IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 163 OF 2016

(Originating from Commercial Case No. 119 of 2015)

PERCY BEDA MWIDADI

MAKSIM CHALDYMOV

YURI VALENTINOVICH CHERNOMORCHENKO ..... APPLICANTS

GOLD TREE TANZANIA LIMITED

VERSUS

GASLAMP HOLDINGS CORP ..... RESPONDENT

24th October & 20th December, 2016

RULING

MWAMBEGELE, J.:

The four applicants – Percy Beda Mwidadi, Maksim Chaldymov, Yuri Valentinovich Chernomorchenko and Gold Tree Tanzania Limited – are defendants in Commercial Case No. 119 of 2015 pending in this court in which they have been sued together with two others (Victor Joseph Peter and Ruphinus Anthony Mlorere) by the respondent; Gaslamp Holdings Corp seeking a number of reliefs which are not relevant here. In the present application, the applicants are seeking, *inter alia,* an order for the respondent to deposit in court the sum of USD 2,000,000.00 as security for costs in respect of the said Commercial Case No. 119 of 2015. They have essentially

made that application under Order XXV rule 1 (1) and section 95 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (hereinafter referred to as the CPC). The application is supported by an affidavit of Percy Beda Mwidadi; the first applicant.

It is the applicants' averment that the respondent has not filed any counter-affidavit to challenge the application and thus beckons the court to allow it as it stands uncontested. On the other hand, the respondent states that the counter-affidavit was filed on 10.10.2016 as directed by the court. I heard the parties on these two rival contentions on 24.10.2016 and this is a ruling thereof.

At the hearing, the applicants had the representation of Mr. Edward Chuwa and Mr. Simon Patrick, learned counsel while the respondent had the services of Mr. Thomas Mihayo Sipemba, also learned counsel.

Mr. Edward Chuwa, learned counsel for the applicants submitted that the learned counsel for the respondent was ordered to file the counter-affidavit on this application by 10.10.2016 and that there was also an order for the applicant to file a reply to the counter-affidavit, if any, by 13.10.2016 and the matter was slated for necessary orders on 17.10.2016. When this matter came for orders on 17.10.2015, the learned counsel submitted, the applicants had not filed any reply because they had not received any counter-affidavit in respect of this application. However, he went on, the record of the court had a counter-affidavit in respect of Miscellaneous Commercial Application No. 166 of 2016. The learned counsel thus submitted that no counter-affidavit has been filed in respect of the present application and therefore stands uncontested and should be allowed. The learned counsel cited an unreported decision of this court (Kente, J.) of ***Mtakuja Kondo & 3 others Vs Wendo***

Maliki & 2 others, Miscellaneous Land Application No. 241 for this proposition. He also cited an unreported decision of the Court of Appeal of ***Brazafric Enterprises Vs Kaderes Peasants Development (PLC)***, Civil Appeal No. 123 of 2014 (at Page 4) for the proposition that the error is fatal. The thus prayed that the court grants the applicants' prayer to allow the application as it is not contested.

Responding, Mr. Sipemba, learned counsel for the respondent vehemently objected the applicants' prayer. Starting with the decision of the Court of Appeal, he stated that the ***Brazafric*** case is not relevant to the present case as it was on non-compliance with rule 83 (6) of the Court of Appeal Rules which requires substantial compliance with form D of the schedule to those Rules. He added that the court was dealing with naming of the court; that is, instead of Court of Appeal of Tanzania, they named it as the Court of Appeal of Mwanza. To the contrary, citing ***Leila Jalaludin Haji Jamal Vs Shaffin Jadaludin Haji Jamal***, Civil Appeal No. 55 of 2003 (at Page 6), the learned counsel argued, an error in numbering an application is not fatal. He submitted that the mistake in numbering the application was caused by the registry and should not be used to defeat the interests of justice and also that the defect is curable.

The learned counsel for the respondent also beckoned the court to exercise its general powers to amend any defect or error in any proceeding in a suit bestowed upon it by the provisions of section 97 of the CPC.

Rejoining, Mr. Chuwa, learned counsel for applicants stated that the respondent was granted leave to file the counter-affidavit in respect of application No. 163; not 166. He should have therefore indicated No. 163. He added that the applicants' application which was served on the responded

was indicated No. 163; not 166. He added that the learned counsel for the respondent has wrongly interpreted the ***Leila*** case in that he has in fact cited Kesaria's argument in that case as the court's decision. The court's decision, he argued, starts at p. 8 and it was on failure to include a Written Statement of Defence in the record of appeal. He added that the counsel for the respondent had not responded on the effect of failure to file a counter-affidavit which, to him, amounted to a concession. He thus reiterated his prayer to have the application allowed for being uncontested.

The central issue on which the learned counsel for the parties have locked horns and which this ruling must answer is whether the respondent, by wrongly numbering the counter-affidavit, should be taken as she has filed no affidavit at all requiring this court to grant the prayers sought in the application as prayed.

The evidence on record is glaringly clear that the respondent filed a counter-affidavit in respect of Miscellaneous Commercial Application No. 166 of 2016. He stated that the number was so indicated as the copy served on them indicated that number. The applicants are taking that defence as a lame one as the respondent prayed for time to file the counter-affidavit in Miscellaneous Commercial Application No. 163 of 2016; not Miscellaneous Commercial Application No. 166 of 2016. The respondent has relied on the ***Leila*** case (supra) to argue that the error is curable. I have read the ***Leila*** case. In that case, Mr. Kesaria, learned counsel for the respondent therein had filed a preliminary objection asking the court to strike out that appeal as the applicants therein had indicated Civil Case No. 343 of 2002 instead of Civil Case No. 343 of 2001 from which that appeal stemmed. At p. 6 of the typed ruling, the Court of Appeal held that the error was a minor curable one and overruled the respondents' objection.

In the case at hand, it is glaringly clear that the respondent, in her counter-affidavit, indicated No. 166 instead of 163. The learned counsel for the respondent has ascribed the error to the court registry which indicated No. 166 instead of No. 163. During the hearing, I had an occasion to look at the number indicated on the documents served upon the respondent. I also asked the learned counsel for the applicant to have a glance at it as well. I also asked some members who had accompanied the applicants' counsel who I learnt later were students on internship. From them and from what I saw on the documents number 3 in 163 was over-written in a manner that one could mistake the 3 as 6 or vice versa. In the circumstances of this case, it will be unfair to punish the respondent for a mistake the registry of this court has contributed to bring confusion between the two numbers. The respondent's counsel is not entirely to blame. And, after all, the learned counsel has shown to the satisfaction of the court, that he was led into believing that the number appearing on the documents served on the respondent confusing such that one could not realize what exactly the number between 163 and 166 was.

As was held by this court [Nsekela, J. (as he then was)] in ***VIP Engineering & Marketing Limited Vs Societe Generale De Surveillance (S.A) & Anor***, Commercial Case No 16 of 2000 (unreported):

> "It is trite law that a litigant should not be allowed to suffer through the mistake of an officer of the Court connected with the administration of justice and that Courts have a duty to ensure that Court records are true and that they represent an accurate record of the proceedings. To this end

Section 97 of the CPC can be invoked to rectify errors should they occur".

In the light of the foregoing and the ***Leila*** case, I am inclined to hold that the impairment, if any, is a minor curable one. As the contents of the counter-affidavit refer to Miscellaneous Commercial Application No. 163 of 2016 and as the documents served on the respondent were over-written in a manner that one could possibly mistake the number 3 on it as number 6, I find and hold that the respondent is not to blame for indicating the number; that is, indicating Miscellaneous Commercial Application No. 166 of 2016, on the counter-affidavit as he did. This, I think, is a technicality which falls within the scope and purview of the provisions of article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977. For the avoidance of doubt, this provision of the *Grund Norm* beckons the court to ignore unnecessary technicalities which may hinder smooth administration of justice.

On the basis of the foregoing, I find the ailment complained of by the learned counsel for the applicants as trivial and curable and order that, from the date hereof, the number indicated in the title of the counter-affidavit should be taken to read as 163 instead of 166; that is to say, it should read as Miscellaneous Commercial Application No. 163 of 2016. With this finding, it means that the respondent had duly filed her counter-affidavit which document should be taken to counter the averments in the affidavit filed by the applicant in support of the application.

For the avoidance of doubt, I have as well read the ***Mtakuja*** and ***Brazafric*** cases relied upon by the learned counsel for the applicants. The latter case was about a misnomer in the Notice of Appeal; it was titled "in the Court of Appeal of Mwanza". The court of Appeal sustained a preliminary objection to

the effect that there was no such court and that the Notice was therefore not compliant with Form D provided for under rule 83 (6) of the Court of Appeal Rules. The case is therefore not applicable in the present instance. Likewise, it is my well considered view that, basing on the finding in the foregoing paragraph, the former case is distinguishable from the present case. In that case, the respondents did not file any counter-affidavit while in the present case, as I have found and held above, the counter-affidavit was filed. Likewise, the ***Mtakuja*** case, without deciding its correctness or otherwise because I read it askance, is, for the same reason, distinguishable from the facts of the present case. It is therefore inapplicable in the present instance. In both the ***Mtakuja*** and ***Brazafric*** cases, unlike in the present, no counter-affidavits were filed. Both cases are therefore distinguishable.

The foregoing said, the invitation by Mr. Chuwa, learned counsel for the applicants, to grant the orders sought for the reason that the application is not contested, is declined. The present application shall proceed to the next step on a date to be slated today. As the applicants did not file a reply to the counter-affidavit because of the impairment the subject of this ruling, are at liberty to file the same within seven days from the date hereof, if they so wish. Costs of this application shall be in the cause.

Order accordingly.

DATED at DAR ES SALAAM this 20th day of December, 2016.

J. C. M. MWAMBEGELE
JUDGE