IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISCELLANEOUS CIVIL APPLICATION NO. 35 OF 2021

(Arising from Civil Case No. 08 of 2021 of the High Court of the United Republic of Tanzania in the District Registry at Mwanza).

REGISTERED TRUSTEES OF THE BAPTIST CONVENTION OF TANZANIA @ JUMUIYA KUU YA WABATISTI .....APPLICANT

VERSUS

JAMES KASOMI..... 1ST RESPONDENT
ISAAC SUI ..... 2ND RESPONDENT
LIVINGSTONE MWAKIBINGA..... 3RD RESPONDENT
ANYIKISYE MWASANDUBE..... 4TH RESPONDENT
t/a BAPTIST CHURCH OF TANZANIA @ KANISA LA BAPTIST TANZANIA.....5TH RESPONDENT

RULING

Date of last order: 29/06/2021
Date of Ruling: 13/08/2021

F. K. MANYANDA, J.

This ruling is in respect of a preliminary objection raised by the Respondents to the hearing of this application. The Applicants are applying for temporary injunctive order against all the Respondents, their agents and workers from carrying on any activities, or occupation, transfer, owning of any property of the applicant, movable and

immovable or causing any injury to the Applicant beneficiaries, believers and any properties pending hearing and determination of the main suit.

The Application is made by way of a Chamber Summons supported with an affidavit sworn by Cosmas Kanunu.

The Respondent filed a joint counter affidavit and raised a preliminary objection on the following points of law: -

1. *That this application is incompetent and bad in law as it contravenes the provisions of section 14(d) and (e) for failure to describe local limit of the where[abouts] of the property in dispute situated or in the local limit of the court of which the respondent actually voluntary reside or carry out business or personally works for gain.*

2. *That the application is bad for contravening the mandatory provision of section 18(a) and (b) of the Civil Procedure Code, [Cap. 33 R. E. 2019].*

3. *That the application is incompetent for being supported by a defective affidavit which contravene the mandatory provisions*

of Order XIX r. 3(1) of the Civil Procedure Code (CPC), [Cap. 33 R. E. 2019] for not stating the ground of relief.

4. *That the application is bad for suing a wrong person, to wit; Livingstone Mwakibinga Mwasandube.*

Mr. Boniface A. K. Mwambukusi, learned Advocate, represented the Respondents at the hearing of the preliminary objection and Mr. Mathias Rweyemamu, learned Advocate. With the leave of this Court hearing was conducted by way of written submissions and the same was complied with.

In his submission Mr. Mwambukusi dropped points one and two and in lieu thereof raised a new ground, he stated in the following words: -

> *"We humbly request to drop grounds 1 and 2 of the preliminary objection. and as a (sic) the fact that the point of law especially on jurisdiction may be raised any time we submit that this honourable court has no territorial jurisdiction to entertain this matter and on two grounds.*

(a) *That we refer this honourable court to the High Court Registries (Amendments) Rules, 2019, the schedule*

thereto, of which Mwanza Registry has jurisdiction on matters originating from Mwanza Region and Geita Region. The reading of this provision and paragraph 16 of the Applicant's Affidavit and annexure EQ8 which is the foundation of the present complaint this honourable court has no territorial jurisdiction to entertain this matter

(b) That this honourable court has no jurisdiction to entertain this matter due to the fact that the same is in outright contravention of provision of Order II rule 4 of the Civil Procedure Code (CPC), [Cap. 33 R. E. 2019] which provide that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property and the same is not qualified under the exception stipulated in Order II rule 4(a), (b) or (c) of the CPC."

As it can be seen, the Counsel has raised these new grounds of objection in his submissions when arguing his preliminary objection. In other words, he has substituted the grounds of the preliminary objection during submissions. There is neither prior notice nor leave of the court. This practice is not precedented in our jurisdiction. I say so because the conduct of Counsel of making a u-turn while making submissions in

support of his preliminary objection, is nothing but an afterthought. He came up with completely new points of objection to the surprise of both the applicant and the court. He ought to have obtained the leave of this court, the least.

A requirement of a notice is meant to prevent surprise and ensure fair hearing. In **Gabinius Singano vs. St, Timoth Pre & Primary School,** Labour Revision No. 8 of 2019 (unreported) my brother Hon. Mwenempazi, J. when faced with a situation akin to this, had this to say:-

> *"The law is silent on the manner which a preliminary objection should be raised, however, practice has shown that one should give notice of preliminary objection and the essence of the notice is to allow the other party prepare his defence. It was therefore not proper for the applicant to raise an objection at the time when he was supposed to respond to the preliminary objection that had been raised by the respondent."*

This position was well elucidated by our superior most court, the Court of Appeal, in the case of **Commissioner General (TRA) vs. Pan African Energy (T) Ltd,** Civil Application No. 206 of 2016 (unreported) where it was faced with a situation similar to this one where in an

application, amidst submissions in respect of a preliminary objection, the Counsel for the Respondent raised a preliminary objection. In the Court of Appeal Rules there was no provision providing for requirement of lodging a prior notice to the preliminary objection, it stated that: -

> *We made it clear that- there is no specific rule concerning preliminary objections to applications filed in court. We were also satisfied that a preliminary objection to an application is, procedurally, similar to preliminary objection to an appeal, and must therefore be made before hearing of the application begins. It may be irrelevant to state that the applicant, as stated by Mr Bhojan, has surprised the opposite party and the court by raising a preliminary objection without prior notice. It is elementary law that litigation should be conducted fairly, openly and without surprises. In* ***Hon. B. P. Mramba vs. Leons S. Ngalai and the Attorney General*** *[1986] TLR 182 we made reference to* ***Halsbury's Laws of England,*** *4th Edition, Vol. 36, Paragraph 38 and underlined: -*
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> > *'The function of particulars is to carry into operation the overriding principle that litigation between the parties, and particularly the trial, should be conducted fairly, openly*

and without surprises, and incidentally to reduce costs.'

After saying so, the Court of Appeal went on stating that: -

"On this point we find it irresistible to associate with the persuasive decision of the High Court of Kenya (Mbogholi and Kuloba, JJ) in ***Juma and Others vs. Attorney General [2003]*** *2 EA 461, wherein it was stated at p. 467:-*

> *'Justice is better served when the element of surprise is eliminated from the trial and the parties are prepared to address issues on the basis of complete information of the case to be met.'*

> *"For the avoidance of doubt, we are aware that the foregoing authorities were dealing with surprise in the course of trial. However, we are certain in our minds that the principle is applicable to the situation at hand as well."*

In those two cited cases above, the courts refrained from entertaining the preliminary objection for lack of a prior notice. I follow the same position.

On the other hand, Mr. Rweyemamu, the Counsel for the Applicant, argued grounds one and two of the preliminary objection which were abandoned by the Respondent. I need not to labour on the same. However, Mr. Rweyemamu, remotely attacked the objection contending that it fails to meet the test for a preliminary objection. Let me examine this contention.

The expression preliminary objection has been used in our jurisdiction to refer to objection to the jurisdiction of the Court, a plea of limitation and the like; it contains a point of law which, if argued as a preliminary point, may dispose of the suit; a preliminary objection cannot be raised if any fact has to be ascertained, that is, it cannot be based on unascertained factual matters. See the case of **Musanga Ng'andwa vs. Chief Japhet Wanzagi and Eight Others** [2006] TLR 351 (CAT).

In another case of **Sugar Board of Tanzania vs. 21st Century Food and Packaging and Two Others,** Civil Application No. 20 of 2007 (unreported), the Court of Appeal of Tanzania maintained the stance on preliminary objection by stating as follows: -

> *"A preliminary objection is in the nature of legal objection, not based on the merits or facts of the case, but on the*

stated legal procedural or technical grounds. Such an objection must be argued without reference to evidence. The fundamental requirement is that any alleged irregular defect or default must be apparent on the face of the notice of motion so that the objector does not condescend to affidavits or other documents accompanying the motion to support the objection."

The decisions above followed the authority in the famous case of **Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd** [1969] EA 296 where the East Africa Court of Appeal considering what constitutes a preliminary objection, said, at page 700:-

"... 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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

And farther down at page 701 Sir Charles Newbold, P. said:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is

argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

From these decisions, what comes out quite clearly, is the fact that any point of objection whose disposal require adduction of evidence fails the test for a valid legal preliminary objection.

In the instant preliminary objection, it has been argued by the Counsel for the Respondent that the objection is based on the plaint which implies that this matter touches issues of land or immovable property. He quoted from a book **Mulla, the Code of Civil Procedure,** 18th Edition at page 376 where a suit for land was defined and cited a case decided by this Court (Hon. Utamwa, J. the case of **Daniel Dagala Kaduda (as administrator of the Estate of the Late Mbalu Kushasha Buluba) vs. Masaka Ibeho and 4 Others,** Land Appeal No. 26 of 2015 contended that the suit is uncertain for lack of description of landed property, hence any injunctive order issued pursuant to such a suit is prone to be unimplementable.

As explained above, the principle governing preliminary objection require the point(s) of law be glary on the pleadings, it does not require

ascertainment from the evidence. In this matter in order for one to conclude that the landed properties, forming the subject matter of this application, are certain or uncertain, has to visit the evidence annexed to the plaint.

I have perused the Chamber Summons and its supporting affidavit and the counter affidavit, I have been unable to find any plaint annexed to it. Which means, the plaint is somewhere for one to access has to get some evidence which is beyond the need of preliminary objections. Even if it were there, still one has to find out whether the alleged subject matter is certain or not certain. In order to find out that fact, one has to get from the evidence by identifying the said properties and their location, which is a contentious fact.

I have failed to see this as a fact obtainable from the pleadings without going into evidence. It is on this reason that I find the first limb of this Preliminary objection as failing to meet the tests enunciated in the case authorities cited above.

As regard to the third point of objection the Mr. Mwambukusi, the Counsel for the Respondent argued that the facts averred in paragraphs 5, 7, 10, 11, 13 15 16 17 and 18 cannot be within the knowledge of the

affiant. It is his views that those facts deal with personal communication and court proceedings which the applicant is not a party. He relied on the authority in the case of **Annandumi Alex @ Kipaa vs. Zahara Adam Munisi and Another,** Commercial Case No. 81 of 2008 (unreported) where it was inter alia held that: -

> *"..... as a general rule of practice and procedure, an affidavit for use in Court being a substitute for oral evidence, should only contain statements to which the witness deposes either of his own knowledge or ... such an affidavit should not contain extraneous matters by way of objection or prayer or legal arguments or conclusion."*

The Counsel also refered to the case of **Yobu Sikilo and 16 Others vs. Furahini Vahaye,** Misc. Land Application No. 105 of 2018 where it was held *inter alia* that it is a statutory requirement that an affidavit may be based on belief only in interlocutory applications, where such grounds for the belief has to be disclosed.

The Counsel specifically mentioned Paragraphs 16, 17 and 18 as mentioning other persons namely, **Mr. Nicholous Luselele Nzella, Elias Kashambagawi, Michael Baranaba Ngusa** and **Sylivatus Retercheo** and complains that the same have not sworn affidavits to support the affiant. Hence their evidence is hearsay. He cited the case of

Sabena Technics Dar Limited vs. Michael J. Luwunzu, Civil Application No. 451/18 of 2020 (unreported) where it was held that an affidavit which mentions another person is hearsay unless that other person swears as well.

Moreover, Mr. Mwambukusi contended that the verification clause is defective in that the deponent did not verify which of the facts deponed are best on personal knowledge or belief and failure to disclose the ground of belief. He cited the case of **Salima Vuai Foum vs. Registrar of Cooperative Society and 3 Others** [1995] TLR 75 where an affidavit was held to be defective for none disclosure of means of knowledge or sources of information and belief. As to the effect of an affidavit having a defective verification clause, the Counsel relying on Order XIX rule 3(1) and the authority in the case of **Dotto Massaba vs. Attorney General and 2 Others,** Misc. Civil Cause No. 30 of 2019 contending that contravention of the said rule renders such affidavit fatally defective.

On his side Mr. Rweyemamu the Counsel for the Applicant submitted in respect of ground three of the preliminary objection distinguishing all the authorities cited by the Respondent on ground that

those cases dealt with suits while the matter at hand deals with an application. Then the Counsel went on distinguishing between a suit and an application contending that making reference to the evidence annexed to the plaint. He insisted that the impugned paragraphs are within the knowledge of the affiant and have no hearsay.

It was the contention of the Counsel for the Applicant that the verification clause was dully verified by the deponent.

I have dispassionately taken into consideration the submissions by both Counsel, the issue for determination in this ground of the preliminary objection is whether the same meets the tests for a legally acceptable preliminary objection. In my firm opinion this ground also like grounds one and two, fall short of the tests. The reason is that, the objection is based on mixed law and fact which have to be ascertained from evidence as I will demonstrate here under.

Starting with the contention that the facts averred in paragraphs 5, 7, 10, 11, 13 15 16 17 and 18 are not based in the knowledge of the deponent. This contention is rather imaginary than real. I say so because the Counsel failed to pint out how could the said facts cannot be held to be within the knowledge of the affiant without proof by

evidence. The Counsel for the Applicant refutes the contention arguing that those facts are within personal knowledge of the deponent. It follows therefore that this contention is subject to proof from the evidence. It cannot be said to a preliminary objection. The Counsel for the Respondent can challenge such evidence during the hearing of the application but not demur the hearing of the application, because the same is dependent on evidence.

Secondly, the argument by the Counsel for the Respondent in Paragraphs 16, 17 and 18 that it is hearsay because the same mention other persons who did not swear affidavits to support the deponent again is controverted by the Counsel for the Applicant that that piece of evidence is hearsay. It is the argument of the Counsel for the Applicant that the witness relied on documents which enabled him acquire the knowledge.

As it can be seen, this issue is contentious, it requires ascertainment from the evidence and can be challenged in the hearing of the application itself but cannot be used to bar the hearing. After all hearsay evidence is not evidence at all, therefore if it is so established during the hearing of the application, such evidence will be discarded,

but this requires analysis of evidence, it does not qualify at this stage as a basis to support a preliminary objection.

Lastly, the contention that the affidavit is fatally defective for having a wrongly verified affidavit in contravention of Order XIX rule 3(1), the Counsel for the Applicant submitted that the verification clause is dully and legally verified.

I have taken pain to go through the affidavit and found that the deponent verified his affidavit that all the facts stated under all the paragraphs save for paragraph 20 are based on his personal knowledge. However, what was stated in paragraph 20 was is based on his belief. He did not state the basis for his belief. Order XIX rule 3(1) of the CPC mandatorily provides that affidavits are to be confined to the facts within the knowledge of the affiant. It reads: -

> *"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"*

As it can be seen, it is in interlocutory applications where facts based on beliefs may be admissible. Even in interlocutory applications,

as rightly submitted by the Counsel for the Respondent, the basis for the belief has to be disclosed. This is per interpretation of the Court of Appeal in the cases of **Salima Vuai Foum vs. Registrar of Cooperative Society and 3 Others,** [1995] TLR 75 and **Dotto Massaba vs. Attorney General and 2 Others,** Misc. Civil Cause No. 30 of 2019.

It is for these reasons that I find the affidavit as defective in the verification clause in respect of the facts averred to in paragraph 20.

What is the way forward? The Court of Appeal of Tanzania sitting at Zanzibar in the case of **Salima Vuai Foum vs. Registrar of Cooperative Society and 3 Others** (supra) held *inter alia* that:

> *"where an affidavit is made on information, it should not be acted upon by any court unless the sources of information are specified".*

Moreover, the Counsel for the Respondent referred this Court at page 78 of the same decision where the Court of Appeal of Tanzania stated as follows:-

"The principle is that where an affidavit is made on an information, it should not be acted upon by any court unless the sources of the information are specified. This was reiterated by the Court of Appeal for Eastern Africa in the case of ***Standard Goods Incorporation Ltd vs. Harakhchand Nathu & Co.,*** *[1950] 17 EACA 99. Again, in the case of* ***Bombay Flour Mill v Hunibhai M. Patel*** *[1962] EA 803, it was held that as the affidavit did not state the deponent's means of knowledge or his sources of information and belief, the affidavit was defective and incompetent, the application based on the affidavit was dismissed. Likewise, in the case of* ***Mtale vs. January Kapembwa*** *[1976] LRT, n.7, which was cited by Mr Mbwezeleni, the High Court of Tanzania correctly in our view, applied the above principle. Applying this principle to the instant case,* ***we have no hesitation in agreeing with Mr Mbwezeleni, learned counsel for the appellant, that the affidavit in question being defective and incompetent was properly rejected by the learned Chief Justice of Zanzibar."*** (Emphasis added).

As it can be gleaned, it is a position of the law that an affidavit containing a defective verification clause becomes also defective. The court cannot act on it. However, recently, courts have become more lenient following the introduction of the principle of overriding objection

which was introduced by Act No. 8 of 2018. In those amendments to the CPC, a new section 3A was inserted into the CPC. The amendment requires courts to deal with cases justly and to have regard to substantive justice as opposed to legal technicalities.

I am aware that the principle of overriding objectives did not come to water down or make meaningless the already established rules of procedures, the same are there to ensure smooth running of justice dispensation by the courts

This was emphasized by the Court of Appeal in the recently decided case of **Mayira B. Mayira & Others, vs Kapunga Rice Project,** Civil Appeal No.359 of 2019 (unreported) where it said *inter alia* as follows: -

> *"Before we conclude, we find it pertinent to address the prayer by the appellants that the Court should be guided by the overriding objective principle in determining the preliminary objection raised. Our response to that prayer can be found from our decisions in* ***Mondorosi Village Council and 2 Others vs Tanzania Breweries Limited and 4 Others*** *(supra) and* ***Njake Enterprises Limited vs Blue Rock Limited and Another,*** *Civil Appeal No. 69 of 2017 (unreported). In which we emphasized the fact*

that ***the overriding objective principle cannot be applied blindly and that the principle is not designed to disregard the rules of procedure couched in mandatory terms, especially those going to the foundation of the case.*** (Empasis added).

Despite this stance, the Court of Appeal gave also the tests for applying the principles of overriding objectives in the case of **Yakobo Magoiga Gichere Versus Penninah Yusuph,** Civil Appeal No. 55 of 2017 and another decision in the case of **Sanyuo Service Station Limited Versus BP Tanzania Limited** Civil Application No. 186/17 Of 2018. In the latter case Hon. Kitusi Justice of Appeal held that: -

"....it can safely be concluded that the courts powers to grant leave to a deponent to amend a defective affidavit, are discretionary and wide enough to cover a situation where a point of preliminary objection has been raised and even where the affidavit has no verification clause. Undoubtedly, as the rule goes, the discretion has to be exercised judiciously. ***On the advent of the overriding objective rule introduced by the written Laws (Miscellaneous Amendments) (No.3), Act, No. 8 of 2018 the need of exercising the discretion is all the more relevant."*** (Emphasis added).

As it can be seen, the principle of overriding objectives is discretionary and the same may be applied where the court finds that it is expedient to condone a given defect in procedure for purposes of dispensing substantive justice, provided that no party is prejudiced.

In the instant matter, there has been no evidence showing that the Respondents are prejudiced in case the defect in the defective clause is amended. In the result, I do hereby hold that the affidavit may be amended in the defective verification clause by providing the missing relevant information, that basis of belief by the deponent in respect of facts deponed in paragraph 20.

As regard to the objection in ground four of the preliminary objection, the Respondent argued that the application is defective for suing a wrong person. The Counsel was of the views that the persons named in the application as **Livingstone Mwakibinga, Ananisye Mwasandube and t/a Baptist Church of Tanzania @ Kanisa la Wababtisti Tanzania** are not the responsible officials. The responsible ones are **Israel Living Mwakibinga**, **Anyangisye Mwasandube** but no order can be effective against these persons because they reside outside the District Registry jurisdiction of this Court. The Counsel added that application is bad in law for containing none existing persons and

the same cannot be amended now. He cited the cases of **Christina Mrimi vs. Coca Cola Kwanza Bottlers Ltd, Civil Appeal No. 112 of 2008** (unreported) and that of **Philemon Joseph Sekere vs. Kanisa la Kiinjili la Kilutheri- Kikwe,** Land Appeal No. 18 of 2010 (unreported) where it was generally held that where names of impleaded persons are wrong the plaintiff may take the necessary steps after amendment and in the latter case, the suit was dismissed for suing a wrong party.

On the other hand, the Counsel for Applicant submitted that the Applicant has sued the proper and responsible persons. The Counsel was of the views that the question is whether the Applicant has sued correct persons is a question of evidence.

This point of objection should not detain me more. It is vivid that the responsibility of a person in a case is ascertainable from the evidence presented. I agree with the Counsel for the Applicant that this ground does not qualify as preliminary objection on point of law. While the authorities in cases cited by the Counsel for the Respondent are correct positions of the law, the same are not applicable to this matter,

because the objection is based on evidence, it has to be proved by adduction of evidence.

It is on these reasons that I find that ground four fails the tests for a preliminary objection.

Lastly, the Counsel has argued another strange ground of objection against a supplementary affidavit which was not raised in the notice of preliminary objection. The Counsel for the Applicant did not say a word about this contention. I think he is right. Just as I said earlier somewhere at the beginning of this ruling, an objection raised in arguments during submissions without notice or leave of the court is prejudicial to the Court and other party for being taken in surprise leading to unfair healing. Such a practice has to be discouraged.

In the upshot, for reasons stated above, I find that the preliminary objection fails in all grounds, save for ground four, where this Court found that the affidavit is defective for want of proper verification clause. Equally, as explained above, this Court finds it expedient to allow the Applicant to amend his affidavit.

Consequently, I make the following orders: -

1. The Affidavit is defective for having a defective verification clause.

2. The Applicant is allowed to file a fresh affidavit with proper verification clause within seven (7) days the same to be filed on or before 24/08/2021 and serve the Respondents' Counsel immediately.

3. The Respondent to file a counter affidavit to the amended affidavit within seven (7) days, the same to be filed on or before 31/08/2021 and serve the Applicant's Counsel.

4. Each party to bear its own costs

Order accordingly.

THE HIGH COURT TANZANIA
UHURU NA UMOJA
MWANZA

F. K. MANYANDA
JUDGE
13/08/2021