IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MSOFFE, J.A., KAJI, J.A., AND KILEO, J.A.)
CIVIL REFERENCE NO. 21 OF 2006

ANNA MAKANGA.....APPLICANT

AND

GRACE WOISO.....RESPONDENT

(REFERENCE from the Ruling of the Court of Appeal of Tanzania at Dar es Salaam)

(Munuo, J.A.)

Dated the 14th day of September, 2006

In

Civil Application No. 150 of 2006

RULING OF THE COURT

22 February & 23 March, 2007:

KILEO, J.A.:

This reference arises from the decision of a single judge of this Court striking out an application for stay of execution pending appeal to this Court.

The respondent, Grace Woiso who appeared in person before us had filed a Preliminary Objection to the reference. After hearing her, and Mr. Buberwa, learned advocate for the applicant, we

overruled the objection and reserved our reasons therefor to be given in the final ruling. We now give our reasons.

The notice of Preliminary Objection, which was filed by the respondent, contains three points:

a) That, the jurat in the applicant's affidavit is incurably defective, as it does not disclose the date when the affidavit was taken or shown.

b) That, the applicant's affidavit is defective for want of verification clause.

c) That, the applicant's affidavit in paragraph 8 and 10 is argumentative, hence offends the cardinal rule in drawing an affidavit.

The respondent did not submit arguments on the Preliminary Objection. She merely asked the Court to consider it as presented. Responding to the Preliminary Objection, Mr. Buberwa submitted that both the 1st and 2nd points of objection were baseless as the affidavit of Feran Kweka clearly indicated the date when it was sworn and further that paragraph II of the affidavit sufficed as far as verification

is concerned. The learned counsel prayed however, in case it is found that it was necessary to explicitly mention the phrase "verification" in the affidavit, then he be allowed to file a supplementary affidavit containing the phrase.

It is true, as submitted by Mr. Buberwa that the objection with regard to the date the affidavit was sworn is not borne out by the affidavit complained about. It is clearly indicated in the jurat, that the affidavit of Feran Kweka in support of the reference was sworn at Dar es Salaam on 15th September 2006.

We find the respondent's 1st point of objection to lack merit.

As for the 2nd point of objection, we have been asked by Mr. Buberwa to accept paragraph II of Feran Kweka's affidavit as constituting verification. The said paragraph, which is the concluding paragraph in the affidavit, reads as follows:

> **"That what is stated herein above is true to the best of my knowledge save for the**

contents of paragraph 7 which is true according to the Court record".

We are of the view that the above statement constitutes verification. Verification is simply a "**final declaration made in the presence of an authorized officer, such as a notary public, by which one swears to the truth of the statement in the document**." (See definition of verification per **Black's Law Dictionary 7th Edition**). The deponent, in paragraph 11 of the affidavit is swearing to the truth of the preceding paragraphs. He has gone further to indicate that the facts in the whole document are true to the best of his own knowledge save for paragraph 7, which is from the Court record. The jurat shows that the affidavit was sworn, verified and dated at Dar es Salaam on 15th September 2006 before a Commissioner for oaths. In the circumstances we find the 2nd point of objection that the affidavit is defective for want of verification clause to be without merit.

In response to the third point of objection Mr. Buberwa argued that paragraphs 8 and 10 are not argumentative. He however

submitted that should the said paragraphs be found to be argumentative they could be expunged. He referred to the case of **PHANTOM MODERN TRANSPORT (1985) LTD and D.T. DOBIE (TANZANIA) LTD,** Civil Reference 15 of 2001(unreported) in support of his argument.

We have considered the two paragraphs complained about and we think that the complaint is well founded. The paragraphs state as follows: -

> **"8. that we are of the view that no one can be the judge of its own cause and hence her decision was bias".**
>
> **"10. that it is in the interest of justice for the court to see to it that justice is done and stay of execution be granted."**

Whether or not the single judge was a judge of its own cause and whether or not her decision was 'bias' as stated in paragraph 8 is

argumentative. Like wise, for paragraph 10, whether or not stay of execution would have been in the interest of justice in the circumstances of this case is a matter of argument, which ought not to have been contained in the affidavit. The law on affidavits as set out in the case of **Uganda v. Commissioner of Prisons, Ex parte Matovu(1966) E.A.514 at page 520** was accepted by this Court in the case of **PHANTOM MODERN TRANSPORT (1985) LTD and D.T.DOBIE (TANZANIA) LTD** referred to by Mr. Buberwa. We also accept that position. In the **Matovu** case it was held as follows:

"..... as a general rule of practice and procedure, an affidavit, for use in court, being a substitute for oral evidence, should only contain statements of facts to which the witness deposes either of his own personal knowledge or from information he believes to be true."

In spite of the fact that we consider the two paragraphs in the affidavit of Feran Kweka to be argumentative, we are however of the considered view that the defects in the affidavit caused by the inclusion of paragraphs 8 and 10 are inconsequential and for this reason we have resolved to overlook them and proceed to act on the

rest of the parts in the affidavit. The justices of appeal in the case of **PHANTOM MODERN TRANSPORT (1985) LTD and D.T. DOBIE (TANZANIA) LTD** also observed that; **"where defects in an affidavit are inconsequential, those offensive paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it".**

It is in the light of the above considerations that we overruled the preliminary objection.

As intimated earlier, this reference arises from the decision of a single judge of this court striking out an application for stay of execution of the decision of the High Court of Tanzania at Moshi (Munuo, J.) dated 26/2/2001 in Misc. Civil Application No. 64/2000.

In striking out the application before her the single judge in her brief ruling stated;

> **"There is no Notice of Motion in this application to enable the Court to know the**

> **nature and grounds of the same. Nor was a copy of the decree sought to be stayed annexed to the application. As it is, the application is not properly before the court. I accordingly strike out the incompetent application."**

There are two grounds for attacking the decision of the single judge and these are to be found in the affidavit of Feran Kweka and the supplementary affidavit of Mr. Buberwa. The two grounds are:

(1) That the single judge erred to strike out the application on the ground that there was no copy of notice of motion and/or decree in the application to enable the court to know the nature and grounds of the same, while those copies were present before the honorable judge.

(2) That the same judge who ruled in the High Court of Tanzania at Moshi (the then Munuo, J.) in Misc. Civil Application No. 64 of 2000 on 26th February, 2001 is the

same judge who ruled in the same matter in an appeal in Civil Application No. 150 of 2004.

Mr. Buberwa made a brief submission before the court arguing that there was a notice of motion tabled before the single judge. He however conceded that the notice of motion did not contain any grounds.

Now, on the first ground we are asked to fault the decision of the single judge for the reason that she found that there was no notice of motion before her while in fact all along there was such notice of motion. The question which follows is, was there a notice of motion, as envisaged in the law, before the single judge?

In order for a notice of motion to be worth the name, it has, as a matter of law to contain the grounds for the application. Such notice of motion has to be substantially in the Form A appearing in the First Schedule to the Court of Appeal Rules. Rule 45 (1) and (2) of the Court of Appeal Rules provide as follows: -

"**45-(1) Subject to the provisions of sub-rule (3) and to any other rule allowing informal applications, all applications to the Court shall be by motion, which shall state the grounds of the application.**

(2) A notice of motion shall be substantially in the Form A in the first schedule to these rules and shall be signed by or on behalf of the applicant."

We have had occasion to peruse the record in Civil Application No. 150 of 2004 before Munuo, J. A. A reproduction of the notice of motion in the record may assist in getting a clearer picture of the problem. The notice of motion reads as follows:

"IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 150 OF 2004
(In the matter of an intended Appeal)

BETWEEN

ANNA MAKANGA.....APPLICANT/APPELLANT

AND

GRACE WOISO
(Legal Representative of

late Dr. Paul Pim Ibreck)…….RESPONDENT

(Appeal from the whole decision of the High Court of Tanzania, at Moshi (Madam Justice Munuo – Judge) dated 26th February 2001 in Misc. Civil Application No. 64/2000)

NOTICE OF MOTION

(Made under Rule 9 (2) of the Tanzania Court of Appeal Rules, 1979 and any other provision of the Law)

TAKE NOTICE that on……..the day of……2004 at……..o'clock in morning/afternoon or soon thereafter as he can be heard ANNA MAKANGA, the Applicant above named will move the Court for an order that: -

> The Honourable Court be pleased to grant stay of execution and warrant of execution issued by the District Court of Moshi and sent to Maripelanto Auctioneers and Court Broker be waived pending Appeal.

This Application will be supported by the Affidavit of ANNA MAKANGA sworn at MOSHI on ……. day of……..2004.

> The Address for service of the Applicant is
> Anna Makanga
> Ben Bella Street,
> P.O. Box 992,
> MOSHI.

Dated this 28th day of October, 2004."

Reading through the notice of motion as reproduced above it becomes obvious that it did not conform to the format required by the law as it did not contain the grounds of the application. The

single judge said that there was no notice of motion to enable her to know the nature and grounds of the same. In this, we cannot fault her. The document termed 'notice of motion' before her is not a notice of motion known in law.

The applicant complains also that the single judge found that there was no decree sought to be stayed annexed to the application while as a matter of fact there was such a decree.

A look at the annexures to the 'notice of motion' before Munuo, J.A. will show that it was the Ruling of L. B. Mchome, J. in Misc. Civil Application No. 34 of 1999 that was annexed to the so called notice of motion.

The notice of appeal annexed is also in regard to Misc. Civil Application No. 34 of 1999. However, the notice of motion tabled before Munuo, J.A. appears to be in respect of Judge Munuo's decision dated 26th February 2001 in Misc. Civil Application No. 64/2000. The learned judge in that decision merely advised the

applicant to file the application for stay of execution in the Court of Appeal if she so wished.

There is no evidence that a notice of appeal against that decision has ever been lodged. Where no notice of appeal has been lodged the Court cannot order a stay of execution as per rule 9 (2) (b) of the Court Rules, which provides as follows: -

> **"9 (2) Subject to the provisions of sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may-**
>
> **(a)……..**
>
> **(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 76, order a stay of execution, on such terms as the Court may think just".**

Since there was no notice of appeal against the decision of Munuo, J in High Court (Moshi) Misc. Civil Application No 64 of 2000, the question of stay of execution of her decision could not arise.

It appears to us that the applicant was not keen in conducting her application, the result of which is that she ended up mixing up things.

The single judge has also been accused of being a judge in her own cause. This complaint is unfounded and it is very unfortunate that it was raised. As earlier stated, no notice of appeal was ever lodged against the decision of Munuo, J in Misc. Civil Application No. 64 of 2000, and consequently, as already elaborated above, there was no question of stay of execution against that decision, which Munuo J.A. would have dealt with. The notice of appeal in the record was against the decision of Mchome, J.

The applicant and her counsel have themselves to blame for the mix up that has occurred.

In the result we dismiss the reference with costs.

DATED at DAR ES SALAAM, this 23rd day of March, 2007.

J. H. MSOFFE
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

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

S. M. RUMANYIKA
DEPUTY REGISTRAR