

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRIGA DISTRICT REGISTRY)

AT IRINGA

MISC. APPLICATION NO.10 OF 2020

**(Originating from the decision of Hon. R.K Sameji J, in Land
Appeal No.11 of 2013, Judgment Delivered On 26th August 2016
Originating From The Decision of Njombe District Land and
Housing Tribunal in Application No.11 of 2009)**

NJOMBE DISTRICT COUNCILAPPLICANT

VERSUS

EDWIN MALEKELA RESPONDENT

22/9 & 16/10/2020

RULING

MATOGOLO, J.

The applicant Njombe District Council has filed this application for extension of time within which to file an application for stay of execution. The application is by way of chamber summons made under section 14(1) of the Law of Limitation Act [Cap 89 R.E 2019, and section 95 of the Civil Procedure Code [Cap 33 R.E 2019], and any other enabling provisions of

the law. The same is supported by an affidavit sworn by George Brown Makacha.

After been served, the respondent one Edwin Malekela filed a counter affidavit but also raised preliminary objection on point of law to the following effect:-

- (a) That, the application is bad in law and incurably defective for being supported by defective affidavit which bears defective verification clause.
- (b) That the application is bad in law for being overtaken by events.
- (c) That the application is bad in law for failure to disclose the source of information.
- (d) That the application is incurably defective for being supported by an affidavit tainted with lies.

The respondent therefore prayed for the application to be struck out with costs.

Parties were invited to argue on the preliminary objection raised before determining the main application.

At the hearing parties were represented, the applicant was represented by Mr. George Brown Makacha (Principal and Authorized officer Njombe District Court), while the respondent were represented by Mr. Innocent Paulos Mwelelwa.

The matter was disposed by way of written submissions. This court restricted the parties that, their submissions not to exceed five pages and font size to be 12, but the applicant did not comply with the said order and his submission exceeds five pages. This court therefore will not consider material supplied by the applicant in exceeded pages, I will confine myself to the submission in pages 1 to 5.

Mr. Mwelelwa abandoned preliminary objection No.4, he argued only points of objection No.1, 2 and 3.

Mr. Mwelelwa before arguing in support of his preliminary objection on point of law he raised, he submitted that this application has no legs to stand due to the fact it was filed subsequent to Miscellaneous Land Application No.9 of 2020 which was pending before this court as per paragraph 9 of affidavit in support of this application. The said application has been struck out with costs on 11th day of August 2020. He contended that, there is no need to entertain this application due to the fact that the application which was required to be stayed was struck out from the court register and the only remedy which available to the applicant's application is to dismiss this application with costs on account that it has no legs to stand.

With regard to the first point of preliminary objection that the application is bad in law and incurably defective for being supported by defective affidavit which bears defective verification clause, Mr Mwelelwa submitted that, the affidavit which has been sworn by the Principal Officer for the applicant contains defective verification clause. He submitted

further that, the verification of pleadings are clearly governed under Order VI Rule 15(1)(2) and (3) of the Civil Procedure Code[Cap 33 R.E 2019].

Mr. Mwelelwa submitted that, the affidavit sworn by the applicant did not show the place it was verified and signed, it only shows that it is dated at Njombe. Mr. Mwelelwa reproduced the disputed part of the affidavit as follows;

"1. George Brown Makacha do hereby verify
that all what is stated in paragraph 1,2,3,4,
and 5 are true to the best of my knowledge.

Dated at Njombe 30th day of April 2020.

.....

Deponent

Mr. Mwelelwa is of the view that, the proper and acceptable verification clause it should be;

*1. George Brown Makacha Do hereby verify that all stated in paragraph
1,2,3,4 and 5 are true to the best of my knowledge.
Verified at Njombe this 30th April 2020.*

.....

Deponent

Mr. Mwelelwa prayed before this court to strike out this application with costs on the ground that, it has been supported by defective affidavit.

Regarding the second point of objection, Mr. Mwelelwa submitted that, the contents of paragraph 2 to 8 of the affidavit are based from other sources of which the principal officer of the applicant has never disclosed in the verification of the said affidavit in support of the application. He contended that, the said principal officer has never participated in any proceedings from the trial tribunal that is Application No. 11 of 2009 and Land Appeal No. 11 of 2013. Mr. Mwelelwa went on submitting that, the District Solicitors who participated on those proceeding are Danstun Shimbo, Ansila Makyao and Hilmar Alex Danda who filed Misc. Land Application No.36 of 2016 in respect of the application for leave to appeal to the Court of Appeal of Tanzania which was dismissed on 4th April 2018.

Mr. Mwelelwa went on submitting, it is clear that, paragraph 2,3,4,5,6,7 and 8 of the said affidavit are offensive paragraphs due to the fact that they are offending the provision of Order VI Rule 15(1) and (2) of the Civil Procedure Code which provides:-

(1) "save as otherwise provided by any other law for the time being in force, every pleading shall be verified at the foot by the party or one of the parties pleading or by some other person proved to the satisfaction of the court to acquainted with the facts of the case.

(2) the person verifying shall specify, by reference to a numbered paragraph of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true"

Mr. Mwelelwa submitted further that, it is a settled law that, if the verifier had received information from other sources he must disclose the said sources of information, failure to disclose the source of information it renders the affidavit defective as a result the entire application will be incompetent. He argued that it is clear that, as the principal officer he has gathered information from the previous solicitors or court records on which he was bound to disclose the same. To support his assertion he referred this court to the case of ***Njombe District Council versus Bedon Kinyunyu***, Misc. Application No. 16 of 2016 (unreported) (HC) Iringa Registry, where Shangali, J. struck out the entire application with costs for failure to disclose source of information. Also he cited the case of ***Edna Sylvester Ndile versus Standard Chartered Bank***, (HC) of Tanzania Labour Division, Misc. Application No. 16 of 2013, S.A.N Wambura, J. struck out the entire application for failure to disclose the source of information.

Mr. Mwelelwa bolstered his argument by referring the case of ***Lalago Cotton Ginnery and oil Mills Co. Limited versus The Loans Advance Realization Trust***, Civil Application No.80 of 2002 and ***Adnan Kitwana Kondo and 3 others versus National Housing Corporation***, Civil Application No. 208 of 2014 Court of Appeal of Tanzania at Dar Es Salaam (unreported), held that:-

"An Advocate can swear and file an affidavit in proceedings which he appears for his client, but on matters which are in the advocate's knowledge only. For example, he can swear an

affidavit to state he appeared earlier in the proceedings for his client and that he personally knew what transpired during those proceedings”

He contended further that, the contents of paragraph 2, 3, 4, 5, 6, 7 and 8 of the affidavit which has been sworn by the principal officer / District solicitor are based on the information which are not within the knowledge of the said principal officer due to the fact that he did not participate in any proceedings which took place early, that is application No. 11 of 2009, Land Appeal No. 11 of 2013 and Misc. 36 of 2013. Mr. Mwelelwa asserted that the affidavit supporting the instant application is defective and renders the entire application to be incompetent before this court for failure to disclose the source of information as required by the law and the remedy for non compliance of disclosure of information is to strike out the application with costs. Thus, he prayed to this court to strike out the application with costs for being supported by a defective affidavit.

With regard to the third point of preliminary objection Mr. Mwelelwa submitted that, the applicant after has received the said execution No. 18 of 2020, started to file an application with the view of delaying the rights of the respondent to enjoy his award as it was ordered by this court.

Mr. Mwelelwa submitted to the effect that, the applicant’s application is a mere afterthought which is intending to delay the entire procedure of handing over the original certificate of title which is in possession of the applicant. The applicant has abandoned her Misc. Land application No. 36

of 2013 which was aimed to challenge the judgment of the High Court and the same was dismissed for non-appearance of the applicant.

Thus, Mr. Mwelelwa submitted that, the application which has been filed by the applicant is incompetent and the court is not properly moved, therefore he prayed to this court to strike it out with costs.

In reply Mr. Makacha submitted that, the counsel for the respondent has alleged that before embarking on submitting on preliminary objection said this application has no leg to stand due to the fact that it was filed subsequent to Misc. Land application No.9 of 2020 which was pending before this court, but the said application was struck out on 20th day of August 2020. Mr. Makacha cited the case of ***Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd,[1969] E.A 696*** at page 700 in which it was held that;

“That preliminary objection consists of point of law which has been pleaded or which arises by clear implication out of pleading and which if argued may dispose the suit”

He contended that, what is stated by the counsel for the respondent is point of fact and not a point of law as it is clearly stated in ***Mukisa Biscuits case*** (supra).

He contended further that the fact that Miscellaneous Application No. 9 of 2020 was struck out on 20th day of August 2020 does not render this

application to be dismissed since the struck out application may be filed afresh. He prayed for this point be ignored since it has no legal basis.

