

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 51 OF 2020

(Arising from Commercial Case No. 29 of 2012)

PANGEA MINERALS LTD.....APPLICANT

VERSUS

PETROFUEL (T) LIMITED1ST RESPONDENT

POWER ROADS (T) LIMITED.....2ND RESPONDENT

LYCOPODIUM TANZANIA LIMITED3RD RESPONDENT

RULING

B.K.PHILLIP, J

This is an application for extension of time for lodging a Notice of Appeal against the ex-parte judgment in Commercial case No. 29 of 2012. It is made under the provisions of section 11 of the Appellate Jurisdiction Act, 1979, supported by an affidavit sworn by the learned advocate Caroline Kivuyo. Mr. Satish Kumar, the managing Director of the 1st respondent swore a counter affidavit in opposition to the application. The 2nd and 3rd respondents are not contesting the application.

The applicant prays for the following orders:-

1. That this Honourable Court be pleased to extend the time for lodging a notice of intention to appeal against the findings in the ex-parte judgment of this Honourable Court in Commercial Case No. 29 of

2012 between Petrofuel (T) Limited v. Power Roads (T) Limited, Lycopodium Tanzania Limited and Pangea Minerals Limited;

2. That the costs of this application be cost in the cause; and

3. Any other order that this Court deem fit and just to grant.

The applicant is represented by the learned Advocate Caroline Kivuyo, the 1st respondent is represented by Bavoo Junus, whereas the learned Advocates, Sylvester Shayo and Jannet Njombe represents the 2nd and 3rd respondents respectively.

The learned Advocate Bavoo Junus raised the following points of Preliminary Objection against the application;

- (i) That the application is bad in law for being brought under the wrong enabling provision of the law.
- (ii) That the affidavit in support of the application is incurably defective for being deponed/sworn by an incompetent person.
- (iii) That the Affidavit in support of the application is incurably defective for being attested to by an unqualified person.

This ruling is in respect of the above mentioned points of preliminary objection. Before proceeding with the determination of the above mentioned points of preliminary objection, let me give a brief background to this matter. In the year 2012, the 1st respondent herein lodge a case against the applicant , the 2nd and 3rd respondents vide Commercial Case No. 29 of 2012, praying for judgment and decree against the applicant, 2nd and 3rd respondents jointly and severally as follows;

- (a) Payment of the unpaid invoices of TZS.199,931,520 and interest amounting to TZS.515,072,528, totaling TZS.715,004,048;
- (b) General damages of TZS.300,000,000.
- (c) Interest on decretal amount at courts rate,

- (d) Costs of this suit,
- (e) Interest on costs at courts rate
- (f) Any other relief(s) as this Honourable Court may deem just fit to grant.

The 1st respondent's claims aforesaid were based on the alleged breach of contract for supply of Diesel for failure to pay for the Fuel/Diesel supplied to the 2nd respondent for the project at Buzwagi. It was the 1st respondent's case, that on 15th October, 2007, the 1st respondent entered into contract with a company known as Fuchs Oil (T) Limited to supply the 2nd respondent with 2000 litres of Automotive Gas Oil "Diesel", thereafter Fuchs Oil (T) Limited assigned the said contract to the 1st respondent and it supplied the fuel/diesel accordingly. The applicant herein and the 3rd respondent had guaranteed for the payment of the money for the fuel/diesel supplied by the 1st respondent. The hearing of Commercial case No. 29 of 2012 proceeded ex-parte. Consequently, this court entered an ex-parte judgment against the applicant, the 2nd and 3rd respondent.

Being aggrieved by the ex-parte judgment aforesaid, the applicant herein appealed to the Court of Appeal of Tanzania and the 2nd respondent lodged a cross appeal. At the Court of Appeal, the advocate for the 1st respondent raised a point of preliminary objection that both appeals were incompetent for failure by the appellants to exhaust the remedy available before the trial Court which passed the ex-parte judgment. The point of preliminary objection was sustained and both appeals were struck out.

Despite the order of the Court Appeal that the applicant has to exhaust the remedy available in this Court, the applicant decided to start afresh the process of appealing to the Court of Appeal without taking any step for exhausting the remedy available in this court as per the ruling of the Court of Appeal. Thus, he lodged this application.

