

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF ARUSHA  
AT ARUSHA**

**MISC.LAND APPLICATION NO. 97 OF 2021  
(Original Land Case No. 23 of 2019)**

**LAZARO BAJUTA .....1<sup>ST</sup> APPLICANT**  
**LAMECK CHACHA .....2<sup>ND</sup> APPLICANT**  
**JACKLINE RWEZAULA .....3<sup>RD</sup> APPLICANT**  
**ELISIFA AMMA ..... 4<sup>TH</sup> APPLICANT**  
**JOSEPH SAMWEL MTUI ..... 5<sup>TH</sup> APPLICANT**  
**JOSEPH SLAA BAYYO .....6<sup>TH</sup> APPLICANT**  
**HAYSHI TARMO SULE .....7<sup>TH</sup> APPLICANT**  
**PAULO SAFARI TEK..... 8<sup>TH</sup> APPLICANT**  
**JAMES PAULO ..... 9<sup>TH</sup> APPLICANT**  
**MOSHI MANONGA SULLE .....10<sup>TH</sup> APPLICANT**  
**SIXBERT S.T. TEKO .....11<sup>TH</sup> APPLICANT**  
**GABRIEL HIITI SARWATT .....12<sup>TH</sup> APPLICANT**  
**EPIMACK MARGWE .....13<sup>TH</sup> APPLICANT**  
**PAULO PETER WILLIAM .....14<sup>TH</sup> APPLICANT**  
**VITALIS VIRGIL JACOB ..... 15<sup>TH</sup> APPLICANT**  
**FAUSTINE SAFARI TEKO .....16<sup>TH</sup> APPLICANT**  
**AUGUSTINO BURA AMNAAY .....17<sup>TH</sup> APPLICANT**  
**LALA NOYA SULLE .....18<sup>TH</sup> APPLICANT**  
**CHRISTOPHER KASTULI MATLE .....19<sup>TH</sup> APPLICANT**

**VERSUS**

**DANIEL AWET TEWA .....RESPONDENT**

## RULING

25/4/2022 & 13/6/2022

### **KAMUZORA, J.**

The Applicants filed an application before this court by way of a chamber summons under Order IX Rule 19 of the Civil Procedure Code, Cap 33 R.E 2019 and Part III of the Law of Limitation Act Cap. 89 R.E 2019 supported by an affidavit deponed by Bora Msafiri Mfinanga the Applicants' counsel. The Applicants seek for this court to set aside the ex parte judgment and decree by this court in Land Case No. 23 of 2019 that was delivered on 18<sup>th</sup> October 2021.

Contesting the application, the Respondent filed a counter affidavit deponed by the Respondent and a notice of preliminary objection on points of law: -

- 1. That, the Applicant's application is incompetently before this Honourable Court for being commenced by an unqualified person.*
- 2. That, the Applicant's application is incompetently before this Honourable Court for being supported by incurable defective affidavit.*
- 3. That, the Applicant's affidavit is incurably defective for being based on hearsay.*

Hearing of the preliminary objection was by way of written submissions and as a matter of legal representation, the Applicants were

represented by Ms. Bora Msafiri Mfinanga and Mr. Kizito while the Respondent enjoyed the service of Mr. Geoffrey Mollel, counsel from Prime Attorneys. Both parties filed their submissions as scheduled.

Submitting in support of the 1<sup>st</sup> point of preliminary objection the Respondent argued that, going through the Applicants chamber summons at page 2 and supporting affidavit at page 7 both documents were drawn and filed by Bora Msafiri Mfinanga as an advocate of Karatu District Council. That, as per section 3 of the Local Government Authority (District Authorities) Act, Cap. 287 R.E 2019 the Karatu District council is a local Government Authority. That, State Attorney are barred from practising as advocate while in the employment of the government as per section 17A of the Office of the Attorney General (Discharge of Duties) Act, Cap 268 R.E 2019 as amended by No. 11 of 2019.

The Respondent went on and submitted that, the above section disqualifies Ms. Bora Msafiri Mfinanga from practicing as an advocate and therefore she was unqualified person when she prepared the Applicants' chamber summons and its supporting affidavit. That, Bora Mfinanga is prohibited to commence proceedings or issue summons in terms of section 41 of the Advocate's Act Cap 341 R.E 2019 thus, she improperly acted as the advocate. In support of his submission, he cited

the case of **Aua Industrial Group Limited Vs. Wia Group Limited**, Civil Case No 44 of 2019.

Arguing in support of the 2<sup>nd</sup> point of preliminary objection, the Respondent reiterated the submission in the first point of objection and added that, the jurat of attestation did not indicate whether the deponent was known or identified to the commissioner for oaths. That, the failure to cross/cancel words and fill the jurat properly rendered the Applicants affidavit incurably defective. In support of this argument he cited the case of **Simplisius Felix Kijuu Issaka v the National Bank of Commerce**, Civil Application no 24 of 2003 CAT (Unreported).

Arguing in support of the 3<sup>rd</sup> point of preliminary objection, the Respondent submitted that, the Applicant's affidavit is incurably defective for being based on hearsay. That, the Applicant's affidavit was affirmed by Bora Msafiri Mfinanga as an advocate who was not the Applicants advocate in the proceeding leading to ex-parte decree. That, there is no any paragraph showing that she perused the case file but she claimed to be conversant with the facts of the case under paragraph 1 of the affidavit. That, the said advocate never represented the Applicants and no any evidence that she perused the case thus the claim that she was conversant with the fact is a lie.

The Respondent further submitted that, under paragraph 9 the deponent lied when said that on 17/2/2021 advocate Nicholaus Leon appeared holding brief of advocate Saitoti Zelothe while the typed proceedings at page 11 advocate Nicholaus addressed the court that he was ready for hearing and stated the number of witnesses he intended to call.

The Respondent added that, it was the deponed that no notice of the date of delivery of ex-parte judgment was issued but, as per the typed proceedings, on 15/10/2021 the summons for publication was issued and published. That, the Applicant's affidavit contains lies and cannot be relied upon to support the application under Order XIX Rule 3 (1) of the CPC. That, the remedy for a defective affidavit as per the case of **Uganda vs. Commissison of prisons, Ex-parte Matovu** [1966] E.A 514 at 520 is render the application incompetent. Basing on the strength of the submission above, the Respondent prays that the application to be struck out with costs.

Responding to the 1<sup>st</sup> point of preliminary objection the Applicant submitted that, the objection carries both point of law and facts and according to the law the same must fail. That, the claim that Miss Bora Msafiri Mfinanga is employed by Karatu District Council does not fall on

pure point of law as the same requires evidence to prove on the Applicants' counsel employment and to cement on this they cited the case of **Ibrahim Abdallah (The Administrator of the estate of the Late Hamisi Mwalimu Vs. Selemani Hamisi the Administrator of the estate of the late Hamis Abdallah**, Civil Appeal No 314 of 2020 CAT (Unreported).

The Applicants join hands with the Respondent on the requirement under section 17A of the Office of Attorney General (Discharge of Duties) Act Cap 268 R.E 2019 but submitted that, Ms. Bora Msafiri Mfinanga is not a State Attorney or a Law Officer as claimed by the Respondents counsel hence not governed by the above law. The Applicants insisted that, Ms. Bora Msafiri Mfinanga is a qualifies advocate with roll number 9630 and in a possession of a renewable certificate as per the Advocate Management System.

The Applicants added that, as per section 24(3) of the Attorney General (Discharge of Duties) Act Cap 268 R.E 2019 the Deputy Attorney General shall cause to be published in the gazette the names of all persons appointed to be Law Officers and State Attorneys. That, through the Notice, GN. No. 1011 Published on 27/11/2020 which provides the list of all appointed Law Officer and State Attorney, the said

Ms. Bora Msafiri Mfinanga is not listed. The Applicant thus prays that the 1<sup>st</sup> point of preliminary objection to be overruled.

