



IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA
APPELLATE DIVISION

(Coram: Geoffrey Kiryabwire, VP; Sauda Mjasiri, JJA; and Anita Mugeni JJA)

APPLICATION NO. 06 OF 2022

BETWEEN

THE ATTORNEY GENERAL OF

THE REPUBLIC OF BURUNDI..... APPLICANT

AND

NIYONGABO THEODOREFIRST RESPONDENT

NIYINGEKO GERARDSECOND RESPONDENT

[Appeal from the Judgment of the First Instance Division of the East African Court of Justice at Arusha by Hon. Lady Justice Monica Mugenyi, PJ, Hon. Dr. Faustin Ntezilyayo DPJ, and Hon. Justice Charles Nyachae (J), dated 16th June 2020 in Reference No. 04 of 2017]

11th May 2022

DETAILED RULING OF THE COURT

A. Introduction.

1. This Ruling filed by the Applicant under Rules 48 (C), 49, 51 and 52 of the East African Court of Justice (EACJ) Rules of Procedure, 2019 (hereinafter referred to as "the Rules of this Court") to amend the affidavit in Application No 03 of 2022 pending before this Court. The Application arises from the Decision of the First Instance Division (hereinafter referred to as "the Trial Court") in Reference No. 04 of 2017 which was filed under Articles 6 (d) and 7 (2) of the Treaty for the Establishment of the East African Community (hereinafter referred to as "the Treaty") challenging the Judgment of Annulment (cassation) of the Applicant's Certificates of Title by the Tribunal de Grande Instance de Bujumbura of The Republic of Burundi in case No RC 0691/16.863 of the 28th December, 2016 .
2. Judgment in Reference No 074 of 2017 was entered by the Trial Court in favour of the Respondents. Being dissatisfied with the said Decision, the Appellants file lodged an Appeal to this Division.
3. At the hearing of the Application, the Applicants were represented by Mr. Diomede Vyizigiro Director Litigation Attorney General's Chambers Burundi and Mr. Pacifique Barankitse State Attorney; and the Respondents by Advocates Mr. Donald Deya and Ms. Esther Muigai Mnaro.



A. Background to Application.

4. It is the case for the Applicants that an error has been in the Affidavit supporting Application No 03 of 2022 lodged on the 18th February, 2022 at page 58 which consists of an interchange of the names of the parties where the present Applicants are referred to as Applicants whereas they should be the Respondents and the Attorney General of Burundi be reflected as the true Applicants.
5. Furthermore, it had also been discovered that said Affidavit reads "Affidavit in reply" whereas it should properly read "Affidavit in Support"
6. It is the case for the Applicants that Rule 48 (c) of the Rules of this Court allows with the leave of the Court for the amendment of so as to determine the real issue of controversy between the parties and to correct any defect or error in the said pleadings. In addition, Rule 51 (1) of the Rules of this Court allow for the amendment of pleadings at any stage of the proceedings in such manner as the Court may direct.
7. It is the case for the Applicants that this is a fit and proper case for the Court for the Court to exercise its discretion to amend the pleadings as prayed.

B. Proceedings before the Appellate Division.

8. When the matter came up for Scheduling both parties indicated that they were ready to proceed. However, counsel for the Respondent

indicated that he wanted to raise an objection to the Application on the grounds that it was incurably defective and if possible the Application should be resolved summarily.

9. Since both parties did not object to proceeding with this application orally, the Court allowed them to proceed and present their arguments.

Applicant's Case.

10. Counsel for the Applicants submitted that there was only one ground to determine in the Application. He pointed out that they had discovered errors in their Affidavit in Application No 03 of 2022 at page 58. The error involved the interchange of names of the parties in the title which Applicants sought leave to amend. He further informed Court that the error involved the Applicant being shown to the Respondent and the Respondent being shown as the Applicant whereas it should have been the other way around.

11. Furthermore, Hajayandi Gervais in the affidavit I support of this Applications in Paragraph 2 thereof reads: -

"...That in the same Affidavit, an error has bee discovered in the title where instead of reading as "Affidavit in support of Application No 03 of 2022", it reads "Affidavit in reply..."

12. Counsel submitted that Rules 48 (c) read together with Rules 51 (1) of the Rules of this Court allows a party with the leave of Court



to make such amends to correct the errors in the pleadings at any time.

13. Counsel further submitted that the substance of the amendment would not change the content in the body and substantive part of the affidavit.
14. Counsel prayed that the Application for amendment be allowed as prayed.

Respondent's Case

15. Counsel for the Respondent opposed the Application. He argued that whereas the Applicant proposed to amend the Affidavit was sworn by Ms. Murekerizeni Consolatte which comprised her evidence another person altogether namely Mr Hajayandi Gervais swore the correcting Affidavit in support of this Application which was irregular.
16. Counsel further argued that the amendment sought was not an amendment of pleadings as the Applicant would want Court to believe but rather an amendment to the evidence contained therein. Counsel submitted that the proposal to amend the evidence was therefore not an error but rather it was deliberate.
17. Counsel further argued that affidavits are statements made on oath and therefore could not just be the subject of an amendment. He further argued that an affidavit is based on the truth which cannot be amended.
18. It is also the case for the Respondent that this Application was not raised in good faith because the Applicants did not discover the



alleged error but rather the amendment was raised after the Respondents raised a preliminary objection to the Affidavit.

