

TANZANIA / JUDGMENT

DEFECTIVE AFFIDAVIT NEW

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31 January 2025

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA DAR ES SALAAM SUB-REGISTRY AT DAR ES SALAAM MISC. CIVIL APPLICATION NO. 29851 OF 2024 (Arising From Civil Case No. 29606 of 2024) BEST & FORTUNER COMPANY LIMITED APPLICANT VERSUS DYNACO LOGISTICS CO. LIMITED RESPONDENT

RULING

11th Dec 2024 & 31st January 2025 MKWIZU,J: This application is made under section 68(e) and section 95 of the Civil Procedure Code, Cap 33 R.E 2019), where the applicant seeks the following

orders:

1. This Honourable Court be pleased to make an order that, the Respondent release two excavator machines one with Chassis No. CAT00320VZBN01054 and the other will) Chassis No. CAT0323DCPBE00333, which are unlawfully under the custody of the Respondent, pending hearing and determination of Civil Case No. 29606 of 2024 pending in this court.
2. Costs of the application be provided;
3. Any other order (s) as the Honorable Court shall deem fit, just and 1 equitable to grant. The chamber summons is supported by an affidavit of YONG FU HE, the Applicant's principal office. According to the supporting affidavit, Applicant and Respondent had an oral agreement on 15th October 2024 for the Respondent to transport three machines (two excavators and one roller) from Dar es Salaam to various construction sites. The Applicant fulfilled their obligations by paying fuel, escort fees, and permits as stipulated in the agreement. However, the Respondent unilaterally demanded that the Applicant pay driver allowances, which were not part of their original agreement. When the Applicant declined this additional payment, the Respondent returned the machines to Dar es Salaam and refused to hand them over to the Applicant. This breach of contract by the Respondent has caused the Applicant to incur substantial losses, including unpaid rent to MLANKA TANZANIA COMPANY LIMITED amounting to USD 200,200 and lost income from TBEA Co. Ltd, estimated at USD 400,400. Additionally, the Applicant faces the risk of civil litigation from TBEA Co. Ltd for breach of contract due to failure to supply the machines on time. The respondent strongly opposed the application. In his counter-affidavit, Mr Weiqiang Xu,

representing the Respondent, reported that on 3rd October, he entered into an oral contract with Mr Yong Fu HE in his personal capacity for hiring three low bed trucks at TZS 15,000,000/= per 2 month for each truck. The agreement included the Respondent ensuring the trucks' good condition while he would cover fuel costs, escort services, and drivers' allowances. He denied any contractual relationship between the Respondent and the Applicant, stating the payments for fuel and allowances were made by Mr. Fu He personally, not by the Applicant. Mr. Weigiang Xu also refuted demands for driver allowances and asserted that Mr. Fu He had ordered the drivers to return the machines to Dar es Salaam after refusing to pay. He clarified that the roller machine was returned to Mr. Fu He, not the Applicant. He identified the two excavators in the custody of the Respondent with specific serial numbers, providing evidence of the disagreement via attached images. He mentioned that the Applicant had never visited to collect the machines. He claimed the Applicant's pursuit of court intervention is an abuse of process, maintaining that no valid agreement existed between the Applicant and the Respondent and that the Applicant is not entitled to any relief as claimed. Together with his elaborative counter affidavit, two preliminary objections were raised to the effect that:

1. That the application is incompetent for wrong citation of the law; thus, this Court's jurisdiction is not properly invoked. 3
2. That the application is incompetent for being supported by a defective affidavit for not being attested according to the law in violation of section 8 of the Notary Public and Commissioner For Oaths Act, Cap 12 R.E 2019 and section 10 of the Oaths and Statutory Declaration Act, Cap. 34 R.E 2019. Both the preliminary objection and the main application were heard together, with an order that the decision of the main application would only depend on the outcome of the preliminary objection. Accordingly, I will first address the preliminary objection before moving to the main application if needed. During the hearing on 11th December 2024, Mr Joseph Kipeche, advocate for the respondents, abandoned the first preliminary objection and focused on the second. This objection contended that the affidavit violated Section 8 of the Notary Public and Commissions for Oath Act, Cap 12 R.E. 2019, and Section 10 of the Oaths and Statutory Declarations Act, Cap 34 R.E. 2019, which mandates that the commissioner for oaths must indicate the date on which the affidavit was taken. Mr. Kipeche argued that the jurat in the present affidavit lacks this date. Moreover, Section 10 of Cap 34 requires the commissioner to declare whether he knew the deponent or was introduced by another party; the affidavit is silent. The 4 cases of *The Commissioner General TRA v Pan African Energy (T) Limited*, Civil Application No. 277/20/2017, and *Tanzania Railway Corporation and Another v Reuben Kyenge*, Misc. Labour Application No. 04 of 2021 (H/C) at Tabora (Unreported) were cited in support urging the court to strike out the application for incompetence with costs. In response, Mr Bakari Juma, for the applicant, argued that the objection was misplaced due to recent developments in the jurisdiction, particularly the introduction of the overriding objective under Sections 3A (1) and (2) of the Civil Procedure Code, R.E. 2019, which allows the court to exercise its powers with minimal regard to technicalities. While acknowledging the omission of the date in the affidavit's jurat,

