

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

MISCELLANEOUS CIVIL APPLICATION NO. 7 OF 2022

ZAWADI SAMSONI APPLICANT

VERSUS

JIHUMBI SAMIKE RESPONDENT

(Arising from Civil Case No. 7 of 2021 of the District Court of Mpanda at Mpanda)

RULING

29/07 & 29/08/2022

NKWABI, J.:

This is a ruling in respect of a preliminary objection raised by the respondent.

The applicant brought this application praying this Court for extension of time to file appeal. Four points of objection were preferred by the counsel for the respondent and they are as follows:

1. That the application is bad in law for being drafted by the unqualified person.
2. That the application is incompetent for being supported by a defective affidavit.
3. That application is vexatious and abuse of court process due to lack of clarity of what the applicant prayed before this honourable Court.

The preliminary objection was disposed of by way of written submissions. Mr. Laurence John, learned advocate filed the submissions for the respondent. Mr. Elias Kifunda drew the submission for the applicant.

On the 1st limb of the preliminary objection which is that the application is bad in law for being drafted by the unqualified person, while expounding on it, Mr. Laurence stated that the present application is vivid that it was drawn by Ellias Julius Kitunfa who introduced himself as an advocate but in the role of advocates there is no such advocate with such name. As such he was of the firm view that the application was drafted by unqualified person contrary to the law. He had earlier on cited section 41(1) of the Advocates Act, Cap. 341 R.E. 2019 and the case of **Edson Osward Mbogoro v. Dr. Emmanuel John Nchimbi & Another**, Civil Appeal No. 140 of 2006.

In the reply submission, Mr. Kifunda attributed the complaint to a typing error. Mr. Kifunda pointed out that that is not a preliminary objection worthy it as it is intended to waste Court's time.

In rejoinder submission, Mr. Laurence insisted that the drawer of the application is not an advocate but an impostor as he did not even stamp his seal. He pressed that the anomaly is not caused by typing error.

In my view, since the said advocate who drew the application has submitted against the preliminary objection and Mr. Laurence did not claim that even the one who drew the submissions is not the advocate and merely an impostor, I find the first leg of preliminary objection unmerited and it is overruled.

Elaborating on the 2nd leg of the preliminary objection which goes, that the application is incompetent for being supported by a defective affidavit, Mr. Laurence maintained that:

1. Verification clause is defective for containing matters which were not in the applicant's knowledge. He cited **Anatol Peter Rwebangira v Principal Secretary, Ministry of Defence and National Service and Another**, [2019] T.L.R. 43 (CA) for that stance.

2. The affidavit contains hearsay statements. That is forbidden as per **Odero Charles Odero v. Minister for Finance and Planning and Another**, Misc. Civil Cause No. 14 of 2021 HC DSM (unreported).
3. The affidavit in support of the application contains extraneous matters in form of opinions contrary to Order XIX Rule 3(1) of the Civil Procedure Code Cap. 33 R.E. 2019, and
4. The affidavit is not signed by the deponent in the jurat, violating the mundane law established in the case of **Director of Public Prosecutions v. Dodoli Kapufi and Another**, Criminal Application No. 11 of 2008 (CAT) (unreported).

Mr. Laurence stressed, in the present application there is nowhere in the jurat where it is indicated that the "Deponent" inscribed his signature at the Commissioner for Oaths hence rendering the whole affidavit fatal and incurable.

On his part, Mr. Kifunda submitted collectively on all the 2nd, 3rd and 4th points of law. In essence he said all these objections are devoid of merits, particularly in view of the overriding objective principle citing **John Mgawe v Aneth Adam & Joyce Aloyce**, Misc. Land Appeal No. 25 of 2020.

In rejoinder submission, Mr. Laurence said the applicant agrees with the anomalies. He insisted that there is nowhere in the affidavit where it is written "Deponent" where the applicant signed.

In my view, I accept Mr. Kidunfa's submission, if there is such anomaly in respect of failure to indicate "Deponent" where the applicant signed then that anomaly is saved by the overriding objective principle. See **Yakobo Magoiga Gichere v Peninah Yusuph**, Civil Appeal No. 55 of 2017 CAT (unreported):

With the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [ACT No. 8 of 2018] which now requires the courts to deal with cases justly, and to have regard to substantive justice, section 45 of the Land Disputes Courts Act should be given more prominence to cut back on over-reliance on procedural technicalities.

Again the current position of the law in respect of affidavits is that the offending parts of the affidavit may be expunged and leave the rest of the

affidavit and be used to decide the matter as per **Phantom Modern Transport (1985) LTD and D.T. Dobie (Tanzania) Ltd**, Civil Reference Nos. 15 of 2001 and 3 of 2002 (unreported) in which it was stated:

"Where defects in an affidavit are inconsequential, those offensive paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it."

For those reasons, the 2nd limb of the preliminary objection is also overruled.

I turn next to deal with the leg of the preliminary objection which states, the affidavit in support of the application contains extraneous matters in form of opinions contrary to Order XIX Rule 3(1) of the Civil Procedure Code Cap. 33 R.E. 2019,

Submitting on the last limb of the preliminary objection Mr. Laurence maintained that it is unclear what the applicant wants before this honourable Court. His chamber application is silent as to which decision he is praying for

extension of time to file his appeal and the affidavit is confusing. He prayed it be dismissed for want of clarity. He cited **Nila Joshua Majola v. Elizabeth Magina & Others**, Civil Appeal No. 49 of 2020 HC (unreported). As indicated above, Mr. Kifunda resisted the preliminary objection by stating that all the objections are saved by the overriding objective principle.

On his rejoinder, Mr. Laurence pointed out that the last limb is conceded as it was not replied to. He prayed it be sustained as the overriding objective principle cannot be applied blindly and ignore the procedural rules which go to the root of the case.

I have gone through the chamber summons and the affidavit in support of the application. In the same, the original case number is indicated as Civil Case No. 7 of 2021 Mpanda District Court. That is not all, the counsel for the respondent owns appearance for the respondent in the District Court in Civil Case No. 7 of 2021 in Mpanda District Court. In the premises, the 3rd limb of the preliminary objection is unmerited just as Mr. Kifunda has put it.

In the premises, I find that the preliminary objection on all three limbs is unmerited. It is overruled. I order costs shall abide by the outcome of the application.

It is so ordered

DATED at **SUMBAWANGA** this 29th day of August 2022.




J. F. NKWABI
JUDGE