19. Counsel for the Respondent consequently submitted that The Application to amend is misplaced and should be dismissed.

Submissions in rejoinder by the Applicant

20. Counsel for the Applicant in rejoinder reiterated his argument that the an amendment as prayed for by the Applicant could be made with the leave of Court. That the proposed amendment would only deal with a change with the names of the parties and not the body and content of the Affidavit.

Analysis and Determination by the Court.

21. We have considered the submissions of the opposing Counsel and the authorities supplied for which we are grateful. This is an Application for leave of Court to allow the Applicant to amend the supporting Affidavit in Application No 03 of 2022.

22. The Applicant relies in this regard on Rule 48 (c) of the Rules of this Court on the general power to amend which provides that: -

“... For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any pleading, a party may amend its pleadings: -

(c) with leave of the Court...

The Applicant further relies on Rule 51 of the Rules of this Court on amendment of pleadings which in Rule 51 (1) thereof provides: -



"...The Court may, at any stage of the proceedings, allow any party to amend its proceedings in such manner as it may direct and on such terms as to costs or otherwise as may be just..."

23. It is the case for the Applicant that the errors in question related to the names in the heading of the Application No 03 of 2022 which were reversed and the title of the Affidavit therein which was wrongly written as "Affidavit in Support" instead of "Affidavit in Reply".

24. In opposing the said Application, Counsel for the Respondent argues that such an amendment in reality is an amendment of evidence already taken on oath which is not acceptable.

25. In our *Ex tempore* dated 11th May 2022 Ruling we allowed the amendment prayed for and now we provide our reasons.

26. Black's Law Dictionary 10th Ed page 68 defines an affidavit as:

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"A voluntary declaration of facts written down and sworn by a declarant usually before an officer authorised to administer oaths..."

However, an affidavit is drafted or structured as a general practice in a particular way the components of which are: -

1. *Commencement: This is the beginning of the document where the affiant or the person making the affidavit is identified.*
2. *Averments: Also known as affirmations, these include a list of all the claims that are being made by the affiant.*
3. *Statement of Truth: A statement of truth is what states that everything that is mentioned in the affidavit is true. A statement of truth may be something like this: I solemnly swear that the*



aforementioned are true and correct to the best of my knowledge and belief.

4. *Attestation Clause: This is the portion where the oath made by the affiant is certified. It also consists of the date.*

5. *Signatures: This is the last portion of the document that includes the signature of the affiant, as well as that of the witness(es).*¹

27. It is necessary therefore to carefully interrogate the Application to amend in light of which part the affidavit will be affected. It therefore not correct as the Respondent would want the Court to believe that the whole of an affidavit is evidence as the evidence is to be found in the averment component of an affidavit.

28. As we found in our ex tempore Ruling the part which the Applicants want to amend is in the "Commencement" component of the Affidavit in Application No 03 of 2022 and not the averment or other part of the said Affidavit. This means that the proposed amendment will not affect the evidence contained in the Affidavit as correctly stated by the Applicant.

29. However, we must also point out that the above finding notwithstanding, the Applicants in their Application generally rely on Rules 49 (c) and 51 of the Rules of this Court (cited above) which are in Part B thereof and apply to the First Instance Division and not the Appellate Division.

30. Since we found merit in the Applicant's Application, we were inclined to exercise our inherent powers provided for under Rule 4 of

¹ What are the components of an affidavit <https://tlc-texas.com/what-are-the-components-of-an-affidavit/> accessed 16/08/2022



the Rules of this Court to allow the Application in order to meet the ends of justice.

31. Another reason for the use of our inherent powers is that we are aware that some legal systems of our Partner States are not very familiar with the use of affidavits which are a common feature of Partner States which have a common law heritage. This legal system gap is further evident in this very Application where even though the parties did not raise it, the Notice of Motion itself has the Parties named in the reverse order (the correct Applicants being referred to as the Respondents and correct Respondents being referred to as the Applicants).

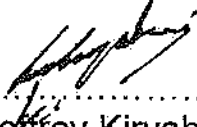
Final Result.

32. We reiterate our Decision to allow this Application for amendment and Order: -
- i) Reference No 1 of 2022 is amended to read Application No. 03 of 2022
 - ii) The parties cited in the proceedings namely Niyongabo Theodore, 1st Applicant and Niyongabo Gerald 2nd Applicant and the Attorney General of Burundi. Respondent are amended to read The Attorney General of Burundi Applicant and Niyongabo Theodore, 1st Respondent and Niyongabo Gerald, 2nd Respondent.
 - iii) For the avoidance of doubt, the averments in the impugned Affidavit remain unchanged.
 - iv) Cost to be in the cause

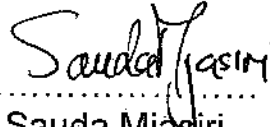


IT IS SO ORDERED.

Dated, delivered and signed at Arusha this...^{per} 11.....day of May, 2022.



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Geoffrey Kiryabwire
VICE PRESIDENT



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Sauda Mjasiri
JUSTICE OF APPEAL



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Anita Mugeni
JUSTICE OF APPEAL