

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO. 713 OF 2020
(Arising from Land Case No. 336 of 2016)

EL NASIR IMPORT & EXPORT COMPANY APPLICANT

VERSUS

JAN BROS INVESTMENT LTD 1ST RESPONDENT

BOMAN ADVOCATES AND COMPANY 2ND RESPONDENT

RULING

Date of last Order: 18.08.2021

Date of Ruling: 27.08.2021

A.Z.MGEYEKWA, J

This is an application to extend time to set aside the dismissal order delivered by this court on 24th August, 2020 in Land Case No. 336 of 2016. The application is brought under section 14 (1) of the Law of Limitation Act, Cap. 89 [R.E 2019], section 68 (e), section 95, Order IX Rule 3 of the Civil Procedure Code Act, Cap.33 [R.E 2019]. The application is supported by an affidavit deponed by Mr. Shehzada Walli, learned Advocate for the

applicant, and contested by a counter affidavit deponed by Mr. Peter Kibatala, learned Advocate for the respondent. The application stumbled upon preliminary objections from both learned counsels. The learned counsel for the first respondent raised one point of preliminary objection as follows:-

- 1. The applicant's affidavit sworn by SHEHZADA WALLI, particularly paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11 (i) – (iv), 12, 13, 14, and 15 are incurably defective for containing hearsay evidence and the source of such information is not disclosed. Having the fact that the said SHEHZADA WALLI was not initial counsel for the applicant.*

The learned counsel for the second respondent pooped up a lengthy four points of preliminary objection which for easy reference, I find it apt to reproduce as hereunder:-

- 1. That, the affidavit of Mr. Shehzada Walli, Advocate (Esq) is fatally defective for containing hearsay matters in paragraphs 3, 4, 5, 6, 7, 8, 10, 13, and 15 whose sources are not acknowledged and disclosed in the Verification Clause.*
- 2. That, the affidavit of Mr. Shehzada Walli, Advocate (Esq) is fatally defective for containing prayers in paragraph 16 and legal opinion/proposition/arguments in paragraphs 14 and 15.*

3. *That, the affidavit of Mr. Shehzada Walli, Advocate (Esq) is fatally defective for the reason that the locus standi of the deponent is to depose the affidavit on behalf of the applicant is not disclosed in the depositions part of the said affidavit.*

4. *That, the affidavit of Mr. Shehzada Walli, Advocate (Esq) is fatally defective in that paragraphs 11 i, ii, iii, and iv, as well as 15 (1) and (11), are not properly verified.*

When the matter was called for hearing on 18th August, 2021, the applicant enjoyed the legal service of Mr. Mercey Kanon, learned counsel whereby the respondent enjoyed the legal service of Mr. Alphonse Nachipyangu, learned counsel.

As the practice of the Court, I had to determine the preliminary objection first before going into the merits or demerits of the application. That is the practice of the Court founded upon prudence which I could not overlook.

Mr. Alphonse, learned counsel was the first one to kick the ball rolling. Having adopted the affidavit supporting the application the learned counsel submitted that they have raised four points of preliminary objection.

Arguing for the first preliminary, the learned counsel for the respondent submitted that the affidavit of Mr. Shehzada Walli, learned counsel is fatally defective for containing hearsay matter. To support his submission he

referred this court to paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 13, and 15. He went on to argue that the applicant has not disclosed the information or the person who gave him the said information. He lamented that Mr. Shehzada Walli was not part of the previous case thus the learned counsel was required to mention the source of information, whether he was informed by someone or perused in the court records. Fortifying his position he cited the case of **Alistidenti Tibanyululwa**, Probate and Administration Cause No. 29 of 2009.

