

**IN THE HIGH COURT OF TANZANIA
AT IRINGA**

MISC LAND CASE APPLICATION NO. 42 OF 2015

**WIDMEL MUSHI APPELLANT
VERSUS
AUGUSTINO MASONDARESPONDENT**

RULING

30th August, 2016 & 14th December, 2016

KIHWILO, J.

Before me is an application under Section 68(e), 95, Order XXXVII Rules 1-4 and Order XLIII Rule 2 of the Civil Procedure Code, Cap 33 Revised Edition 2002 (henceforth "CPC") for this Court to grant an interim and temporary injunction restraining the respondent from interfering whatsoever with the suit premises pending the determination of the main suit. The Application is supported by an Affidavit of MWAMGIGA SAMUEL CRELUY NJEGERE.

The Respondent who appeared in person and fended for himself filed a Counter Affidavit and in addition to that he filed a notice of preliminary point of objection to the effect that;

- 1) The application is hopelessly and bad in law as it is not admitted properly by the Deputy Registrar of the High Court but the court Clerk.*
- 2) The application is hopeless and bad in law as it contains incurably defective affidavit since the source of the information of the deponent is not disclosed at all in the affidavit other than in the Plaint.*
- 3) The affidavit in support of the application is not properly filed in the Court.*
- 4) The application is frivolous and vexatious as instituted against wrong person.*
- 5) The application is res-subjudice as there is an appeal which is still pending in this court related to the same subject matter.*

As the Applicant did not concede to the raised points of preliminary objections the court fixed a hearing date and each party duly made submissions.

The Respondent being a layperson was very brief in submitting in respect of each point. He argued in support of the first point of preliminary objection that the chamber summons was not signed by the Deputy Registrar hence the application is defective. Arguing in support of the second point of preliminary objection the Respondent contended that the affidavit in support of the application is incurably defective since the counsel for the Applicant signed on behalf of his client and there is nowhere in the affidavit where the source of information is disclosed. The Respondent opted to abandon the third and fifth points of preliminary objection. Amplifying on the fourth point of preliminary objection, the Respondent contended that the court was not properly moved since he was not the legal personal representative of the late Peter Masonda who owns the disputed piece of land. He finally prayed that the application should be dismissed.

Arguing in response to the first point of preliminary objection Mr. Mwamgiga, learned counsel strenuously submitted that the same have no merit because according to the records the original copy in the court file have been properly signed and that even if the same was not signed that is an inadvertent mistake on the part of the court which cannot occasion any miscarriage of justice though. He cited the case of **The Hon. AG & 2 others Vs V.G Chavda**, Civil Application No.122 of 2004 (unreported) in which Nsekela JA (retired) quoted with approval the case of **Cropper V Smith** (1884) XXVI Ch.D 700. Mr. Mwamgiga submitted further that he felt that the error did not occasion any injustice.

In response to the second point of preliminary objection Mr. Mwamgiga submitted that the same had no merit since the deponent at paragraph 1 of the affidavit described that he is representing the applicant and therefore was ready to depone facts of the case and that the verification clause was legally perfect. To buttress further his point he referred this court to the case of **Kibo Match Group Limited V Mohamed Enterprises (T) Ltd**, Civil Case No. 6 of 1999 (unreported). He further argued that the fourth point of preliminary objection is not an objection since a preliminary objection cannot be based on unascertainable factual

matters but rather it has to be based on legal matters. To support his argument he cited a case of **Mussanga Ng'wang'wa V Chifu Japhet Wanzagi and 8 others** [2006] TLR 351 and argued further that, the issue of the Respondent not being the administrator will be considered later as it requires evidence to prove it. He finally prayed that the entire preliminary objection should be dismissed with costs.

Having gone through the submissions and the notice of preliminary objections I have found that the central issue for determination is short and narrow whether or not the preliminary objections are meritorious.

I must remark in passing that the objection about the Deputy Registrar not signing the affidavit is baseless since the original copy in the court file was dully signed and even if it was not signed that omission in my view did not occasion any injustice on the part of the Respondent.

I have painstakingly gone through the affidavit several times in order to establish the validity of the second point of preliminary objection and in particular to see whether there is any source of the information. In so doing I was interested to see the verification clause that is the core part

when it comes to establishing the source of the deponent's information.

The verification clause subject of the instant objection reads;

*"I, **MWAMGIGA SAMUEL CRELUY NJEGERE** verify that what is stated in paragraphs 1,2,3,4,5 and 6 above is true to the best of my own knowledge."*

In my considered opinion Mr. Mwamgiga was totally wrong, misguided and misconceived when he argued that the fact that he described at paragraph 1 his status as representing the applicant and that he was ready to depone was right and legally perfect.

In my view there is considerable merit in the submission by the respondent in that given the averments in the affidavit the deponent ought to have disclosed the source of information. This position have been stated in numerous occasions by this Court and the Court of Appeal of Tanzania and one particular case is the case of **Phantom Modern Transport (1985) Limited Versus D.T.Dobie (Tanzania) Limited**, Civil Reference No. 15 of 2001 and 3 of 2002 in which authority is cited the classic case on affidavits that is **Uganda Commissioner of Prisons, Ex- Parte Matovu**(1966) E.A. 514 at p. 520 which said:-

"as a general rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of his own knowledge or information....."

In the result, the preliminary objection raised by the respondent has merit in that the affidavit in support of the application is incurably defective hence the application has no legs to stand on and therefore is hereby dismissed. Costs to be in the cause.

Ordered accordingly.



P.F. KIHWELO

JUDGE

12/12/2016

Ruling to be delivered by the Deputy Registrar on 14th December,

2016.



P.F. KIHWELO

JUDGE

12/12/2016