

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

COMMERCIAL CASE NO.106 OF 2012

TWIGA BANCORP LTD.....PLAINTIFF/RESPONDENT

VERSUS

- 1. MASHALLAH INVESTMENT OIL CO.LTD**
- 2. MEIS INDUSTRIES CO.LTD**
- 3. ISLAM ALLY SALEH**
- 4. MEREY ALLY SALEH.....DEFENDANTS/APPLICANTS**

Date of last Order: 26/02/2013

Date of last submissions: 26/03/2013

Date of Ruling: 30/04/2013

RULING

MAKARAMBA, J.:

This is a ruling on a point of preliminary objection raised by the Defendants/Applicants by way of Notice filed in this Court on the 4th of December, 2012 against the Counter-Affidavit of **MATHEW SIMON KAKAMBA**, learned Counsel for the Plaintiff/Respondent, that, it is argumentative, and therefore bad in law as it offends Order XIV Rule 3 (1) of the Civil Procedure Code, 1966 Cap.33 R.E 2002 and that the offensive Counter-affidavit be "struck out" of the Court record.

The Counter-Affidavit, the subject of the preliminary objection was sworn by **Mathew Simon Kakamba**, the Plaintiff's/Respondent's learned

Counsel, in answer to the affidavit of **Mr. Joseph E.A Mwakajinga**, the Defendant's/Applicant's learned Counsel. The affidavit was in support of the Defendant's/Applicant's application to set aside the default judgment entered by this Court against the Defendants/Applicants on the 29th day of October, 2012. In that application, the Defendants/Applicants pray that they be allowed to file their joint Written Statement of Defence. The Applicants/Defendants lodged lodged their application in this Court on the 21st November, 2012. The application has been brought under Order IX Rule 13(2) of the Civil Procedure Code, Cap.33 R.E. 2002.

The preliminary objection by consent was disposed of by way of written submissions by **Mr. Kakamba**, learned Counsel for the Plaintiff/Respondent and **Mr. Mwakajinga**, learned Counsel for the Defendants/Applicants.

I have gone through the submissions of learned Counsel on record. The bone of contention as could be gleaned from the submissions of Mr. Mwakajinga, learned Counsel for the Defendant's/Applicants, is that, paragraphs 5 to 12 of the Counter Affidavit of **MATHEW SIMON KAKAMBA**, the Plaintiff's/Respondent's Counsel, are argumentative. However, as Mr. Kakamba rightly submitted in his reply submissions, Mr. Mwakajinga only makes the allegations but without specifically stating how and to what extent each paragraph in paragraphs 5 to 12 of the Counter Affidavit of Mr. Kakamba is argumentative and offensive. This Court would have expected Mr. Mwakajinga to assist it by pointing out specifically the extent to which each of paragraphs 5 to 12 of the Counter-Affidavit of Mr. Mathew Simon Kakamba is argumentative, by specifying out which

statements or phrases in those paragraphs are argumentative. Mr. Mwakajinga offers as an explanation his shortfall by stating in his rejoinder submissions that he (Mwakajinga) opted not to argue in detail on the extent to which those paragraphs are argumentative, for what he (Mr. Mwakajinga) say was *"to save the Court's time."* It is rather unfortunate however, that in his bid to save the Court's time, Mr. Mwakajinga has denied this Court the benefit of argument on the extent to which paragraphs 5 to 12 of the Counter-Affidavit of **MATHEW SIMON KAKAMBA**, learned Counsel for the Plaintiff's/Respondent's Counsel are argumentative.

In the course of their submissions in support and rival, the learned Counsel for the parties have relied on some statutory provisions, as well as case authorities on the principles governing affidavits. In the spotlight is Order XIV Rule 3 (1) of the Civil Procedure Code, 1966 Cap.33 R.E 2002, which expressly requires that *"an affidavit be confined to such facts as the deponent is able of his own knowledge to prove."* According to Mr. Mwakajinga, to the extent that paragraphs 5 to 12 of the Counter Affidavit are argumentative they are therefore offensive to Order XVI Rule 3(1) of the Civil Procedure Code, and should therefore be struck out. It is worth noting however, that the law does not offer any definition of what an affidavit is. Mr. Mwakajinga has assisted this Court by citing **Osborne's Concise Law Dictionary**, wherein an "affidavit" is defined as being:

"A written statement in the name of a person, called the deponent, by whom it is voluntary signed and sworn to or affirmed. It must be

confined to such statements as the deponent is able of his own knowledge to prove, but in certain cases it may contain statements of information and belief with the sources and grounds thereof."

Amplifying further on what an affidavit is, Mr. Mwakajinga also cited to this Court, the famous Ugandan case of **UGANDA VERSUS COMMISSIONER OF PRISONS, EXPARTE MATOVU [1966] E.A. 514** at page **520**, in which the Court stated thus:

*"...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 knowledge** or...Such an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion." (the emphasis is of this Court).*

According to Mr. Mwakajinga, an affidavit which violates the conditions laid down in ***Exparte Matovu's case*** (above) as per the decision of the Court of Appeal in **Civil Reference No.15 of 2001 and 3 of 2002 in PHANTOM MODERN TRANSPORT (1985) VERSUS D.T. DOBIE (TANZANIA) LIMITED** (Unreported), also cited by Mr. Mwakajinga in his submissions, is to be "*struck out.*" Mr. Mwakajinga reinforces his argument in support of the preliminary objection, by referring this Court to the decision in the case of **DAR ES SALAAM EDUCATION CORPORATION AND ANOTHER VERSUS NBC**

HOLDING CORPORATION AND OTHERS, Civil Application No.39 of 1999 where it was held that:

*"It is correct that an affidavit is required to contain only matters of facts and not arguments. It is equally correct that **at the hearing an applicant is required to present arguments based on the facts deposed in the affidavit.** So, according to Order XIX Rule 3 the sequence is that **facts are given in the affidavit while arguments are made in Court.**" (the emphasis is of this Court).*

According to Mr. Mwakajinga where a paragraph in an affidavit or counter affidavit is offensive, then it has to be struck out. And if the majority of the paragraphs in the affidavit or counter-affidavit are offensive, then the whole affidavit or counter-affidavit must be struck out, and accordingly the application which is supported by the counter-affidavit or affidavit found to contain offensive paragraphs.

In his rebuttal, Mr. Kakamba argues that, a counter-affidavit is not merely a reply to the affidavit but it is a reply made to oppose what is stated in the affidavit. According to Mr. Kakamba, a counter affidavit will not be completely free from arguments, if such arguments can be proved, which brings it within the portion of the definition in **Osborne's Concise Law Dictionary** that *"...it must be confined to such statement as the deponent is able of his own knowledge to prove..."* The counter-affidavit will certainly assign reasons as to why the contents of the affidavit are being disputed and/or opposed, Mr. Kakamba further argues.

According to Mr. Kakamba, the learned Counsel for the Defendants/Applicants merely alleges that paragraphs 5 to 12 of the counter affidavit are argumentative and offensive without specifically stating how and to what extent each paragraph is argumentative and offensive. Such generalization is dangerous and the Court must avoid determining the same, Mr. Kakamba further argued. Paragraphs 5 to 12 of the Counter-Affidavit are in fact countering what is stated in the Affidavit, and the opposition contained in them is specifically directed to each averment contained in the Affidavit, Mr. Kakamba pointed out. No any extraneous matter is imported in any of the paragraphs of the counter affidavit Mr. Kakamba further submitted.

In his rejoinder, Mr. Mwakajinga cited section 3 (1) of the Tanzania Evidence Act, Cap.6 R.E 2002, which provides that:

"Facts includes:

- (a) *Anything, state of thing, or relation of things, capable of being perceived by the senses;*
- (b) *Any mental condition of which any person is conscious."*

The main issue in the matter before this Court is whether paragraphs 5 to 12 of the Counter Affidavit are argumentative. This is a question of fact and must therefore be proved by the person alleging such facts. I should point out here that from the submissions of learned Counsel for the parties it does not seem to me that they have any qualms at all with the principles as to affidavits. Without the risk of sounding repetitive, I may summarize those principles as follows: An affidavit must *be confined to such facts as*

the deponent is able of his own knowledge to prove (Order XIV Rule 3 (1) of the Civil Procedure Code, 1966 Cap.33 R.E 2002). An affidavit for use in court of law is a substitute for oral evidence (***Exparte Matovu's case***). An affidavit should *contain only matters of facts, and not arguments* (***Dar es Salaam Education Corporation case***) *or extraneous matters by way of objection or prayer or legal argument or conclusion* (***Exparte Matovu's case***).

From the above principles, clearly arguments based on facts the maker (deponent) of his own knowledge deposed in the affidavit are to be presented at the hearing of the application for which the affidavit supports. I should state here also that although an affidavit is a formal written document setting out a person's own account of events in numbered paragraphs, **affidavits may sometimes contain a statement of fact based on information or belief, but the grounds supporting that information or belief must then also be set out in the affidavit.** Sometimes, the maker (deponent) of an affidavit may be cross-examined on the contents of the affidavit. Affidavits for use in court are a way of giving evidence to the court other than by giving oral evidence. They are the means of telling the court about facts (evidence) which support particular issues raised by each party. Affidavits as a form of evidence allow the court to weigh up differing versions of events. This means that arguments or opinion on facts are not facts as understood in the law of evidence and should not therefore feature in the affidavit. Facts as per the law on affidavits are only those confined to the deponent's own knowledge so as to guard against hearsay evidence finding its way in the affidavit


which when used in a court of law, amounts to "*a substitute for oral evidence.*"

As I pointed out earlier in this ruling, Mr. Mwakajinga, learned Counsel for the Defendants/Applicants, merely alleges that paragraphs 5 to 12 of the Counter Affidavit of Mr. Kakamba are argumentative and offensive, but without going an extra mile to specifically state how and to what extent each one of the mentioned paragraphs is argumentative and offensive. This generalization has therefore denied this Court the opportunity to know which among the averments in those paragraphs "matters of fact" are as per the deponent's own knowledge, and which ones are "arguments" which ought to be reserved to be presented at the hearing. Mr. Mwakajinga has therefore failed to establish his allegations to the satisfaction of this Court. It is for the above reasons that the allegation raised by Mr. Mwakajinga that paragraphs 5 to 12 of the Counter Affidavit of Mr. Kakamba are argumentative and offensive lack merits and accordingly stand dismissed.

Mr. Mwakajinga contends also that the Counter-Affidavit of Mr. Kakamba was written in a form like that of a written statement of defence and therefore does not qualify to be called a counter affidavit. However, Mr. Mwakajinga did not even attempt to identify the features in the counter-affidavit which he claims that they make the counter affidavit resemble a written statement of defence. In my considered view, the contents and validity of affidavit or counter-affidavit, depends on what the law on affidavits say, but it is not a matter of comparison or of conjecture.

In the upshot, and for the above reasons, the preliminary objection on a point of law the Defendants/Applicants raised by way of Notice filed in

this Court on the 4th day of December, 2012 fails and is hereby dismissed with costs, which costs shall be in the cause. Order accordingly.

A handwritten signature in black ink, appearing to read 'R.V. Makaramba', is written over a horizontal dotted line.

R.V. MAKARAMBA

JUDGE

30/04/2012

Ruling delivered this 30th day of April, 2013 in the presence of **Mr. Joseph E.A. Mwakajinga**, Advocate for the Defendants/Applicants, and holding brief of Mr. **Mathew Simon Kakamba**, Advocate for the Plaintiff/Respondent.

A handwritten signature in black ink, appearing to read 'R.V. Makaramba', is written over a horizontal dotted line.

R.V. MAKARAMBA

JUDGE

30/04/2013