THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MBEYA
AT MBEYA
MISC. LAND APPLICATION NO. 75 OF 2019.
(From the District Land and Housing Tribunal for Rungwe, at Tukuyu, in Land Application No. 36 of 2012).

PAUL MWANKUSYE.....APPLICANT
VERSUS
1. NKUTUSYA KAGWEMA.....1ST RESPONDENT
2. ALLY AMOSI.....2ND RESPONDENT
3. EMILY ANDEKISYE.....3RD RESPONDENT
4. RICHARD MWASIGANILE.....4TH RESPONDENT
5. EMANUEL JOHN.....5TH RESPONDENT
6. GASPER MWAFULA.....6TH RESPONDENT
7. PHILEMON K. NDAGILE.....7TH RESPONDENT
8. MAGELETA BHANDEKILE.....8TH RESPONDENT
9. JANES S. MWANKUSYE.....9TH RESPONDENT

RULING

02/6 & 08/10/2021.

UTAMWA, J:

This is a ruling on a preliminary objection (the PO) raised by the respondents against the supplementary affidavit filed by the applicant in support of the application. In this application, the applicant PAUL MWANKUSYE moved this court for, *inter alia*, an extension of time to file an appeal against a judgment of the District Land and Housing Tribunal for Rungwe, at Tukuyu, in Land Application No. 36 of 2012. The application

was preferred under section 41(2) of the Land Disputes Courts Act, Cap. 216 RE. 2019. It was supported by an affidavit sworn by the applicant himself. The respondents NKUTUSYA KAGWEMA, ALLY AMOSI, EMILY ANDEKISYE, RICHARD MWASIGANILE, EMANUEL JOHN, GASPER MWAFULA, PHILEMON K. NDAGILE, MAGELETA BHANDEKILE and JANES S. MWANKUSYE resisted the application through their joint counter affidavit.

The applicant further successful prayed before this court for filing a supplementary affidavit in support of the application. He filed the same according to the time prescribed by the court. The respondents raised the PO against the supplementary affidavit based on the following three limbs:

i. That, the supplementary affidavit is bad in law for containing legal arguments and conclusions.
ii. That, the supplementary affidavit is incurably defective in its verification for contravening Order VI rule 15(2) and Order XIX rule 3(1) of the Civil Procedure Code, Cap. 33 RE. 2019.
iii. That, the supplementary affidavit is bad in law for containing a *jurat* of attestation that offends the provisions of section 8 of Notaries Public and Commissioner for Oaths Act, Cap. 12 RE. 2019 (Cap. 12 in short).

The respondents thus, urged this court to dismiss the application with costs.

The applicant did not concede to the PO. The parties thus, argued it by way of written submissions. They signed their respective written submissions themselves since they were not legally represented.

Nonetheless, their respective submissions had a legal flavour which implied that they had been made through an assistance of a semi-legally skilled mind.

In their written submissions in chief, the respondents argued, regarding the first limb of the PO that, paragraphs 7, 8 and 10 of the supplementary affidavit contains arguments and conclusions. This course offended the law as underscored in the decision of the Court of Appeal of Tanzania (the CAT) in the case of **Phantom Modern Transport 1985 Ltd v. Dobie (T) Ltd, References No. 15 of 2001 and No. 3 of 2002, CAT** that cited with approval the case of **Uganda v. Commissioner of Prisons Exparte Matovu (1966) EA. 541.**

The respondents further supported the above stance of the law by citing another decision of the CAT in **Mustapha Raphael v. East African Gold Mines Ltd, Civil Application No. 40 of 1998, CAT.** In that precedent, they argued, it was held that, an affidavit is not a kind of superior evidence: it is simply a written statement on oath. It has to be factual and free from extraneous matters such as hearsay, legal arguments, objections, prayers and conclusions.

Concerning the second limb of the PO the respondents made the following submissions: Order VI rule 15(2) of the CPC guides that, the person verifying shall specify, by reference to the numbered paragraphs of the pleadings, what he verifies of his own knowledge and what he verifies upon information received and believed to be true. Order XIX rule 3(1) of the same legislation provides that, an affidavit shall be confined to such

facts as the deponent is able of his own knowledge to prove. In case the facts are based on information, the source must be disclosed. In the matter at hand however, though the verification clause indicates that all facts in the affidavit were based on his own knowledge, the close perusal of paragraphs 6 and 8 clearly shows that, the facts under such paragraph were based on the applicant's knowledge and other persons. This is more so because, the applicant showed under paragraph 8 that he, and other persons had realised the fact deponed under that paragraph. However, the applicant did not disclose such other persons, hence the defect in the affidavit.

The respondents also referred this court to the decision by the CAT in the case of **Salim Vuai Foum v. Registrar of Cooperative Societies and 3 others [1995] TLR. 75** to support their contentions. They submitted that, this precedent held that, where an affidavit is based on information, it should not be acted upon by any court, unless the sources of information are specified.

In relation to the third limb of the PO, the respondents submitted that, the *jurat* of attestation in the supplementary affidavit at issue indicates that, the same was not sworn by applicant. It was in fact, sworn by one WILLIAM LUSAMBAGI who was introduced to the commissioner for oath by a person with a single name. This course offended section 8 of Cap. 12. These provisions, the argued, provides that, every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under the Act shall, insert his name and state truly in the *jurat* of

attestation at what place and on what date the oath or affidavit is taken or made.

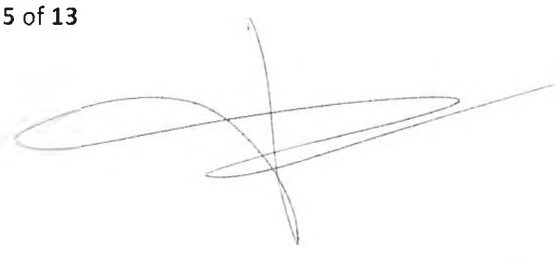
In his replying written submissions, the applicant was very brief. He submitted regarding the first limb of the PO that, there are neither arguments nor conclusions in the supplementary affidavit. Rather, it was based on the facts only.

As to the second limb of the PO, the applicant contended that, the supplementary affidavit did not violate the above cited provisions of Cap. 12. It was based on facts from the applicant's own knowledge. The use of the plural word "we" instead of a singular word "I," was a mere typing error. This error can be saved under the principle of overriding objective.

In relation to the third limb of the PO, the applicant conceded to it. He argued that, the *jurat* in fact, offended section 8 of Cap. 12. However, he argued that, it was a mere typing error for the *jurat* to show that, the affidavit was sworn by another person, i. e William Lusambagi instead of the applicant himself. He thus, agreed that, the application should be struck out, but without costs since the applicant is a layman who is seeking for justice and the PO was raised at an early stage of the application. He also prayed for the leave to refile the same.

The issue before me according to the arguments by the parties is therefore, whether or not the supplementary affidavit under scrutiny is incurably defective for the reasons shown above or for any of them.

I will firstly examine the third limb of the PO which is essentially not disputed by the applicant. In my view, though the parties agree that the



jurat offended section 8 of Cap. 12, I will not approve their accord. In fact, the section is irrelevant to the third limb of the PO. These provisions of the law only require a notary public and commissioner for oaths attesting an affidavit to disclose three particular only: his (the Notary Public and Commissioner for oaths) name, the place and the date of the oath. The *jurat* under discussion clearly reveals all these three particulars. It indicates that, the oath was taken at Mbeya on the 4th day of March, 2021 before an advocate going by the name of Daud Ramsay Mwamakamba (see at the second and third pages of the affidavit).

I therefore, find that, the *jurat* of attestation in the supplementary affidavit did not offended section 8 of Cap. 12 as contended by the respondents. Nonetheless, this finding does not mean that the supplementary affidavit did not offend any other rule/s on the law on affidavits. Indeed, my opinion is that, the circumstances of the matter at hand attracts a conclusion that, the *jurat* of attestation in the supplementary affidavit under scrutiny offended the law. This opinion is based on the following reasons: in the first place, it is common ground that, affidavits in this land are governed by various laws including the following: the CPC, Cap. 12, the Oaths and Statutory Declarations Act, Cap. 34 RE. 2019 (henceforth Cap. 34) and case law.

Order XIX rule 3(1) of the CPC for example, guides that: an 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. Moreover, the law guides that, an affidavit takes place

of oral evidence; see decisions by the CAT in the cases of **Phantom Modern Transport (1985) Limited v. D.T Dobie (Tanzania) Limited, Civil Reference No. 15 of 2001 and 3 of 2002, CAT at Dar es Salaam** (unreported) and **Juma S. Busiyah v. The Zonal Manager, (South) Tanzania Post Corporation, Civil Application No. 8 of 2004, CAT at Mbeya** (unreported).

The law further guides that, a person who intends to give evidence or who is required to do so before a court, has to make an oath or a solemn affirmation; see section 4(a) of Cap. 34 and the decision of the Court of Appeal of Tanzania (the CAT) through Msoffe, JA (as he then was), in the case of **Samwel Kimaro v. Hiday Didas, Civil Application No. 20 of 2012, CAT at Mwanza** (unreported, at pages 6 of the typed version of the ruling). It follows thus, that, the law requires the facts that can be deponed in an affidavit under Order XIX rule 3(1) of the CPC, to be made on oath or affirmation as per section 4(a) of Cap. 34. This is so since affidavits takes place of oral evidence as observed earlier.

It is further guided by the law, especially section 10 of Cap. 34 that, a statutory declaration (which obviously includes an affidavit like the one discussed above), shall be in the form prescribed in the Schedule to the Act, unless the law provides otherwise; see also the **Samwel Kimaro case** (supra, page 6). Indeed, a look at the form prescribed under the schedule to Cap. 34 shows that, a deponent of such a statutory declaration (or affidavit) shall make an oath or affirmation to be taken by a person authorised to take it. For this reasons, the CAT observed in the **Samwel Kimaro case** (supra, at pages 4-6), that, an affidavit is nothing more than

a statement made under oath, and that, the oath or affirmation is intended to add sanctity to the statement. The CAT based the above cited observation on the commentaries by Mulla, The Code of Civil Procedure, 17th Edition, Vol. 2, by B. M. Prasad, at page 849.

Moreover, section 11 of Cap. 34 empowers a Notaries Public and Commissioners for Oaths who exercises powers of the Notaries Public and Commissioners for Oaths under Cap. 12, to take such declarations under Cap. 34.

The oath or affirmation envisaged by the laws cited above is usually contained in the *jurat* of attestation of an affidavit; see the **Samwel Kimaro case** (supra, at page 6). The CAT in that case defined the *Jurat* as the clause written at the foot of the affidavit stating when, where and before whom such affidavit was sworn. It based this definition on the Black's Law Dictionary.

It follows therefore that, according to the laws cited above, a person who intends or who is required to execute an affidavit, must perform, among other things, the following steps himself: he must depone the relevant facts, verify them and make an oath or affirmation under the *jurat* of attestation before an authorised person. These steps also constitute essential ingredients of an affidavit in law; see also the **Samwel Kimaro case** (supra, at page 4-5) following the commentaries by Mulla (supra). Owing to this stance of the law, the *jurat* must clearly indicate that, the person who makes the oath or affirmation is the same person who deponed and verified the facts. A person cannot therefore, make an oath

or affirmation in an affidavit, the facts of which were deponed and verified by another person.

In the matter at hand however, the affidavit indicates that, it was the applicant PAUL MWANKUSYE who deponed and verified the facts of the supplementary affidavit. Nonetheless, the *jurat* of attestation shows that, it was the said WILLIAM LUSAMBAGI who made the oath before the commissioner for oaths. This inconsistency was fatally improper and offended the laws just cited above. This court (Aboud, J.) also supported this particular stance of the law in the case of **Mariam Khairuddin v. Glenrich Transportation Co. Ltd, Revision No. 825 of 2019, High Court of Tanzania, Labour Division, at Dar es Salaam** (unreported). The holding in this precedent was to the effect that, the fact that a *jurat* of attestation of an affidavit indicates that an oath or affirmation was made by a different person from the one who had deponed and verified the facts, is not a typing error, such irregularity is fatal and incurable. In fact, though the **Mariam Khairuddin case** (supra) made the above decision on different reasons from the ones I have listed above, it still supported the position that, such an inconsistency of the names in an affidavit is lethal to it.

Furthermore, the prescribed form in the schedule to Cap. 34 indicates that, the *jurat* of attestation of an affidavit should disclose whether the person administering the oath (attesting officer) knows the deponent of the facts personally or he has been identified to him by another person. If the deponent is identified to the attesting officer by another person, such other person must also be disclosed by name. In the supplementary affidavit

however, it is indicated that, the attesting officer did not know the deponent, but he was introduced to him by one William. In my view, the disclosure of the identifying person by a single name creates doubts and erodes the authenticity of the *jurat*. This is because, failure to disclose a full name (or other names) of such identifying person implies that, the attesting officer did not properly know the said identifying person and the deponent too. This omission enhances the impropriety of the *jurat* of attestation of the supplementary affidavit at issue.

My conclusion is therefore, that, though the supplementary affidavit did not offend section 8 of Cap. 12, it offended other mandatory laws cited above in their generality. The violations were fatal since they eroded the authenticity of the supplementary affidavit as observed previously. The contention by the applicant that the inconsistencies in the *jurat* of attention were due to mere typographical errors cannot thus, be tenable.

Moreover, as observed earlier, affidavits take place of oral evidence. They must thus, be authentic for fear of misleading courts and resulting into injustice to parties. The irregularities discussed above cannot thus, be made good under the umbrella of the principle of overriding objective as proposed by the applicant. Indeed, this principle has been recently underscored in our written laws. It essentially requires courts to deal with cases justly, speedily and have regard to substantive justice as opposed to procedural technicalities. The principle was also underscored by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported) and many other decisions by the same court.

The principle of overriding objective however, does not create a shelter for each and every breach of the law on procedure like the ones discussed above. This is the envisaging that was recently underlined by the CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported). In that case, the CAT declined to apply the principle of overriding objective amid a breach of an important rule of procedure.

Owing to the above reasons, I answer the issue posed herein above affirmatively that, the supplementary affidavit under scrutiny is incurably defective for the reasons shown above.

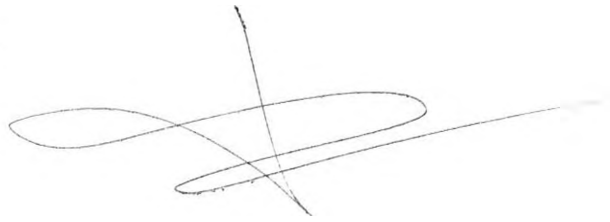
The sub-issue at this juncture is this: which orders should this court make upon making the above finding? The respondents urged this court to dismiss the application with costs. The applicant pressed it to only strike it out with leave to refile. In my settled opinion, this court cannot dismiss the application since that is not a legal remedy for a defective supplementary affidavit. This is because, the main affidavit supporting the application is still breathy. In fact, even if it is presumed (without deciding) that the main affidavit is also defective, this court could not dismiss the application. This is so because, that weakness would only render the application incompetent, which said fault would not entitle this court to dismiss it. It is our law that, a dismissal order applies only to worthless matters heard on merits or which are time barred. The only legal remedy for an incompetent application/matter is to strike it out. However, in the matter at hand, even

an order for striking out the application is uncalled for since the main affidavit is still intact.

On the other hand, I cannot strike out the supplementary affidavit and grant leave to refile it as prayed by the applicant. This is because, in law a defective affidavit cannot be struck out since it is not an independent document which institutes the matter in court. It is merely a piece of evidence supporting a chamber summons or any other matter in court. In law, an improper evidence can only be expunged, and not struck out. Again, the applicant cannot be permitted by the law to apply for refiling the supplementary affidavit through mere replying written submissions. In law, applications are made orally in court or formerly by chamber summons supported by affidavit so as to give all the parties equal opportunities to be heard on the prayers sought before the court.

Owing to the above reasons, I find that, it is needless to consider the other two limbs of the PO. This is because, the findings I have made above are capable of disposing the entire matter. I will not thus, examine the first and second limbs of the PO.

Having observed as above, I hereby expunge the applicant's supplementary affidavit from the records. Costs shall be in the course since the matter is still pending for hearing. This is because, the expunging of the supplementary affidavit does not automatically make the main affidavit supporting the application inoperative. The same is still alive as I observed previously. The application shall thus, proceed to the hearing on merits, unless the applicant will successfully move the court, according to the law,



and obtain an order granting him leave to file another supplementary affidavit. It is so ordered.

JHK. UTAMWA

JUDGE

24/09/2021.