he asserted that such oversight was not fatal, as it did not prejudice the respondents. He cited *Sanyou Service Station Limited v BP Tanzania Limited*, Civil Application No. 185/17/2018, (unreported) where the Court of Appeal suggested that amending a defective affidavit was the appropriate remedy. He noted that the *Commissioner General TRA v Pan African Energy (T) Limited* decision was issued in February 2018, whereas the *Sanyou* decision was more recent, dated 22 May 2019. He emphasised the legal principle that the later decision prevails when the Court of Appeal produces conflicting choices. Thus, he argued that the *Railway Corporation* case served only as 5 persuasive authority and not as a binding precedent. He strongly prayed for the dismissal of the preliminary objection with costs. In the rejoinder submissions, Mr Joseph Kipeche stated that the *Sanyou* case is distinguishable due to its focus on the verification clause and issues related to paragraph numbering in the affidavit without addressing the jurat of attestation. He emphasised that the overriding objectives are not intended to enable parties to bypass the mandatory provisions of the law. Citing the case of *Joseph Thoma Kleruu V CRDB Bank PLC and 2 Others*, Misc. Land Application No 347 of 2021 (H/C), where it was clarified that the overriding objective cannot rectify a defective affidavit. He lastly reiterated reliance on an earlier cited case and prayed for the preliminary objection to be sustained. I have considered the parties contending arguments. Both parties agree that the affidavit supporting the application lacks the date on the attestation clause and an explicit declaration by the commissioner for oath on whether he knew the deponent or was introduced by another party. The issue is whether the omission is fatal. The party's advocate holds antagonistic views. The applicant's counsel relied on the Court of Appeal decision of the *Sanyous* case, suggesting that omission is curable, while the respondent's counsel was banked on the Commissioner General's 6 Case, 2019 and 2018 decisions, respectively. I have read them all. Guided by the same doctrine of *Stare decisis* proposed by the applicant, I would go straight for a more current decision of the Court of Appeal in *Linda Cosmas vs George Shida & Others*, Civil Application No. 183/08 of

- 2020) [2023] TZCA 17439 (21 July 2023) (TANZLII), where the matter before the Court involved failure to state whether the deponent was known to the Commissioner for Oaths personally or otherwise. Distinguishing curable and incurable defects in the affidavit, particularly on the jurat of attestation, the Court held: "A reading of section 8 of the Act and the cited cases reveals that not any irregularity would have a serious effect of rendering a jurat of attestation incurably defective. In very clear terms, they are to the effect that it is only failure to show when, where and before what authority (whom) the affidavit was taken which are the only serious deficiencies which render a jurat of attestation and an affidavit as a whole incurably defective subject to be expunged. It therefore goes without saying that the defect complained of by the applicant is not one of such serious omissions." (emphasis added) 7 The decision above is binding on me. While not indicating whether the deponent was known to the Commissioner for Oaths, either personally or otherwise, is not fatal, the affidavit in question lacks the date on which it was attested, rendering it incurably defective, as highlighted by the Court of Appeal in the

authority cited above. I am thus compelled to sustain the preliminary objection and strike out the application for being incompetent. This marks the end of the matter. The respondent is awarded her costs. DATED at DAR ES SAALAM, this 31st Day of January 2025 E. Y Mkwizu Judge COURT: Ruling is delivered in the presence of Elery Wilson Isasi, the advocate for the applicant and MS Juliana Diglas for the respondent E. Y Mkwizu Judge 8

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