

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**MISC. CIVIL APPLICATION NO. 44 OF 2018**

(C/O Taxation Cause No. 97 of 2017 at Karatu District Land and Housing Tribunal of Karatu)

**JOSEPH THOMAS TEMU .....1<sup>ST</sup> APPLICANT**

**CONSTANSIA THOMAS TEMU.....2<sup>ND</sup> APPLICANT**

**WILLIBRUGA THOMAS TEMU.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**YOHANA THOMAS TENGERE.....1<sup>ST</sup> RESPONDENT**

**PIUS THOMAS TENGERE.....2<sup>ND</sup> RESPONDENT**

**RULING**

8/5/2019,14/6/2019

**MWENEMPAZI, J:**

The applicants herein named filed this application under section 14(1) of the Law of Limitation Act and any other enabling provisions of law praying for orders of this court extending time so that the reference of Taxation Cause No. 97 of 2017 in the District Land and Housing Tribunal may be made and heard in order to satisfy itself as to the correctness legality and

propriety. The applicant is praying also for an order for cost to follow events and any other relief the court may deem it fit to grant.

The chamber summons is supported by an affidavit sworn jointly by the applicants Joseph Thomas Temu, Costancia Thomas Temu and Wilbruga Thomas Temu. In the affidavit, the applicants have deponed that they agreed to give power of attorney to Joseph Thomas Temu and he prosecuted the Taxation intended to be impugned by the applicant in the reference. He accepted and filed the said Taxation Cause No. 97 of 2017 which was decided in favour of the respondents. They were aggrieved and wanted to apply for reference to the High Court. They could not do it in time as they were supplied with the copies of the ruling late. Hence, they have filed this application for the extension of time.

The respondents are being served by Emmanuel Safari, learned advocate. He filed a counter affidavit pursuant to the authorization of the respondents named herein. The deponent has averred that the respondents are disputing the application and that the applicants are required to strictly prove the allegations. Further, he has deponed that the documents were ready for collection immediately the ruling was delivered. It is the applicants who delayed to collect the same. The counsel has also filed a notice of preliminary objection raising three points of objections as follows: -

1. The jurat of attestation to the Applicant's affidavit is incurably defective.

2. That, the applicant's affidavit is incurably defective for containing arguments, prayers and conclusions.
3. That, the verification clause to the Applicant's affidavit is incurably defective for failure to state the place and date the verification as filed.

Pursuant to the Court Order dated 11<sup>th</sup> February, 2019 parties were ordered to dispose hearing of the application by way of written submission. They duly complied to the order of the court. The counsel for the Respondent argued the points as follows.

That on ground 1 of objection, that the jurat of attestation of the applicants' affidavit is incurably defective. On the face of the record, it is clear that; **one**, the commissioner for oaths did not state or show whether the deponents were known to him or introduced to him by the person known to him. **Two**, it did not show whether it was sworn or affirmed by the deponents; and **three**, the dates of signatures of the deponents differ from the date of signing by the commissioner for oaths. In this regard the deponents signed on the 9<sup>th</sup> May, 2018 and the commissioner for oaths signed on the 10<sup>th</sup> May, 2018. This contravenes the provisions of section 8 of the ***Notaries Public and Oaths Act, Cap. 12 R.E.2002***. According to the provisions,

"Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act ***shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made.***"

The counsel for the respondent has submitted further that the variation shows the swearing did not take place before the commissioner for oaths. Thus, the affidavit is incurably defective and prays the objection to be sustained.

