IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 14 OF 2016

(Arising from Miscellaneous Commercial Cause No. 259 of 2015)

GASLAMP HOLDINGS CORP ..... APPLICANT

VERSUS

PERCY BEDA MWIDADI
VICTOR JOSEPH PETER
MAKSIM CHALDYMOV
YURI VALENTINOVICH CHERNOMORCHENKO ..... **RESPONDENTS**
RUPHINUS ANTHONY MLORERE
GOLD TREE TANZANIA LIMITED

4th July & 17th October, 2016

RULING

MWAMBEGELE, J.:

The applicant filed the present application seeking for the following orders:

1. That this Honourable Court may be pleased to issue a summons to the first Respondent to appear before this Honourable Court and show cause why he should not be convicted of contempt of Court and be

detained as a civil prisoner for disobedience of the lawful order of this Court made on the 14th December, 2015;

2. That this Honourable Court may upon hearing the Respondent enter a finding that the Respondent has committed contempt by disobeying the lawful Court order of 14th December, 2015 and imprison the first Respondent to a term of imprisonment as the Court sees fit;
3. That this Honourable Court may be pleased to order the first Respondent to purge his contempt by complying with the order of this Court made on the 14th December, 2015;
4. That this Honourable Court may be pleased to issue an order that the first Respondent pay the Applicant's costs; and
5. That this Honourable Court may be pleased to grant any other order as it shall deem fit and just to grant in the circumstances.

The application has been taken under Order XXXVII rule 2 (2) and section 68 (e) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (hereinafter "the CPC") and any other enabling provisions of the law. It is supported by the affidavit sworn by a certain John Alphonce.

On 14.06.2016, Mr. Chuwa, learned counsel from a law firm going by the name Chuwa and Co. Advocates representing the first, third, fourth and sixth respondents put this court and the applicant on notice to the effect that at the first hearing of the present application, he would raise the following preliminary objection on points of law:

(a) The chamber application is bad in law for being brought under wrong provisions of law; and

(b) The chamber application is bad in law for being supported by a defective affidavit.

On 07.06.2016 the learned counsel for the parties agreed and prayed to the court to dispose of the preliminary objection (hereinafter "the PO") by written submissions. The court granted the prayer and proceeded to schedule the dates on which the submissions could be filed. Both parties have filed their written submissions timeously.

I wish to state at this stage that this ruling was slated to be pronounced on 11.08.2016 but because I was out of the station for two consecutive months for a special assignment which ended on 22.09.2016, that could not be possible. Now that I am back and the ruling is ready, I am now set to deliver.

Submitting for the PO, the learned counsel for first, third, fourth and sixth respondents opted to start with the second point. He argues that the affidavit of Alphonce John which supports the application, is defective in that it is based on hearsay statements without disclosing the source of the information thereof. Particular reference is made to paras 3, 9 and 10. The learned counsel submits that the paragraphs under reference offend the provisions of Order XIX rule 3 of the CPCP which dictate that "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 ground thereof are stated". The learned counsel for the first, third, fourth and sixth respondents submits that the deponent ought to have disclosed sources of the information by disclosing the name of the alleged legal counsel. The provisions of the law being mandatory, he argues, the law has been offended and therefore the affidavit should not be acted

upon as was the case in ***Salima Vuai Foum Vs Registrar Of Cooperative Societies & 3 Others*** [1995] TLR 75 and ***Premchand Raichand Ltd and another Vs Quarry Services of East Africa Ltd and others*** [1969] 1 EA 514. The learned counsel has underlined the position of the law that an affidavit which does not conform to the requirement of the law is defective and the application based on such affidavit is liable to be struck out. He has relied on ***Sinani Umba Vs National Insurance Corporation (T) Limited and City Insurance Consultants***, Civil Application No. 50 of 2003 (CAT unreported) for this proposition.