With regard to the first point of preliminary objection Mr. Makacha submitted that, the counsel for the respondent cited Order VI Rule 15(1), (2) and (3) of the Civil Procedure Code, which states that the verification shall be signed by the person making it and shall state the date on which date and the place at which it was signed.

Mr. Makacha reproduced the said verification clause and contended that, the counsel for the respondent suggested for the proper and acceptable verification clause, but he said it is not true that the verification clause in the applicant's affidavit does not show the place and date on which it was signed as it is alleged by the Advocate for the respondent. He said the verification clause was verified in the first line of the verification clause by one George Brown Makacha and it was dated at Njombe on 30th day of April 2020 and the signature of the deponent was appended thereto as seen in the applicant's affidavit. He was of the considered view that, the provision of Order VI Rule 15(1),(2) and (3) of the civil Procedure Code was complied with.

He contended further that, the applicant verification clause cannot be termed as defective because the two paragraphs quoted in the applicant verification clause must be read together. And that, what has been stated by the respondent in respect of that matter is afterthought because writing the word "verified" before the word "dated" in paragraph 2 of the verification clause would be repetition. Hence making no any difference

between the applicant's verification clause from that suggested by the respondent.

Mr. Makacha prayed for the first point of objection be overruled with costs and the court to proceed to determine the application on merit.

Regarding the second point of preliminary objection Mr. Makacha submitted that, this application has not been overtaken by any event because the respondent has not handed over the Certificate of Title to the decree holder. And the said execution No. 20 of 2020 is still pending and is yet to be determined. Thus, this court has been properly moved, he prayed for the second point of preliminary objection be overruled with costs.

With regard to third point of objection the respondent's counsel argued that the contents of paragraph 2 and 5 of the applicant's affidavit sworn by the deponent are based on information in which the deponent depends from other solicitors who participated in previous cases (Dunstan Shimbo, Ansila Makyao and Hilmar Alex Danda). Mr. Makacha submitted that, the respondent further reiterated that paragraphs 1,2,3,4 and 5 of the applicant's affidavit offend the provision of Order VI Rule 15(1) (2) and (3) of the Civil Procedure Code, which requires deponent to state in numbered paragraphs in the pleading what he verifies of his own personal knowledge and what he verifies from information received and believed to be true.

He contended that, throughout the entire affidavit the deponent one George Brown Makacha did not state that, he received information from any person which would require him to state the source of that information in verification clause. He argued that, what is stated by the respondent submission is that the deponent of the applicant might have received

information somewhere those are afterthought since the applicant deponent did not state so in the affidavit, the statement of the facts deposed thereto are the matters within the personal knowledge of the applicant's deponent.

He went on arguing that, apart from the above the respondent in written submission mentioned a list of counsels such as Danstan Shimbo, Ansila Makyao and Hilmar Alex Danda who participated in the previous matters, he viewed it as the question of evidence, it cannot be a point of law capable of disposing of this matter on preliminary objection as principle derived from the case of ***Mukisa Biscuits case***.

With regard to the case of ***Njombe District Council Versus Bedon Kinyunyu(supra)*** cited by the learned counsel for the respondent, Mr. Makacha submitted that the said application in that case was not struck out for not disclosing the source of information rather for failure to indicate the date and state the place the verification was made.

However, Mr. Makacha argued that, the cases cited by the counsel for the respondent were decided long before the change of the jurisprudence on the rules on the rules relating to verification clause. The position now as to the defect in the verification clause does not render the same incurably defective. Thus, he prayed before this court to overrule the second point of preliminary objection with costs.

Mr. Makacha concluded by praying to this court to dismiss the preliminary points of objection raised with costs.

Having read the respective submissions by the learned counsel and upon going through the chamber summons and the court records, the

main issue for determination is whether the points preliminary objection raised are tainable.

Regarding the first point of objection, for convenience and clarity I think it is important to reproduce **Order VI Rule 15(3) of the Civil Procedure Code** which provides guidance for verification clause in affidavits. The same provides:-

"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"

It is my considered opinion that the applicant complied with order VI Rule 15(3) of the Civil Procedure Code as the applicant has signed, he has stated that the same was signed on 30th April 2020 at Njombe, and the act by the applicant to write dated instead of verified in my opinion is not fatal, is a mere irregularity in form, it has nothing to do with the substance of the matter. It is a principle of law now that Courts should focus more on substantive justice rather than technicalities. See the case of **Victor Rweyemamu Binamungu versus Geofrey Kabaka**, Civil Application No. 602/08 of 2017(unreported) CAT at Mwanza. This point of objection in my view has no merit.

With regard to the second point of objection, that the application is bad in law for being overtaken by events.

As disclosed by the learned counsel in their respective submissions, execution has not been concluded. There is an application only pending before the District Land and Housing Tribunal which is yet to be determined.

In the case of ***Shell and B.P Tanzania Ltd Vs. The University of Dar Es Salaam***, Civil Application No.68 Of 1999 (unreported), Lugakingira J.A as he then was had this to say:-

"Execution is completed when the judgment creditor gets the money or other thing awarded to him by the judgment debtor. In the instant case, execution of the judgment was not a single process. It entailed several events, all of them have to be undertaken before execution was deemed to be completed, these including the process of issuing the attachment order, the attachment of property to be attached, Proclamation for sale, sale of the attached property and finally payment of the sale proceeds to the decree holder. When all these are completed that is when execution is completed"

In the instant case it is wrong as submitted by the counsel for the respondent to assert that, the application is bad in law as the same has been overtaken by events only because of the application for execution filed by the applicant which is still pending before the Tribunal. Under that circumstance, the application is not overtaken by event as the same has not undergone all processes of execution as discussed in the case of ***Shell and B.P case*** cited above. This objection is baseless.

Regarding the third point of objection, the argument by Mr. Mwelelwa is that, the contents of paragraphs 2 to 5 of the affidavit are based from other sources of information, hence he viewed the affidavit to

be defective for the failure of the deponent to disclose source of such information. I have carefully read the contents of the paragraphs in the affidavit, I have noted that, there is nowhere in the affidavit the deponent has verified that he received information from any person. What the deponent verified is that:-

"I, George Brown Makacha do hereby verify that all what is stated in paragraph 1,2,3,4 and 5 are true to the best of my own knowledge".

The contention by Mr. Mwelelwa is that, the deponent has never participated in any proceeding from the trial tribunal that is Application No. 11 of 2009 and Land Appeal No.11 of 2013. The question here is, if he did not take part in the named proceedings how did he come aware of what transpired in the proceedings. It is where he was required to disclose the source of such information. He was not expected to verify that all what transpired in those proceedings are from his own knowledge. He was not a party to the proceedings, and he has not been in conduct of the same. It is my considered opinion that it was wrong for him to verify to know the same from his own knowledge, as it was held in the case of ***Adnan Kitwana Kondo Vs. National Housing Corporation*** (supra). This point of objection has merit. Mr. Makacha had an alternative prayer that if this court finds the affidavit defective it should not strike it out but should order the applicant to amend the same. An affidavit cannot be amended, what can be done with regard to an affidavit which did not disclose some

important information is to file supplementary affidavit, a defective affidavit cannot be acted upon or amended.

Now what is the effect of failure to disclose source of information. Failure to disclose source of information which are not from the deponent's own knowledge renders the affidavit defective, the reason is that he lied as he verified information from his own knowledge while were obtained from other sources. Defective affidavit renders the application incompetent and the only remedy is for it to be struck out as Wambura, J. did in the case of ***Edna Sylvester Ndile vs. Standard Chartered Bank*** (supra).

Apart from that, this application emanated from Miscellaneous application No. 9 of 2020 which was struck out on 11th day of August 2020, for that reason to entertain this application will be meaningless as stay are useful where the judgment debtor intends or has taken legal action such as an appeal to the Court of Appeal. In the instant application the applicant filed an application for extension of time but the same was struck out, for that reason, there is no legal action taken by the applicant to warrant this court to entertain this application.

Basing on the above reasons it is my considered opinion that this application is incompetent the same is struck out.

It is so ordered.


F.N. MATOGOLO
JUDGE
16/10/2020.

Date: 16/10/2020
Coram: Hon. F. N. Matogolo – Judge
Applicant: Mr. Francis Haule – Solicitor
Respondent: Mr. Hafidh Mbinjika holding brief
C/C: Grace

Mr. Francis Haule - Solicitor:

My Lord I am appearing for the applicant.

Mr. Hafidhi Mbinjika - Advocate:


My Lord I am holding brief for Mr. Mwelelwa advocate for the Respondent.

Mr. Haule - Solicitor:

My Lord the matter is for ruling. We are ready.

COURT:

Ruling delivered.


F. N. MATOGOLO
JUDGE
16/10/2020