

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

CIVIL APPLICATION NO. 185/17 OF 2018

SANYOU SERVICE STATION LTD. APPLICANT

VERSUS

BP TANZANIA LTD.

(Now PUMA ENERGY (T) LTD) RESPONDENT

**(Application for extension of time to apply for revision against the decision
of the High Court of Tanzania (Land Division), at Dar es Salaam)**

(Mgaya, J.)

dated the 7th day of November, 2014

in

Land Case No. 148 of 2005

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RULING

9th & 22nd May, 2019

KITUSI, J.A.:

There is before me an application by Sanyou Service Station Ltd, hereafter the applicant, for extension of time within which to apply for revision of the judgment and decree of the High Court in Land Case No. 148 of 2005. The application is by way of Notice of Motion preferred under Rule 10 of the Tanzania Court of Appeal Rules, 2009, (the Rules), and it is supported by an affidavit of Ajay Soman.

The respondent, BP Tanzania Limited (Now Puma Energy (T) Limited) resists the application and has filed an affidavit in reply in terms of Rule 56 (1) of the Rules, taken by Gibson Mgina, its Chief Accountant. Along with the affidavit in reply, the respondent raised two separate points of preliminary objection and filed two separate Notice under Rule 107 of the Rules.

The first Notice was filed on 18th June, 2018 challenging the competence of the application on account of the supporting affidavit bearing a defective verification clause. The second Notice was filed on 20th April, 2019. Its basis is that the application for revision is not maintainable because the order sought to be revised is appellable under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002.

At the hearing of the application the parties were represented by counsel who argued the first point of preliminary objection fiercely, the respondent's counsel having dropped the second point. The legal feud was between Mr. Samson Mbamba, learned advocate for the applicant and Mr. Libent Rwazo, learned advocate for the respondent. This ruling is in respect of their rival submissions on the supporting affidavit's verification clause.

Mr. Rwazo began by pointing out that the supporting affidavit begins with number 6 on to 14, meaning that it does not contain paragraphs 1 to 5. However, he pointed out again, the deponent purports to verify paragraphs 1 to 9 including, it means, the non-existent paragraphs 1 to 5. The learned counsel further pointed out that paragraphs 10 to 14 are not verified.

As we shall later see, the above facts are not disputed by Mr. Mbamba, for the applicant.

Next, Mr. Rwazo submitted on the relevancy of verification of an affidavit and the consequences of failure to comply. The learned counsel submitted that a verification clause tests the genuineness and authenticity of the facts deponed, and holds the maker responsible for those facts. It informs the Court on whether to act on the facts or not, he further submitted. The learned counsel supported his submissions with the decision in the case of **Lisa E. Peter V. Al - Hushoom Investment**, Civil Application No. 147 of 2016. In this case, he submitted, another decision in the case of **DPP V. Dodoli Kapufi and Another**, Criminal Application No. 11 of 2008 (unreported) was cited for the essentials of a valid affidavit.

In further submissions, Mr. Rwazo referred to the decision in the case of **A. K. K. Nambiar V. Union of India** (1970) 35 CR 121, also cited in the case of **DPP V. Dodoli Kapufi** (supra). The India decision is authority for the importance of a verification clause in an affidavit.

On the above grounds Mr. Rwazo, though aware of the recent amendments to the Appellate Jurisdiction Act, Cap 141, R.E. 2002, introducing the concept of overriding objective, submitted that this application should be struck out because the said concept of overriding objective does not mean that procedures should not be followed. He went on to argue that the applicant had an opportunity to apply for rectification of the defects, but did not do so, and submitted that now that a point of preliminary objection has been raised, the door to that option is no longer available to the said applicant.

As earlier intimated, the applicant concedes to the defects in the affidavit, so when Mr. Mbamba, learned advocate, took the floor he submitted that in such situations, even where a P.O has been raised the Court has previously granted, and should in this case, grant the applicant leave to cure the defect by inserting a proper verification. He invited the Court to be inspired by the decision of the High Court in **Kiganga and**

Associates V. Universal Gold NL, [2000] TLR, 24. He specifically drew the Court's attention to holding No. 5 which shows that the Court may order rectification of the defect. Mr. Mbamba cited two other decisions of the Court, these are **National Insurance Corporation (T) Ltd & Another V. Shengena Limited**, Civil Application No. 20 of 2007 and; **Lalago Cotton Ginnery and Oil Mills Company Limited V. The Loans and Advances Realization Trust (Lart)**, Civil Application No. 80 of 2002 (both unreported).

Mr. Mbamba referred to the obiter dictum in the case of **DSM Education & Office Stationery & Another V. NBC Holding Corporation & 2 Others**, Civil Application No. 39 of 1999 (unreported). Then the learned counsel went on to distinguish the case of **Lisa E. Peter** (supra) on two grounds. **First**, that it was decided before the introduction of the overriding objective. **Second**, that the attention of the single Justice who decided it was not drawn to the other decisions on the matter.