Due to time constraints, I ordered the points of preliminary objection to be disposed of by way of written submissions. Starting with the 1st point of preliminary objection, Mr. Junus submitted that, section 11 of the Appellate Jurisdiction Act, 1979 which has been cited by the applicant in this application is a dead law. He contended that the proper citation of the law is section 11 of the Appellate Jurisdiction Act, Cap 141, R.E.2019 which formerly was known as the Appellate Jurisdiction Act , Cap 141 R.E 2002.

As regards the 2nd point of preliminary objection, Mr. Junus contended that the learned Advocate Caroline Kivuyo, has deponed on matters which she has no personal knowledge, contentious and needs substantive evidence for establishing a right and denying liability for her client contrary to the law. It was the contention of Mr. Junus that an advocate can swear an affidavit in the proceedings she/he appears for his /her client on matters which he /she has personal knowledge, formal and non-contentious matters only. To cement his arguments , he cited the case of **Lalago Cotton Ginnery and Oil Mills Co. Ltd Vs The Loans and Advances Realization Trust (LART) , Civil Application No. 80 of 2002** (unreported) in which the court made the following findings;

"An Advocate can swear and file an affidavit in proceedings in which he appears for his client, but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during those proceedings".

And the case of **Hon Zitto Zuberi Kabwe (MP) Vs The Board of Trustees, Chama cha Demokrasia na Maendeleo, Civil Case No.270 of 2013**, (unreported), in which the court held that;

"My settled view in interpreting the decision in the Lalago case is that, though it is undisputed that our civil justice system recognizes an advocate as authorized agent of the party he represents in court, the precedent (Lalago case) did not give a blank cheque authority to

an advocate in swearing affidavits for his clients in respect of all facts that he had personal knowledge. The authority is only limited to facts that came into the advocate's personal knowledge by virtue of him acting in such capacity for his client. That mandate does not extend to substantive evidence for establishing a right or denying liability for his client in any court proceedings. Otherwise, an advocate will be both a witness and a counsel in the same case because; affidavits in law take place of oral evidence as I observed earlier".

Expounding more on this point, Mr. Junus referred this court to the contents of Paragraphs 2, 2(i)-2(vi), 3-11 and 16 of the affidavit sworn by Ms. Kivuyo, which, he contended that they contain information which are not in the knowledge of Ms. Kivuyo. Mr. Junus also claimed that the contents of paragraphs 14-21 of the affidavit of Ms. Kivuyo are contentious.

As regards the 3rd Point of Preliminary objection, Mr. Junus submitted that Okare Emesu who attested the affidavit of Ms. Kivuyo on 24th April 2020 was, at that time unqualified person because he had neither a valid practicing certificate as an advocate nor a Notary Public certificate, thus he had no mandate to act as the commissioner for oaths. According to the information available in the Tanzania Advocates Management System (TAMS), counsel Okare Emesu renewed his practicing certificate and Notary Public certificate on the 11th May 2020, contended Mr. Junus. To bolster his arguments he referred this court to the provisions of section 39 and 41 of the Advocates Act, Cap 341, R.E 2019 and section 4 of the Notary Public and Commissioner for Oaths Act, cap 12 .R.E 2019 (Herein after to be referred to as "Cap 12"). He also cited the case **of Edson Oswald Mbogoro Vs Dr. Emmanuel John Nchimbi & the Hon. Attorney General , Civil Appeal No. 140 of 2002** (unreported), in which the court said the following ;

"After considering the above decisions of those three Commonwealth countries, that is to say England, Kenya and Uganda, we can say that

although there is no specific statutory provision on the point, if an advocate in this country practices as an advocate without having a current practicing certificate, not only does he act illegally but also whatever he does in that capacity as an unqualified person has no legal validity. We also take the liberty to say that to hold otherwise would be tantamount to condoning illegality. It follows that the notice of appeal, the memorandum of appeal and the record of appeal which were prepared and filed in this Court by Dr. Wambali purporting to act as an advocate of the appellant were of no legal effect”.

In rebuttal Ms. Kivuyo, submitted that the 1st point of preliminary objection is misconceived since in terms of the Interpretation of laws Act, a written law may be cited in three ways namely, using its short title, using the year of its enactment and by using the chapter number given to it in any revised edition. In this application the applicant cited the short title and year of enactment of that law, thus the law cited in this application is correct and it is in line with the provisions of section 20(2) (b) of the Interpretation of Laws Act (Cap 1 R.E 2002). So, the case of **Shibuda** (supra) cited by the respondent is distinguishable from this application, contended Ms. Kivuyo.

