

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC.COMMERCIAL CAUSE NO. 85 OF 2018

**(Originated from Commercial Case No. 59 of 2017 and Misc.
Commercial Application No. 34 of 2018)**

BETWEEN

MAXCOM AFRICA PLC APPLICANT

VERSUS

UDA RAPID TRANSIT PLC RESPONDENT

RULING

Date of the Last Order: 18/04/2018

Date of the Ruling 23/04/2018

SEHEL, J.

When the matter was called for orders on 18th day of April, 2018 counsel Mtani representing the respondent notified this court that the respondent was served with the applicant's application filed under certificate of urgency together with an interim order of this court issued on 16th day of April, 2018. He said since the matter is under certificate of urgency, the respondent managed to file a counter affidavit and a notice of

preliminary objection on 17th April, 2018. He thus prayed of their preliminary objections to be heard together with the main application.

Counsel Kahoko who appeared to represent the applicant had no objection to the proposal made by the counsel for the respondent. In that respect, this court outlined the sequence of submissions, as follows; the respondent shall submit first on its point of preliminary objections, followed by a reply from the applicant and applicant makes its submissions on the main application. Thereafter, the respondent makes a rejoinder to the preliminary objections and then replies to the main submission. Finally the applicant rejoins.

Counsel Mtani in his submission on the preliminary objections opted to drop the first point of preliminary objection and decided to argue the two remaining objections. The two preliminary objections retained are:-

- (1) The subject matter of the application has taken over by event.
- (2) That the deponent is not a competent person to swear the affidavit attached.

In expounding the first objection, counsel Mtani said the subject matter of the application is for the court to restrain the respondent from

removing the employees of the applicant in the bus stations in the Dar – RT bus projects pending hearing and final determination of Misc. Commercial Application no 34/2018 that seeks for restoration of Commercial Case No. 59/2017. He said the respondent has taken over the fare ticket office management since 13th April, 2018 as such the order sought by applicant had been taken over by event. He argued given the status that the respondent is in control of the activities at the bus stations then the orders prayed cannot be issued. He contended that when the application is overtaken by event then the remedy is to dismiss such an application. To cement his argument for dismissal of the application, he cited the case of **Shabir Ebrahim Bhaijee and 2 others Versus Selemani Rajabu Mizino and Another**, Civil Application No. 40 of 2007 (Unreported – CAT) where the Court of Appeal stated “In a number of cases where it is shown that the application has been overtaken by the event, the court has dismissed such applications (see for instance **Joachim Kalembe Versus M.C. Mwamlima**, civil application No. 76 of 1998 and **Shell & BP Tanzania Limited Versus The University of Dar es Salaam**, Civil Application No. 68 of 1999 (both unreported))”.

TMA

The counsel concluded his submissions in respect of this objection by praying for the application to be dismissed.

For the second objection, counsel Mtani contended that the application is supported by an affidavit sworn by the counsel for the applicant, Mr. Gwamaka Mwaikugile who cannot depose on the issues of facts that are required to establish a prima facie case for issuance of temporary injunction. He contended issues as to whether there is a prima facie case, irreparable loss and balance of convenience cannot be gained by appearance in court. They are within the knowledge of the principal officer of the applicant and not within the knowledge of the counsel for the applicant. It was his view that since the affidavit was sworn by a person who is not competent then the whole affidavit has to be strikeout as it does not qualify to support the application for temporary injunction. The counsel referred this court to the case of **Hon. Zito Zuberi Kabwe Versus Board of Trustees, Chama cha Demokrasia na Maendeleo and Another**, Civil Case No. 270 of 2013(Unreported) where Utamwa, J strike out the counter affidavit of the respondent because it was sworn by an advocate representing the respondent. Based on these submissions,

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counsel Mtani prayed for this Court to strike out the affidavit in support of the application and thereby striking out the whole application as it will lack supportive affidavit which will be contrary to Order XLIII Rule 2 of the Civil Procedure Act, Cap. 33 (hereinafter referred to as "CPC").

Counsel Kahoko began his reply by responding to the objection regarding affidavit. He said the affidavit in support of the application complied with Order IX Rule 3 of CPC which seeks the deponent to confine to matters which are within his knowledge. He contended that so long the objection of the counsel for respondent is not that the facts deposed are not within deponent's knowledge then the affidavit in support is proper. The counsel then went into detail on the genesis of the application.

In respect of the matter being over taken by event, he strongly disputed the facts narrated by counsel Mtani. Counsel Kahoko told this Court that the respondent issued a letter to the applicant on 13th April, 2018 requiring the applicant amongst other things to fully corporate in handing over and transition of ITS and Fare Collection Operations Management with immediate effect from tomorrow as evidenced by Annexure HA2 to the affidavit. According to counsel Kihoko's view by

logical analysis the respondent did not take the control on 13th April, 2018. He insisted that the applicant is still in operation and the applicants' staffs are still discharging their daily duties in the DART Project.

As a matter of law, first I have to determine the points of law raised before going into merits of the application. In case I find the preliminary objections raised have no merit then I will proceed with the main application. I will start with the objection that the deponent is not competent to swear the affidavit. Counsel Mtani is arguing that the deponent being an advocate of the applicant has no capacity to swear an affidavit in support of the application because the advocate has no knowledge on matters like irreparable loss to be suffered by the applicant and he cannot depose on balance of convenience. Counsel Kahoko replied that since the counsel for respondent is not disputing that the deponent had stated facts which are within his knowledge then the affidavit is not defective as it complied with Order XIX Rule 3 of CPC.

From these rival submissions it is for this Court to determine as to whether an advocate can swear an affidavit on behalf of his client.

MM

It is trite law that an advocate should not act as a counsel and witness in the same case (*Jafferah and another Vs Borrison and another* [1971] EA 165, *Gandesha Vs Killing Coffee Estate Ltd* [1969] EA 299). This is not only a rule of practice but it is also the law that affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove (See Order XIX Rule 3 (1) of CPC). An affidavit should not only contain statements based on information whose source is not disclosed but also it should not contain extraneous matters by way of objection or prayer or legal argument or conclusion (See **Phantom Modern Transport (1985) Limited Vs D.T. Dobie (Tanzania) Limited**, Civil References No. 19 of 2001 and No. 3 of 2002 (unreported) **Stanbic Bank Tanzania Limited Versus Kagera Sugar Company Limited**, Civil Application No. 57 of 2007 (unreported)). It is also the law that if the Court finds that the defects are inconsequential, it can order for the offensive paragraphs to be expunged and proceed with the application if there is still substance in the affidavit to support the motion. But if there is no substance left, the application would not stand, although a fresh one may be filed.

AAA

In **Lalago Cotton Ginnery and Oil Mills Company Ltd Vs The Loans and Advances Realization Trust (LART)**, Civil Application No. 80 of 2002 (Unreported) the Court of Appeal of Tanzania stated:

"An advocate can swear and file an affidavit in proceedings in which he appears for his client, but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during these proceedings."

It follows then that an advocate can swear and file an affidavit in proceedings in which he appears for his client but on matters which are within his personal knowledge. These are the only limits which an advocate can make an affidavit in proceedings on behalf of his client.

Applying the above position of the law to the matter at hand, the affidavit under attack is in support of an application for maintenance of status quo and restraining orders. In order to convince the Court as to why restraining order should be issued, Paragraphs 8, 9, and 11 of Mwaikugile's affidavit reads:

"8. That, if the respondent will not be restrained the applicant will suffer an irreparable loss as the letters was of very short notice and the respondent's acts would cause serious financial harms.

9. Further that the removal of applicant's employees will or is likely to open up a series of labour complaints against the applicant for unfair termination of their employments.

10. Not relevant.

11. That, on the balance of convenience the applicant stands more high chances to suffer inconvenience than the respondent if the status quo will not be maintained."

To my reading of the above paragraphs these are matters which are not within the sole personal knowledge of the counsel as instigated in his verification clause. They are matters which he acquired as an advocate as such the deponent failed to disclose the source of information of these matters. Consequently, though counsel Gwamaka Mwaikugile was entitled to act as counsel for the applicant as well as he has a right to file an affidavit in support of the application for restraining orders, the affidavit offended the provisions of Order XIX Rule 3 (1) of CPC above in that it

contained matters which were not purely within his personal knowledge. Failure to disclose the source of information then the affidavit is materially defective.

Accordingly, there is merit to the objection and I proceed to strike out the affidavit and consequently the application as it will no longer be supported by an affidavit. The respondent shall have its costs. Since the present objection suffice to dispose the whole matter then I see no need to further proceed to determine the other objection and the main application. I make no order of filing fresh application as I leave it to the wisdom of the applicant if it so wishes to do so. It is so ordered.

DATED at Dar es Salaam this 23rd day of April, 2018.



B.M.A Sehel

JUDGE

23rd day of April, 2018.