

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL APPLICATION NO. 211 OF 2022

(Arising from Commercial Cause No. 103 of 2022)

Z.A.S INVESTMENT COMPANY LIMITED APPLICANT

VERSUS

EQUITY BANK TANZANIA LIMITED 1ST RESPONDENT

EQUITY BANK KENYA LIMITED 2ND RESPONDENT

RULING

Date of last order: 13/02/2023

Date of ruling: 02/03/2023

AGATHO, J.:

By way of application the Applicant applied for an injunctive order to restrain the Respondents from undertaking recovery measures pending determination of the main case (case No. 103 of 2022) which is before this Court. The parties had filed their pleadings, namely application and affidavit in support, and a counter affidavit in opposition to the same.

On 13/12/2022 the Applicant's counsel raised a Preliminary Objection (PO) that the Respondents' counter affidavit is defective. That it does not answer the Applicant's affidavit. And that is against the law (Order XIX Rule 1, 2 and 3 of the Civil Procedure Code [Cap 33 R.E. 2019]. The

Applicant's counsel cited this provision of the law on the date of the hearing. In my view such PO partially meets the requirements set in the **Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd [1969] E.A. 696**. I am saying partially because as will be shown latter I do not think this PO can dispose the case.

Interestingly, the learned counsel, Tumaini Michael who was holding a brief of Mr. Timony Vitalis, the Respondents' counsel distanced himself from the counter affidavit. He prayed that the matter be adjourned to enable Mr. Timony Vitalis to appear and address the Court on the defect in the counter affidavit. Having no objection from the Applicant, the court adjournment the case to 13/02/2023. Surprisingly, on the latter date Mr. Timony Vitalis never entered appearance. Instead, Mr. William Mang'ena appeared to represent the Respondents and the hearing of the PO started.

To begin with Mr. Juventus Katikiro, the Applicant's counsel submitted that the counter affidavit of the Respondent looking at paragraphs 1- 16 of the said counter affidavit, it is plain that the same did not respond to the affidavit in support of the application. In his view that is not proper because the claim or allegation stated by the Applicant in the affidavit have not been responded to by the Respondents despite the fact that

the Applicant has affirmed serious issues through her affidavit in relation to the loan secured. He argued that from the first paragraph up to sixteenth paragraph the Respondents have not responded to any of the allegations made by the Applicant in her affidavit in support of application before this court. He added that, it is the principle of the law that the affidavit or counter affidavit must confine itself to the allegations or facts that have been sworn by the other party. This principle is put forward in the provision of Order XIX rule 3(1) and (2) of the Civil Procedure Code [Cap 33 R.E. 2019] governing the matter to which an affidavit should confine to. Mr. William Mang'ena, advocate for the Respondents responded that in the first place there is not any legal requirement that the Respondent must refer to each paragraph of the affidavit in support of the application. He reiterated that Order XIX Rule 1, 2 and 3 of the Civil Procedure Code [Cap 33 R.E. 2019] govern the affidavits to be used in Court. But he added that nowhere in the rules indicating that counter affidavit should be responding to each paragraph of the affidavit. He has also submitted on the principle of the law that an affidavit should be confined to what has been submitted by the other party only. In his opinion that is wrong. He argued that the counter affidavit may contain facts that is based on the knowledge of the deponent. It is not necessarily to be confined to what has been alleged

by the other party. The deponent may raise new facts. While the latter is true, I am of the view that the counter affidavit cannot completely be unresponsive to the affidavit in support of the application. Otherwise, the whole purpose of filing the said counter affidavit will be defeated.

Mr. Mang'ena submitted in alternative that if the Court finds that the PO is with merit, they be allowed to argue the application based on the affidavit of the Applicant. At his point I should say that this is unusual practice. No law was cited to back the prayer. I ask myself on what basis can the Court allow a Respondent who filed a defective counter affidavit to oppose the application by relying on the Applicant's affidavit. This will be benefiting the Respondent from his or her on wrongdoing. Moreover, the affidavit is an alternative to oral testimony. Being a sworn statement, it can only be countered by another affidavit not mere statements from the bar.

Mr. Mang'ena submitted further that their prayer to argue the application despite the defective counter affidavit is based on the fact that the application before the court is a matter of law. And considering the number of case law which have categorically provided that for the application of this nature to be granted, there must: (1) be a suit – a triable issue. The Applicant must prove that there is a prima facie case,

(2) the applicant must prove that he will suffer irreparable loss, (3) on the balance of convenience that the Applicant will suffer more than the Respondents if injunction order is not granted. Indeed, the Respondents' counsel has rightly pointed out that application for injunction is a matter of law despite not citing any case law. The court must consider the requirements set in the law for its grant. The requirements have been stated in the case of **Atilio v. Mbowe 1969 H.C.D 284**. In my view, where the application is unopposed for instance where the Respondents filed defective counter affidavit which is as good as no counter affidavit the court will not blindly proceed to grant the application. It is obliged to act judiciously and in accordance with the law. It will proceed to examine criteria set in the law before granting injunctive order. If the requirements are not met it will refuse to grant the said injunction order.

Mr. Mang'ena argued further that it is a settled principle of law that even if the Respondent have not filed a counter affidavit, he or she is allowed to be heard on points of law in application. He prayed that in event the Court finds the counter affidavit was not proper they be given an opportunity to protest the application based on the Applicant's affidavit where they will show the Court that the requirements of the law in this kind of application have not been met. He submitted that they will not

argue on the facts. Mr. Katitikiro for the Applicant objected to this prayer because there is nothing submitted on the law or case law to subscribe or support the prayer sought. In my view, it is true that a Respondent who filed the defective counter affidavit or failed to file the counter affidavit may be given an opportunity to come and argue on points of law. However, that is the discretion of the Court. But we ask can a defective affidavit be acted upon? In the case of **Omari Ally Omari v Idd Mohamed and Others, Civil Revision No. 90 of 2003 (HC-DSM)** (unreported) Hon. Massati, J. (as he then was) held at page 7 that:

"As a general rule a defective affidavit should not be acted upon by a court of law, but in appropriate cases; where the defects are minor, the courts can order an amendment by way of filing fresh affidavit or by striking out the affidavit. But if the defects are of a substantial or substantive nature, no amendment should be allowed as they are a nullity, and there can be no amendment to nothing..."

In the case at hand the counter affidavit did not answer the affidavit in support of application. Hence there was no counter affidavit. But there are instances where defective paragraphs may be struck out and the affidavit may remain substantially intact to be acted upon or even a fresh affidavit may be allowed to be filed. But that may be allowed if the

defects are minor. That is not the case with the Respondents' counter affidavit. The defects are substantial.

Lastly, Mr. Mang'ena submitted that in event the alternative prayer is refused, he prayed that the Court to invoke the overriding objective principle to allow them to file another fresh counter affidavit rather than the matter to be decided on technicalities. This prayer was not objected by Mr. Katikiro, the Applicant's counsel. I am settled in my view that the overring objective principle cannot be used blindly in disregard of mandatory procedural laws. See the case of **Paulo Francis Kilasara v Stanbic Bank Tanzania Ltd, Civil Application No. 80/01 of 2019 CAT at Dar es salaam at page 13** where the Court held that the overriding objective cannot be used blindly. The Court of Appeal went further citing its decision in **Puma Energy Tanzania Limited v Roadways (T) Ltd, Civil Appeal No. 3 of 2018** where it held that the overriding objective was not designed to blindly disregard mandatory procedural requirements going to the root of the matter before the Court. In the present case, the filing of proper counter affidavit is a requirement of the law (Order XIX Rule 1, 2 and 3 of the Civil Procedure Code [Cap. 33 R.E. 2019]). Thus, in my view, the overriding objective can neither rescue such defective counter affidavit

nor can it be used to condone the wrongdoing of the Respondents by allowing them to file a fresh counter affidavit. To do so is to mock procedural justice. In any event context matters. In this case the Respondents were represented by learned advocates who are presumed to master the laws and procedures. They are aware of the function and content of counter affidavit. The prayer to file a fresh counter affidavit is thus declined.

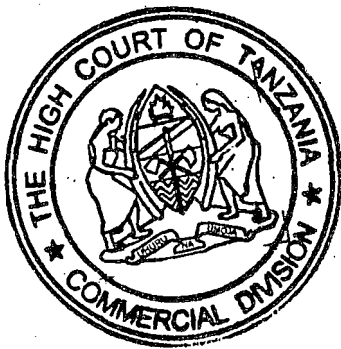
On the point that the Respondents' counsel prayed to be allowed to argue on the point of law, the counsel for the Applicant opposed it because no law or case law was cited. The cases exist but without citing them Court will not know of their existence. It is plain that there was no law cited to support the claim that the Respondents should argue on point of law only not facts. What the counsel is trying to say is that the counter affidavit may be ignored, and the court should focus on pure points of law. But he is forgetting the points of law have to be supported by evidence. The application cannot simply be determined by looking at the law only. The evidence must be in place to support the said application.


In the end the PO is sustained, the defective counter affidavit cannot be acted upon. There was thus no counter affidavit. Consequently, the

application appears to be uncontested. But since the application for injunctive order is a matter of law, the date will be fixed when the Applicant will be heard on her application. The prayer to be granted the application at this stage is premature. Each party to bear its costs.

It is so ordered.

DATED at DAR ES SALAAM this 3rd day of March, 2023.




U. J. AGATHO
JUDGE
03/03/2023

Date: 03/03/2023

Coram: Hon. U. J. Agatho, J.

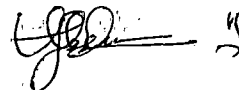
For Applicant: Kelvin Ngeleja, Advocate

For Respondents: Baraka Msana, Advocate.

C/Clerk: Beatrice

Court: Ruling delivered in Chambers, today, this 3rd March, 2023 in the presence of Kelvin Ngeleja, learned counsel for the Applicant, and Baraka Msana, learned counsel for the Respondents.




U. J. AGATHO
JUDGE
03/03/2023