

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO 131 OF 2022

(Arising from Execution Proceedings in respect of Miscellaneous Commercial Cause No. 33 of 2021)

BETWEEN

MOHAMED ABDILLAH NUR.....1st JUDGMENT DEBTOR/APPLICANT

UMMULKHEIR MOHAMED.....2nd JUDGMENT DEBTOR/APPLICANT

WINGS FLIGHT SERVICES LTD.....3rd JUDGMENT DEBTOR/APPLICANT

AFRICA FLIGHT SERVICES LIMITED...4th JUDGMENT DEBTOR/APPLICANT

Versus

HAMAD MASAUNI.....1st DECREE HOLDER/RESPONDENT

ARTHUR MOSHA.....2nd DECREE HOLDER/RESPONDENT

JUMA MABAKILA.....3rd DECREE HOLDER/RESPONDENT

NASSORO SHABAN

t/a ADILI AUCTION MART.....4th DECREE HOLDER/RESPONDENT

Date of last Order: 27th April, 2023

Date of Ruling: 30th May, 2023

RULING

MKEHA, J:

Through the use of legal services of Messrs Simon Mnyele and Deogratius Lyimo learned advocates, the applicants are moving the court to be

pleased to vacate its execution order dated 18/07/2022 for having been issued prematurely or for not being in conformity with the decree and the application made by the respondents to execute the decree. The application is made under sections 38 (1) and (2) and 95 of the Civil Procedure Code. The chamber summons is supported by an affidavit affirmed by Mr. Abdillah Nur Guled on behalf of the 3rd and 4th applicants, as well as the supplementary affidavits affirmed by Messrs Mohamed Abdillah Nur and Ummul Kheir Mohamed, the first and second respondents respectively.

The application is contested through a counter affidavit sworn by Mr. Arthur Mosha, the second respondent. Apart from filing the counter affidavit, the respondents did also raise a notice of preliminary objection to the effect that, the application is incompetent for want of supporting affidavits of the 1st and 2nd applicants. Messrs Alex Mgongolwa and Kennedy Mgongolwa learned advocates represented the respondents.

The application was argued by way of written submissions in which both the application and the preliminary objection were argued at once. The submissions were as hereunder.

In the course of submitting in respect of the preliminary point of objection, it was submitted for the respondents that, the application was incompetent for having been filed without supporting affidavits of the 1st and 2nd applicants.

According to the respondents, filing the application without the two affidavits offended Order XLIII Rule 2 of the Civil Procedure Code. According to the learned advocates for the respondents, the filing of supplementary affidavits in respect of the 1st and 2nd applicants did not cure the anomaly since there was nothing to be supplemented by the supplementary affidavits. The decision in **THE REGISTERED TRUSTEES OF ST. ANITA'S SCHOOLS (T) AND 6 OTHERS VS AZANIA BANK LIMITED, CIVIL APPLICATION NO. 168/16 OF 2020** was cited.

It was submitted in reply with respect to the preliminary objection that the cited decision by the Court of Appeal interprets Rule 49 (1) of the Court of Appeal Rules which does not apply in the High court. The learned advocates for the applicants submitted also that, following the order of this court dated 12th October 2022 which allowed the applicants to file supplementary affidavits, the preliminary objection had been overtaken by events.

The learned advocates for the applicants did not contest the fact that, when the application was filed at first instance, the same was not supported with affidavits of the 1st and 2nd applicants. It is true that, on 12/10/2022 the court granted leave to the applicants for the filing of supplementary affidavits. However, the leave, as requested by Mr. Deogratus Lyimo learned advocate, was for introducing what had transpired during and after the alleged wrong eviction of the applicants. In no way could the court grant leave for supplementing what was by then not in existence. Mr. Lyimo learned advocate did not ask for leave to supplement what was not there but supplementing the affidavits that had been filed by 12/10/2022.

In the case law cited by the learned advocates for the respondents it was held by the Court of Appeal that, *like its name supplementary affidavit can only be filed to supplement a proper existing affidavit*. Therefore, since the applicants had not filed affidavits of the 1st and 2nd applicants, the supplementary affidavits added nothing.

It is therefore, I think, correct to hold that, the application is incompetent for want of affidavits of the 1st and 2nd applicants. This is because, Order XLIII Rule 2 of the Civil Procedure Code is couched in mandatory terms that, every application to the court made under the Civil Procedure Code

should unless otherwise provided, be made by a chamber summons supported by an affidavit. The applicants have not demonstrated that, this is one of the applications in which the affidavits of the 1st and 2nd applicants were unnecessary.

Following the foregoing holding, I find no need of dwelling into merits of the application. And for the foregoing reasoning, the application is struck out with costs for being incompetent.

DATED at DAR ES SALAAM this 30th day of May 2023.




C.P. MKEHA

JUDGE

30/05/2023

Court: Ruling is delivered in the presence of Ms. Dorah Malaba learned advocate for the applicants and Mr. Kennedy Mgongolwa learned advocate for the respondents.




C.P. MKEHA

JUDGE

30/05/2023