On the first ground, the learned counsel for the first, third, fourth and sixth respondents has been very brief. He states that the provisions of the law cited are not applicable to move the court to convict any person. He has relied on the definition of the term "conviction" as defined by **Black's Law Dictionary**. He has however not cited which provisions would have been appropriate in the circumstances.

The learned counsel for the first, third, fourth and sixth respondents has thus prayed to the court to strike out the suit with costs.

On the other hand, Mr. Thomas Sipemba, learned counsel for the applicant, following suit by arguing the second point of PO first, submits that the attack on para 3 of the affidavit supporting the application is unfounded because the affidavit was appended with the ruling of this court of 14.12.2015 in which there was contained such restraint orders. The learned counsel seems to argue that, in the circumstances, there was no need to disclose the name of the counsel who advised him. However, should the court find that the deponent has not disclosed the source of advice that the respondents were

indeed restrained from accessing the mine site and from dealing with the assets at the mine site, he prays that the court takes judicial notice of its own decision pronounced on 14.12.2015.

Mr. Sipemba submits that Mr. Chuwa has not made any substantial submission in respect of para 9 of the affidavit supporting the application and that the para does not contain anything to suggest whether expressly or impliedly that the deponent obtained the information contained therein from his legal counsel. He submits that the averments contained in para 9 are well within the knowledge of the deponent and this has been indicated in the verification clause.

Likewise, the learned counsel submits that the words complained of; that is, reference to his employer who reported the matter to the Police in Chunya, are not contained in para 8 but para 9. He thus argues that the contents of para 8 are within the knowledge of the deponent.

As for para 10, Mr. Sipemba submits that Mr. Chuwa has not submitted anything on it. He stated that the words appearing in para 10 are "I am advised by the applicant's legal counsel, which advice I verily believe to be true tht the actions of the 1st respondent is (sic) in contempt of the court orders issued on 14th December, 2015". He submits that the deponent has stated the source of the information to be the applicant's legal counsel and that that is not a blanket reference like the one referred to in ***Sinani Umba***; a case cited by Mr. Chuwa.

The applicant's counsel has also reminded the court that where an affidavit contains a defective paragraph or defective paragraphs and if the application can stand based on the remaining paragraphs, then the court can proceed

with the hearing of the application in question. For this stance, the learned counsel has cited ***Phantom Modern Transport (1985) Limited Vs D. T. Dobie (Tanzania)***, Civil References No. 15 of 2001 and 3 of 2005 and ***Attorney Generai Vs SAS Logistics***, Criminal Application No. 9 of 2011, both unreported decisions of the Court of Appeal. The learned counsel has thus submitted that should the court find that the paragraphs complained of are defective, it should expunge them and leave the substantive parts of the affidavit intact to support the application.

In the alternative, the learned counsel has argued that should the court find those paragraphs as offending, it should order the applicant to make necessary amendments by including the name of the legal counsel from whom the deponent received the information as was the case in ***D. T. Dobie (Tanzania) Limited Vs Phantom Modern Transport (1985) Limited***, Civil Application No.141of 2001. By so doing, he argues, no injustice will be occasioned.

On the first point of the PO, the learned counsel submits, essentially, that the provisions cited in support of the application are quite apposite as they are clear and empower the court to order detention of a party as a consequence of disobedience or breach of injunction.

The learned counsel for the applicant has thus beckoned the court to dismiss the PO with costs.

Rejoining, the learned counsel for the first, third, fourth and sixth respondents submits that allowing an amendment will not be appropriate. He has cited **Mogha's Law of Pleadings in India with Precedents**, 18th Edition at pp

431 and 432 at which it is stated, *inter alia*, that amendment in affidavits is not permissible.

In respect of para ten, the learned counsel submits that failure to mention the name of the applicant's legal counsel amounts to insufficient disclosure of information as was stated in ***Sinani Umba***.

I have read and subjected the learned arguments by both learned counsel to proper scrutiny. The ball is now in my court to determine on them. In determination of the controversy between the parties I will also follow the path taken by the learned counsel by starting with the second point of PO.