With respect to the second preliminary objection, Mr. Alphonse contended that the applicant's affidavit deponed by Shehzada Walli, learned Advocate is fatally defective for containing prayers, proposition, and arguments. Supporting his argumentation, he referred this court to paragraphs 14, 15, and 16 of the applicant's Advocate affidavit. He strongly submitted that an affidavit is not required to contain facts that need evidence. Fortifying his position he cited the cases of **Leandri Leonard v Commissioner for Land**, Misc. Land Application No. 1 of 2010, **Hemedi Abdallah H. v Selemani Marando**, Civil Appeal No. 12 of 2004 HC and **Augustino Lyatonga Mrema and Others v The Attorney General**, Misc. Civil Cause No. 59 of 1995 HC at Dar es Salaam (all unreported).

As to the third preliminary objection, Mr. Alphonse simply stated that Mr. Shehzada Walli, learned counsel has no locus standi to deponed the

applicant's affidavit for the reason that the root case is the Advocate who represented the applicant was not instructed by the client, he claimed that Mr. Shehzada Walli was required to mention if he was instructed to represent the applicant.

Concerning the fourth preliminary objection, Mr. Alphonse contended that the affidavit is defective since paragraphs 11 (1) to (4), 15 (1) & (2) were not verified while the same were pleaded individually and separately. Insisting, he claimed that in filing an affidavit the maker is required to state what he verified. He added that the substantive justice principle should not be used to avert courts procedures that every party is required to follow. To substantiate his argumentation he cited the case of **Mondorasi Village Council and Others v TBL & Others**, Civil Appeal No. 666 of 2017.

On the strength of the above argumentation, Mr. Alphonse beckoned upon this court to strike out the application or expunge the offending paragraphs and see if the remaining paragraphs can sustain the application.

The learned counsel for the first respondent contended that paragraphs 3, 4, 5, 6, 7, 8, 9, 11 (i), (ii), (iii), (iv), 12, 13, 14, and 16 of the applicant's affidavit contains hearsay evidence. The learned counsel for the 1st respondent submitted the learned counsel was required to state if it was

In his reply, the learned counsel for the applicants was brief and focused. On the first ground, he argued that paragraph 1 of the affidavit shows that Mr. Shehzada Walli was an Advocate for the applicant. It was his view that the learned counsel was conversant with the facts thus he was not required to mention the source of information. He valiantly argued that the mere allegations that the affidavit contained hearsay matter is not true and the paragraphs 3, 4, 5, 6, 7, 8, 9, 20, 13, 14, and 15 containing facts which the learned counsel was informed.

Submitting on the second preliminary objection, Mr. Kanon contended that examining paragraphs 14 to 15 of the affidavit there is no any word that contains prayers. He submitted that the applicant's Advocate is narrating the facts and paragraph 16 connects the affidavit and chamber summons. Stressing, Mr. Kanon argued that the said paragraphs do not anywhere contain prayers, arguments, or opinions.

Concerning the third preliminary objection that Mr. Shehzada Walli was not instructed to defend the applicant. Mr. Kanon contended that Mr. Shehzada Walli introduced himself as an Advocate for the applicant thus there was no need to state that he was hired by the applicant.

As to the fourth preliminary objection, Mr. Kanon rebutted that paragraphs 11 and 15 were not verified. He added that as long as the applicant mentioned the numbers means even the subparagraphs were

included and the same was verified. Regarding the oxygen principle, Mr. Kanon submitted that section 3 of Cap.33 states that a court is not bound by procedural technicalities therefore the same can be cured under section 3 of Cap.33. [R.E 2019].

On the strength of the above submission, the learned counsel for the applicant beckoned upon this court to dismiss the preliminary objections and proceed to determine the matter on merits.

In his rejoinder, both learned counsels for the defendants maintained their submissions in chief and urged this court to strike out the application for being accompanied by a defective affidavit.

I have considered the learned counsels' submissions for and against the application. Let me first tackle the argument by the learned counsels for the respondents that the application is defective for being verified by an advocate who relied upon information, that the source of information was not stated and the same is argumentative.

I have scrutinized the applicant' affidavit and noted that Mr. Shehzada Walli particularly in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 13, and 14 has mentioned the applicant in all paragraphs and on paragraph 15 Mr. Shehzada Walli acknowledged that he has read the proceedings, Judgment, and Decree that means he was did not represent the applicant in the previous case and Mr. Kanon in his submission did not dispute that

Mr. Shehzada Walli did not represent the applicant in the previous case. In other words, the applicant's advocate has acknowledged that he received the information from the applicant.

It is a legal requirement that any affidavit made on information must state the source of the said information, either as a whole or in any particular paragraph, to state the facts deposed to or any of them and if so which ones, are true to the deponent's knowledge or as given by his client or are true to his information and belief. Short of that renders the affidavit defective and incompetent. In the instant application I have found that the learned advocate acknowledged receiving the information which formed part of his affidavit, therefore, Mr. Shehzada Walli was supposed to state or acknowledge the source of information in his verification clause. In the case of **Standard Goods Corporation Ltd. v Harakchand Nathu & Co** [1950] EACA 99 it was held that:

" It is well settled that where an affidavit is made on information, it should not be acted unless the source of information is specified."

Similarly in the cases of **Premchand Raichand Ltd and another v Quarry Service of East Africa Ltd and others** [1969] 1EA 514, **Malachi O Majlwa and 84 others v Dar es Salaam City Council and the Attorney General**, Misc Civil Cause No. 14 of 1993 HC of Tanzania (unreported). In the case of **Premchand Raichand Ltd (supra)** it was held that:

“ The affidavit in support of the application did not disclose the source of the information contained in them and should have been disregarded.”

Additionally, the court went further and distinguished the matters stated on information and matters stated on the deponent's knowledge as it was stated in the case of **Serikali ya Mapinduzi ya Zanzibar v Farid Moh'd Abdall** [1998] TLR 5 and the case of **Kubach & Saybook Ltd v Hasham Kassam & Sons Ltd** [1972] HCD 228.

Guided by the above authorities, I have found that the verification clause is defective.

With respect to the second limb of objection raised by the second respondent's Advocate, I have gone through the applicant's Advocate affidavit and noted that paragraph 15 and 16 contain legal arguments and prayers. In the case of **Leandri Leonard Tairo** (supra) and in the case of **Uganda v Commissioner of Prison Ex Parte Matovu** (supra) the court held that an affidavit should not contain extraneous matters by way of objection or prayer or legal arguments or conclusion. Therefore, I fully subscribe to the submission made by the 2nd respondent Advocate that the applicant/s Advocate affidavit is defective for containing prayers and argumentative paragraphs.

For the findings which I have made, I conclude by stating that the noticeable defects are not the reason for not determine the applicant's application. Instead, the remedy is to expunge the offending paragraphs from the court record. In the case of **Uganda v Commissioner of Prisons Ex-parte Matovu** (supra) the court held that:-

“ With respect to prayers contained in the affidavit, prayers have to be made in court at the hearing otherwise there is no point in making the application. So making them prematurely in an affidavit should not be a reason for avoiding determination of the application.”

Applying the above authority since the applicant's Advocate affidavit contains hearsay evidence, legal argumentation, and prayers the same cannot be left to stand, therefore, I proceed to expunge paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 13 and 14, 15 and 16 from the court records. After expunging the same, the affidavit remains with two paragraphs that cannot be left to stand.

Having considered the above point of preliminary objection, as shown above, it is evident that the present application is improperly filed before this Court. Since the first and second points of objections raised by Mr. George, learned counsel for the 1st respondent, and Mr. Alphonse, learned counsel for the 2nd respondent renders the application incompetent, I find

no any justifiable legal reasons to deal with the remaining points of objection, as it will not reverse the decision made above.

As a result, and for the above reasons, I proceed to strike out the affidavit for being incompetent with costs.

Order accordingly.

Dated at Dar es Salaam this date 27th August, 2021.




A.Z.MGEYEKWA

JUDGE

27.08.2021

Ruling delivered on 27th August, 2021 in the presence of Mr. George Ngemera, learned counsel for the 1st respondent, and Mr. Alphonse, learned counsel for the 2nd respondent.




A.Z.MGEYEKWA

JUDGE

27.08.2021