In rejoinder, Mr. Rwazo apart from submitting that this Court is not bound by the decision of the High Court in the case of **Kiganga** (supra), he pointed out that the verification in that case was in relation to a plaint therefore, it was not as vital an issue as it is in this case. The learned

counsel went on to distinguish this case from the case of **National Insurance** (supra) which Mr. Mbamba relied upon. Submitting that in that case it was the same Mr. Mbamba advocate who was guilty of presenting an affidavit bearing a defective verification but having realized the defect, the learned counsel had swiftly applied to rectify the said defect before any objection had been raised.

The learned counsel did not spare the other cases that had been relied upon by Mr. Mbamba. As regards the case of **Lalago** (supra) he submitted that it was of no assistance to the applicant because at page 8 of the decision the Court considered the omission to verify, fatal. In **DSM Education** (supra) the applicant was ready and seeking to have the unverified paragraphs expunged.

Turning to the suggestion made by Mr. Mbamba that the overriding objective rule should be called to use, Mr. Rwazo submitted that the rule did not do away with the requirement for the parties to follow the Rules of the Court. He reiterated his prayer that this application be struck out, and the applicant may bring a fresh application.

Passionately contested though this application it only calls upon me to decide, a narrow issue in my view, what are the consequences of an application that is supported by an affidavit bearing a defective verification clause. I need not repeat the fact that the applicant is not disputing the facts raised in the point of preliminary objection. In deciding the lone issue before me I will, at some point, refer to these undisputed facts.

But first let me set out the legal rationale for verifying an affidavit; and certainly I am not re-inventing the wheel. In **A. K. K. Nambiar** case (supra) which we cited with approval in **Lisa E. Peter** (supra), both cited to me by Mr. Rwazo, this was said of the reasons for verifying affidavits:-

"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 allegations. 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.”

All these are matters of established principles.

The next aspect in terms of principles is that it is in order for one to be allowed to amend a defective affidavit. Mr. Rwazo concedes to this proposition but holds the view that only when there is no Notice of Preliminary objection may one whose affidavit is challenged be allowed to amend it. The case of **Kiganga** (supra) relied upon by Mr. Mbamba for the applicant was distinguished for having involved a verification of a plaint not of an affidavit, and that, in any event, it is a decision of the High Court.

With respect, this Court has previously decided on the point in **DDL Invest International Limited V. Tanzania Harbours Authority & Two Others**, Civil Application No. 8 of 2001 (unreported), and a preliminary objection had been raised.

A little more needs to be stated about that case so as to appreciate its relevance or otherwise to the instant. In that case, the late Kisanga,

J.A. (as he then was) agreed with the position that had been taken by the Court in its previous decision that whether or not to allow a party to amend an affidavit with a defective verification is a matter in the discretion of the Court. The previous case he referred to is **University of Dar es Salaam V. Mwenge Gas and Lub Oil Limited**, Civil Application No. 76 of 1999 (unreported).

In digression, I need to have it noted that in **The University of Dar es Salaam** case (supra) the Court was dealing with a situation worse than the present, because in that case there was no verification clause at all. So, in **DDL Invest** (supra) the following passage was reproduced from the **University of Dar es Salaam** (supra):-

*"Bearing in mind what was stated by this Court in **Salim Vuai Foum's** case (supra), it would appear that a Court has discretion to allow a deponent of an affidavit lacking a verification clause to amend the affidavit. I take it, that by using the word 'amend', this Court meant that the deponent can, if circumstances justify it, grant leave to the deponent to file an affidavit having a verification clause."*

I wish to emphasize that from the foregoing, it can safely be concluded that the Court's powers to grant leave to a deponent to amend a defective affidavit, are discretionary and wide enough to cover a situation where a point of preliminary objection has been raised and even where the affidavit has no verification clause. Undoubtedly, as the rule goes, the discretion has to be exercised judiciously. On the advent of the overriding objective rule introduced by the Written Laws (Miscellaneous Amendments) (No. 3), Act, 2018, the need of exercising the discretion is all the more relevant.

Turning to the affidavit in question, it seems to me that what I have before me is a case of wrong numbering of the affidavit indicating the first paragraph as Number 6 instead of Number 1, then going about to verify the paragraphs whose numbers are wrong. Again some of the paragraphs, Number 10 to 13, have not been verified. Does this justify striking out of the application?; I ask myself? I think it does not. I find the decision and reasoning in **DDL Invest International** (supra), well grounded. True, rules of procedure should be followed as rightly submitted by Mr. Rwazo, but not without some sense of reasoning and justice.

Accordingly, for those reasons, I overrule the point of preliminary objection and order that the affidavit be amended so as to cure the defects as to numbering and insert a proper verification clause.

Costs in the cause.

DATED at **DAR ES SALAAM** this 20th day of May, 2019

I. P. KITUSI
JUSTICE OF APPEAL

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




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL