

**IN THE FAIR COMPETITION TRIBUNAL
AT DAR ES SALAAM**

BEFORE

HON. R.H. SHEIKH, JUDGE/CHAIRMAN

MR. A.K. JUMA, MEMBER

MR. F.G. KIBODYA, MEMBER

APPLICATION NO. 7 OF 2009

EMIRATES AIRLINES.....APPLICANT

VERSUS

IRFAN M. DINANI.....1ST RESPONDENT

TANZANIA CIVIL AVIATION

AUTHORITY.....2ND RESPONDENT

RULING

The applicant EMIRATES AIRLINES by this application is seeking the restoration of Application No.7 of 2009 which was on 2/09/2010 dismissed for non-appearance of the applicant.

By notice of preliminary objection filed on 20/02/2011 the 1st respondent IRFAN M. DINANI has taken objection to the application on preliminary points of law and has prayed that the application be dismissed with costs on the grounds that:-

The applicant's affidavit filed in connection with the chamber summons seeking, *inter alia*, to restore the application is incurably defective:

- A. For contravening section 10 of the Oaths and Statutory Declarations Act, Cap. 34 of the laws of Tanzania.
- B. The applicant's reliance on the statements made to the deponent by Mr. Ambokile Mwakaje regarding the events of 2/09/2010 are hearsay.

The hearing of the grounds of objection proceeded ex parte the 2nd respondent who was absent at the hearing.

In support of the first ground of objection ground A, Mr. Dinani submitted that the affidavit of Fayaz Bhojani learned counsel for the applicant filed in support of the chamber summons is incurably defective due to non-compliance with the provisions of section 10 of the Oaths and Statutory Declarations Act, Cap.34 R.E. 2002. Citing in his support the case of Peter Mziray Kuga and Anne- Kilango Malecela and 2 others, High Court Misc. Civil Application No. 7 of 2006 Mr. Dinani submitted that under section

10 of the Act and the schedule thereto it is mandatory for the Commissioner for Oaths before whom the oath is made to state in the jurat of attestation whether the deponent was known to him personally or whether the deponent was identified to him by a person identified by name and known to the Commissioner for Oaths personally. Mr. Dinani added that this was what this Tribunal had ruled with respect to his counter-affidavit filed in this very application. Mr. Dinani contended that in Mr. Bhojani's affidavit it is not stated in the jurat of attestation of the oath/declaration whether the deponent or person making the oath is known to the Commissioner for Oaths or whether he was identified to him by a person known personally to the administrator of the oath.

As regards ground B Mr. Dinani contended that the assertions made by Mr. Bhojani in paragraph 6 of his affidavit therein are hearsay having been made on information received by Mr. Bhojani from his legal officer, Mr. Ambokile Mwakaje who has not filed an affidavit. In support of his arguments on ground B, Mr. Dinani cited the case of Benedict Kimwaga V. Principal Secretary, Ministry of Finance, Civil Application No. 31 of 2000, C.A.T (DSM) (unreported).

In response to Mr. Dinani's submissions on ground B, Mr. Ishengoma learned counsel for the applicant submitted that the decision of the Court of Appeal in the Benedict Kimwaga case is

distinguishable as it was based on the Court of Appeal Rules which were then in force. Mr. Ishengoma argued that while the Fair Competition Rules 2006 are silent as to whether the Civil Procedure Code Act 1966 applies in this Tribunal, since this Tribunal sits as the High Court of Tanzania the Civil Procedure Code is applicable in proceedings before this Tribunal. He submitted that under Order XIX rule (3) of the Civil Procedure Code a deponent may, in interlocutory matters, rely on information received from other persons provided the source of information is disclosed by the deponent. Mr. Ishengoma further argued that as Mr. Bhojani has disclosed the source of the information stated in paragraph 6 of the affidavit there was no necessity for filing an independent affidavit of Mr. Ambokile Mwakaje in support of the affidavit deposed by Mr. Bhojani.

Regarding ground A, Mr. Ishengoma basically submitted that in the instant case both the deponent of the affidavit objected to and Mr. Mushukuma the Commissioner for Oaths who attested the oath are advocates of the High Court of Tanzania, and furthermore their offices are on the same floor in the same building. He asserted that the case of Peter Mziray Kuga V. Anne Kilango Malecela is distinguishable as in that case the deponent had resided in Kilimanjaro Region while the attesting officer resided in Dar es Salaam. It is Mr. Ishengoma's argument that since both Mr. Bhojani the deponent and Mr. Mushukuma the Commissioner for Oaths who administered the oath are

advocates with offices on the same floor of the same building it can be assumed that the deponent was known personally by the Commissioner for Oaths and therefore the omission by Mr. Mushukuma to indicate this in the jurat of attestation is one which may be disregarded by this Tribunal. Citing section 85 of the Fair Competition Act No.8 of 2003, Mr. Ishengoma further asserted that this Tribunal has under the Act wide powers to deal with matters before it, including powers to summon witnesses, in order to ensure that the ends of justice are met. He urged upon the Tribunal to summon the Commissioner for Oaths in order to investigate and satisfy itself as to whether or not the deponent had appeared personally before the Commissioner for Oaths who had administered and taken the oath and whether the deponent was known to him personally or whether the person making the oath or making the declaration was identified to him by a person known to him personally.

As regards ground B we are inclined to agree with Mr. Ishengoma to the extent that while this Tribunal has its own rules and is not bound by the provisions of the Civil Procedure Code Act 1966, Cap. 33 R.E. 2002 (C.P.C.) 1966, it may in its discretion apply the provisions of the C.P.C to fill in any gap in the Fair Competition Tribunal Rules 2006. It is our view that the circumstances of this case are such that make necessary and admit the application of Order XIX rule 3(1) of the C.P.C which clearly permits the admission of statements of belief/information in affidavits made

in interlocutory applications provided that the grounds thereof are stated. Paragraph 6 of the affidavit reads as follows:

“That on the eventful date i.e. 2nd September 2010, the said MR. AMBOKILE MWAKAJE was in the Tribunal, but when requested the Respondents to hold my brief, very surprisingly and without any good reason, the Respondents rejected his request. Further that, the Respondents having refused my Legal officer’s request as stated above, the Tribunal regarded the said letter (FB-1) unsupportive and hence dismissed the Applicant’s application.”

In the instant application the deponent has clearly disclosed in the verification clause the grounds of his belief in the truth of the information he had received from Mr. Ambokile Mwakaje his legal officer regarding the events of 2/9/2010. This is in compliance with Order XIX rule 3 of the C.P.C and to this extent we cannot accede to the assertion by Mr. Dinani that the statements made in paragraph 6 are hearsay requiring the swearing and filing of a separate affidavit by the legal officer.

This ground of objection is accordingly hereby overruled.

With regard to ground A of the preliminary grounds of objection, as stated herein, Mr. Ishengoma is of the view that as the deponent is personally known to the Commissioner for Oaths who administered the oath the omission by the Commissioner for

Oaths to specify/state whether he knew the deponent personally or whether the deponent was identified to him may be disregarded. We must disagree.

Sections 5 and 10 of the Oaths and Statutory Declarations Act Cap.34 R.E. 2002 provide:-

“S. 5. Every oath or affirmation made under this Act shall be made in the manner and in the form prescribed by rules made under section 8.

S. 10. Where under any law for the time being in force any person is required or is entitled to make a statutory declaration, the declaration shall be in the form prescribed in the Schedule to this Act:

Provided that where under any written law a form of statutory declaration is prescribed for use for the purposes of that law such form may be used for that purpose.”

The schedule to the Act aforesaid made under section 10 of the Act provides:

“I, A.B. do solemnly and sincerely declare as follows:

(here state the matters declared)

I, the said A.B., make this declaration conscientiously believing the same to be true and in accordance with the provisions of the Oaths and Statutory Declarations Act.

This Declaration is made and) (Signature
subscribed by the said A.B who) of the
is known to me personally (or) person
who has been identified to me) making the
by.....) declaration)
.....the latter)
being known to me personally))
this.....day of.....
.....
(Signature, qualification and
Address of the person taking
the declaration)."

Under Section 10 of Cap.34 it is mandatory that the statutory declaration complies with the form prescribed in the schedule and it must be stated and specified in the jurat

of attestation whether the deponent was known to the Commissioner for Oaths personally or whether he was identified to him by a person personally known to the Commissioner for Oaths. It is not enough for learned counsel to state in his submission that the deponent was known to the Commissioner for Oaths simply because they are both advocates and allegedly work in the same building and the same floor. Needless to say this submission from the bar by learned counsel is not evidence and would itself require evidence to prove the allegation that the two advocates know one another. A specific statement of identification has to be given in the jurat. Failure to state/indicate in the jurat of attestation whether or not the deponent is known to the Commissioner for Oaths or how he identified the deponent is a material omission which has rendered the affidavit incurably defective. (see the case of Peter Mziray Kuga V. Anne - Kilango Malecela and Others, supra). We agree entirely with the 1st respondent that the affidavit filed in support of the application does not comply with the mandatory requirement of section 10 of Cap.34 and is therefore incurably defective for non-disclosure in the jurat of attestation of facts showing how the deponent was identified by the Commissioner for Oaths.

This is the position this Tribunal had taken in our ruling in this very application which was read on 30/3/2011 in which

this Tribunal had struck out the 1st respondent's counter affidavit on the same ground.

The argument by Mr. Ishengome seeking to distinguish an affidavit sworn by an advocate before another advocate from one sworn by a lay person is, as pointed out by the 1st respondent, both illogical and discriminatory and contrary to section 10 of Cap.34. We also cannot accede to Mr. Ishengoma's wish to have the Commissioner for Oaths summoned so that he can confirm that the deponent is personally known to him. Indeed that would not only be contrary to the express provisions of section 10 of Cap.34 and grossly unjust but also a waste of time and resources and would defeat the very objective of proof by affidavit, specifically provided for by the law, with respect to certain proceedings including interlocutory proceedings. Certainly we do not think the Legislature intended affidavits made by advocates before other advocates to be treated differently or to be excluded or exempted from the provisions of section 5 and 10 of Cap. 34.

Ground B is accordingly hereby sustained.

Mr. Ishengoma's request to the Tribunal not to order costs in favour of the 1st respondent must be rejected not least because learned counsel for the applicant were clearly to blame and negligent for not checking the attestation clause

before filing the affidavit. Had they taken the trouble to do so they would surely have noticed the omission by the Commissioner for Oaths to indicate how he had identified the deponent.

In the event the application being incompetent for being supported by an incurably defective affidavit is hereby struck out with costs.

Signed

Hon. R. H. Sheikh – J/Chairman

Signed

Mr. Felix G. Kibodya – Member

Signed

Mr. Ali K. Juma – Member

Ruling read this 26th day of September, 2011 in the presence of Mr. Mwakaje learned counsel for the applicant, Mr. Mkoma learned counsel for the 1st respondent and Ms Patricia Chenga learned counsel for the 2nd respondent.

Signed

Hon. R. H. Sheikh – J/Chairman

Signed

Mr. Felix G. Kibodya – Member

Signed

Mr. Ali K. Juma – Member