

Received in

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CASE NO 72 OF 2010

1. JONES M. K. MUSOKWA
2. BENJAMINI MUTEMBEYI
3. MOHAMED NGUNDE
4. HAMISI J. MKANDIA
5. SAMIA A. MPOMA
6. HUSSEIN AMBARI
7. ROOSEVELT NYEREMBE

APPLICANTS

VERSUS

1. ATTORNEY GENERAL
2. PERMANENT SECRETARY MINISTRY OF FINANCE
3. E.D. KARATTA
4. B.W. LWEBANGA
5. A.P. MACHA
6. W. MULLINGA
7. S. MOHAMED
8. P. MKANDAWIRE
9. A.S. KABUNGA

RESPONDENTS

RULING

Date of last Order: 01-09-2010

Date of Ruling: 03-11-2010

JUMA, J.

The seven applicants herein are by a Chamber Summons dated 8 June 2010 moving this court pursuant to the provisions of Order 1 Rules 8, 10-(2) and section 95 of the **Civil Procedure Code, Cap. 33**. The applicants would like this court to revoke by striking out the representative capacity of the 3rd, 4th, 5th, 6th, 7th, 8th and 9th respondents to prosecute the HC Civil Case Number 95/2003 on

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behalf of the former employees of the East African Community. The decree arising from the HC Civil Case Number 95/2003 is presently pending before another Judge and is at the stage of execution by this court.

If their request to strike out the names of the 3rd, 4th, 5th, 6th, 7th, 8th and 9th respondents to represent others in HC Civil Case Number 95/2003 succeeds, the seven applicants want themselves to be appointed as representatives in a new suit for which they are seeking leave to file on behalf of former employees of the East African Community. The title of the new representative suit they propose is Jones M.K. Musokwa and 6 Others Vs AG and 8 Others, HC Miscellaneous Civil Case Number 72 of 2010). The seven applicants would like this court to also direct the notice of their application to become new representatives to be given to other former employees of the defunct East African Community. The seven applicants would like this notice to be published in the UHURU and HABARI LEO newspapers.

The chamber application by the seven applicants herein is strongly opposed by the respondents. Together with a counter affidavit presented for filing on 5th July 2010, the Attorney General on behalf of 1st and 2nd respondents issued a notice of Preliminary Objection which according to the Attorney General should ultimately lead to the dismissal of this application with costs. In the points of objection the Attorney General contends:

- i) That the application by the seven applicants is untenable by reason of being *res judicata*.
- ii) That the affidavit supporting the application is incurably defective for containing defective jurat of attestation.
- iii) That the affidavit in support of the application lacks proper verification clause.
- iv) That the affidavit in support of the application is fatally defective for failing to disclose the deponents' source of information.
- v) That the affidavit in support of the application is fatal for failure to identify the deponent who affirmed or swore the affidavit.
- vi) That affidavit in support of application should not be acted upon because it is tainted with lies.

The facts on record leading up to this application and points of objection, shortly stated, are as follows. The seven applicants herein and also the 3rd, 4th, 5th, 6th, 7th, 8th and 9th respondents together with the other 10,917 persons all were formerly employed by the defunct East African Community. Sometime in May 2003 the 3rd, 4th, 5th, 6th, 7th, 8th and 9th respondents herein obtained permission and filed a representative suit on behalf of all 10,931 former employees of the East African Community. In that High Court Civil Case Number 95 of 2003; the former employees of the Community sued the Government of United Republic of Tanzania.

Shortly after the filing of the Civil Case Number 95 of 2003, a series of negotiations ensued leading on 20th September 2005 to the signing and conclusion of a Deed of Settlement between on the one hand the former employees of the defunct East African Community, and the Government of Tanzania, on the other hand. The Attorney General (1st Respondent herein) signed the Deed of Settlement on behalf of the Government. Whereas Mr. M.J.A. Lukwaro and Mr. Adronicus Byamungu (learned Advocates) signed the Deed of Settlement on behalf of Plaintiffs in the Civil Case Number 95 of 2003 (the former employees of the East African Community).

Records of the Civil Case Number 95 of 2003 show that on 21 September 2005 Oriyo, J. (as she then was) of this court, delivered a Judgment for the plaintiffs on the terms and conditions set out in the Deed of Settlement. The Civil Case Number 95 of 2003 which the former employees of the East African Community had instituted against the Government was by that Judgment of Oriyo, J. marked as settled.

Under the terms of the Deed of Settlement which now forms part of the judgment of this Court in Civil Case No. 95 of 2003, the former employees of the East African Community agreed to withdraw all claims against the Government. The Government in that Deed agreed to pay not only the Plaintiffs who had filed the settled HC Civil Case Number 95 of 2005, but to also pay all former employees of the defunct East African Community who were not

party to that civil case. It was in addition agreed that the mode of payment of claims should be based on individual entitlements as reflected in the records of their respective personal files. The Government estimated that there were 31,831 former employees of the defunct East African Community. Further, though it had indicated that it will pay the individual concerned a total of Tanzanian shillings one hundred seventeen billion (Tshs 117,000,000,000/=), the Government agreed to consider and pay any other genuine claims arising from the claims of former employees of the East African Community. No other payments were expected out of this framework of agreement.

The preliminary points of objection were heard by way of written submissions. 1st and 2nd respondents' written submissions on preliminary objection were filed on 15 September 2010. The seven applicants' written submissions and the 3rd to 9th respondents' written submissions were filed on 29th September 2010.

I propose to begin with the points of objection touching on defective affidavits because the law in Tanzania is now well settled that an application which is supported by a defective affidavit is incompetent. On this point of objection Mr. G.P. Malata the learned Senior State Attorney submitted that the joint affidavit supporting the application by the seven applicants is defective by reason of failing to disclose when and where the oath was taken rendering the joint affidavit defective. According to the learned Advocate, the defective affidavit contravenes the mandatory

requirements of section 8 of the **Notaries Public and Commissioners for Oaths Act, Cap. 12 R.E. 2002** which provides,

Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made.

