

IN THE HIGH COURT OF DAR ES SALAAM
DAR ES SALAAM DISTRICT REGISTRY
MISC CIVIL APPLICATION NO 246 OF 2022

VEHICLE AND EQUIPEMNT LTD.....APPLICANT

VERSUS

JEREMIAH CHARLES NYAGAWARESPONDENT

Date of last Order: 19/09/2022

Date of Ruling: 21/09/2022

RULING

Bade, A.Z. Judge

The applicant has moved this Court under section 14(1) of the Law of Limitation Act, Cap 89 R.E 2019 seeking an extension of time within which the Applicant may file an Application for Review. The respondent filed a counter affidavit simultaneously with a notice of preliminary objection on point of law that:

Application is supported by incurable defective affidavit which contains legal arguments and reasoning, hearsay evidence, speculations and lies paragraphs 2, 4, 6, 7 and 8.

The parties are represented by learned advocates Mr. Herry Kauki for the Applicant, and Mr. Baraka Lweeka for the Respondent.

The argument as per the Respondent's counsel is mainly that the affidavit is defective, where he painstakingly went on to point out all the offending paragraphs in view of the law viz:

1. The law on affidavit is offended by the filed affidavit in support of the Application for extension of time. That **Rule 3(1) of Order XIX of the Civil Procedure Code Cap 33 (RE 2019)** is particularly at issue where it provides that Affidavits should confine to facts, and not fabrications, speculations, arguments, legal reasoning and or law; and
2. The Law of Evidence **Tanzania Evidence Act S. 62 (1) (a), (b), (c) and (d) of Cap 6 (RE 2019)** which qualifies a sworn affidavit as written evidence in substitute of oral evidence; and as such it has to be direct evidence with no hearsay or speculation.

In support of his argument, counsel for the Respondent points out how Paragraph 2, 3 and 4 on one hand; and Paragraph 5, 6, 7, and 8 on the other of the Affidavit do not satisfy the qualities stated above. The averments that there was a Civil Case No 265 of 2020 before this Court is a fabrication as no such case exists. Further the averment that the Court's decision in Civil Appeal No 265 of 2020 was based on Exchequers receipt and not the E-filing rules is also baseless and a fabrication since the Ruling of this Court was not based on the purported Exchequers receipt and thus was not per incuriam. The Counsel insists that neither does the Ruling state so nor has the Court made any supposition on such basis.

In support of his position, he cited the case **Mathias Daffa & 27 Others vs Permanent Secretary, Ministry of Works, and 2 Others in Misc**

Land Application No. 502 of 2017 (unreported, supplied in Court); and also refer the case of **Fem Construction Co Ltd vs Nkululeko Karanja in Civil Appeal No. 168 of 2005** (also unreported, supplied in Court)

In response, the Counsel for the Applicant countered that the Preliminary Point of Objection should be a pure point of law and not based on facts that need to be ascertained on exercise of judicial discretion, and thus asks this Court to disregard the preliminary point of objection since the issue raised on paragraph 2 of the affidavit would need such ascertaining to determine its truthfulness. He says the confusion is a slip of the pen, not a fabrication. He cited the principle enunciated in **Mukisa Biscuit Manufacturing Co. Ltd vs West Distributors Ltd [1969] EA 696**.

He contends that the mentioning of the law was only for purposes of showing how the same offends the law particularly the E-Filing Rules, and as such does not contravene the Law in Affidavits.

He further maintains that the cases cited are distinguishable as they dealt with representative suit. And that what is purported to be arguments are simply facts in an effort to show that the Applicant was not sleeping on her rights, and thus prays for the preliminary objections to be dismissed with costs.

In rejoinder, the Respondent's counsel agreed with the Applicant's counsel that the principle in **Mukisa Biscuit's case** is a well settled law that preliminary objections should be really points of law, and persist on the issues stated previously; that the Applicants counsel do see and agree that the case is none existence, and that it can not be a slip of the pen that can be corrected by him as a counsel since he was not the one who deponed to this affidavit and present it as written evidence. As in distinguishing the

authorities for being that of a representative suit, the counsel points out that the same is governed by the same law of affidavits regardless.

Having heard the submission made by the both counsel and going through the pleadings, the issue worth of determination is whether the raised preliminary objections have merit. Now looking at Rule 3(1) of Order XIX of the Civil Procedure Code which provides:

"Affidavit shall be confined to such facts as deponent is able of his on knowledge to prove, except in the interlocutory applications, on which statement of his belief may be admitted provided that the grounds thereof are stated."

Basing on this legal requirement this Court has revisited the Chamber summons and the supporting affidavit of the applicant to see whether the paragraphs as mentioned herein by the respondent are offending the provisions of **Rule 3(1) of Order XIX of the Civil Procedure Code**. The court is of the firm view that Paragraph 4 and 5 contains legal arguments and contradicts each other, while paragraph 6 contains arguments and legal reasoning that the court based its decision on a wrong or old position of the law. At the same time, paragraph 7 contains arguments and legal reasoning that the delay is not caused by negligence or inaction. It is obvious that the deponent ought to have stated facts revealing that the delay was not caused by negligence.

Accordantly, the legal status of non-conforming affidavits is quite settled with a plethora of legal pronouncements including in the case of **Uganda V Commissioner of Prisons *ex parte* Matovu (1966) EA 514** where it was succinctly stated

“The affidavit sworn by Counsel for is also defective. It is clearly bad in law. Again, as a general rule, of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only constitute statements of facts and circumstances to which the witness deposes either of his own knowledge or from information to which he believes to be true. Such affidavit must not contain extraneous matter by way of objection or prayer or legal argument. The affidavit by Counsel in this matter contravenes Order 17 Rule 3 and should have been struck out.”

I must hasten to add that the quoted provision above is in pari materia with our own Order XIX Rule 3.

The Court also observes that the **Tanzania Evidence Act S. 62 (1) (a), (b), (c) and (d) of Cap 6 (RE 2022)** qualifies oral evidence to be direct evidence; and since affidavits are substitute for oral evidence, a sworn affidavit as written evidence has to be direct evidence; cementing the provisions in **Order XIX rule 3 of the Civil Procedure Code Cap 33 (RE 2022)**.

In this regard the Affidavit must fail, and thus it is Struck out.

I would agree with the Respondent’s Counsel that in such a situation **Order XLIII Rule 2 of the Civil Procedure Code Cap 33 RE 2022** must come into play in that the Chamber Application has no supporting affidavit and thus cannot stand and thus it is incompetent.

In the final analysis the Application is wholly struck out. The Respondents must have their costs.



A. Z. Bade

JUDGE

19/09/2022

Ruling delivered in the presence of Ms. Susanna Mafwere holding brief for Mr. Baraka Lweeka for Respondent and Mr. Emmanuel Ndanu for the Applicant.



A. Z. Bade

JUDGE

19/09/2022