

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA**

MISC. LAND APPLICATION NO. 105 OF 2018

(From the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 157 of 2014.)

YOBU SIKILO & 16 OTHERS.....APPLICANTS

VERSUS

FURAHINI VAHAYE.....RESPONDENT

RULING

Date of Last Order: 02/04/2020
Date of Ruling : 14/05/2020

MONGELLA, J.

The applicants herein filed an application seeking for extension of time within which to file an appeal out of time against the impugned decision of the District Land and Housing Tribunal (Tribunal). Before the application could proceed to hearing, the respondent raised a preliminary objection on two points of law to wit:

- 1. That the application is incompetent for being supported by a defective affidavit which contains hearsay evidence contrary to Order XIX Rule 3 (1) (2) of the Civil Procedure Code, Cap 33 R.E. 2002.*

2. *That the affidavit in support of the application lacks proper or adequate verification, hence defective and as per Order XIX Rule 3 (1) of the Civil Procedure Code.*

The applicants enjoyed legal services of Ms. Mary Gatuna, while the respondent enjoyed legal services of Ms. Joyce Kasebwa, both learned advocates. The preliminary objection was argued by written submissions.

Arguing on the first point, Ms. Kasebwa submitted that the application is incompetent before this Court for offending the provisions of Order XIX Rule 3(1) and (2) of the Civil Procedure Code (CPC) by containing hearsay evidence. She contended that the deponent in the affidavit is the one required to prove on the facts therein. She said that the affidavit contains hearsay under paragraph 4 whereby the deponent talks of one Advocate Grace Emmanuel requesting for the copies of judgment and decree, but the said Grace Emmanuel did not swear an affidavit to that effect. She cited the case of **Standard Goods Corp. Limited v. Harackchard Nathar and Co.** [1950] EACA 99 in which it was ruled that *"the court should not act upon the unspecified source of information."* She as well cited the case of **Salima Vuai Foun v. Registered Cooperative Societies and Others** [1995] TLR 75 in which it was held that *"where an affidavit is made on information, it should not be acted upon by any court unless the sources of information are specific."*

On the second point, Ms. Kasebwa argued that the application contains a defective verification clause thus offending the provisions of Order VI Rule 15 (2) of the CPC. She submitted that the provision of Order VI Rule 15

(2) requires a person verifying to specify by reference to the numbered paragraphs of the pleading what he/she verifies according to own knowledge and he/she verifies upon information received and believed to be true. She contended that in the affidavit in support of the application at hand, the deponent verified all the paragraphs to be true to the best of her own knowledge and understanding while at paragraph 4 she mentions one Advocate Grace Emmanuel as the person who requested for the copies of judgment and decree. She cited the case of **Aloys Lyenga v. Inspector General of Police & Another** [1997] TLR 101 in which a suit was dismissed for having a defective verification clause as the one in the case at hand. Other cases she cited include: **Lotay v. Starlight Insurance Brokers Ltd.** [2003] EA 551 (CAK); **Pattni v. Ali and Others** [2005] 1 EA 339 (CAK); and that of **Anatol Peter Rwebangira v. The Principal Secretary, Ministry of Defence and National Service and the Attorney General**, Civil Application No. 548/04 of 2018 (CAT at Bukoba, unreported). In all these cases, the Courts insisted on stating the source of information in the verification clause where the same is not within the deponent's own knowledge.

In reply Ms. Mary Gatuna, the applicant's advocate and deponent in the affidavit in support of the application challenged the respondent's preliminary objection arguing that it is baseless. She argued that the paragraph claimed to contain hearsay evidence is not hearsay as such. She quoted the said paragraph as reading:

"That being dissatisfied with the decision, on 8th day of September 2016 the applicants through the service of one Grace Emmanuel Advocate, requested for certified copies

of necessary documents to wit decree, judgment and proceedings for the purpose of processing an appeal."

In her view, she argued that there is no single phrase indicating hearsay as alleged. In the same line of thinking, Ms. Gatuna also challenged the preliminary point that the verification clause is defective. She argued that she deponed on facts best known to herself and not obtained from anyone. She argued that, the respondent's advocate raised the preliminary objection basing on her own assumptions.

I have considered the rival submissions from both counsels and gone through the affidavit in support of the applicants' application. From paragraph 1 of the affidavit, I get the impression that Ms. Mary Paul Gatuna, the deponent in that affidavit, was engaged by the applicants as their legal counsel to represent them in the matter before this Court. The impression I as well get from paragraph 4 of the affidavit is that the applicants were represented by one Advocate Grace Emmanuel in the District Land and Housing Tribunal. This is because Ms. Gatuna stated that she has been in conduct of this matter before this Court. In addition, one cannot engage an advocate just to collect copies of judgment, decree and proceedings if the same did not represent him/her in the case. That is why I get the impression that it was Advocate Grace Emmanuel who represented the applicants in the Tribunal.

The law allows advocates to swear affidavits on behalf of their clients, but under special circumstances. This is on matters which are in the advocate's personal knowledge. In the case of **Lalago Cotton Ginnery,**

and Oil Mills Company Limited v. The Loans and Advances Realisation Trust (LART), Civil Application No. 80 of 2002. (CAT-unreported) it was held:

*“An Advocate can swear and file an affidavit in proceedings in which he appears for his client, **but on matters which are in the Advocate’s personal knowledge only...**”*

Under paragraph 4 and 5 of the applicants’ affidavit the deponent who is an advocate states:

“4. That being dissatisfied with the decision, on 8th day of September 2016 the applicants through the service of one Grace Emmanuel Advocate, requested for certified copies of necessary documents to wit decree, judgment and proceedings for the purpose of processing an appeal.

5. That on 5th day of December 2016 the applicants herein were supplied with the said certified copies for an appeal purpose.”

Looking at the above quoted paragraph and considering the fact that the deponent, Ms. Mary Gatuna never represented the applicants in the Tribunal, I hesitate to be convinced that these are facts she must have had on her own knowledge. In my view, she must have obtained the facts from someone, may be her clients, the applicants. This is because, in my view, there is no way she could have come up with such facts on her own without her being a magician or a prophet. If she was a magician or a prophet then she should have pointed the same in her affidavit showing the way in which she came across such information. Under the circumstances I agree with Ms. Kasebwa that the affidavit in support of the application contains hearsay. Having contained hearsay, the

deponent ought to have stated the source in the affidavit and in the verification clause and stated the reasons for believing such facts. Nevertheless, the law also provides limitations as to information on belief to the effect that the same are only acceptable in interlocutory applications and not applications for extension of time.

The CAT in **Jestina George Mwakyoma v. Mbeya-Rukwa Autoparts and Transport Limited**, Civil Application No. MBY 7 of 2000 (unreported) held:

*"The deponent to an affidavit must have personal knowledge of the facts to which he depones. True, persons other than the applicant may also supply affidavits, but if they do, they must be persons who depose to what they personally know. In contrast, **a deponent to whom O 19 r 3 applies may depone to facts known to him and, in interlocutory applications, to statements of his belief...**"*

In the case of **The Chairman- Pentecostal Church of Mbeya v. Gabriel Bisangwa and 4 Others**, DC Civil Appeal No. 28 of 1999 this Court held:

'It is a statutory requirement, however, that an affidavit may be based on belief only in interlocutory applications. This is what sub-rule (1) of rule 3 of Order XIX provides. An application for extension of time is not one of an interlocutory nature. In that category fall applications for interlocutory orders, not for specific reliefs. And if an affidavit in an interlocutory application is based on the beliefs of the deponent the grounds for such beliefs must be disclosed...Since the application before me is not one of an interlocutory nature in as much as it seeks a permanent solution to the delay in filing the application for leave, an affidavit based on the belief of the deponent is not admissible in evidence. This then leaves

the application without evidence that supports it. It follows that the application is untenable..."

Having found that the affidavit contains hearsay, it is my settled view that the verification clause is also fatally defective as the deponent did not disclose the source of information on the facts appearing to be hearsay. In **Salima Vuai Fom v. Registrar of Cooperatives Societies & 3 Others** [1995] TLR 75 it was held that "where an affidavit is made on information, it should not be acted upon by any court unless the sources of information are specified." Under the circumstances, this Court cannot act on the applicants' affidavit for lack of disclosure of sources of information on the paragraphs ruled to contain hearsay.

Having said all, I sustain the respondent's preliminary objection and struck out the applicants' application for being defective and incompetent before this Court. Costs awarded to the respondent.

Dated at Mbeya on this 14th day of May 2020.


L. M. MONGELLA
JUDGE

Court: Ruling delivered in Mbeya in through video conference on this 14th day of May 2020 in the presence of Mr. James Kyando, learned advocate holding brief for Ms. Mary Gatuna, learned advocate for the applicants and Mr. Luko Beda, learned advocate for the respondent.




L. M. MONGELLA
JUDGE