In their written submission, the 3rd to 9th respondents agreed with Mr. G.P. Malata the learned Senior State Attorney that the joint affidavit which the applicants rely to sustain their chamber application contravenes section 8 of the **Notaries Public and Commissioners for Oaths Act** and should be struck out.

Mr. SBM Chamriho the learned Advocate on behalf of the seven applicants conceded that the place at which the oath was taken does not appear in the joint affidavit. The learned Advocate described this omission as an inadvertent omission which could be curable using the inherent powers of this court. Mr. Chamriho also conceded that both the date and the place where applicants' affidavit was verified were not indicated.

I have considered the rival submissions articulated on behalf of opposing sides of the application with respect to whether the joint affidavit by the seven applicants is in compliance with the law. It is now settled law that affidavit is a mode of placing evidence before the court; a party relying on such a mode of placing evidence must ensure such affidavit complies with **Notaries Public and Commissioners for Oaths Act**. Section 8 of the **Notaries Public and Commissioners for Oaths Act** employs word "shall" meaning

that affidavits must comply with conditions set under section 8 of the **Notaries Public and Commissioners for Oaths Act**, and with due respect, I do not agree with the suggestion by Mr. Chamriho, the learned Advocate that despite the mandatory language of section 8 of the **Notaries Public and Commissioners for Oaths Act**, I should still resort to the inherent powers of this court to cure the defective affidavit in the interests of justice. In my view, interests of justice oblige me to reject the joint affidavit under the circumstances of this application before me.

There are several reasons why in the circumstances of this application it would not be to the interests of justice for this court to cure the defective joint affidavit of the applicants. This court cannot lightly interfere with the judgment and decree arising from Civil Case Number 95/2003 presently at the stage of execution by this very court. Application by the seven applicants has potential serious consequences on the consent judgment delivered by Oriyo, J. on 21 September 2005 and resulting decree now under execution. In an application like this one before me, where apart from praying for leave to file a representative suit, the applicants are also seeking to strike off the names of respondents who were duly appointed to represent the rest of plaintiffs under Civil Case No 95 of 2003 make it even more important for the seven applicants to ensure their joint affidavit strictly complies with **Notaries Public and Commissioners for Oaths Act**.

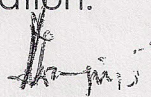
In their paragraphs six and seven of their joint affidavit, the seven applicants raise a very serious allegation to the effect that the Attorney General, Permanent Secretary, Ministry of Finance colluded with the representatives of the former employees of the defunct East African Community to defraud the applicants of the agreed sum of Shs. 450,426 billion. This is a very serious allegation, to say the least. This allegation imputing fraud and breach of trust will form the foundation of the impending suit which the applicants plan to file. This impending suit will seek to paint the picture that the consent Judgment of this court (Civil Case Number 95 of 2003- by Oriyo, J. as she then was) is vitiated by fraud and breach of trust. I am of the decided opinion that the seriousness of the allegations raised by the seven applicants in their joint affidavit must be supported by a non-defective joint affidavit that fully complies with **Notaries Public and Commissioners for Oaths Act**.

The Court of Appeal of Tanzania has on several occasions addressed itself to the effect of an affidavit whose jurat (i.e. certification by Commissioner for Oaths that the affidavit was sworn to by the individual who signed it) does not state the place where the oath or affidavit was taken or made. Ramadhani, J.A (as he then was) in the case of **D. B. Shapriya & CO. LTD V Bish. International B.V- Civil Application No. 53 of 2002 (unreported)** was in no doubt that section 8 of **Notaries Public and Commissioners for Oaths Act** categorically provides that the place and on what date the oath or affidavit is taken or made has to be shown in the jurat. And this requirement is mandatory. Kaji, JA in 1. **Wengert -**

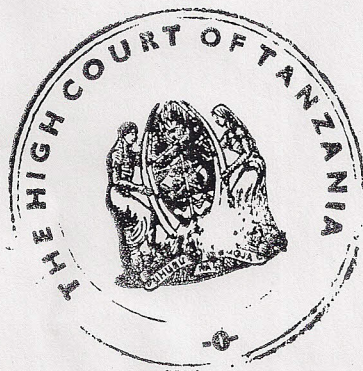
Windrose Safari (T) Limited, 2. Franz Josef Wengert, 3. Eastern Air Charter and Safaris Limited vs. 1. Biduga and Company Limited, 2. Hillary J. Biduga Civil Appeal No. 39 of 2000 (unreported) was clear that an affidavit which does not comply with the conditions under section 8 is incurably defective.

Applying the settled principle of law, in the instant case the joint affidavit by the seven applicants is neither dated nor signed. The place of verification is not indicated or dated. With these flaws, the purported Chamber Summons with which the seven applicants have relied upon to move this court is therefore left without any leg to stand on.

In the upshot, the chamber application is hereby struck out for being supported by a defective joint affidavit. Respondents are awarded the cost of this application.


I.H. Juma
JUDGE
03-11-2010

Delivered in the presence of Jones M.K Musokwa (1st Applicant), Benjamini Mtembeyi (2nd Applicant), Mohamed Ngunde (3rd Applicant), Hamisi J. Mkandia (4th Applicant), Rooselvet Nyerembe (7th Applicant), and Malata (Senior State Attorney for 1st and 2nd Respondent), W. Mullinga (6th Respondent), P. A. Mkandawire (8th Respondent) and A.S. Kabunga (9th Respondent).




I.H. Juma
JUDGE
03-11-2010