

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 775 OF 2022

(Originating from Civil Reference No. 22 of 2022)

GIDEON FARES OPANDA.....APPLICANT

VERSUS

MOHAMED OMARY MASOUD.....RESPONDENT

RULING

28/02/2023 & 27/03/2023

L. HEMED, J.

At the outset, on 2nd day of December, 2022, the applicant, **Gideon Fares Opanda**, under certificate of urgency, filed this application seeking to set aside the dismissal order dated 30th day of November, 2022 and have it restored for reasons put forward thereof. It should be noted that on the said date, the Court opted to dismiss the matter, as it was on record that the applicant had failed to attend the said case since its inception in this Court.

The application is supported by the affidavit deposed by the applicant himself and contested through counter affidavit sworn by one

Peter Alfred Bana, counsel for the respondent. Upon being served with the said counter affidavit, the applicant raised the preliminary objections on points of law to mention are: -

- 1. That, the counter affidavit is bad in law for being contravening provisions of Order XIX, rule 3 of the Civil Procedure Code [Cap 33 R.E 2019]; and*
- 2. That the counter affidavit is incurable defective in the jurat attestation.*

With the directives of this Court dated 22/12/2022, both the application and the preliminary objections were argued by way of written submissions. Parties filed their submissions as per the ordered schedule.

As the practice demands, I opted to dispose of the preliminary objections first. The applicant argued the first limb of the objection to the effect 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 as provided under Order XIX, rule 3 of the Civil Procedure Code [Cap 33 R.E 2019].

He stated that, the contravening paragraphs to the counter affidavit are paragraphs 5, 5(i), 6, 8, 8(i) (ii) (iii) (iv) (v) (vi) (vii) (viii) and 9. To buttress his statement he cited the case of **Lalago Cotton Ginnery and Oil Mills Company Limited vs. The Loans and Advances Realization Trust (LART)**, Civil Application No. 80 of 2002, (CAT-DSM) (Unreported) at page 6 and 7 which approved the decision of *Ex parte Matovu* so far as the subject is concerned. He also referred this Court to the decision in **Francis Eugen Polycarp vs. Ms Panone & Co. Ltd**, Misc. Civil Application No. 2 of 2012 (HCT-MOSHI) (Unreported) at page 4 and the decision in **Mantrac Tanzania Limited vs. Junior Construction Company Limited & Another**, Misc. Commercial Cause No. 70 of 2017 (HCT, COMMERCIAL DIVISION-DSM) at page 6 and 8. He prayed that, the defective counter affidavit be struck out.

On the second limb of objection, he submitted that, the counter affidavit is defective on ground of variance of dates when the attestation was made and the endorsement in the *jurat* of attestation as it does not disclose as to how the commissioner for oaths knew the deponent one Peter Alfred Bana. To support the aforesaid assertion, he quoted section 8 of the Notaries Public and Commissioner for Oaths Act [Cap 12 R.E

2019] and section 5 of the Oaths and Statutory Declarations Act [Cap 34 R.E 2019].

Regarding the instant application, he adopted the affidavit in support of the application to form part of his submissions. He specified that, on 30th day of November, 2022 this Court dismissed the application in Reference No. 22 of 2022 for want of his appearance as he was appearing before her ladyship Mgeyekwa, J in Misc. Land Application No. 720 of 2022.

He detailed that, it is on record the said application was scheduled for mention with a purpose of making necessary orders on 30th day of November, 2022 at 10:00 am, while Misc. Land Application No. 720 of 2022 was scheduled for hearing on the same day at 9:00 am before Hon. A. Mgeyekwa, J.

He stated that, he promptly and diligently perused the Court file and immediately lodged this application through online system on 1st day of December, 2022 and later submitted the hard copy for filing on 2nd day of December, 2022. To that, he cited the case of **Romulus Msunga vs. Sukari Maribate**, Misc. Civil Application No. 107 of 2019 (HCT-MWZ), (Unreported) to cement his argument. He added the case of **Nasibu Sungura vs. Peter Machumu** [1998] TLR 501 which

principled on application to set aside the order dismissing the suit for non-appearance. In the said case, the Court was of the view that, in applications to set aside an order, the question it is not whether the case for the applicant is soundly maintainable and meritorious, but whether the reasons furnished are sufficient to justify the applicant's non-appearance on the date the suit was dismissed. Thus, he prayed the application be granted with costs for reasons adduced and law thereat.

