

and legal points effective.
IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

CIVIL APPLICATION NO. MBY 8 OF 2004

JUMA S. BUSIYAH APPLICANT
VERSUS
THE ZONAL MANAGER,
(SOUTH) TANZANIA POST CORPORATION..... RESPONDENT

(Application to restore appeal from the ruling of
the High Court of Tanzania at Mbeya)

(Mackanja, J.)

dated the 17th day of January, 2002
in
Misc. Civil Appeal No. 21 of 1998

RULING

MUNUO, J.A.:

The applicant, Juma S. Busiyah, through the services of Mr. Mushokorwa, learned advocate, seeks:

- (a) Extension of time to appeal to the Court of Appeal of Tanzania out of time;
- (b) Leave to appeal to the Court of Appeal of Tanzania against the decision in Miscellaneous Civil Appeal No. 21 of 1998 in the High Court of Tanzania at Mbeya; and
- (c) Costs of the application.

Mr. Mwakolo, learned advocate for the Respondent, filed a preliminary objection on a point of law contending that the affidavit

in support of the application is incurably defective in that it contains extraneous matters by way of legal arguments so the application should be dismissed with costs.

At the hearing, Mr. Mwakolo specified that paragraph 7 of the affidavit in support of the application is bad in law because it contains matters of law instead of deponing to facts. Counsel for the applicant cited the case of **Uganda versus Commissioner of Prisons Ex Parte Matovu** 1966 E.A. 514 at Page 520 wherein the then Eastern Africa Court of Appeal observed:

"The affidavit sworn to by counsel 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 of oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of his own personal 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 or

conclusion. The affidavit by counsel in this matter contravenes O.17.r.3 of the Rules of this Court and should have been struck out."

Mr. Mwakolo submitted that the said O17.r.3 I is in pari materia with the provisions of Order 19 Rule 3 of the Code of Civil Procedure, 1966 which states:

Order XIX Rule 3:

Affidavits

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:

Provided that the grounds thereof are stated.

The provisions of Order XIX Rules 3 of the Code of Civil Procedure, 1966, are similar to the provisions of Order 19 Rule 1 of the Indian Code of Civil Procedure Act V of 1908. Mulla, The Code of Civil Procedure 10th Edition Pages 665 to 666 reflect the same.

Mr. Mushokorwa, learned advocate for the Respondent, resisted the preliminary objection. He conceded that paragraph 7(a) and (e) of the affidavit in support of the application relate to matters of law. He nonetheless, contended that pleading points of law has not offended any law so the court should strike out para 7(a) and (e) only and let the application be determined on merit instead of striking it out with costs. In the alternative, counsel for the applicant argued, the court should allow the applicant to amend the pleadings in order to rectify the defective affidavit. He contended that even in the above Ex-parte Matovu case, the court did not strike out or dismiss the case which indicated that the defective affidavit was a minor irregularity which is curable. He cited the case of Salima Vuai Fourn Versus Registrar of Cooperative Societies and Three Others (1195) TLR 75 to support his argument that the defective affidavit is curable by way of amendment or striking out the defective clauses.

With respect, the case of **Salima Vuai Fourn** is distinguishable from the present case because in Salima's case the issue was one of a defective verification of the affidavit in that the verification clause did not disclose the source of the deponent's knowledge and

information. In that case the court held that where an affidavit is made on information, it should not be acted upon by any court unless the sources of information are specified. Here the issue is not defective verification. The issue before me is one of pleading matters of law instead of deponing to facts. Is such a defect incurable?

The definition of the word "Affidavit" has some clue to the above issue. Osborn's Concise Law Dictionary, 6th Edition by John Burke, Sweet and Maxwell at Page 20 states:-

"Affidavit:

A written statement in the name of a person, called the deponent, by whom it is voluntarily signed and sworn to or affirmed. It must be confined to such statements as the deponent is able of his own knowledge to prove, but in certain cases it may contain statements of information and belief with the sources and grounds thereof. The parties to civil proceedings may agree that their case be tried upon affidavit and the court may order

that any particular facts, or the evidence of any particular witness, shall be proved by affidavit. Affidavits are of infinite variety."

From the about definition of affidavit, it is clear that a deponent to an affidavit depones to facts, that is evidence, not matters or points of law. My view is fortified by Order XIX Rule 1 of the Code of Civil Procedure, 1966 which states:

"1. Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavits of any witness may be read at the hearing, or such conditions as the court thinks reasonable:

Provided that where it appears to the court that either party bona fide desires the production of a witness for cross-examination, and such witness can be produced an order shall not be made authorizing the evidence of such witness to be given by affidavit."

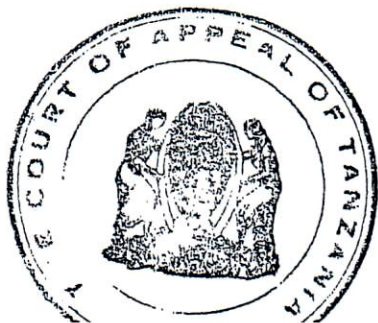
In view of the above definition of 'affidavit' and the provisions of Order XIX Rules 1 and 3 of the Civil Procedure Code, 1966, an affidavit is essentially, facts, and therefore evidence, not points of law or legal arguments as pleaded at paragraph '7. In that respect, the Ex-Parte Matovu case cited supra is in line with the provisions of Order XIX Rule 3 of the Code of Civil Procedure Code, 1966. Under the circumstances the affidavit in support of the application is incurably defective and thence renders the application incompetent.

For the reasons stated above the preliminary objection is sustained. The application is accordingly struck out with costs.

DATED at MBEYA this 4th day of May, 2005.

E.N. MUNUO
JUSTICE OF APPEAL

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



(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR