

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 225 OF 2015

(ARISING FROM COMM CASE NO 22 of 2015)

LEIGHTON OFFSHORE PTE LTD-

TANZANIA BRANCH.....APPLICANT

VERSUS

DB SHAPRIYA \$ CO. LIMITED.....RESPONDENT

RULING

Mansoor, J:

Date of RULING- 26TH FEBRUARY 2016

This is a Ruling arising from an exparte hearing of the preliminary objections taken by the Counsel for the Respondent against the Application for extension of time



within which to file an application for stay of execution filed by the Applicant on 23rd November 2015 under the Certificate of Urgency. The preliminary objections were heard exparte since the Applicant and its Counsel failed to enter appearance on the date fixed by the Court for hearing of the preliminary objections and no notice as why they did not appear in Court was received by the Court.

The objections taken by the Respondent against the Application were as follows:

1. That the Application is bad at law for being supported by a defective affidavit;
2. The Application is misconceived and bad at law for there being no pending application to set aside a default decree; and,
3. That the Application is not maintainable as the applicant has admitted its indebtedness to the Respondent.

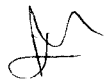


In the course of hearing, Counsel Roman Masumbuko who appeared on behalf of the Respondent dropped the 3rd objection and argued only on the remaining two objections. In support of his oral arguments, the Counsel filed the skeleton written arguments as provided by the High Court (Commercial Division) Procedure Rules. The Applicant did not file any submissions as required by the Rules.

In support of the objection on a defective affidavit, Counsel Roman Masumbuko said the affidavit in support of the chamber summons did not disclose the source of information, as the facts deposed in the affidavit are not within the deponent's own knowledge, as provided in Rule 3 (1) of Order XIX of the Civil Procedure Code, Cap 33 R: E 2002. He said, Advocate Stanslaus Ishengoma who deposed the facts in the affidavit was not acquainted with the facts of the case since he did not represent the Applicant in Commercial Case No. 22 of 2015. He said, Advocate Ishengoma failed to indicate the source of information in the verification clause of the affidavit.



Counsel Roman said, since the Applicant is a body corporate, Advocate Ishengoma was duty bound to disclose the name of the officer or director or shareholder of the Applicant's company from which he received the information. The Counsel referred the Court to the case of **Phantom Modern Transport (1985) Limited vs D.T. Dobie (Tanzania) Limited**, Court of Appeal Civil Reference No. 15 of 2001 and 3 of 2002 (unreported), the Court observed that an affidavit being a substitute of evidence, should not contain hearsay. The deponent has to clearly disclose the source of information as that person can be called before the Court to give evidence. The Counsel also referred me to the case of **Protas S.G. Kongogelo vs Tanzania Telecommunications Co. Limited**, Court of Appeal at Dar es Salaam, Civil Application No. 119 of 2006, where the Court of Appeal had said that, where an affidavit is made on information it should not be acted on by any Court unless the sources of the information are disclosed. He said, Advocate Ishengoma was supposed to state in the verification clause what paragraphs are of his own knowledge and what information he has received from a particular person in the



Applicant's Company, and the name of the person in the applicant's company should have been disclosed.

Advocate Roman Masumbuko also objected that the affidavit is defective as it contains prayers and arguments contrary to Rule 2(1) of Order XIX of the CPC. He said paragraphs 4, 10, 11, 12, 13, 14 and 15 of the affidavit are argumentative and contains prayers. He refers to the case of **M/S Bulk Distributors Limited vs Happyness William Mollel**, Court of Appeal of Tanzania at Arusha, Civil Application No. 4 of 2008 (unreported) and the case of **Justin Joel K Moshi vs CMC Land Rover (T) Limited, Civil Application No. 93 of 2009**, Court of Appeal of Tanzania at Dar es Salaam (unreported), in which it was held that defective affidavit renders applications incompetent and a nullity.

Now, since the respondent has taken objection to the affidavit in support of the application, I agree that that the disclosure of the source of information in the affidavit of Mr Stanslaus Ishengoma is vague and he has failed to describe sufficiently



for the purpose of identifying the person or persons from whom the information was received by him. The respondent submits that the affidavit be rejected and the application be struck off. I agree that when the matter deposed to is not based on personal knowledge the source of information should be clearly disclosed and with sufficient particularity. In the case of a body corporate the name of the person and his or her status in the company or body corporate must be clearly given in the verification clause.

At the out-set, it will be proper to consider Order 19, Rule 1 and 3 of the Civil Procedure Code in its proper context and setting. In some cases evidence can be given by affidavit. Under Order 19, Rule 1 Civil Procedure Code for sufficient reasons the Court may order that any particular fact or facts may be proved by affidavits. Where evidence on affidavit is used, it is necessary before a Court can act on affidavits that care must be taken to see that they represent the real facts.

A handwritten signature in black ink, consisting of a stylized, cursive 'M' followed by a horizontal line and a small flourish.

Order 19, Rule 3, of the Civil Procedure Code lays down the general rule that affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove. This is necessary to ensure that the affidavit represents the true facts. An exception was made in respect of interlocutory application and Order -19, Rule 3 Civil P. C. provides in the latter part of Sub-section (1) that on interlocutory applications statements of belief may be admitted provided the grounds thereof are stated. While permitting statements of belief, that is, statement on information believed to be correct, the CPC made it obligatory that the grounds of the belief must be stated. In other words, the deponent is required to disclose the source of information with sufficient particularity. This was considered necessary to secure the object that the affidavit should represent the true facts. It should be clear from the above discussions that Order 19. Rule 3, C.P. C. contains provisions of a substantive nature and that they cannot be treated as providing for mere matters of form. This conclusion finds support from the various observations of the Court of Appeal in the cases cited by the Counsel for the Respondent in his



submissions, for which I have referred on the need of proper affidavits in accordance with law.

The verification of the affidavit of Advocate Stanslaus Ishengoma is defective. The body of the affidavit discloses that certain matters were known to the Applicant Company, particularly the facts and the proceedings of Commercial Case No. 22 of 2015. Advocate Ishengoma did not make the affidavit personally, he was informed of the facts by an officer of the Applicant's company. The verification however states that everything was true to the best of his information he gathered from court records and from the Applicant and belief. Verification should invariably be modelled on the lines of Order 19, Rule 3 of the Civil Procedure Code. And when the matter deposed to is not based on personal knowledge the sources of information should be clearly disclosed and that the deponent should have sufficiently describe for the purposes of identification the person or persons from whom information was received.



Consequently, the affidavit is defective for failure to give the source of information and belief, this defect rendered the entire application incompetent. The application is therefore struck out for being supported by a defective affidavit.

I shall not determine the rests of the objections, since the first objection sufficed to dispose of the entire application.

DATED at DAR ES SALAAM this 26TH day of FEBRUARY, 2016



MANSOOR

JUDGE

26TH FEBRUARY 2016