As rightly submitted by Mr. Chuwa and conceded by Mr. Sipemba, an affidavit must conform to the conditions of the provisions of Order XIX of the CPC. One such condition is that it must 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". This is the tenor and import of rule 3 of Order XIX of the CPC. This provision of the law has been interpreted in a number of decisions. In ***Salima Vuai Foum*** (supra), a case cited by Mr. Chuwa, the Court of Appeal, relying on ***Mtale Vs January Kapembwa*** [1976] LRT, n. 7, ***Standard Goods Incorporation Ltd Vs Harakhchand Nathu and Company*** [1950] 17 EACA 99 and ***Bombay Flour Mill Vs Hunibhai M. Patel*** [1962] EA 803 held at p 78 that:

> "The principle is that where an affidavit is made on information, it should not be acted upon by any court unless the sources of the information are specified."

Mr. Chuwa is of the view the affidavit sworn by John Alphonce supporting the application is tainted with this deficiency. To the contrary, Mr. Sipemba for the plaintiff thinks it is not. Who between the two learned counsel is in the right track? This is the million dollar question which must be tackled in this ruling.

The paragraphs under attack are paras 3, 9 and 10. These paras are couched thus:

> 3. That I have been advised that by a court order dated 14th December, 2015 in Miscellaneous Commercial Application No. 259 of 2015 the Respondents above were restrained from accessing the mine site referred to in paragraph I above and were further restrained from dealing with the assets at the mine site.
>
> ***"It is now shown to me a copy of the ruling of this Court in Miscellaneous Commercial Application No. 259 of 2015 to be referred as part of this Application".***
>
> 9. That I immediately reported the matter to my employer who reported the matter to the police in Chunya Police Station (OCD), the matter is still under investigation. The assets that had been taken from the mine site have been repossessed by the police and are kept at the Chunya Police Station.
>
> 10. That I am advised by the Applicant's Legal Counsel, which advice I verily believe to be true that the actions of the 1st

Respondent is in contempt of the court orders issued on 14th December, 2015.

The words complained of are "I have been advised that by a court order ..." in para 3, "I immediately reported the matter to my employer ..." in para 9 and "I am advised by the applicant's legal counsel ..." in para 10. It is the argument of Mr. Chuwa that the deponent ought to have disclosed the person who advised him in para 3, the name of the applicant's counsel in para 9 and the name of the employer in para 10.

I must state at the outset that I find considerable merit in Mr. Chuwa's complaints in respect of the three paragraphs complained of. In para 3 of the affidavit in support of the application, the deponent deposes that he was advised that by a court order dated 14.12.2015 in Miscellaneous Commercial Application No. 259 of 2015 the respondents were restrained from accessing the mine site and from dealing with the assets at the mine site. The source of that advice is not disclosed. It seems to me that the deponent, in terms of rule 3 of Order XIX of the CPC, ought to have mandatorily disclosed the source of that advice failure of which the paragraph offends against the provision cited to which affidavits must mandatorily conform. I am not ready to buy Mr. Sipemba's argument to the effect that the court should take judicial notice of its ruling. Fine; the court may take judicial notice of its ruling dated 14.12.2015 but that will not cure the ailment in the affidavit. The court is not swearing the affidavit; it is the dependent. Thus, this argument does not rescue the learned counsel for the applicant from Mr. Chuwa's complaint.

Likewise in para 9 the deponent deposes that he immediately reported the matter to his employer who reported the matter to the Chunya Police Station at which the matter is still under investigation. The name of the employer is not disclosed. I, again, am of the considered view that it was relevant that the name of the employer was disclosed to make a meaningful counter-affidavit as well as verifying the veracity of the averment, whenever possible.

