

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

MISC. CIVIL APPLICATION NO. 6 OF 2020

*(Arising from Civil Case No. 2 of 2019 in the District Court
of Urambo at Urambo)*

BARIGONO S/O PHILIMON AND ANOTHERAPPLICANT

VERSUS

PASTOR ANANIA N. KITU.....RESPONDENT

RULING

Date: 21st October & 11th December, 2020

BAHATI, J.:

This ruling is in respect of the Preliminary Objection on a point of law raised by the respondent that;

- I. That, the application is bad in law as it is not properly verified contrary to the law hence the court is not properly moved.*
- II. That, the application is incompetent for non-disclosing the applicants.*

This matter was disposed of by way of written submission based on the fixed schedule, and hence this particular submission. Both parties duly complied hence this ruling.

The applicant was represented by Mr.Kadaraja Jestil, learned counsel while the respondent Mr. Musyani Emmanuel, learned counsel.

On the first limb of preliminary points of objection, it was submitted that the application is incompetent for being supported by a defective affidavit which lacks proper verification. The application is not properly verified and contravenes Order VI Rule 15 (1) (2) (3) of the Civil Procedure Code, Cap.33 [R.E 2019].

The Order VI Rule 15 (1) provides categorically that;

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

Sub Rule (3) 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. Order VI Rule 15 (1) (2) of the Civil Procedure Code, Cap 33 [R.E 2019] give the condition that in the verification part the name of the verifier to be included in the verification clause and shall be signed by the person making it. From the records, the applicant’s application has not been signed, it shows clearly that the said application has not met the above-mentioned condition and contravenes the mandatory provision as provided by the Civil Procedure Code, Cap. 33 [RE.2019].

He further submitted that the said application has not met the above mentioned condition and the person verifying has not signed contrary to the mandatory requirement of Order VI Rule 15 (3) of the Civil Procedure Code, Cap.33.

Given the fact that, the applicant's application has failed to meet the mandatory requirement of the law hence the same should be struck out for want of proper verification clause by not signing at the verification clause. This was also the position of the Court of Appeal in the case of **Gilliard Mlaseko And One Other Versus Corona Faida Busongo Civil Application No. 4 of 2007 at TABORA (Unreported)** where the court held that a party who does not sign pleading is not a party to that pleading consequently the court found that the affidavit is incurably defective and the application was struck out.

He submitted that, the applicant is not a party to this application as his advocate has failed to sign an affidavit annexed to this application and for reasons wherefore, the court can not entertain incompetent application and in the light of the foregoing, it is the respondent's submission that the preliminary objections be upheld and the applicant's application be struck out with cost.

On the second limb of preliminary points of objection that the application is incompetent for non-disclosing the names of the applicants.

He submitted that at the time the Miscellaneous. Civil Application No. 06 of 2020 was presented before this court on 21/02/2020 the parties thereto were **BARIGONO PHILIMON & OTHERS VERSUS PASTOR ANANIA N. KITU.**

He contended that other applicants are not disclosed in this case at hand (i.e their names) in paragraphs 1 and 5 of the sworn-in affidavit it has named applicants but they are not known who are those applicants or who among the applicant (if any), is not known.

Further, he submitted that it is not a duty of this court to trace as to who are those others that duty lies to the applicants and when this court will issue any order it is not known the order will it be for one of the applicants or anyone else not a part to the application?

He went on to state that the whole of the application need to be presumed that it is not there and the inference if is so, be drawn then there is no any applicant in this application or the inference should be drawn that, Application is incompetent as it was held by the Court of Appeal of Tanzania sitting as a full bench at Tabora Registry in **Haji Rashid Amani VS Juma Mohamed and 16 Others, Civil Appeal No. 91 of 2016 (Unreported)**, in that case, the issue which was raised was who are those 16 others in an appeal where the court agreed and endorsed that by not showing or indicating who are those other in appeal make the appeal incompetent and consequently the appeal was struck out.

Additional, he submitted that as it is requested to this court to draw an inference and draw inspiration from the above-cited case and find that by not showing or indicating others in the application renders the application incompetent. In the light of this authority as long as the application is not shown the other applicants then there is no application at all before this court involving the alleged applicants and the same ought to be struck out with cost.

Replying, the applicant submitted that on the first point of preliminary objection which states that the application has no proper verification clause contrary to order VI Rule 15 (1) and (2) of Cap. 33 [R.E 2019] of the Code. The above-cited law only requires the pleading to be verified at the foot by the party making it. This requirement has been met fairly and squarely as the applicant has verified the affidavit as required by the law.

What the law requires is a verification clause, which means the name, numbered paragraphs verified, and the signature at the foot of the pleading which in the affidavit in place the requirement has been met.

On page 2 of the affidavit, there is verification clause, the name of the verifier, the signature of the verifier at the foot of the verification clause as well as the numbered paragraphs verified.

The contention that the verifier has not shown his name is not true as the name appears at the foot of the verification clause. Therefore he prayed that this court to find it with no merit whatsoever and upheld the application.

The second point of preliminary objection that the application is incompetent for non-disclosing the applicants. This has no merit since the decree that is being executed is titled **PASTOR ANANIA N. KITU VERSUS BARIGONO S/O PHILIMON AND OTHERS** which is Civil Case No. 3 of 2019.

Apart from that even the judgment that led to the decree is also titled **PASTOR ANANIA N. KITU VERSUS BARIGONO S/O PHILIMON & OTHERS** which is Civil Case No.3 of 2019. Therefore to change the title of the court's documents like judgment and decree to another name would be to establish something different, that is why the applicant opted to use the title of the decree and judgment not to mislead the adjudicator. The respondent has cited the case of **Haji Rashid Aman Versus Juma Mohamed and 16 Others** which is Civil Appeal No. 91 of 2016. In that case, the counsel for the appellant conceded the preliminary objection. A case that is not relevant in the current position of the Civil Procedure Code, Cap. 33 [R.E 2019].

The central point for determination is whether the application is fatally defective for not mentioning who others are? In a recent

development, the law has turned into addressing the principle of overriding objectives in our civil justice system to ensure that the substantive objective is given a higher priority. According to section 3A (2) of the Civil Procedure Code Cap. 33 as amended by Written Laws (Miscellaneous Amendment) (No. 3) Act 2018 [Act No. 8 of 2018] provides that the court shall; in the exercise of its power or the interpretation of any of its provisions, seek to give effect to the overriding objective.

The above shift is similarly reflected in some recent decisions of the court of appeal (see **Martin d. Kumaliya and 117 others V. Iron and Steel LTD** which is civil application No. 70/18 of 2018 CA (Unreported), **Yakobo Magoiga Gichere Versus Peninah Yusuph CA, (Unreported)**, **Paulina Samson Ndawa Versus Theresia Thomas, Civil Appeal No. 55 of 2017 CA** (Unreported) all these cases addresses the importance of applying the principle of overriding objective in the civil justice system.

Upon considering the submissions by both parties, the issue for determination concerning this first point of objection is whether the PO raised has merits. As submitted by the respondent that non-proper verification of the Affidavit is fatal to law, and whether the way the respondent has submitted has offended the procedural laws. As submitted by the applicant that the law requires the pleading to be verified at the foot by the party making it.

It is trite law that Order VI Rule 15 (1) (2) (3) of the Civil Procedure Code, Cap.33 [R.E 2019] provides that ;

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

Sub Rule (3) 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. Order VI Rule 15 (1) (2) of the Civil Procedure Code, Cap 33 [R.E 2019]

From the record, the applicant Kadaraja Jestil J(learned counsel) has not signed the verification as a party. It is only the deponent who has signed. It is clear to me that if a verification clause satisfies the conditions prescribed under Order VI Rule 15 of the CPC that verification shall be deemed valid even if the verification clause is signed by the deponent. The essence and rationale of verification are to test the genuineness and authenticity of claims the applicant has made in his affidavit and also to make the applicant responsible for those claims. The Court of Appeal of Tanzania in **Anna Makanga Vs Grace Woiso Civil Reference No. 21 of 2006 Court of Appeal at DSM (Unreported)** described verification as simply a final declaration made

in the presence of an authorized officer, such as a notary public, by which one swears to the truth of the statement in the document. In so far as the verification clause in the present case is concerned, it was signed on 20 February 2020 in Tabora by the deponent himself.

In my opinion, the Affidavit of Verification which the applicant has signed complied with Order VI Rule 15 (3) and Rule 15 (2) of Order VI because the deponent has verified that the contents of all the paragraphs in his affidavit are true to the best of his knowledge. With respect, I do agree with Mr. Kadaraja Jestil does not offend the law Order VI Rule 15) which governs verifications. The first preliminary point of objection has no merit and is hereby overruled.

In respect of the second ground of objection, that the application is incompetent for non-disclosing the names of applicants. As rightly submitted by the applicant, that judgment that led to the decree is also titled **PASTOR ANANIA N. KITU VERSUS BARIGONO S/O PHILIMON & OTHERS** which is Civil Case No.3 of 2019. Therefore to change the title of the court's documents like judgment and decree to another name would be to establish something different, that is why the applicant opted to use the title of the decree and judgment so that not to mislead the adjudicator.

It is true that, the respondent has cited the case of **HAJI RASHID AMAN VERSUS JUMA MOHAMED AND 16 OTHERS** which is Civil

Appeal No. 91 of 2016 which in this case is distinguishable. I agree with the submission by the applicant that the point for determination is whether the application is fatally defective for not mentioning who others are?

I quite agree in a recent development, the law has turned into addressing the principle of overriding objectives in our civil justice system to ensure that substantive objective is given a higher priority. According to section 3A (2) of the Civil Procedure Code Cap 33 as amended by Written Laws (Miscellaneous Amendment) (No. 3) Act 2018 [Act No. 8 of 2018] provides that the court shall; in the exercise of its power or the interpretation of any of its provisions, seek to give effect to the overriding objective.

Therefore it is my conviction that promoting fair trials in justice administration indeed, goes in tandem with the valuable recently articulated legal principle of oxygen. This principle essentially requires the court to deal with cases justly speedily and to have regard to substantive justice. In a way, the principles also try to avoid prioritization of procedural technicalities in the process of justice administration.

From the reasons adduced above, I find that the objections raised have no merit. The objection raised is struck out with costs.

It is so ordered.

A.A. Bahati

A.A.BAHATI,

JUDGE

11/12/2020

Ruling delivered under my hand and seal of the court in chamber,
this 11th day December, 2020 in the Applicant and Musyani Emmanuel
for Respondent.



A.A. Bahati

A. A. BAHATI

JUDGE

11/12/2020