On another front, the Respondent has submitted that the affidavit contravenes the provisions of **Order XIX Rule 3(1) and (2)** of the **Civil Procedure Code, Cap. 33 R.E. 2002**. The said provisions provide as follows:

*"3. (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted:*

*Provided that the grounds thereof are stated.*

*(2) The costs of every affidavit which unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall (unless the court otherwise directs) be paid by the party filing the same."*

The other ground, the Respondent has raised the ground that the applicant's affidavit is incurably defective for containing arguments, prayers and conclusion. The affidavit should contain only facts without any legal arguments, prayers or conclusions. The counsel has shown as an example paragraph 3, 10 and 11. He has cited the case of **Thehen Stahulunion Export Versus Kibo Wire Industries Limited** [1973] LRT.217, Onyiuke J. held that:

*"in an affidavit application, the affidavit shall disclose only those facts within the deponent's personal knowledge and it should not contain legal discourse or hypothetical arguments except in case of interlocutory applications where the statements of belief may be admitted when the grounds thereof are stated."*

The affidavit is defective for containing legal arguments and prayers, and in the premises the ground of objection has merit and it is prayed that the same be upheld and the application be upheld.

The last point of objection is that the Verification clause to the applicant's affidavit is incurably defective for failure to state place and date of verification. The record shows that the affidavit is signed by three deponents who are the applicants. However, it misses where it was verified and on which date. It is the requirement of law that the deponent should state the place and date of signing a verification as per Civil Procedure Code, Cap. 33 R.E. 2002, Order VI Rule 15(3) on the verification on which it is provided as follows:

*"The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed."*

The respondent's counsel has submitted the verification clause to the applicant's affidavit is defective for failure to state the place of and date of signature.

The Respondent has cited the case of **Simplisius Felix Kijuu Issaka Vs. The National Bank of Commerce Limited, Civil Application No. 24 of 2003, Court of Appeal of Tanzania** where Kaji

J.A observed that the effect of defective affidavit is to render the application incompetent. It leaves the application without legs to stand. The application therefore must be struck out.

The applicants in their reply submission have generally submitted that the preliminary objection lacks locus stand. In the statement I understand they are trying to submit to this court that the objection cannot stand and it is a delay tactic. The court cannot entertain the same in consideration of time, money spent and other risk. As such it does not fit into the meaning within the preliminary objection within the meaning as enunciated in the case of **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd** [1969] 1 EA 696

*"a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."*

The applicants have also referred another case the case of *National Insurance Cooperation (T) Limited and another versus Shengerema Ltd, Civil Application No. 20/2007(unreported)*. Very unfortunate however they have not attached a copy of the decision. Their argument however is, if the point raised by the respondent does not dispose the matter, the court can strike out the application and order reinstatement be entered the fact which is the matter of delay. They have the opinion and prayer that this objection be dismissed and application for the extension of time be heard basing on the facts that the objections in no way will dispose off the matter but rather delay.

The first point of objection is on the defectiveness of the jurat of attestation in contravention of section 8 of the **Notaries Public and Commissioners for Oaths Act, Cap. 12 R.E 2002** as quoted above.

It is clear in the affidavit by the applicants here that the date on which the affidavit was affirmed or sworn varies from the date the affidavit was taken to the commissioner for oath. That clearly show that the same was not taken before the commissioner for oath but it was sent for signature only vitiating the meaning of oath. The place where the affidavit was sworn is also not known. The deponents are not shown whether they affirmed or did swear the affidavit. I have no doubt that is how the document and the point is sustained.

The verification of the affidavit accompanying this application has been made in general by all the applicants named. It will be of practical help if we will be able to see what it is written. I quote: -

*"That, we Joseph Thomas Temu hereby, Constancia Thomas Temu and Wilbruga do hereby verify that, all which are stated in paragraph number 1, 2,3,4,5,6,7 and 8 are true to the best of our understanding and our own....."*

As submitted above by the counsel for the respondent the verification is not in line with the requirement of Order VI Rule 15(3) of the CPC. I find it hard to understand to what extent the deponents have knowledge of the facts they have verified. Who knows which fact and to what extent? The affidavit is defective as submitted by the Respondent.

Under the circumstances the affidavit is defective to the extent submitted and observed by the court. The effect of it is to render the whole application incompetent. The application is therefore struck out with cost. It is ordered accordingly.



T. M. Mwenempazi

JUDGE

14/06/2019