In the same token, the deponent deposes that he was advised by the applicant's legal counsel which advice he verily believed to be true that the actions of the first defendant is in contempt of the order of this court dated 14.12.2015. The name of the applicant's counsel is again not disclosed. The name of the applicant's counsel who has been appearing in this matter is Thomas Mihayo Sipemba, learned counsel, who the pleadings show he is a partner in a law firm going by the name East Africa Law Chambers. One cannot safely assume that the applicant's legal counsel referred to is necessarily Thomas Mihayo Sipemba, it could be someone else from the law firm. In the circumstances, I strongly feel that the name of the applicant's legal counsel who supplied the deponent with the information to the effect that the first respondent's counsel was tantamount to contempt of this court's order ought to have been disclosed. Blanket reference to the applicant's legal counsel who supplied him with the information deposed in the affidavit offends the law.

With the foregoing in mind, I find and hold that the three paragraphs complained of offends against the provisions of order XIX rule 3 of the CPC. What is the law in cases of this eventuality? The law on this point is fairly settled. It is the law that once paragraphs are found to be offending against the law, the remedy is to expunge them; that is, the offending paragraphs.

That this is the law was stated in the ***Phantom Modern Transport (1985) Limited*** and ***SAS Logistics*** cases (supra), unreported decisions of the Court of Appeal cited by the learned counsel for the applicant. In ***SAS Logistics*** the Court of Appeal quoted the following paragraph from the ***Phantom*** case (supra):

> "It seems to us that where defects in an affidavit are inconsequential, those offensive paragraphs can be expunged or overlooked, paragraphs leaving the substantive parts of it intact so that the court can proceed to act on it. If however, substantive parts of an affidavit are defective, it cannot be amended in the sense of striking off the offensive parts and substituting thereof correct averments in the same affidavit"

In the light of the above authorities, I find myself in agreement with Mr. Sipemba, learned counsel on the proposition that should the court find that the paragraphs under attack are offending against the law, it should proceed to expunge them and not striking out the whole affidavit thereby leaving the application without necessary support. In the premises, paragraphs 3, 9 and 10 of the affidavit of John Alphonce are struck off the affidavit supporting the application. For the avoidance of doubt, the rest of the paragraphs remain intact.

I must mention here that I have not found any purchase with Mr. Sipemba's argument to the effect that should the court find that the paragraphs are defective, it should allow the applicant to make necessary amendments. This

course is unacceptable as it would amount to pre-empting the preliminary objection. It is the law in this jurisdiction that once a preliminary objection has been filed, any attempt to pre-empt it will not be acceptable. That this is the law has been stated times and again in a string of cases in this jurisdiction. One such case is ***Mary John Mitchell Vs Sylvester Magembe Cheyo & ors***, Civil Application No. 161 of 2008 (unreported) in which the Court of Appeal reiterated its earlier position it stated in ***Method Kimomogoro Vs Board of Trustees of TANAPA***, Civil Application No. 1 of 2005 (unreported) wherein it stated:

> "This court has said in a number of times that it will not tolerate the practice of an advocate trying to preempt a preliminary objection either by raising another preliminary objection or trying to rectify the error complained of."

That was not the first time the Court of Appeal held that a preliminary objection should not be pre-empted. There are other cases. Such cases include ***Shahida Abdul Hassanali Kassam Vs Mahedi Mohamed Gulamali Kanji*** Application No. 42 of 1999 (Unreported), ***Almas Iddie Mwinyi Vs National Bank of Commerce & Another*** [2001] TLR 83, ***Alhaji Abdallah Talib Vs Eshakwe Ndoto Kiweni Mushi*** [1990] TLR 108, ***The Minister for Labour and Youth Development and Shirika la Usafiri DSM Vs Gaspa Swai & 67 Others*** [2003] TLR 239 and ***Frank Kibanga Vs ACCU Ltd***, Civil Appeal No. 24 of 2003 (unreported), to mention but a few.

The foregoing said, the second point of the PO succeeds to the extent stated above.

Having so found and held, what then should be the way forward? I have gone through the remaining paragraphs. I think they contain enough material upon which this application can stand in this court.