In reply, the respondent through the legal service of Peter Bana, averred that, affidavit or counter affidavit for use in Court is treated as sworn evidence as stated in the case of **Jackline Ntuyabaliwe Mengi & 2 Others vs. Abdiel Reginald Mengi & 5 Others, Civil Application No. 332/01 of 2021 (CAT-DSM), (Unreported)** at page 22. He refuted that, there is no paragraph in his Counter affidavit which offends Order XIX, rule 3 of the Civil Procedure Code [Cap 33 R.E 2019]. He also asserted that, whatever was said by him was the facts from his own knowledge which he was able to prove and that's why he elaborated each and everything concerning lies from the applicant's affidavit.

Mr. Bana urged this Court to invoke the principle of overriding objective as per section 3A and 3B of the Civil Procedure Code [Cap 33 R.E 2019]. He further cited the case of **Sanyou Service Station Ltd vs. B.P Tanzania Ltd**, Civil Application No. 185/17 of 2018, (CAT-DSM), (Unreported) at page 10 and 11.

As to the second limb of objection, he asseverated that, the difference in dates at the *jurat* clause were caused by a slip of a pen and in his opinion, it is an irregularity which is not fatal. To back up his asseveration, he cited the case of **Madam Mary Silvarius Qorro vs. Edith Donath Kweka & Another**, Civil Appeal No. 102 of 2016, (CAT-ARUSHA), (Unreported) at page 10 and 11 and the one of **A.A.R Insurance (T) Ltd vs Beatus Kisusi**, Civil Appeal No. 67 of 2015, (CAT-MWZ), (Unreported) at page 2 and 3 to cure his anomaly.

Opposing the application, Mr. Bana submitted that, there is no dispute that the applicant acted promptly to write a letter for perusal of the file and filed this application at hand, but that alone is not enough to convince the Court that the applicant has adduced sufficient reasons for restoration of his case. He qualified that, promptness in filing the application is one thing and adducing good reasons for failure to attend the matter is another different thing.

The learned advocate for the respondent stated that, if the applicant was real attending another matter, he could have filed a notice of absence stating the reasons thereof or he would have sent an advocate to appear on his behalf. He added that, the Order shows that the applicant had never appeared since he lodged the application, hence the dismissal.

In re-joining, the applicant stated that, violation of the provisions of the law is fatal enough to strike out the counter affidavit for being incurably defective. He alleged that, the case of **Jackline Ntuyabaliwe Mengi (supra)**, **Sanyou Service Station Ltd (supra)**, **Madam Mary Silvarius Qorro (supra)**, **A.A.R Insurance (T) Ltd and Jackson Zebedayo @ Wambura (supra)** are distinguishable and irrelevant with the facts of the instant case before this Court. He thus reiterated the prayer for the matter to be struck out made in submissions in chief.

In re-joining to the reply to the application, he explained that, there is no requirements of the law, which compels any party in the case to issue notice of absence and attaching proceedings as submitted by the counsel for the respondent.

He added that, the procedure is very clear that you cannot deal with application while there is a pending notice of the preliminary

objection. He averred that, the counsel for the respondent decided to move the Court to dismiss the application in concealing the presence of the notice of the preliminary objection filed before this Court on 18th day of November 2022, so, technically it remained in the record undetermined. In the end, he maintained his prayer that his application for restoration be granted with costs.

I have carefully considered the arguments advanced by the applicant, the reply from the respondent plus the rejoinder submissions in determining the merit or demerit of the preliminary objections raised. Order XIX, rule 3 (1) of the Civil Procedure Code [Cap 33 R.E 2019] provides to the effect 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 grounds thereof are stated".

Having observed and analysed the whole counter affidavit, it is with no shadow of doubts that, paragraphs 5, 5(i), 6, 8, 8(i) (ii) (iii) (iv) (v) (vi) (vii), (viii) and 9 of the said counter affidavit are offensive for not

being factual. In deed they contravene the dictates of Order XIX, rule 3 (1) of the Civil Procedure Code (*supra*).

The case of **Lalago Cotton Ginnery and Oil Mills Company Limited** (*supra*) is apposite and respectable law in relation to the circumstance of this case. As a result, the counter affidavit deponed by one Peter Alfred Bana is substantially defective and devoid of merit for not containing facts but arguments and extraneous matters. In the premises, the fate of the defective counter affidavit is to be struck out as it was well amplified in the case of **Mantrac Tanzania Limited** (*supra*) at pages 6 and 8.