As regards the 2nd point of preliminary objection, Ms. Kivuyo, submitted that, the affidavit in support of this application is proper and competent. The deponent deposed on matter which she has personal knowledge and at the verification clause the deponent disclosed the source of information of the matter she deposed on. That is all what is required under the laws, contended, Ms. Kivuyo. She referred this court to the case of **Stanbic Bank Tanzania Limited Vs Kagera Sugar Limited, Civil Application No.57 of 2007** (unreported) in which the Court said the following ;

"Paragraph 3 of the affidavit for instance shows that the deponent perused the court record. This means that some of the matters deposed in the affidavit came from the court record and not from the deponent's own knowledge. In fact almost all the information

contained in the affidavit from paragraphs 4 to 33 and 35 were obtained from the court record and the verification clause ought to have disclosed such source of information. In this respect we disagree with the learned counsel for the applicant that the deponent after scrutinizing the court record he internalized the information as his own. What the law requires is for the deponent to say where he derived such information. It does not allow one to take the information as his/her own."

Furthermore, Ms. Kivuyo submitted that the contents of paragraphs 2, 2(i) - 2(vi) , 3-11 and 16 of the affidavit are based on information whose source have been disclosed. The contents of paragraphs 14 -21 are not contentious but are factual issues that the applicant does not intend to challenge decision of the High Court to proceed ex-parte. Moreover, she submitted that the affidavit in support of this application does not entail any admission, denial or even the substance of the dispute between the parties. All facts deponed in the affidavit are basically about the background to this matter, as such there is no any paragraph in the affidavit where the deponent is denying or accepting liability on behalf of the applicant. Thus, the affidavit in support of this application has met all the principle established in the Zitto Kabwe (supra) and Lalago (supra) insisted, Ms. Kivuyo.

As regards the 3rd point of preliminary objection, she submitted that, the same is not a pure point of law as it requires evidence to prove it. Thus it contravenes the criteria of a valid Point of preliminary objection established in the case of **Mukisa Biscuits manufacturing company Limited Vs End Distributors Ltd (1969) E.A 696**. She went on to submit that holdings in the case of **Mukisa Biscuits manufacturing company Limited** (supra) was quoted with approval by the Court of Appeal of Tanzania in the case of **Karata Ernest & Others Vs Attorney General** (unreported).

She distinguished the case of **Edson Oswald Mbogoro** (supra) from the application in hand on the ground that the advocate in that case was representing the party in the case, so his competency could be ascertained by asking him to confirm it, but that is not a situation in this application. The respondents' advocate is challenging the competency of an advocate who is not before this court and not instructed to represent the applicant, contended Ms. Kivuyo. She further submitted that, in any case she was disputing the averment pertaining to the qualification of the learned Advocate Okare Emesu before whom she took the oath for the affidavit in support of this application.

In rejoinder, Mr. Junus reiterated his submission in chief and further submitted that the provisions of the law cited by Ms. Kivuyo, that is section 20(2)(b) of the Interpretation of Laws Act, does not exist since section 20(2) of the interpretation of Laws Act does not have paragraph "(b)". Mr. Junus also insisted that according to the holding of the Court of Appeal in the case of **Lalago** (supra), an Advocate can swear and file an affidavit in proceedings in which he appears for his client, but on matters which are in the advocate's personal knowledge only. It was the contention of Mr. Junus that the case of **Edson Mbogoro** (supra) is relevant in this case, as it has the same scenario to the application in hand, since the issue in that case was in respect of the validity of the practicing certificate of the advocate who had signed and verified the documents which were lodged in court. He was not the advocate who was appearing in the case. Mr. Junus argued further that Tanzania Advocates Management System ("TAMS") is found in the Judiciary's website, hence this court has to take judicial notice of the information found therein, in terms of section 59 (3) of the Evidence Act.

