

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

**REFERENCE NO. 21 OF 2023**

(Reference from the Decision of the Taxing Master in Bill of Cost No 23 of 2023 by Hon.  
Chugulu, DR, dated 8 June 2022)

**ISACK LUNYILIKO MHAVILE (Administrator of the late**  
**SIMON LUNYILIKO MHAVILE .....APPLICANT**

**VERSUS**

**FATUMA MWINYI..... RESPONDENT**

**RULING**

*Date of last Order: 29/09/2023*

*Date of Ruling: 1/11/2023*

**K. D. MHINA, J.**

This reference arises from Bill of Cost No.23 of 2023, wherein the Taxing Master taxed the bill at a tune of TZS 3,740,000/= against the applicant.

The reference was brought by way of chamber summons made under Order 7 (1) (2) (3) and (4) of the Advocates Remuneration Order, G.N No 264 of 2015, supported by the affidavit of Mr. Stevens Kosi Madulu, the counsel for the applicant which expounded the grounds for the reference.

The orders being sought are for this Court to reverse the decision of the Taxing Master by quashing it, costs of the application and any other relief this Court deems just and fit to grant.

After being served with the reference, the respondent, through the services of Mr. Felix Mutaki, learned advocate, countered it by a notice of preliminary objection canvassed only one ground, namely;

- i. The affidavit in support of the Application is incurable defective contrary to Order IX, Rule 3 (2) of the Civil Procedure Code [ Cap.33 R.E 2019], thus rendering the Application incompetent.*

The preliminary objection was argued by way of written submissions. The applicant was represented by Mr. Steven Kosi Madulu, a learned advocate, while the respondent was represented by Mr. Felix Mutaki, also a learned advocate.

Briefly, in support of the objection, Mr. Mutaki submitted that the application is defective for containing a defective supporting affidavit, which cannot be rectified.

He narrated that the affidavit contained extraneous matter in paragraphs 5 and 7. To support his argument, he cited the decision of the Court of Appeal in **Jacquiline Ntuyabaliwe Mengi vs. Abdiel Reginald Mengi and Another**, Civil Application No. 332 of 2021 (Tanzlii), where it was held that an affidavit should not contain extraneous matters.

*As a rule of practice and procedure, an affidavit for use in Court, being a substitute for oral evidence, should only contain statements of facts and the circumstances for which the witness deposes either of his own knowledge .....Such affidavit should not contain extraneous matters by way of objection or prayer or legal arguments of conclusions”.*

On the way forward, Mr. Mutaki, based on the cited case of **Jacquiline Ntuyabaliwe Mengi** (Supra), submitted the remedy for an affidavit containing extraneous matter is to either strike out the offending paragraphs or disregard them, allowing the Court to proceed with hearing and determination of the application based on the remaining paragraphs.

He concluded by submitting that the remaining paragraphs 1, 2, 3, 4, 6, and 8 are insufficient to support the application, thus rendering the entire application untenable.

In his brief reply, Mr. Madulu vehemently opposed the objection and the submission in chief by submitting that the application is competent as it does not contain extraneous matters by way of objection or prayer or legal arguments or conclusions.

In addition to that, because the affidavit does not contain extraneous matters, then the cited case of **Jacquiline Ntuyabaliwe Mengi** (Supra), is distinguishable from the instant application.

Having gone through the affidavit in controversy and submissions from both parties, the issue before me is whether or not the application is proper before this Court.

By the nature of the preliminary objection, in the determination of the issue above, the entry point is Order 19 Rule 3 (1) of the CPC. The Order reads;

*3.-(1) 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”.*

The applicability of the cited provision of law is well expounded in the cited case of **Jacquiline Ntuyabaliwe (Supra)** where it was held that;

*"As a rule of practice and procedure, an affidavit for use in Court, being a substitute for oral evidence, should only contain statements of facts and the circumstances for which the witness deposes either of his own knowledge.....*

***Such affidavit should not contain extraneous matters by way of objection or prayer or legal arguments of conclusions".***

[Emphasis provided]

From the narration above, the question here is whether the paragraphs complained of, i.e., paragraphs 5 and 7 contains extraneous matters or not. On this I will quote the paragraphs as follows;

*5. THAT, the Respondents/ Decree Holder's Bill of Costs was Taxed at a total TShs. 3,740,000/= which the Applicant is dissatisfied with the said awarded costs for being against the Advocates Remuneration Order, 2015 because the Land Case No. 216 of 2022 which resulted into the Bill of Costs No. 23 of 2023 was not heard and determined on merits.*

*7. THAT, the Applicant is not satisfied by the awarded the awarded Bill of Costs for the reason that the award is unlawful for not being supported by evidence to show how the same was incurred because no vouchers/ receipts were produced on the hearing date as required by Order 58 of the Advocates Remuneration Order, G.N 264 and for no reasons/grounds mentioned in the Chamber Summons."*

Flowing from above, it is quite clear that paragraphs 5 and 5 contains legal arguments. For instance, in paragraph 5 the legal argument is contained in the phrase the "*Applicant is dissatisfied with the said awarded costs for being against the Advocates Remuneration Order, 2015*" while in paragraph 7 is contained in the phrase "*Applicant is not satisfied by the awarded the awarded Bill of Costs for the reason that the award is unlawful for not being supported by evidence to show how the same was incurred*".

The above are not the facts as required by the law to be contained in the affidavit but they are the legal argument. I said as above because the word "fact" in **The Chairman Pentecostal Church of Mbeya vs. Gabriel Bisangwa and four others**, (DC) Civil Appeal No 28 of 1999, unreported (HC-Mbeya) is defined as follows;

*"In evidence, which an affidavit is a fact is a circumstance event or occurrence which a party must bring forward in proof of his claim or in establishing his defence. A fact is therefore an actual and absolute reality. As the learned authors of Black Law Dictionary. Abridged 6<sup>th</sup> Edition say at page 410 of their works: Fact means reality of events or things the actual occurrence or existence of which is to be determined by evidence".*

Thus, what contained in paragraphs 5 and 5 of the affidavit cannot be facts rather than be extraneous matter ie. Legal arguments. Therefore, I expunge the defective paragraphs 5 and 7 from the applicant's affidavit.

On the way forward I wish to cite the decision of the Court of Appeal in **Phantom Modern Transport (1985) Ltd v. D.T Dobbie (T) Ltd**, Civil Reference No. 15 of 2001 and 3 of 2005 (unreported) where the Court held that;

*"Where defects in an affidavit are inconsequential those defective paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the Court can proceed to act on it.*

The question is whether the remaining paragraphs 1, 2, 3, 4, 6, and 8 of the applicant's affidavit can support the application.

Having passionately and careful read the remaining paragraphs of the affidavit, surely the paragraphs are the narration of events of the matter between the parties. The explanation is as below;

In paragraph 1, the deponent introduced himself the advocate of the High Court and subordinate courts.

In paragraph 2, the deponent averred that he was the one who represented the applicant in the previous Land Case and Bill of Costs.

In paragraph 3, the deponent gave a background of the Land Case between the parties.

In paragraph 4, the deponent narrated how the respondent filed the Bill of Costs.

In paragraph 6, the deponent, stated what was granted in the Bill of Costs and

In paragraph 8, the deponent stated that the affidavit was in support of the chamber summons.

Therefore, from the above discussion the remaining grounds of the affidavit cannot in anyway support the application for reference, thus affect the whole application and render it incompetent. Legally, that means there is no evidence at all to support the allegations in the chamber summons.

In the end, I find the application incompetent for the reasons I discuss and indicate above. The affidavit purported to accompany the application is incurably defective and cannot as such support the application.



Consequently, the preliminary objection raised is sustained and the application is accordingly struck out with costs.

It is so ordered.



  
**K. D. MHINA**  
**JUDGE**  
**01/11/2023**