The counsel for the respondent submitted that, its effect of affidavit containing arguments and extraneous matters is not to strike out, but to expunge the said paragraphs. In fact, I am at one with the learned counsel for the respondents, however, if we expunge them the remaining paragraphs, so to say, paragraphs 1, 2, 3, 4 and 9 do not suffice to contest the applicant's affidavit and the same to be called counter affidavit.

Again, Mr. Bana prayed the Court to evoke the principle of overriding objective. Be it as it may, the principle of overriding objective cannot be used as a shield to circumvent the provisions of the

procedural laws. In the case of **Mondorosi Village Council & 2 Others vs. Tanzania Breweries Limited & 4 Others**, Civil Appeal No. 66 of 2017, (Unreported), the Court of Appeal of Tanzania was of the view that:

"...overriding objective principle cannot be applied blindly against mandatory provisions of the procedural law which goes to the foundation of the case".

The contained word under the dictate of Order XIX, rule 3 (1) of the Civil Procedure Code [Cap 33 R.E 2019] which is of paramount is the term ***shall*** which connotes imperative performing of a function and its applicability is stipulated under section 53 (2) of the Interpretation of Laws Act [Cap 1 R.E 2019]. Thus, non-compliance with the above provision of law by the counsel for the respondent necessitated the counter affidavit to be incurably defective.

In the event, the first limb of objection being answered in affirmative, there is no need for this Court to labour itself in determining the second limb of objection as doing so tantamounts to an academic exercise. The entire counter affidavit is thus struck out.

Upon striking out the counter affidavit, the current application stands uncontested or in other word it is as good as it was heard *ex*

parte by way of written submissions. Having so done, I think there is only one issue calling for my determination, that is, whether the applicant's has shown sufficient cause to trigger this Court to restore the application for reference which was dismissed for want of prosecution on failure to attend it.

According to the record in Application for Reference No. 22 of 2022, the applicant failed to appear on 07/11/2022; 09/11/2022 and 30/11/2022. The applicant could not assert anything as to why he could not attend his matter since he lodged it. In the affidavit of the applicant, he has tried to explain why he did not attend the matter on the date the matter was dismissed. It should be noted that, the reason for dismissing the said application was that the applicant did not attend it from the date when it was filed.

The question I have tried to ask myself is, should we grant the application and open the pandora box for those litigants who file their case(s), desert them and when dismissed, they come without shame or palatable reasons seek for restorations. I am not prepared to open such dangerous box!

Needless to say, secondly, the applicant avers that, his non appearance on the material date was subject to hearing in Misc. Land

Application No. 720 of 2022 before her ladyship Hon. A. Mgeyekwa, J *vide* notice of date of hearing dated 15th day of November, 2022, attached to the affidavit as annexure G2. Surprisingly, the said notice/ summons is addressed to one **Haruna Mtumwa Kondo** and not the applicant. The applicant has not substantiated his connection with the addressee. Additionally, even the said summons was not even availed to this Court on the material date. This Court finds that, the applicant opted to attend the case of another person leaving his own case unattended. It is my firm view that the applicant desired the consequences of his non-appearance on the material date.

The applicant also contended that the matter was dismissed on the day when the matter was called for mention. I am aware of the decision of the Court of Appeal in **Mr. Lembrice Israel Kivuyo vs. M/S DHL World Wide Express DHL Tanzania Limited**, Civil Appeal No. 83 of 2008, (Unreported) at page 5, it stated that:

"There is a difference between a mention and a hearing. That the CPC does not provide for a mention, it provides for a hearing only".

I abide to the aforesaid position. It is correct that, the matter was dismissed before the Court on the date when it was called for mention

for necessary orders. The Question to pose is how would the said necessary orders be made and effected without the presence of parties including the applicant? As aforesaid, it is on record that since the application for Reference No. 22 of 2022 was filed, the applicant never appeared. In the circumstance, the only necessary order for disposal of the matter was to dismiss the application, which was found to be unattended by the applicant.

Consequently, I find and hold that the applicant has neither shown sufficient cause for his non-appearance nor a point of law of sufficient to persuade this Court to exercise its discretion powers to restore the application in respect of Reference No. 22 of 2022. In the end, I find this application with no iota of merits and hereby dismiss it with costs. Order accordingly.

DATED at DAR ES SALAAM this 27th March 2023

