

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM
LAND CASE NO 19 of 2010

1. ALEX DINKA NDIBALEMA

2. MAGRETH ALEX NDIBALEMA

APPLICANTS

VS

1. CRDB BANK PLC

2. KIMBEMBE AUCTION MART LIMITED

3. THE PUTRCHASER OF PLOT NUMBER NO.

286 BLOCK G MBEZI BEACH DSM

RESPONDENTS

Ruling

Date of last Order: 12-07-2011

Date of Ruling: 21-07-2011

JUMA, J.:

The applicants, Alex Dinka Ndibalema and Magreth Alex Ndibalema commenced their application for leave to appeal to the Court of Appeal of Tanzania by Chamber Summons which they filed on 16th December, 2010. That application is supported by a twelve (12) paragraph affidavit sworn to by one MWEZI MHANGO setting out the grounds upon which

the two applicants rely to support their application for leave to appeal to the Court of Appeal.

In opposing this application, CRDB BANK PLC, KIMBEMBE AUCTION MART LIMITED, and THE PURCHASER OF PLOT NUMBER NO. 286 BLOCK G MBEZI BEACH DSM (the respondents herein) filed their counter affidavit dated 2nd March 2011 and affirmed by Daimu Halfani. Together with the counter affidavit, respondents issued a Notice of Preliminary Objection asking this court to dismiss the application for leave because application is incompetent,

- i) for containing an incurably defective affidavit.
- ii) as there is a suit by way of Counter Claim pending for hearing in the High Court for the same case.

Hearing of the preliminary point of objection was heard by way of written submissions. Written submissions in support of the preliminary objection against the application for leave to appeal were drawn and filed on respondent's behalf by Mpoki & Associates, Advocates. But instead of restricting its submissions to the two points of objection notice of which

they had issued and which they filed on 2nd March 2011, respondents proceeded to add and submit on two additional points of objection contending that the application for leave to appeal to the Court of Appeal is incompetent since (a) the applicant has no right of appeal, (b) the application for leave has been brought under a wrong citation of enabling provision of law.

Mhango and Company of Advocates have taken great exception to the unilateral decision of the respondents' counsel to add two additional points of objection. Submitting on behalf of the applicants, Mhango and Company of Advocates submitted that the applicants were taken by surprise when respondents raised additional points of objection without leave of this court and without issuing a proper notice to the other party. With due respect, Mr. Mhango has a point. Respondents should not be allowed take this Court and also the applicants by a surprise. In view of the fact that the additional points of objection were raised unilaterally by the respondents without notice

or leave of this court, I will therefore order that the additional two points of objection should be disregarded and shall not be considered by this Court.

On the contention that the affidavit of the applicants is incurably defective, Mpoki & Associates submitted that paragraphs 9, 10, 11 and 12 of the affidavit are arguments whereas paragraph 12 is an opinion. The learned counsel believes that the deponent should instead, have stated the grounds which he thinks are fit to be considered by the Court of Appeal and not arguments he will advance once at the Court of Appeal.

Submitting on verification clause, the learned counsel asserted that the verification of the affidavit is defective because it is not dated and it is also not signed by the deponent. According to Mpoki & Associates, by the verification clause failing to expressly state the grounds of belief renders the verification clause defective. That it is not enough for the affidavit to state that “paragraph 12 is

based on the belief I hold for the reasons stated therein” since the grounds of belief cannot be referred to generally. The learned counsel firmly believes that the deponent has not stated the ground of belief and the phrase “for reason stated therein” is not sufficient. To cement his submission that the deponent is required by the law to state the grounds of his belief, Mpoki & Associates drew the attention of this court to Order XIX rule 3 of the **Civil Procedure Code, Cap. 33 RE 2002** which according to the learned counsel direct that affidavits should contain facts but not hearsay, arguments and opinions.

Replying to the submissions contending that the supporting affidavit taken out on behalf of the applicants was incurably defective because some of its paragraphs are arguments whereas another paragraph is an opinion, Mhango Advocates notes that what the applicants did in these paragraphs was to show the points of law which they want the Court of Appeal to consider if their application for leave is accepted. In so far as the objection on defective

verification is concerned Mr. Mhango submitted that Order XIX rule 3 (1) of the **Civil Procedure Code, Cap. 33 R.E. 2002** which according to the learned Advocate guides the preparation of an affidavit does not state that an affidavit must be verified, let alone to be dated and signed.

