IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

MISC- LAND APPLICATION NO. 107 OF 2017

(Originating from Land Case No. 76 of 2016)

THE ARUSHA CITY COUNCIL.....APPLICANT

VERSUS

JACKSON JAPHET MTEMA.....1ST RESPONDENT

COLMAN FABIAN MSESE.....2ND RESPONDENT

GABRIEL SHIRIMA.....3RD RESPONDENT

CHRISTINA KASSIM JUMANNE.....4TH RESPONDENT

HADIJA ISSA ABDALLAH.....5TH RESPONDENT

RULING

S.M. MAGHIMBI, J:

On the 15th day of August, 2017, the applicant, Arusha City Council filed this application under the provisions of Order IX Rule 7 and Section 95 of the Civil Procedure Code, Cap. 33 R.E 2002. The application sought for an order to set aside an ex-parte order in Land Case No. 76/2016, to which the applicant herein was the defendant, issued on the 01st day of August, 2017 and an order the same to be heard and determined inter-parties. The applicant also sought for an order for costs. On the 20th September, 2017, respondents, through the Advocate Mr. Jacob Malick filed a notice of preliminary objection on a point of law that the affidavit in support of the application is bad in law for fact that the jurat is drawn on a fresh and

different page where there is no any party of the body of the affidavit. Mr. Malick hence prayed that the application be dismissed with costs.

In the interest of time, the court on the 20th day of March, 2018 ordered that the application be disposed by written submissions and parties were ordered to make cross submissions on both the substance of the application and the preliminary objections rose.

I will start determining the preliminary objection raised and should the objection be overruled, I shall proceed to determine the substance of this application. The objection raised as said earlier was on the jurat of attestation which Mr. Malick pointed out that the jurat is drawn on a fresh and different page where there is no any part of the body of the affidavit. His submission was that the meaning of Jurat is defined by the **Osborn's concise law Dictionary, 8th edition**, edited by Leslie Rutherford and Sheila Borne, Sweet & Maxwell, 1993 at pg 188 as:

> *"a memorandum at the end of the affidavit stating where and when the affidavit is sworn, followed by the signature and description of the person before whom it is sworn."*

Mr. Malick then referred this Court to the Court of Appeal case of samwel Kimaro Vs. Hidaya Didas, Civil Application No. 20/2012 (unreported) where the court held at page 6:

> *"this is indeed the jurat which according to the Black's Law Dictionary is "the clause written at the foot of the affidavit stating when, where and before whom such affidavit was sworn."*

Mr. Malick then submitted that from the directive of the Court of Appeal, the jurat of an affidavit should not be on a fresh page sheet on which no

part of the body of the affidavit appears. He further cited the holding of the court on the same Simon Kimaro Case (Supra) where the court further held:

> *"the jurat usually appears on the left hand side of the page, immediately below the last paragraph of the affidavit. It should not be written on a fresh sheet on which no part of the body of the affidavit appears"*

Mr. Malick then referred to the affidavit of Grayson Orcado which is in support of this application is in contravention of the laid down principle. That the jurat is written on the fresh page which is page 3 of the affidavit where there is no part of the body of the affidavit thereon. Mr. Malick then prayed that the application is dismissed with costs.

In reply, Mr. Eugene Nyalile, learned Solicitor representing the applicant mainly challenge the applicability of the cited case of Simon Kimaro to the current case. His submission was that the Counsel for the respondents failed to appreciate what was the argument of the Court and what was the decision of the Court in the cited case. He argued that in the cited case, the Court was defining what an affidavit is according to Lord Atkin's Court Forms Vol. 3 (2nd Edition) in England. That it is misconception and misdirection to call such definition the decision of the Court. He further argued that in fact, the preliminary objection raised in the cited case was dismissed for want of merit.

Mr. Nyalile submitted further that the requirement of a valid affidavit is clearly stated in the Notaries Public and Commissioners for Oaths Act. [Cap. 12 R.E. 2002] under section 8 to the effect that;

"Every Notary Public and Commissioner for Oath before whom any oath is taken or made under this Act shall state truly in the jurat of attestation at what place and what date the oath or affidavit is taken or made"

He the submitted that the affidavit sworn by Grayson Orcado, Counsel for the applicant herein meet this statutory requirement and that it is what was a discussion in the cited case of Samwel Kimaro(Supra). He argued that in the cited case of Samwel Kimaro(Supra) the even rejected to declare the affidavit which did not disclose the name of the attesting witness to be invalid for the reason that it is not a requirement of law. That the Court went on to state that even if there is any defects in the affidavit the remedy is not to struck out the application supported by such affidavit and cited the holding of the court that:

"....in a fit case the conventional wisdom is that the Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise offending passage be removed,

.....the point of emphasis here for our purpose is that ideally in such a situation an application is not to struck out for containing a defective affidavit. Rather, there is always room for an amendment in order to save the application. It is not always the case that an application will be struck out because is supported by a defective affidavit".

He hence argued that the remedy if at all to the defective affidavit is not to strike out the application there is a room for amendment.

On my part, I have considered the parties submissions for and in opposing the objection. Indeed this objection need not detain me much, as per the same cited case of Samwel Kimaro (Supra), as correctly pointed out by Mr. Nyalile, the court held:

> *"....in dispensing justice the Courts is doubt rendering or giving a very valuable service to the society at large and to the consumers of our justice system in particular. If so, the society/consumers must continue to have trust and faith in our system. These will be lost if cases are sometimes struck out on flimsy, cheap or too technical reasons. I think it is to the best interests of any one that cases should reach finality without being hindered in the process by preliminary objections which could be avoided or which do not ultimately determine the rights of the parties".*

As far as the records go, the jurat in affidavit in support of the application is in conformity with the provisions of Section 8 of the Notaries Public Act. The procedural defect pointed out is not in the provision of any law. Furthermore, the ratio decidendi in the cited case of Samwel Kimaro was not on which page the jurat was contained. The cited principle just happened to be in Lord Atkin's definition of the jurat and was not in any way the basis of the court of appeal's decision in that case. That said, I find the objection raised is a matter that clogs the dispension of substantive justice. If I uphold the objection I might end up in violation of of Article 107A (1) (e) of the Constitution of the United Republic of Tanzania of 1977 (as amended) because I will be letting myself to be tied

up with undue procedural technicalities. The objection raised before me is hereby overruled.

As per my order dated 20/03/2018, the parties were to make submissions on both the objection and the substantive application; I will now determine the main application before me which is filed under Order IX Rule 7 and Section 95 of the Civil Procedure Code, Cap. 33 R.E 2002. In the main application, the applicant seek to have an order to set aside an ex-parte order in Land Case No. 76/2016 dated 01/08/2017.

In his submissions, Mr. Nyalile first prayed that the facts as contained in the affidavit sworn by Grayson Orcado, the applicant's Solicitor dully authorized to represent the applicant; be adopted to form part of his submission. He then submitted that the respondents herein instituted a land case No. 76 of 2016 being representative suit filed under order I rule 8 (1) & (2) of the Civil Procedure Code (Cap. 33 R.E. 2002) claiming from the applicant to have issued to them a notice to vacate and demolish their buildings for the purpose of construction a modern dumpsite. That when the said Land case No. 76/2016 was called on for 1st Pre-Trial Conference on 1st August, 2017 in the absence of the applicant's representative and the Counsel for the respondent (plaintiffs in the main case) prayed for ex-parte hearing of the case, the prayer which was granted by the Court and case was scheduled for hearing on 9th, 10th and 18th October, 2017 ex-parte. That the absence of the applicant representative on the 1st Pre-Trial Conference was occasioned by a number of reasons which was beyond his control and cannot be calculated as negligence, inaction laziness and

disrespect of Court's Order as averred by the respondent's counsel in his counter affidavit.

The reasons for the absence as advanced by Mr. Nyalile is that there was a changes in the office of Arusha City Solicitor which made the office to lose track of the case not only Land case No. 76/2017 (the subject of this application) but a good number of cases in different Courts and Tribunals. That the former in-charge City Solicitor was transferred to Ubungo Municipal Council, while the solicitor in charge of this case, Mr. David Makata was terminated in his employment and due to his termination which was not foreseeable, there was no formal hand over of the progress of cases and other official assignments. That It was until July, 2017 when the present Arusha City Solicitor in-charge was able to peruse the file and discovered that the said Land Case was fixed for mention with a view to fix a date for mediation on 7/2/2017. He submitted further that he made all efforts to know the progress of the case and after a file perusal made on 07th August, 2017 he discovered that the same was fixed for hearing ex-parte on 9th, 10th and 18th October, 2017. He immediately filed the present application seeking this Court to set aside the said ex-parte order. He argued that during the termination of Mr. David Makata, the Applicant's Solicitor and the transfer of Mr. Bahati Chonya as Contained in paragraph 6 of the affidavit supporting the application, the office was left with only one legal officer who was unable to handle all cases alone as far as there was no formal hand over case files from the solicitor who was charged with the handling of the said Land case. That it was until the arrival of Grayson

Orcado, the current in-charge in the office of Arusha City Solicitor, which made easier for the coordination and track record of the cases.

Mr. Nyalile hen referred this court to Order IX rule 7 of the CPC and argued that the reasons advanced for the non-appearance of the applicant was beyond his control, bearing in mind that, this is a government office and that instruments such as case files are kept secretly due to confidentiality of government documents. He then cited the case of Mwanza Director M/S New Refrigeration Co. Ltd V. Mwanza Regional Manager of Tanesco and Another (2006) TLR 329, where the Court had this to say;

> *".....the law Order IX rule (6) and (7) does not mandate the Court to proceed ex-parte in every instance the defendant though duly served fails to appear as in my opinion rightly observed by B.D Chipeta in his Treatise, Civil Procedure in Tanzania. A student manual ...., He notes that; even where the defendant duly served fails to appear; "the Court may refuse to proceed ex-parte and may adjourn the hearing to another date fixed by if in the Court's opinion it would be in the interest of justice to do so."*

He further referred to several cases where right to be heard under Article 13 (6) (a) of 1977 constitution of the United Republic of Tanzania (as amended) was emphasized, this included the case of Dishon John Mtaita v. The Director of Public Prosecution, Criminal Appeal No. 134 of 2004 (unreported), Mbeya-Rukwa Auto Parts & Transport Limited v. Jestina George Mwakyoma, Civil Appeal No. 45 of 2000 (unreported) and the case

of Abbas Sherally & Another vs. Abdul S.H.M. Fazalboy Civil Application No. 33 of 2002 (unreported)

He then prayed that in the interest of justice, the Court to grant this application. In his reply, Mr. Malick submitted that the applicant is contending about the right to be heard and the adherence of the principles of natural justice while this is not an issue to be determined here. That the issue is whether there is good and sufficient cause for the applicants' solicitors failing to attend to the court, something which triggered on the counsel for the respondent to pray for the ex-parte hearing which the applicant is praying the honorable Court to set it aside.

On my part I am in agreement with Mr. Malick's submissions, that the reasons advanced by the applicants do not suffice the dicretion of this court to grant the application. As per the records in Land Case No. 76/2016, the last time the applicants (then defendant) appeared in court was on the 28/11/2016 when the scheduling order was issued. Thereafter, the matter came before mediator on 07/02/2017; 16/03/2017; 20/03/2017 and 21/03/2017 when the mediator Judge marked the mediation failed as the defendants never showed up on all those dates. Then the matter came before me, the mediation having failed, on 22/03/2017; 20/06/2017 and the defendants still never showed up. On 01/08/2017 upon prayer by the plaintiffs, the court ordered the hearing to proceed ex-parte of the applicants/defendants. Miraculously, it was after the ex-parte hearing order was made that for the first time in almost one year, the applicants (Mr. Eugene Nyalile) showed up. And it was after that they continued to make

their appearance and filed this application two weeks after the ex-parte order was issued.

The absence of the applicants for eleven months has not been satisfactorily justified. To me they were just ignorant testing the waters of the courts, only to re-gain their consciousness after an ex-parte order was issued. Therefore as far as this application goes, the applicants have failed to show sufficient reasons as to why the ex-parte order should be departed. As correctly argued by Mr. Malick, such an institution could not in any way go for almost a year without having a lawyer to appear on its behalf.

That said, the applicants have failed to convince the court to vacate its order. The application before me lacks merits and is hereby dismissed with costs.

HIGH COURT OF TANZANIA

SGD: S. M. MAGHIMBI
JUDGE
13/08/2018

I hereby certify this to be a true copy of the original.

S.M. KULITA
DEPUTY REGISTRAR
ARUSHA
03/09/2018