

VI

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

**CIVIL APPLICATION NO. 192 OF 2006**

**MSASANI PENINSULA HOTELS LIMITED ..... FIRST APPLICANT  
INDIAN OCEAN HOTELS LIMITED ..... SECOND APPLICANT  
COMMERCE AND TRADING LIMITED .....THIRD APPLICANT  
JAYANTLILAL WALJI LADWA ..... FOURTH APPLICANT  
DHILAJLAL WALJI LADWA ..... FIFTH APPLICANT  
CHANDULAL WALJI LADWA ..... SIXTH APPLICANT  
JITESH JAYANTILAL LADWA .....SEVENTH APPLICANT**

**VERSUS**

**BARCLAYS BANK TANZANIA LIMITED .....FIRST RESPONDENT  
RICHARD GODDARD OF DE CHAZAL DU MEE ...SECOND RESPONDENT  
KIERAN DAY OF DE CHAZAL DU MEE ..... THIRD RESPONDENT**

**(An intended appeal from a Ruling of the  
High Court of Tanzania, Commercial Division  
at Dar es Salaam)**

**(Luanda, J)**

**dated the 8<sup>th</sup> day of December, 2006**

**in**

**Commercial Case No. 43 of 2005**

.....

**RULING**

**NSEKELA, J.A.:**

The seven applicants lodged a notice of motion under Rule 3(2) (a) of the Court of Appeal Rules, 1979 and section 4 of the Appellate Jurisdiction Act, Cap. 141 (RE 2002) seeking the following orders, that-

"1. Pending determination of the applicant's intended appeal from the judgment and decree of the High Court of Tanzania (Commercial Division) Honourable Mr. Justice Bernard Luanda, J. dated 8<sup>th</sup> December, 2006 (Commercial Case No. 43 of 2005) this Honourable Court be pleased to order and grant restraining and preservatory orders for maintaining the status quo bellum on the grounds that;

- (a) .....
- (b) .....
- (c) ....."

The notice of motion was supported by an affidavit affirmed by the seventh applicant, Jitesh Jayantlal Ladwa, on behalf of the other applicants. When the matter came before this Court (Kileo, J.A.) on the 9.2.2007, apparently the three respondents had not filed their respective counter – affidavits, and so Dr. Ringo, learned advocate, sought and was granted leave to file the respondents affidavit in reply on or before the 14.2.2007. The application was then fixed for hearing on the 23.2.2007. On the said date the matter did not proceed as scheduled and so came before me on the 8.3.2007. On the

resumed hearing date, Mr. Rweyongeza, learned advocate for the respondents, raised a preliminary objection, notice of which had been given, challenging the competency of the counter – affidavit lodged by the seventh applicant on two grounds-

- “(i) That the counter – affidavit has been filed out of time and without leave of the Court;
- (ii) The counter – affidavit is incurably defective as it contains opinions, point of law (sic) and arguments.”

It is not in dispute that the Court had ordered that the counter – affidavit should be filed on or before the 14.2.2007. Mr. Rweyongeza submitted that it was filed on the 16.2.2007 out of time, whereas Dr. Ringo has contended that it was filed on the 14.2.2007 as evidenced by Exchequer Receipt No. 27972967. This was in respect of payment of notice of preliminary objection and counter – affidavit. There is no dispute that this was indeed the case. However the counter – affidavit was apparently lodged and signed on the 16.2.2007 by the Senior

Deputy Registrar. Rule 113 (1) of the Court of Appeal Rules, 1979, provides as follows-

"113 (1) The fee payable on lodging any document shall be payable at the time when the document is lodged."

My understanding of this sub-rule is that a document is lodged when the fee for lodging it is paid. The exchequer receipt for lodging the counter – affidavit was issued on the 14.2.2007 and so this is the date when the counter affidavit was lodged. The receipt was not issued on the 16.2.2007.

This takes me to Rules 15 which reads-

"15. Whenever any document is lodged in the Registry or in a sub-registry or in the registry or the High Court under or in accordance with these Rules, the Registrar or deputy registrar or the Registrar of the High Court, as the case may be, shall forthwith cause it to be endorsed, showing the date and time when it was lodged."

According to this Rule, whenever a document is lodged in accordance with these Rules, then the Registrar shall forthwith cause it be endorsed. Applying this Rule to the facts herein, the counter-affidavit was lodged on the 14.2.2007 in terms of Rule 113 (1) of the Court Rules. It was the responsibility of the applicant to file the counter – affidavit on or before the 14.2.2007. After doing so, then Rule 15 came into play. The next stage was for the Registrar to cause it to be endorsed showing the date and time when it was lodged. Causing the endorsement of a document is a duty cast upon the Registrar. This was done on the 16.2.2007, hence the rival contentions. This Court in Civil Appeal No. 91 of 2003, **21<sup>st</sup> Century Food and Packaging Ltd v Tanzania Sugar Producers Association and two others** (unreported) had occasion to examine Rule 15 of the Court Rules and stated-

"..... if a provision imposes a duty on an authority to cause something to be done, it is up to that authority to see to it that the obligation is performed as required and the

The second ground of complaint related to the contents of the said counter – affidavit. Mr. Rweyongeza submitted that the affidavit was incurably defective since it contained opinion, had points of law and was argumentative. He singled out paragraphs 5(d); 12; 18 and 20. He also submitted that the verification clause was defective. Perhaps I should mention at this juncture that in the two grounds raised, the issue of verification is non – existent! Dr. Ringo conceded that paragraphs 18 and 20 were defective and submitted that they should be expunged from the body of the affidavit.

In the case of **Uganda v Commissioner of Prisons ex parte Matovu** (1966) EA 514, the High Court of Uganda, stated at page 520 as under-

“..... 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 and circumstances to which the witness deposes either of his own knowledge or from information which he believes to be true. Such an affidavit should

not contain extraneous matters by way of objection or prayer or legal argument or conclusion."

There is merit in Mr. Rweyongeza's complaint. Paragraphs 5 (d); 12; 18 and 20 are indeed defective. Paragraphs 5 (d) is an opinion; paragraphs 12, 18 and 20 are argumentative and contain legal discourses. Such matters ought not to appear in affidavits. In Civil References Nos. 15 of 2001 and 3 of 2002, **Phantom Modern Transport (1985) Limited v D.T. Dobie (Tanzania) Limited** (unreported) this Court had this to say-

"It seems to us 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."

The view I have taken is that the offending paragraphs 5 (d); 12; 18 and 20 should be expunged from the counter – affidavit leaving the remaining part of the affidavit intact.

In the result, I dismiss the preliminary objection. Costs to be in the cause.

DATED at Dar es Salaam this 23<sup>rd</sup> day of March, 2007.

H.R. NSEKELA  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original



  
S.M. RUMANYIKA  
**DEPUTY REGISTRAR**