

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 43 OF 2016

JUDICATE RUMISHAEL SHOO & 64 OTHERS.....APPLICANTS

VERSUS

THE GUARDIAN LIMITED.....RESPONDENT

**(Application from the decision of the High Court of Tanzania
(Labour Division) at Dar es Salaam)**

(Moshi, J)

Dated the 24th November, 2015

in

Land Revision No. 80 of 2010

RULING OF THE COURT

9th September & 13th October, 2016

LILA, J.A.:

This is an application for extension of time to serve the Respondent with the memorandum and record of Appeal. It is brought under Rule 10 of the Court of Appeal Rules, 2009. It is brought by way of a notice of motion and it is supported by an affidavit affirmed by Mr. Majura M.A. Magafu, learned advocate.

The grounds upon which the application is brought are two.

These are:-

- (i) *When the copy of the Notice of Appeal was served to the Respondent on 19th of April, 2011 the Respondent acknowledged receipt of the same but did not furnish and/or serve his proper address for service for the purposes of the appeal as required by Rule of the Court of Appeal Rules, 2009.*
- (ii) *On 5th day of January, 2016 the applicant lodged the Memorandum of Appeal before this Court but due to the Respondent's failure to comply with the provisions of Rule 86(1) (b) of the Court of Appeal Rules, 2009 the memorandum and the record of Appeal is not yet been served to the Respondent.*

Apart from filing an affidavit in reply Mr. Michael J.T. Ngalo, learned advocate for the Respondents he also filed a notice of preliminary objection on the following grounds:-

- (a) The notice of motion is bad in law for including 64 other undisclosed Applicants meaning that those 64 others are unknown or unidentifiable on the notice of motion.*
- (b) That a copy the affidavit supporting the notice of motion and served on the Respondent is not attested as required by the law rendering it incurably defective.*
- (c) That the affidavit made, sworn and lodged in support of the notice of motion is incurably defective for containing extraneous matters by way of legal arguments and conclusions.*

At the hearing of the above points of objection Mr. Majura A. Magafu, learned advocate, entered appearance for the applicants and Mr. Michael Juakhim Tumaini Ngalo represented the respondent.

Submitting on the first point of preliminary objection, Mr. Ngalo contended that in the application it is indicated that there are 65 applicants but the name of only one applicant is indicated that is Judicate Rumishael Shoo. He said the names of the remaining 64 others are not indicated. It was his view that there ought to have been a list of all 65 applicants. He insisted that the names of all applicants ought to have been disclosed. Failure to do so, he said, was not proper. To bolster his arguments he cited this Court's decisions in **HSU Chin & 36 others v. Republic**, Criminal Appeal No. 345 of 2009 and **Lugano S. Kalomba & 22 others**, Civil Appeal No. 78 of 2008 (both unreported) in which it was held that the names of all appellants must be mentioned so as to make it a joint appeal.

Regarding the defect of the affidavit in support of the Notice of Motion which is the second point of objection, Mr. Ngalo argued that the affidavit in support of the Notice of Motion served to him is not completely

attested. He contended that contravened the requirements of section 8 of the Notaries Public and Commissioner for Oaths Act (Cap 12 R.E. 2002).

On ground three, Mr. Ngalo argued that paragraphs 6 and 7 of the affidavit in support of the Notice of motion are arguments and conclusions as they raise legal argument attracting answers of yes or not. As for paragraph 8, he said it is indicated that it is based on belief but the grounds of such belief are not disclosed. He was of the view that it is offensive and in support of his assertions he cited the cases of **Phantom Modern Transport (1985) Ltd v. D.T. Dobie (Tanzania)Ltd**, Civil Reference No. 15 of 2001 and 3/2002 [unreported] and **Rustamali Shivji Karim Merani v. Kamal Bhushan Joshi**, Civil Application No. 80 of 2009, (unreported). He urged this Court to dismiss the application.

In reply, Mr. Magafu submitted that the names of applicants are annexed to the application at page 9 and they duly signed. He said the cases cited by Mr. Ngalo are irrelevant because they concern notice of appeal while this is application for extension of time. He said the Court of Appeal Rules requires the names of appellants be indicated in the Notice of appeal. He said it is not the case in the present application. He said if any

of the applicants died his/her legal representative will be substituted when the appeal will be lodged. He accordingly said the point of objection raised have no legal basis.

On the issue of the respondent being served with unattested copy of the affidavit in support of the application, Mr. Magafu conceded that happening but he prayed that they be ordered to serve the respondent with a duly attested affidavit. He said provided that the one lodged in Court is properly attested then the Court can invoke its discretion under Rule 4(2) of the Court of Appeal Rules, 2009 to order service of another duly attested affidavit.

Regarding paragraphs 6, 7 and 8 of the affidavit in support of the application containing legal arguments, conclusions and reliefs, Mr. Magafu contended that paragraph 6 and 7 of the affidavit are facts that the Respondent could not be served with the memorandum and record of appeal because he did not furnish a proper address of service after he was served with the copy of the Notice of appeal.

Submitting on paragraph 8, Mr. Magafu contended that it is based on the applicant's belief which is allowed under order XIX Rule 3 of the Civil

Procedure Code Act (Cap 33 R.E. 2002). He said there is no legal requirement that the grounds of belief should be disclosed. Otherwise he urged the Court to observe the requirements of the Rules and Article 107A of the Constitution of the United Republic of Tanzania which requires courts not to embrace technicalities at the expense of justice. He also urged, in case the Court finds that there are offensive paragraphs in support of the application then they be allowed to amend under Rule 111 of the Rules.

In his short rejoinder Mr. Ngalo reiterated what he had submitted in chief and he added that the principle applicable in notices of Appeal that names of appellants must be indicated apply in the instant application. He further said the CPC does not apply in the Court of Appeal and even if it applies yet the proviso to order XIX Rule 3 requires grounds of belief be stated.

Just for convenience, I wish to start with the determination of the second point of objection as there is no serious contention by the parties. Mr. Ngalo raised and Mr. Magafu conceded that the affidavit in support of the application served to the respondent is not attested at all. Mr. Ngalo

was also quick to indicate if the affidavit filed in Court is properly attested then the Court should order that he be served with a properly attested affidavit. On his part, Mr. Magafu indicated readiness to supply Mr. Ngalo with a properly attested affidavit.

For my part, the affidavit in the Court record is properly attested. I, in the circumstances, order that Mr. Magafu should serve Mr. Ngalo with a properly attested affidavit within one week from the date of delivery of this ruling.

I now turn to the first point of objection. As indicated above Mr. Ngalo is faulting the notice of motion for not indicating the names of all applicants. Apparently, the two cases cited by Mr. Ngalo in support of his assertion concerned the failure to indicate the names of all the appellants in the notice of appeal. Mr. Magafu contended that is not a requirement in applications of this nature. In the alternative, he said the list of all applicants is annexed in the affidavit. He is of the view that, that is sufficient.

I have read the two cases cited that is **Lugano S. Kalomba & 22 others and HSK CHIN & 36 others** (supra) (unreported). In both the

two cases, the Court held that the procedure for representative suit does not obtain in the Court of Appeal under the current Court of Appeal Rules, 2009 and it is insisted that the names of all appellants should be mentioned in the notice of appeal. The Court made reference to Rule 68 (3) of the Rules which, in part, reads:-

"68(3) where two or more persons have been jointly tried and any two or more of them desire to appeal to the Court, they may, at their option lodge separate, notices or a joint notice of appeal..."

In respect of whether the names of all applicants should be mentioned in the notice of motion, Rule 49 (1) and (2) of the Rules may assist. That Rule states:-

49- (1) Every formal application to the Court

shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts.

(2) ***An applicant may, with the leave of the Court or with the consent of the other party lodge one or more supplementary affidavits, and an application for such leave may be made informally*** (emphasis mine).

The above exposition of the law very clearly points out that a formal application is **lodged by an applicant**. There is, therefore, no indication that there is a representative notice of motion. That being the case then where there are more than one applicant, all the names of applicants must be mentioned in the notice of motion. They must all be identified by names. Reference to the rest as "others" is insufficient. The reasons are that it is significant that it be known who are those persons, by names, moving the Court and who would bear the consequences in case the application is not successful for example payment of costs etc.

I am therefore of the firm view that the principle enunciated in **Lugano S. Kalomba** (supra) and **HSU CHIN** (supra) rightly apply in notices of motion. The names of all persons making an application should be mentioned in the notice of motion. However, since the name of one

applicant is indicated in the instant application, I find that the defect is not fatal. The notice of motion can be amended by presenting another one disclosing (showing) the names of all applicants. The list of names annexed to the affidavit at pages 8 and 9 reads ***"list of retrenched staff from the Guardian Ltd."*** It cannot be said to be a list of **applicants**. I hereby accordingly order that another notice of motion be filed with names of all applicants. Where the list is short all the names must be indicated but where the list is too long, as in this case, and for the sake of space, it can be indicated thus: "Judicate Rumishael Shoo and 64 Others (names enclosed/annexed). Then the list of those whose names are not indicated should be annexed as a "List of 64 applicants".

In the last point of objection the respondent contends that the affidavit made, sworn and lodged in support of the notice of motion is incurably defective for containing extraneous matters by way of legal arguments and conclusions. The paragraphs in the applicants' affidavit under attack are paragraphs 6, 7 and 8.

In order to appreciate Mr. Ngalo's contentions I hereby quote the relevant paragraphs.

6. *That the applicants after filing the notice of appeal they served a copy to the respondent and Respondent acknowledged receipt of the same by endorsing in applicants copy but respondent did not supply the address for service to date.*

7. *That on January, 2006 the applicants filed a memorandum and record of appeal before this Court, however, the same is not served to the respondent to date as the respondent has not provided the address for service to the Applicant to date.*

8. *That I verily believe that the appeal has overwhelming chances of success as there are number of legal issues which ought to be resolved by this Court during the hearing of the appeal.*

Mr. Ngalo has categorized paragraphs 6 and 7 as containing legal arguments and conclusions. Mr. Magafu on the other had insisted that they contain facts which even the respondent, in his affidavit in reply, conceded. As indicated above Mr. Ngalo cited the case of **Phantom Modern Transport** (supra) to buttress his contention in which the famous case of **Uganda v. Commissioner of Prisons, Exparte Matovu** [1966] E.A. 514 which laid down the rule regarding what should be contained in an affidavit. The position set is that an affidavit should only contain **statements of facts and circumstances** to which the witness deposes and it should not contain extraneous matters by way of objection or prayer or legal arguments or conclusion.

Now the issue to be resolved is whether paragraphs 6 and 7 (above quoted) contain legal arguments and conclusions. There is need, in my view, to know the meaning of the words arguments and conclusions.

The Academics Legal Dictionary by S.L. Salwan and U. Narranga, 22nd Edition, 2012 at page 28 defines the word "argument" to mean:-

"a connected discourse based upon reason, a cause of reasoning tending and intended to establish a position and to induce belief".

A concise Oxford dictionary, Tenth Edition defines the word argument to mean:-

- (1) A heated exchange of diverging or opposite views.*
- (2) A set of reasons given in support of something.*

The same dictionary defines the word "conclusion" to mean:

- 1. The summing up of an argument or text.*
- 2. A judgment or decision reached by reasoning.*

The Concise Oxford Dictionary also defines the word "fact" to mean.

"a thing that is indisputably the case.... The truth about events as opposed to interpretation."

It is thus apparent that an affidavit is supposed to contain statements which are **a true position of the matter or event**. It should not contain anything based on reasoning.

Now carefully considered, paragraphs 6 and 7 of the applicants cannot be said to contain arguments or conclusions. They explain the real situation obtaining in the application. They actually tell why the applicants have accessed the Court. They categorically state that the applicants are yet to serve the respondent with the copy of the memorandum and record of appeal because the respondent is yet to supply the address for service. The respondent does not dispute this in his reply affidavit. So the statements by the applicants in paragraphs 6 and 7 are statements of facts not arguments or conclusions. They are, instead, substantive paragraphs in the application.

Mr. Ngalo has also raised issue with paragraph 8 of the applicants' affidavit in support of the application. He contends that it is based on belief but the grounds of belief are not disclosed. But it is clear in the verification that it is based on deponents own belief. The grounds of belief are well stated in paragraph 8 of the affidavit that there are a number of

legal issues to be resolved by the Court during the hearing. Mr. Ngalo is not challenging the above stated ground of belief. He says the grounds of belief are not stated. I can therefore safely hold that the grounds of belief are well stated in the affidavit.

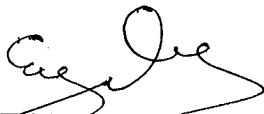
All said, save for the first point of objection which I have upheld and ordered amendment of the Notice of motion, the remaining two points of objection are dismissed. The application to proceed with the hearing upon the applicant complying with the order given. In the circumstances I make no order for costs.

DATED at DAR ES SALAAM this 4th day of September, 2016.

S.A. LILA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL