THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

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

MISC. LAND APPLICATION NO. 106 OF 2018

NATIONAL HOUSING CORPORATION.....1ST APPLICANT
YONO AUCTION MART & CO. LIMITED.....2ND APPLICANT

VERSUS

ANNA FRANCIS MAENDAENDA.....RESPONDENT

RULING

Date of Last Order: 23/04/2020
Date of Ruling : 02/07/2020

MONGELLA, J.

The applicants herein filed an application seeking for extension of time within which to lodge a notice of appeal out of time against the judgment and decree of this Court in Land Case No. 7 of 2011 delivered on 31st July 2017. Before the application could proceed to hearing the respondent through her advocate, Ms. Mary Mgaya raised a preliminary objection on four points to wit:

1. *The affidavit in support of the application is incurably defective as it contains hearsay evidence.*

2. *The affidavit in support of the application is incurably defective in its verification clause.*

3. *The affidavit in support of the application is incurably defective as it contains opinion, legal arguments, prayers and conclusions.*

4. *The application is incompetent under the law for being supported by an incurably defective affidavit.*

The preliminary objection was argued by written submissions timely filed in this Court by both parties. In her submission, Ms. Mgaya abandoned the 4th point of preliminary objection and consolidated the 1st and the 3rd points.

Arguing on the first point, Ms. Mgaya contended that paragraph 5 of the applicant's affidavit contains hearsay and paragraphs 13 (i) to (iv), 14 and 15 contain legal arguments, opinions and conclusions. Referring to Order XIX Rule 3 (1) of the Civil Procedure Code she argued that an affidavit being a substitute of oral evidence is to be confined to statements of facts capable of being deponed by an affiant. She added that an affidavit should be free from extraneous matters by way of hearsay evidence, opinions, legal arguments and conclusions.

She said that the phrase "*the judgment subject to be impugned is tainted with serious illegalities*" under paragraph 13, amounts to legal argument; that "*the court misdirected itself by holding...*" under paragraph 13 (1) constitutes an opinion, legal argument and opinion. She further averred

that paragraph 13 (ii) and (iii) contains legal arguments and conclusion on the phrases that "*court decision is wrong because it failed to make finding from the evidence*" and "*the court decision is also wrong when it misdirected itself.*" She argued further that paragraph 13 (iv) is very argumentative as it contains opinion and extraneous matters whereby the deponent states that "*the court committed apparent errors which lead to injustice*" and that "*there was no proof of ownership.*" She further referred to paragraph 14 where the deponent states "*the decision of the court in land case no. 7 of 2011 is illegal*" and paragraph 15 where it is stated that "*given the circumstance of this matter.*" In her view, these statements by the deponent advance legal arguments, opinions and conclusion. To bolster her arguments, Ms. Mgaya referred to the case of ***Juma S. Busiya v. The Zonal Manager (South) Tanzania Post Corporation***, Civil Application No. 8 of 2004 (HC, unreported) in which while quoting in approval the case of ***Uganda v. Commissioner of Prisons Ex parte Matovu*** (1966) EA 514 this Court held:

> *"The affidavit sworn by the counsel is also defective, it is clearly bad in law. Again, as a general rule of practice and procedure, an affidavit for use in court, being a substitute of oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of his own personal knowledge or from information to which he believes to be true. Such affidavit must not contain extraneous matters by way of objection or prayer or legal argument or conclusions."*

Ms. Mgaya further argued that paragraph 5 of the applicant's affidavit contains hearsay evidence whereby the deponent stated "*the applicants made diligent follow ups on the status of the case through their legal*

counsel, namely Advocate Habibu." She contended that such allegation contains hearsay evidence as the record shows that the said Mr. Habibu did not file any supplementary affidavit to cement the allegations.

Ms. Mgaya concluded that since the substantial part of the gist for extension of time stems out of the offensive paragraphs, the remaining paragraphs cannot save the application even if the offensive ones are expunged. She referred to the case of ***D. T. Doboe (T) Ltd v. Phantom Modern Transport (1985) Ltd***, Civil Application No. 141 of 2001 to buttress her position.

On the second point, Ms. Mgaya contended that the application is defectively incurable for having a defective verification clause. She argued so saying that the deponent, one Pauline Kamaghe never prosecuted the matter before as evidenced in the verification clause where she stated that, "*with exception to paragraph 1 and 2 the remaining paragraphs to wit 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 (i) to (iv) was according to the information supplied by one Aloyce Sekule.*" Ms. Mgaya further argued that it is trite law that once a deponent in an affidavit relies upon the information supplied by a third party or deposes facts which are not within his knowledge; it becomes imperative for the said third party mentioned in the verification clause to file a supplementary affidavit to back up the assertions. She said that otherwise, the deposition so made would be rendered nothing other than being hearsay information.

To bolster her position she referred this Court to the case of ***Tanzania Milling C. Ltd v. Zacharia Amani t/a All Gold Co. & Another***, Civil

Application No. 415 of 2018 (unreported) in which the Court of Appeal while quoting in approval its previous decision in ***Benedict Kimwaga v. Principal Secretary of Health***, Civil Application No. 31 of 2002 (unreported) held:

> *"If an affidavit mentions another person, then that other person has to swear an affidavit. However...the information of that other person is material evidence because without the other affidavit it would be hearsay."*

Ms. Mgaya further cited the case of ***NBC Ltd v. Superdoll Trailer Manufacturer Co. Ltd***, Civil Application No. 13 of 2002 (unreported) and that of ***John Chuwa v. Anthony Ciza*** [1992] TLR 233, whereby the Court of Appeal reiterated the position that if an affidavit mentions another person it becomes inevitable for that person to file an affidavit, short of which makes such affidavit a mere hearsay. Finding strength on the authorites she cited, she contended that the said Aloyce Sekule whom the deponent alleges to be acquainted with the facts of the case and one Advocate Habibu mentioned under paragraph 5 of the deponent's affidavit had to file supplementary affidavits. She concluded that the absence of the affidavits of these two persons renders the affidavit in support of this application a mere hearsay.

In reply, Mr. Aloyce Sekule argued first on the preliminary point that the applicant's affidavit contains hearsay evidence, opinions, legal arguments, prayers and conclusions, particularly under paragraphs 5, 13 (i) to (iv), 14 and 15. He argued that the respondent's counsel has misconstrued and came up with misleading and confusing interpretation of Order XIX Rule 3 (1) which provides:

> *"Affidavit 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."*

Expounding on the above provision, Mr. Sekule argued that the rational answer as to whether paragraph 5 of the applicant's affidavit is hearsay is found in what was observed in the case of ***Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors Ltd*** (1969) EA 696 whereby at page 700 the Court observed that:

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

In line with the above decision, he argued that the objection that applicant's affidavit contains hearsay need more evidence to prove and thus cannot qualify to be a preliminary objection on point of law. To further buttress his stance he quoted a decision of this Court in ***Ado Shaibu v. Hon. John Pombe Joseph Magufuli & 2 Others***, Misc. Civil Cause No. 29 of 2018 (HC Main Registry, unreported). He argued that in this case this Court (Feleshi, JK) dealt with the same objection concerning hearsay evidence and had this to say:

> *"With the above considered in composite, it make it clear that the legitimacy of the impugned paragraphs above cannot be ascertained without hearing the parties on merits. It will be wrong to pre-empt the petitioner or conclude at this stage that the paragraphs contain false evidence which cannot be acted upon... in that view, this court holds the impugned paragraphs are arguable and*

require substantiation and even if it were to expunge them, which is not the case, that would naturally fall within the discretionary powers of the court which in purview of Mukisa's case above, does not qualify to invite filing of preliminary objections. It is from the above position this court finds both the 5th and 6th raised preliminary points of objections to be not pure points of law, hence, untenable in law. The same are consequently hereby overruled."

Regarding the point that the applicant's affidavit contains legal arguments, opinions and conclusions, Mr. Sekule argued that it is in the deponent's personal knowledge that she is the one who received the said judgment and was then advised by the counsel for the applicants. He contended that the alleged paragraphs 13 (i) to (iv), 14 and 15 do not contain legal arguments, opinion and conclusions because the reason upon which the application at hand is based is that the impugned decision of this Court is based on repealed law. He contended that under the circumstances, the applicant has to show highest chances of success of the intended appeal, based on the illegality of the court's decision which was based on a repealed provision of the law. He further stated that the illegalities have to be pointed out in the application for extension of time as failure to show the same amounts to condoning on the illegality. In support of his argument he cited the case of ***Samson Kishosha Gabba v. Charles Kingongo Gabba*** [1990] TLR 133; ***NHC and 2 Others v. Jinglang Li***, Misc. Land Application No. 102 of 2014; and that of ***Republic v. Yona and Others*** [1985] TLR 84 in which it was ruled that in an application for extension of time the applicant has to adduce sufficient reasons such are likelihood of success in the intended appeal, such as demonstrating the illegality in the impugned decision.

Mr. Sekule concluded on the points by arguing that there is no any violation of Order XIX Rule 3 (1) of the Civil Procedure Code as alleged by the respondent. He appreciated the cases cited by the respondent's counsel to be good law, but contended that they are distinguishable as in the matter at hand the applicant's affidavit is based on personal knowledge. Nevertheless, he prayed for the court to expunge the offensive paragraphs in the event it finds the same to be defective and allow the application to proceed to hearing on the remaining paragraphs. With this prayer he referred this Court to the case of ***Phantom Modem Transport [1985] Limited v. D.T. Dobie [Tanzania] Limited***, Civil Reference No. 15 of 2001 and 3 of 2002.

On the second point of preliminary objection, Mr. Sekule argued that there is nothing wrong with the verification clause. He argued so saying that the deponent is capable of proving all the alleged facts. He added that the fact that the respondent's counsel submitted about filing supplementary affidavit means that there is no defect in the verification clause. He contended that handling of the matter does not mean to appear in court rather even administratively within the office whereby one can make follow up on the matter. He referred to the case of ***Ado Shaibu*** (supra) in which the issue of verification clause was underscored. He quoted the decision of this Court as hereunder:

> *"Likewise, this Court would have discretion to order for an amendment to put right the petitioner's verification clause. In the case of* ***Raia Mwema Company Limited v. Minister for Information, Culture, Arts and Sports & 2 Others****, Misc. Civil Application No. 109 of 2017, Dar es Salaam, Main Registry, unreported, the Court had the following to say regarding verification clause:-*

"Conversely, premised on a wide range of legal positions it is this court's objective unfeigned observation that, even if it were assumed that the verification clause was as such defective the available remedial measures would be drawn from Order VI Rule 15 (1) & (3) of the Civil Procedure Code, [Cap 33 R.E, 2002]; a decision in F.A. Sapa vs. Signora [1991] 3 SCC 375 and further guidance from SRI. G.C. Mogha in "The Law of Pleadings in India,' 14th Edition, published by Eastern Law House, at page 58 and 59 and Mulla, "The Code of Civil Procedure", 16th Edition, Volume II, at page 1181.

It is worth noting here that, the Indian position in some citations above has been considered and domesticated with approval by the High Court in the decisions of: Kiganga and Associated Gold Mining Company Limited v. Universal Gold N.L, Commercial Cause No. 24 of 2000 (Dar es Salaam Registry) (unreported) and Godfrey Basil Mramba v. The Manging Editor & 2 Other, Civil Case No. 166 of 2006, (Dar es Salaam Registry),(unreported) in which the High Court in the two scenarios made orders for amendment of the pleadings."

He concluded by praying for the respondent's preliminary objections to be overruled for being devoid of merit.

I have considered the rival arguments by both counsels and thoroughly gone through the applicant's affidavit which is the subject of the respondent's preliminary objection.

Starting with paragraph 5 of the applicant's affidavit, I find that part of this paragraph is hearsay. The said part reads:

"...the applicants made diligent follow ups on the status of the case through their legal counsel, namely Advocate Habibu, but have always been told by the court clerks that

the judgment was not ready, and once ready, they will be served with a summons for appearance for delivery of the judgment."

It is obvious from the above quoted statement that the information on delivery of the judgment was given by the said Advocate Habibu. It was therefore imperative for him to swear an affidavit to supplement on the averments by the deponent. Mr. Sekule argued that this point of objection does not qualify to be a preliminary objection as it requires evidence. He cited the case of ***Ado Shaibu*** (supra) to cement his point. With all due respect, the hearsay raised by the respondent's advocate and as seen in paragraph 5 quoted above does not require evidence to be determined. The same is vividly identified in the paragraph. I have as well read the case of ***Ado Shaibu*** (supra) he referred to. In this case the court did not rule that hearsay evidence requires proof in evidence. In fact, the issue in this case concerned claims of "false evidence" of which I agree with the findings of the court that it requires proof. This is unlike in the case at hand where the issue concerns hearsay evidence.

As regards to paragraph 13 (i) to (iv), I first of all agree with Mr. Sekule that illegality in the impugned decision is one of the factors that can warrant grant of extension of time. This has been decided in a number of cases such as ***Kalunga and Company Advocates v. National Bank of Commerce Ltd***, Civil Application No. 124 of 2005; ***Aruwaben Chagan Mistry v. Naushad Mohamed Hussein & 3 Others***, Civil Application No. 6 of 2016; ***Jehangir Aziz Abubakar v. Balozi Ibrahim Abubakar & Another***, Civil Application No. 79 of 2016 and ***Lyamuya Construction Company Ltd. v.***

Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 (unreported). However, in my considered view, it suffices to briefly state the illegality without involving arguments. Under paragraph 13 the deponent stated:

> *"13. That, the Applicants have read the judgment and decree in Land Case No. 7 of 2011 have seen serious illegalities caused which merit the attention of the Court of Appeal, to wit:*
>
> *(i) The court misdirected itself by holding that, on failure to pay rent by the respondent, the 1st applicant should give a notice of intention to terminate the lease, and not a notice of eviction, while it is very clear that upon expiry of the thirty (30) days without the respondent remedying the breach, the lease would be terminated automatically.*
>
> *(ii) That, the court's decision is wrong because it failed to make a finding from the evidence that, the respondent had abandoned the premises without notice to the 1st applicant as required.*
>
> *(iii) That, the court's decision is also wrong in that, having held that the 1st applicant ought to have issued a notice of intention to terminate the lease and not a notice of eviction, it misdirected itself when it we (sic) ahead and further held that no notice of eviction was served upon the respondent."*

The deponent as seen in paragraph 13 (i) to (iv) above went further to include arguments. In my considered view, he ought to have shown the illegality by stating the legal rules offended by the court in the impugned judgment. The deponent did not state the breached legal rules but presented his opinion on the decision of the court.

The respondent argued that paragraph 14 and 15 of the applicant's affidavit contain opinion, arguments and conclusion. In these paragraphs the deponent stated:

> *"14. Further that, since the decision of the court in Land Case No. 7 of 2011 is illegal on the basis of the above grounds, these forms proper highest chances of the intended appeal being heard in favour of the 1st and 2nd applicants.*
>
> *15. That, the given circumstances of this matter, and the fact that the applicants have never been aware of the judgment delivered on 31st July, 2017, the 1st and 2nd applicants have no other remedy apart from applying for extension of time to file a Notice of Appeal out of time so as to appeal to the Court of Appeal, against the decision on the grounds narrated above."*

In my view, these paragraphs do not contain arguments, opinion or conclusion as claimed by the respondent. They provide facts which will have to be proved during hearing. The offensive paragraphs as I have noted above could be expunged as per the case of ***Phantom Modem Transport [1985] Limited v. D. T. Dobie [Tanzania] Limited***, Civil Reference No. 15 of 2001 and 3 of 2002 cited by both parties. However, after considering the verification clause which I find to be defective, I hesitate to expunge the defective paragraphs as the same shall be of no relevance.

In the verification clause the deponent states that only what is stated in paragraphs 1 and 2 are to the best of her own knowledge, and what is stated in paragraphs 3 to 15 are based on the information and advice received from her legal counsel, namely, Aloyce Sekule, which she

believes to be true and correct. This connotes that paragraphs 3 to 15 is hearsay having gathered the same from Aloyce Sekule.

Mr. Sekule challenged the respondent's argument that the affidavit contains hearsay arguing that the deponent had personal knowledge of what he was told by her lawyer. I agree with him to extent that the deponent was informed of the matters deponed in the affidavit by his lawyer. This fact as it stands is not hearsay. However, as regards the content of what she was informed, that amounts to hearsay as it was not in the deponent's own personal knowledge, but obtained from Mr. Sekule and Advocate Habibu.

In addition, from the verification, it is seen that the affidavit contains matters of belief as the deponent states to believe what she was informed by the said Aloyce Sekule, the applicants' advocate. The law allows matters of belief to be deponed. However, the same are confined to interlocutory matters only. In ***Jestina George Mwakyoma v. Mbeya-Rukwa Autoparts and Transport Limited,*** Civil Application No. MBY 7 of 2000 (CAT, unreported) it was 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..."

The fact that the deponent included matters of belief in a matter not being interlocutory, I find the affidavit incurably defective. Mr. Sekule cited a number of cases in which the Courts ordered the defective verification clause to be amended. In my view however, this cannot be done on every defect in the verification clause. The defect in the verification of the affidavit in the application at hand affects the whole affidavit as I have observed above. Under the circumstances, ordering an amendment of the same cannot be the correct approach.

Having observed as above, I sustain the respondent's preliminary objection to the extent shown in this ruling and struck out the applicant's application with costs.

Dated at Mbeya on this 02nd day of July 2020.

THE HIGH COURT OF TANZANIA

L. M. MONGELLA
JUDGE

Court: Ruling delivered in Mbeya in Chambers on this 02nd day of July 2020 in the presence of the respondent and Mr. Gamba holding brief for Ms. Mary Mgaya, learned Advocate for the respondent.

L. M. MONGELLA

JUDGE