modern Transport (1989) Ltd Civil application No.141 of 2001 (unreported)** where it was held that, the absence of verification clause does not defeat an affidavit but amendment may be allowed.

On the strength of that case, Counsel for applicant argued that, if the Court finds it necessary, if any, amendments can be done to cure the said defect and the respondents will not be prejudiced by the said amendment.

I will start with issue No.2. The submission made by Counsel for the respondent is based on matters of fact. Evidence is required as to whether the affidavit s fatally defective for being drawn by someone who is not on the roll, contrary to the Advocate's Act. It is suffice to state here that, the principle governing preliminary objections is well settled in law. In the cited case of **Mukisa Biscuits (supra)** Law, J.A said:

> *"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arise by clear implication of pleading, and if argued as a preliminary point may dispose of the suit....."*

Sir Charles Newbold, P added:

> *" A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasions, confuse the issue. This improper practice should stop."*

For an issue raised as a preliminary objection to be dealt with, at this stage of this case, it has to be on a point of law which, if successful, it disposes of the matter summarily. As demonstrated above, no evidence has been led to prove what the Counsel for the respondent is contending and therefore, this second issue raised by the respondent, lacks the criterion for a preliminary objection. On whether or not the application was drawn by a person who is not recognized by the Advocates Act, to me that appears to be factual hence requiring proof by calling evidence. That

should await trial. It cannot be disposed of by way of a preliminary objection. Therefore this point fails.

Now, back to the first issue. I have to confess that, the issue of wrong citation/non citation of the law has always been an issue for debate in our courts of law. There are instances where it was held that wrong citation/non citation renders an application incompetent and there are other instances where the Court held that non citation/wrong citation is a curable irregularity if it does not go to the root of the application, thus, can be ignored provided that the jurisdiction to grant the order sought exists. (See **Saggu V. Roadmaster Cycles (U) Ltd (supra),** and **Rawal V. Mombasa Hardware (1968) E.A 392.** I think, as rightly pointed out by Counsel for applicant, the gist of his application is accommodated under O.XXXV together with section 95 of the CPC and that, he had cited Rule 2(2) and rule 3 of order XXXV correctly, since those are the relevant provisions in the application. The only irregularity so far is the non citation of sub section (e) of section 68 of the CPC. I am mindful of the fact that, time and again, Counsels have always been encouraged to have the practice of citing the relevant statutory enabling provisions whenever they are there.

I have considered this irregularity of non citing paragraph (e) of section 68 of the CPC. It is my considered opinion that, this anomaly per se, does not go into the root of the application itself. It is an irregularity which can be cured by way of an amendment. As was held by Massati, J.A in the Court of Appeal case of **Ottu on behalf of P.I Assenga & 106 other V. AMI Tanzania Limited, Civil Application No. 35 of 2011,** this irregularity is harmless and so curable. With this, I will allow amendment as prayed.

Now, coming to the final limb of the preliminary objection. While Counsel for respondent has submitted that the affidavit lacks proper verification clause as required by the provisions of the CPC, Counsel for applicant, while conceding, maintained that, the omission is curable by

amendment. As a general rule, every pleading must be signed by the party or by one of the parties or by his pleader. Similarly, every pleading must be verified by the party or by one of the parties pleading or by some other person acquainted with the facts of the case. The person verifying the pleading must specify what paragraphs he verifies upon his knowledge and what paragraph he verifies upon his knowledge and what paragraphs he verifies upon information received by him and believed by him to be true. The verification must be signed on an affidavit by the person verifying and must contain the date on which and the place at which it was signed.

The object underlying this provision is, as rightly submitted by Counsel for applicant, to fix upon the party verifying or on whose behalf verification is made, the responsibility for the statement that it contains; and to prevent as far as possible, disputes as to whether the suit was instituted or defended with the knowledge or authority of the party, who signed the verification or on whose behalf it has been signed. That is the position of the law. Now the issue here is whether the omission on the part of the applicant not to have a specific clause on verification is fatal to render the application incompetent, or it is a mere irregularity which does not cause injustice to the respondent and therefore could be cured by an amendment.

This subject is not virgin territory. There is a plethora of authorities which held that, such an irregularity can be cured. See: **VIP Engineering & Marketing Ltd V. Said Salum Bakhressa, Civil Application No.47/1996 (CA)** Samatta J.A (as he then was), **Isaya Mwakilasa & 6 others V. East Africa Television & 3 others, Commercial case No. 46 of 2008** and many others. Much as I agree with Counsel for respondent that the affidavit as it stands does not have a verification clause, However, I notice that paragraph 16 of the pleadings have all the requirements of the verification clause. What is a miss is the word verification clause and that alone, cannot in my view, render the under application void.

disclosed, the date and signature of the person who deponed is there. So in the absence of the word verification clause, can that alone render the application incompetent? In my opinion, no.

There are different schools of thought when it comes to the issue of verification. I fully subscribe to what learned Counsel for respondent submitted in that, O.VI r 15(1) and (2) of the CPC provides the law on how verification shall be. Going by that provision, it is clear that, every pleading shall be verified at the foot by the party pleading, and that the person verifying shall specify by reference to the numbered, paragraphs, of pleadings, what he verifies of his own knowledge and what he verified upon information received and believed to be true. The object of requiring verification is clearly to fix the responsibility for the averments and allegations in the affidavit on the person signing the verification and at the same time discourage wild and irresponsible allegations unsupported by facts.

This point has been sufficiently canvassed by both Counsels. I commend them. All of the cases cited are relevant. In most of such cases, the remedy lies in striking out the pleadings as Counsel for applicant has argued. This will enable the aggrieved party to re-institute the suit. But then, in the interest of justice, and considering the nature of the irregularity itself, I will not strike out the application for this irregularity alone. To me, like in many other cases, a defect in the matter of signing and verification of pleadings is merely an irregularity which can be cured with leave of the Court. Where the verification of a plaint or application is defective, that should not normally be rejected unless the anomaly goes to the root of the matter itself. I take this irregularity to be one of those technicalities which if adhered too closely could lead to the defeat of substantial justice. So rather than derail the road to justice, and since the amendment will not prejudice the applicant, I will allow the amendment to cure the said defect.

Having satisfied myself as to the preliminary points, I conclude by holding that, the preliminary objections have no merit. They are dismissed with costs. It is accordingly ordered.

A.E BUKUKU

JUDGE

12 SEPTEMBER, 2011.

Ruling delivered in Chambers this 12th day of September, 2011in the presence of Mr. Seka, Learned Counsel for the Plaintiff/Respondent and in the absence of Applicant/Defendant.

A.E BUKUKU

JUDGE

12 SEPTEMBER, 2011.

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