Having critically analyzed the submissions made by the learned Advocates, I wish to point out that of all points of preliminary objection raised by Mr. Junus, the last one, takes preference over the rest because the validity of the affidavit in support of this application is crucial. I am saying this having

in mind the provisions of Order XLIII Rule 2 of the Civil Procedure Code Cap 33, R.E. 2019 which provides that every application to the Court has to be supported by an affidavit. The position of the law is that an affidavit has to be sworn before a Commissioner for Oaths. The provision of sections 3 (1) and 4 of Cap 12, provides a guidance on the person who can practice as a commissioner for oaths in this country. According to section 4 of Cap 12 every commissioner for oaths is obliged to have certificate obtained from the High Court of Tanzania, and the same ceases to be in force unless renewed. For ease of reference let me reproduce hereunder the provisions of section 3 (1) and 4 of Cap 12.

Section 3 (1)

"Any of the following persons shall, except as provided in sub section (2), be entitled to practice as a notary public and Commissioner for Oaths in Mainland Tanzania in accordance with the provisions of this Act and to levy fees in accordance with the first Schedule-

(a) an advocate; and

(b) a person entitled to practice as a notary public in England, Scotland, Northern Ireland or the Republic of Ireland".

section 4

"(1) Any person mentioned in section 3 who is entitled to practice as a notary public and commissioner for oaths shall, on application to the Registrar of the High Court and payment to him of the prescribed fee, and upon signing a roll to be kept by the Registrar, be granted a certificate in the form in the Second Schedule, which certificate shall, subject to the provisions of section 5, entitle him to practice as a Notary Public and Commissioner for Oaths in Mainland Tanzania so long as it is in force.

(2) Every certificate shall cease to be in force after the 31st December next following the date of issue, unless it is renewed.

Therefore, it is imperative that the affidavit has to be attested by a commissioner for oaths with a valid practicing certificate for the same to be valid. If the commissioner for oaths who attested the affidavit in support of the application had no valid certificate as stipulated in the provisions of section 4 of Cap 12, then, the affidavit in question cannot be valid to support an application before the Courts of law, and consequently, there cannot be a competent application before the Court.

For the reason stated herein above, I will start with the last point of preliminary objection which involves the validity of the affidavit in support of this application. First of all, let me say on the outset that the last point of preliminary objection is a point of law since the requirement for the commissioner for oaths to have a valid practicing certificate is a matter of law. I am in agreement with Mr. Junus that this court is supposed to take judicial notice of the information available in the TAMS as far as the validity of the practicing certificates for advocates and Commissioner for oaths is concerned. I personally checked the information available in the TAMS in respect of the practicing certificate of learned Advocate Okare Emesu, the same shows that Mr. Okare Emesu, renewed his practicing certificate as an advocate and commissioner for oaths on 11th May 2020. I summoned Mr Okare Emesu to appear before me for the purpose of confirming the information aforesaid obtained from the TAMS. On 18th August 2020, Mr. Okare Emesu appeared before me in the presence of the advocates for the applicant and the respondent. He confirmed before this court that the information available in the TAMS are correct.

From the foregoing, as correctly submitted by Mr. Junus, on 24th April 2020, when Mr. Emesu attested the affidavit in support of this application he had no valid practicing certificate to exercise his powers as a commissioner for oaths. Thus, the attestation he made was invalid and the affidavit in support of this application is therefore invalid.

At this juncture I wish to point out that the case of **Edson Osward Mbogoro** (supra) referred to this court by Mr. Junus is relevant as it had the same scenario to the one in hand. By that decision the position of the law is that a document prepared or attested by an advocate or commissioner for oaths respectively, without a valid practicing certificate has no legal validity. In the case of **Baraka Owawa Vs Tanzania Teacher's Union, Misc. Labour Application No. 6 of 2020** (unreported), my brother, Hon Galeba J, was confronted with a similar situation to the one in hand whereby an affidavit in support of an application was attested by unqualified person. He expunged from the courts record the affidavit and proceeded to strike out the application for being incompetent for lack of a supporting affidavit as required under the Civil Procedure Code, Cap 33, R.E. 2019. Under the circumstances, I am constrained to expunge from the court's record the affidavit sworn by Ms. Kivuyo for being invalid having been attested by unqualified person. Having expunged from the court's record the affidavit in support of this application, then, this application lacks a supporting affidavit. Consequently, the same is rendered incompetent.

From the foregoing I do not see any plausible reasons to determine the remaining points of preliminary objections since the application is incompetent. In the upshot, this application is hereby struck out with costs.

Dated at Dar es Salaam this 1st day of September 2020.




B.K. PHILLIP
JUDGE