The first point of the PO will not detain me. Both learned counsel for the parties have been very brief in arguing for and against this point and nothing substantial has come out clearly in the argument for the point. The provisions of rule 2 (2) of Order XXXVII are self explanatory. The provision reads:

> "In case of disobedience or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained as a civil prisoner for a term not exceeding six months, unless in the meantime the court directs his release."

The sub-rule speaks for itself. It covers a situation when there is disobedience of a court injunction order like what is alleged to have transpired in the instant case. The provision upon which the present application has been made is therefore quite apposite. The only snag is reference to "any other provisions of the law". I, following decisions of my brother at the Bench Mihayo, J., have more than once discouraged the use of this phrase in some of my previous rulings. One such ruling is ***Municipal***

Director, Kinondoni Municipal Council Vs N. W. Builders Limited, Miscellaneous Commercial Cause No. 46 of 2015 (unreported). The phrase "any other enabling provisions of law" does not have any value addition to any application. The phrase cannot provide enough legs on which an application can stand in court. This court (Mihayo, J.) has observed in occasions more than once that the phrase "any other enabling provisions of law" is now meaningless, outdated, irrelevant and an unnecessary embellishment. In ***Janeth Mmari Vs International School of Tanganyika and Another***, Miscellaneous Civil Cause No. 50 of 2005 (unreported), His Lordship Mihayo, J. had an opportunity to make an observation on the phrase. His Lordship observed:

> "This song, '**any other enabling provisions of the law**' is meaningless, outdated and irrelevant. The court cannot be moved by unknown provisions of the law conferring that jurisdiction. That law must therefore be known. Blanket embellishments have no relevance to the law nor do they add any value to the prayers to the court."
> (Emphasis not mine).

His Lordship had occasion to make an observation in yet another case: ***Elizabeth Steven & another Vs Attorney General***, Miscellaneous Civil Cause No. 82 of 2005 (also unreported) as follows:

> "The phrase any other provision of law is now useless embellishment, the law is now settled."

My brother Makaramba, J. also had an occasion to comment on the phrase in ***Rubya Saw Mill Timber Vs Consolidated Holdings Corporation,*** Commercial Case No. 297 of 2002 (unreported) in the following terms:

> "The Applicant has invoked the omnibus magical phrase ***"and any other enabling provision of the law in force"*** presumably to take care of the other provisions of the law under which the application could be brought but without mentioning them specifically. This Court is therefore left wondering what those other provisions under any other enabling provision of the law in force are. The acceptable practice is for the applicant to have mentioned in the application the specific provisions in the other enabling provisions of the law in force as conferring jurisdiction on this Court to do what the applicant is asking it to do. I should only mention here that it is now settled law that failing to cite a specific provision of the law or citing a wrong provision of the law renders an application incompetent and liable to be dismissed and/or struck out as the case may be".

In the light of the foregoing authorities, it is apparent that an applicant must therefore cite provisions of the law under which an application is made, failure of which he cannot, legally, successfully seek refuge under the phrase

"any other enabling provisions of the law". The court cannot legally be moved by unknown provisions of the law.

In the present instance, the applicant having cited the provisions of the law which supported his application, the phrase "any other enabling provisions of law" was unnecessary. The second point of the PO by Mr. Chuwa is therefore overruled.

The cumulative effect of the above discussion is that the first point of the PO is overruled and the second point of the PO is partially sustained such that the offending paragraphs complained of; that is, paragraphs, 3, 9 and 10 are declared defective and expunged from the affidavit. The remaining paragraphs of the affidavit supporting the application have enough material upon which the application can stand in this court.

The application will therefore proceed on the date to be slated today. The circumstances of this matter are such that there should be no order as to costs. I therefore make no order as to costs.

Order accordingly.

DATED at DAR ES SALAAM this 17th day of October, 2016.

J. C. M. MWAMBEGELE
JUDGE