I have carefully considered the points of objection, supporting affidavit together with submissions of learned counsel. With due respect, I do not see anything wrong with paragraphs 9, 10, 11 and even 12 of the affidavit taken out by Mr. Mwezi Mhango on behalf of the applicants. Paragraph 9 of the affidavit is all about the question of law which the applicant would like to canvass in the Court of Appeal i.e. whether the plaint failed to disclose a cause of action. Paragraph 10 will raise another question of law to be canvassed i.e. whether the right procedure open to the applicants whose suit was dismissed by this court is by way of a suit or they just needed declaratory orders.

Paragraph 11 is about use of commentaries on provisions that are in *pari materia* with statutory provisions applicable

in Tanzania. I am of the decided opinion that these paragraphs are in compliance with the requirement of the law to the effect that a party seeking leave to appeal to the Court of Appeal is required to seek leave of the High Court by satisfying the High Court that there are matters arising from the decision of High Court worth the attention of the Court of Appeal because they raise issues of general importance or a novel point of law or where the grounds of appeal show a prima facie or arguable appeal.

Similarly, I did not see anything wrong with the verification of the affidavit which the applicants filed in support of the Chamber Summons. In the words of Supreme Court of India in the case of **A. K. K. Nambiar vs. Union of India & Anr** 1970 AIR 652:

The reason for verification of affidavits are to enable the Court to find out which facts can be said to be proved on the affidavit evidence of, rival parties. Allegations may be true to knowledge or allegations may be true to information received from persons or allegations may be based on records. The importance of verification is to test the genuineness and

authenticity of allegations and also to make the deponent responsible for allegations. In essence verification is required to enable the Court to find out as to whether 'it will be safe to act on such affidavit evidence.

Information in affidavit is true and correct cannot be verified by anyone other than its source i.e. the person who sources the information must himself take the oath if affidavit is to be acted on.- see Mackanja, J., in **Chairman Pentecostal Church vs. Gabriel Bisangwa & 4 Others (DC) Civil Appeal Number 28 of 1999 HC Mbeya**. From the foregoing, it is clear to me that the verification clause of the affidavit which was taken out by Mwezi Mhango satisfies the conditions of specifying which of the contents of affidavit are true to the deponent' s knowledge and also specifies allegations which were sourced from the Ruling against which the applicants are seeking leave of this Court. The point of objection contending that affidavit of the applicants is incurably defective is without merit and is hereby dismissed.

On their second point of objection revolving around the question whether an application for leave to appeal to the Court of Appeal is not sustainable where there is a Counter Claim pending for hearing in the High Court for the same case; Mpoki & Associates submitted that the mere fact that Land Case Number 19 of 2010 had been dismissed for want of cause of action does not render the whole of that suit dismissed because there was a pending counter claim. Replying to this contention, Mhango and Company of Advocates submitted that the intended appeal to the Court of Appeal does not in any way mean that the respondents cannot pursue their counter claim. According to the learned Advocate, the party who relies on counter claim is free to file a separate suit. Further, Mr. Mhango submitted that the applicants have the right to appeal against the decision of this Court which decided that their Plaint did not have any cause of action.

From the submissions which the two learned counsel have made, I have formulated one main issue for my determination and I will identify this issue to be whether a

counter claim which the respondents allege as pending is covered by the principle of law enunciated in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696**, i.e. whether this point of objection raises pure point of law which if argued as a preliminary objection is capable of disposing of the application for leave without going into the merit of the application.

In my opinion, the right of the applicants to seek leave to appeal to the Court of Appeal is not tied to the decision of the respondents to pursue their counter claim or not to pursue it. Respondents' right to pursue their counter claim is distinct from the applicants' right to seek leave of this Court and appeal to the Court of Appeal against the dismissal of their Land Case No. 19 of 2010. It is to the applicants to whom a right to contest the decision to dismiss their suit for want of prosecution belongs. The applicants have real interest in ensuring that the Court of Appeal overturns the decision of this Court to dismiss their Land Case No. 19 of 2010 for want of prosecution. It is the

applicants who will be adversely affected if their application for leave to appeal is not heard by this Court. The applicants are in other words *dominus litis* This Court cannot compel the applicants to sit back and wait for the respondent to decide whether to pursue their counter claim or not to pursue it.

It is clear from the foregoing that the existence or otherwise of a Counter Claim does not raise any pure point of law capable of disposing of the application for leave to appeal to the Court of Appeal, without going into the merit of the application.

In the upshot, like the first point of objection, the second point of objection is also found to be without merit and is hereby dismissed, with costs awarded to the applicants.

It is ordered accordingly.



I.H. Juma
JUDGE
21-07-2011

Delivered in presence of Mr. Daimu (Advocate) who holds the brief for Mr. Mhango, Advocate (for the applicants).



A handwritten signature in black ink, appearing to read "I.H. Juma".

I.H. Juma
JUDGE
21-07-2011