

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

REVISION APPLICATION NO. 84 OF 2021

BETWEEN

NASREEN HASSANALI.....APPLICANT

VERSUS

AGA KHAN HEALTH SERVICES TANZANIA.....RESPONDENT

RULING

Date of Last Order: 03/12/2021

Date of Ruling: 14/12/2021

I. Arufani, J.

This ruling is in relation to the two points of preliminary objection raised against the application filed in this court by the applicant which read as follows:-

- 1. That this application is defective for containing the affidavit which is defective for lacking the proper verification clause contrary to Order VI Rule 15 (1), 15 (2) and 15 (3) of the Civil Procedure Code, CAP 33 RE 2019.*
- 2. That this application is defective for containing the defective affidavit contrary to Order XIX Rule 3(1) of the Civil Procedure Code, CAP 33 RE 2019.*

While the applicant was represented in the matter by Mr. Salmin Suleiman Mwiry, Learned Advocate, the respondent was represented by Mr. George Ambrose Shayo, Learned Advocate. The said points of preliminary objection were argued by way of written submission after the counsel for the parties prayed and allowed by the court to do so.

The counsel for the respondent stated in his submission in support of the points of preliminary objection that, although Labour Court Rules, GN. No 106 of 2007 regulates the format and what should be contained in an affidavit supporting an application to be filed in the court but it does not provide for how the facts deposed in an affidavit should be verified. That being the position of the law the counsel for the respondent stated that, pursuant to Rule 55 (1) of the Labour Court Rules, the court is required to resort into the general law in civil matters which is Civil Procedure Code, Cap 33 R.E 2019 (hereinafter referred as the CPC). He cited in his submission Order VI Rules 15 (1), (2) and (3) and Order XIX Rule 3 of the CPC which provides for how pleading is required to be verified and on which facts the affidavit should be confined.

The counsel for the respondent argued that, the affidavit in support of the application affirmed by the counsel for the applicant shows the counsel for the applicant deposed and verified at paragraphs 3, 4, 5, 6, 7 and 8 of the affidavit the facts which he cannot have knowledge of them by himself and he didn't disclosed the source of those facts when he was verifying his affidavit. He submitted that, that shows the affidavit supporting the application violates the law and that error goes to the root of the case. To bolster his argument, he cited the case of **Nicodemus G. Mwita v. Bulyanhulu Gold Mine Ltd.,** Revision No. 17 of 2012 HCLD at DSM (unreported) where it was stated that, the application for revision supported by a defective affidavit is incompetent before the court.

He went on arguing that, the said defect is not a mere technicality that can be outlawed by Article 107A (2) (e) of the Constitution of the United Republic of Tanzania of 1977 (hereinafter referred as the Constitution) as amended from time to time and supported his argument by using the case of the **Director TOS Filling Station V. Ayoub and 9 Others,** Civil Application No. 30 of 2010, CAT at DSM (unreported). In addition to that, he referred the court to the case of **Mandorosi Village Counsel and two others**

V. Tanzania Breweries Limited and Four Others, Civil Appeal No. 66 of 2017, CAT at Arusha (unreported) where it was stated that, overriding objective principle cannot be applied blindly against the mandatory provision of the procedural law which go to the very foundation of the case. In fine he prays the application be struck out for being incompetent.

In response, the counsel for the applicant submitted that the affidavit in support of the application is not defective as the same has been verified on his own knowledge. He argued that, he obtained the said knowledge through appearing and representing the applicant in Labour Dispute No. CMA/DSM/ILA/R.1025/17/095 at the Commission. He acknowledged the position of the law as cited by the counsel for the respondent in his submission. He however submitted that, the contents of paragraphs 4, 5, 6, 7, and 8 of the affidavit are within his knowledge, hence there was no need for disclosing its source in the verification clause of his affidavit.

The counsel for the applicant argued that, according to definition of knowledge, it is not necessarily that knowledge should be obtained through being supplied with information. It can be obtained through representing the applicant. To support his

submission, he cited the case of **Tanzania Breweries Ltd V. Herman Bildad Minja**, Civil Application No. 18 of 2019, CAT at DSM (unreported) where the case of **Lalago Ginnery and Another V. The Loans and Advances Realization Trust (LART)**, Civil Application No. 80 of 2002 (unreported) was quoted in which it was stated that, an advocate can swear an affidavit in proceeding in which he appears for his client but on matters which are in the advocate's personal knowledge only. He distinguished the case of **Nicodemus G, Mwita** (supra) from the facts of the present case and added that, the rules of procedure are hand maid of justice hence, they should not be used to defeat justice.

He cited in his submission the case of **General Marketing Co. Ltd. V. A. A. Shariff** (1980) TLR 61 where it was stated the spirit in Article 107A (2) (e) of the Constitution is for the court to dispense justice without being tied up with legal technicality which may obstruct dispensation of justice. He submitted that in case the court will find the current affidavit has defects in the aforementioned paragraphs and as the same are minor the applicant be ordered to amend the affidavit so as to afford the applicant's case to be heard on merit and not to allow procedural issue to defeat the end of

justice to the applicant. Finally, he prayed the Court to overrule the points of preliminary objection with costs and let the matter be heard on merit.

In his rejoinder the counsel for the respondent reiterated his submission in chief and stated that the issue in question is not the definition of the word knowledge, rather it is the deponent's failure to indicate the source of information of the facts deposed in the affidavit in the verification clause of his affidavit. He distinguished the case of **Tanzania Breweries Ltd.** (supra) by stating that, the respondent in the instant application is not disputing the applicant's counsel to swear an affidavit for his client. His disputing is on the action of the counsel for the applicant to verify in the verification clause of his affidavit the information which were not in his personal knowledge. At the end he insisted his prayers that, the application be struck out for being incompetent.

The court has carefully considered the rival submission from the counsel for the parties and it has gone through the impugned affidavit and the provisions of the law stated were contravened in the present application. The court has found proper to state at this juncture that, as rightly argued by the counsel for the respondent the

Labour Court Rules provides for the form and what should be contained in an affidavit to be filed in a labour court to support any matter. However, it does not provide for how verification clause of an affidavit to be filed in the court should be verified.

The court has found that, as submitted by the counsel for the respondent, the court is required to use Rule 55 (1) of the Labour Court Rules to adopt the format of verifying affidavit provided under other laws. The court has found the counsel for the respondent argues Order 15 (1), (2) and (3) of the CPC was not observed in verifying the affidavit supporting the application at hand. After carefully reading the cited provision of the law the court has found it does not deal with verification of an affidavit but it deals with verification of pleadings. The definition of the term "pleading" as given under Order VI Rule 1 of the CPC is as follows:-

"Pleading" means a plaint or a written statement of defence (including a written statement of defence filed by a third party) and such other subsequent pleadings as may be presented in accordance with rule 13 of Order VIII."

The subsequent pleadings which can be presented under Order VIII Rule 13 of the CPC are defence to a set off or counter claim. This

shows that, as affidavit is not pleading then its verification is not governed by the above cited provision of the law. The above finding of this court is being bolstered by what was stated in the case of **Loshya Investment Limited V. Visiontech Computers Limited**, Commercial Case No. 56 of 2005, HC Com. Div at DSM (unreported) where Massati, J. (as he then was) stated that:-

"Mr. Uronu has referred to O. VI r. 15 as the law governing verification of affidavits. With respect I think, he is wrong. O. VI r. 15 only applies to verification of "pleadings". O. VI r. 1 defines "pleading", to mean a plaint, written statement of defence, and other subsequent pleadings as may be presented under r. 13 of O. VIII. So by necessary elimination, r. 15 of O. VI does not apply to affidavits. The law on affidavits is set out in O. XIX r. 3 of the Civil Procedure Code 1966."

The above quoted excerpt shows clearly that affidavit is not a pleading and Order VI Rule 15 of the CPC does not apply to an affidavit. The court has found the provision of the law governing affidavit is Order XIX Rule 3 of the CPC. However, that provision of the law is providing for the facts upon which an affidavit is required to be confined and does not provide for the manner upon which an affidavit is supposed to be verified. Now the question to ask in this

situation is whether an affidavit is required to be verified in the manner pleadings filed in court are required to be verified or not.

The answer to the above question can be found in the case of the **DPP V. Dodoli Kapufi and Another**, Criminal Application No. 11 of 2008 (Unreported) where the Court of Appeal of Tanzania held that, verification clause in an affidavit is one of the essential components of a valid affidavit. When the Court of Appeal of Tanzania was dealing with the similar issue in the case of **Lisa E. Peter V. Al-Hushoom Investment**, Civil Application No. 147 of 2016, CAT at DSM (unreported) it stated that, the importance of verification clause in an affidavit was persuasively and meticulously laid down by the Supreme Court of India in the case of **A. K. K. Nambiar V. Union of India** (1970) 35CR 121 where it was held that: -

*"The reasons for verification of affidavits are to enable the Court to find out which facts can be said to be proved on the affidavit evidence of rival parties. Allegations may be true to information received from persons or allegation may be based on records. **The importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for allegation.** In essence, verification is*

required to enable the Court to find out as to whether it will be safe to act on such affidavit evidence. In the absence of proper verification, affidavits cannot be admitted in evidence.”[Emphasis added.]

I have bolded part of the above extract to underscore the premises that, it is imperative for an affidavit not only to be verified but to be verified properly as if it is not verified properly, it cannot be admitted in a case as evidence to prove what is intended to be proved before the court. Therefore, although Order XIX Rule 3 of the CPC does not provide for how the affidavit is supposed to be verified and Order VI Rule 15 of the CPC does not deal with verification of an affidavit as it deals with verification of pleadings but an affidavit to be filed in the court is required to be verified in the same manner as pleadings are required to be verified.

Back to the verification clause of the affidavit supporting the application at hand the court has found the counsel for the respondent is arguing it was not properly verified as the deponent verified all paragraphs in the affidavit on his own knowledge while in actual fact there are paragraphs in the affidavit containing facts which cannot be said would have been verified on the personal

knowledge of the counsel for the applicant. For purposes of appreciating what is deposed in the impugned paragraphs 3, 4, 5, 6, 7 and 8 of the affidavit of the counsel for the applicant supporting the application they read as follows:-

- 3. That, the respondent is a company duly incorporated under the laws of Tanzania whose address for the purpose of this case shall be determined in due process.*
- 4. That, the applicant was employed at Aga Khan Health Service, Tanzania (hereinafter referred to as AKHST) on 3rd October 2016 on a two (2) year contract as Project Manager.*
- 5. That, while employed and during the tenure of her employment the applicant was never given job description nor KIP's. on several occasion during her employment the applicant requested from the respondent to be issued with the job description but she was never issued with the job description nor KIP's but rather she was subjected to several appraisal which were conducted without the applicant knowing the standard of performance required nor the criteria to which the performance appraisal were assessed on.*
- 6. That, to the applicant surprise on 28th July, 2017 she was handled with a poor performance letter while she was never issued with job description nor given any tool, training or any form of guidance on what she needs to do to improve her performance.*

7. *That, to the applicant surprise on 30th August, 2017 she was informed by her boss that the decision to terminate her employment was reached before she was even given an opportunity to respond to the allegations of poor performance made against her and was asked to handover all of her present works and on 31st August, 2017, she was handed with termination letter.*
8. *That, the respondent terminated the applicant with reasons of poor performance without issuing her with her job description despite several demand to be given her job description for her position from beginning of her employment till the date she was terminated. Further the applicant was never given any tool, training or any form of guidance on what she needs to do to improve her performance and therefore the applicant's termination did not follow the requisite procedures and amount to unfair termination."*

That being what is deposed in the paragraphs of the affidavit of the counsel for the applicant to support the application of the applicant, the court has found those paragraphs gives historical background of the applicant from when she was employed by the respondent, what transpired during the period of her employment and what happened until when she was terminated from her employment. To the views of this court and as rightly argued by the

counsel for the respondent it cannot be said the facts deposed in the afore quoted paragraphs of the affidavit supporting the application are within the personal knowledge of the counsel for the applicant.

The court has considered the definition of the term knowledge given by the counsel for the applicant in his submission. He defines the term knowledge to mean facts, information and skills acquired through experience or education or the theoretical or practical understanding of subject or awareness or familiarity gained by experience of a fact or situation. The court has found that, the counsel for the applicant has not disclosed the source of the said definition of the term knowledge.

Although the court is not in dispute with the given definition but it has found the counsel for the applicant has not stated how the said definition can be used to justify his conduct of not disclosing the source of the facts he deposed in his affidavit on his own knowledge while in actual fact they were not on his own knowledge but are the facts came into his knowledge through the information he received from the applicant which the law requires to be disclosed in a verification clause of an affidavit. The court has considered the argument by the counsel for the applicant that the facts deposed at

the impugned paragraphs of his affidavit are within his knowledge as he obtained the same through the conduct and experience he obtained when he was conducting the matter before the Commission for Mediation and Arbitration but find those facts are not the facts which he can verify on his own knowledge.

To the view of this court the counsel for the applicant was required to disclose the source of the said facts in his affidavit as the facts he obtained from the applicant through the conduct of his case and he believed the same to be true and not to verify them as the facts which are within his knowledge. The court has arrived to the above view after seeing that, the position of the law stated in the case of **Lalago Cotton Ginnery** (supra) quoted with approval in the case of **Tanzania Breweries Limited** (supra) is very clear that, an advocate is allowed to swear an affidavit in proceedings in which he appears for his client on matters which are in his personal knowledge only.

The court gave in the above cited cases an example of matters which an advocate can swear in an affidavit to be filed in the court in a proceeding of his client by stating that, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and

that he personally knew what transpired during those proceedings. He cannot swear on matters which transpired out of the proceedings like those of how the client was employed, how he was treated and how he was not satisfied by the treatment which caused him to decide to initiate a matter in a court of law or in other quasi-judicial bodies.

The above finding caused the court to come to the view that, as the court has found the impugned paragraphs of the affidavit of the counsel for the applicant were verified contrary to the law, then as stated in the case of **Salim Vuai Foun V. Registrar of Cooperative Societies and Three others** [1995] T.L.R. 75 they cannot be acted upon by the court. That being the position of the law the next step is to see if the impugned paragraphs are expunged from the affidavit or ignored the remaining paragraphs of the affidavit can support the application or not.

The court has found the remaining paragraphs of the affidavit cannot support the application as they are only giving description of the parties, legal issue raised in the affidavit and the reliefs claimed by the applicant. That caused the court to find the affidavit supporting the application of the applicant cannot stand on the remaining

paragraphs and that renders the affidavit incurably defective. As stated in number of cases an incurably defective affidavit cannot support an application and it renders the whole application incompetent.

The court has considered the prayer by the counsel for the applicant that the applicant be allowed to amend the affidavit so that justice can be done to his case instead of allowing procedural issues to affect his case but find that, as stated in the case of **Nolasco Kalongola V Promasidor (T) Pty Ltd.**, [2018] LCCD 45 an incurably defective affidavit cannot be amended or altered. The remedy available for an application supported by an incurable defective affidavit as stated in the case of **Bulham Abdul Karim t/a EAU Enterprises V. NBC Jamhuri Branch Bukoba**, Civil Application No. 7 of 1996 (unreported) is to strike out the application from the record of the court.

In the premises the points of preliminary objection raised by the respondent are hereby upheld. The application filed in the court by the applicant is accordingly struck out for being incompetent as is supported by an incurably affidavit. For the interest of justice, the applicant is granted leave to refile in the court a competent

application for revision. The competent application to be refiled in the court within fourteen (14) days from the date of this ruling. It is so ordered.

Dated at Dar es Salaam this 14th day of December, 2021.

Jca

I. Arufani

JUDGE

14/12/2021

Court: Ruling delivered today 14th day of December, 2021 in the presence of Mr. Salmin Suleiman Mwiry, Advocate for the Applicant and in the presence of Mr. George Ambrose Shayo, Advocate for the Respondent. Right of appeal to the Court of Appeal is fully explained.



Jca

I. Arufani

JUDGE

14/12/2021