Replying to the 2<sup>nd</sup> point of preliminary objection, the Applicants reiterated what was stated above and added that, the issue on jurat of attestation has no merit since the attesting officer did not indicate that the deponent was introduced to him meaning that, he knew her personally. To support this argument, they cited the case of **Beatrice Mbilinyi Vs. Ahmed Mabkhut Shabiby**, Civil Application No. 475/01 of 2020 (Unreported).

Responding to the 3<sup>rd</sup> point of preliminary objection on hearsay evidence the Applicants submitted that, since an affidavit is a substitute of an oral evidence and not a matter of law and procedure, a deponent is required to depone facts which she has personal knowledge and hearsay is not admissible. That, the exception of the said general rule is provided under Order IXX Rule 3 of CPC Cap 33 R.E 2019. The Applicants explained that, it is true that the Applicants counsel initially never represented the Applicants but all facts presented by the Applicants' counsel were on record of the case file and court proceedings. That, the mere fact that it was typed 2021 instead of 2019 is a mere clerical error which does not amount to hearsay evidence.

That, the contents of paragraph 8,9 and 16 are facts that the Applicants' counsel stated to be true as were found on the record of court proceeding. The Applicants were of the view that, the case of **Uganda V Commission of prison Matovu(supra)** is distinguishable from the present case and stated that in this matter the Applicants' counsel had no intention to lie. Basing on the above submission, the Applicants prays for this court to overrule all the preliminary objections with costs.

In a brief rejoinder the Respondent submitted that, the submission by the Applicants on the 1<sup>st</sup> point of preliminary objection intends to mislead the court by trying to make it believe that the State Attorney listed in the schedule to the GN. No.1011 of 2020 made under section 24(4) of Cap 268 R.E 2019 are the only State Attorney in Tanzania a fact which contravenes section 3 of the same law. That, the CMA record in Labour Dispute No. CA/ARS/193/2017 **Willy Bura Daffi vs. Halmashauri ya Karatu** and the court proceedings of this court shows that Bora Msafiri Mfinanga introduced herself as a solicitor of Karatu District Council. That, even the address of the drawer contains the address of advocate Bora Msafiri Mfinanga which is an admission that the she is the solicitor of Karatu District Council.



The Respondent added that, the submission that the advocate has a roll number and a valid practicing certificate is misconceived as once a person is a State Attorney, she is rendered unqualified to practice as an advocate. That, Ms. Bora Mfinanga is estopped from denying the fact that she intentionally caused the Respondent to believe that she is a State Attorney and supported this issue with section 123 of the Evidence Act Cap 6 R.E 2019 and the case of **Parvis Gulamali Fazal Vs. National Hosing Corporation**, Civil Appeal No 166 of 2018 CAT (Unreported).

Regarding the 2<sup>nd</sup> point the Respondent re-joined that, the case of **Beatrice Mbilinyi Vs Ahmed Mabkhut Shabibi**, Civil Application No. 475/01 (Unreported) is highly misconceived and without merit. That, it is clear in the said case the court agreed that there is no law requiring the commissioner for oaths to indicate whether the deponent was known or identified to him the decision which the Respondent stated that was made in forgetfulness of the case of **Simplisius Felix Kijuu Issaka and the National Bank of commerce(supra)**.

On the 3<sup>rd</sup> point of preliminary objection the Respondent submitted that, the verification in the affidavit is false as the Applicants' advocate admitted to have not perused the case file and having stated false dates

gives impression that the verification clause is false, baseless and unfounded. With the strength of the submission above the Respondent prays for this court to regard the preliminary objections as meritorious and strike out the application with costs.

That being the submission made by both parties in respect to the raised points of preliminary objections the question for the determination by this court is whether the points raised are of merit.

Starting with the 1<sup>st</sup> point of preliminary objection, the matter for consideration is whether this application has been commenced by unqualified person. It is without doubt that the drawer of the Applicants' documents and deponent of the affidavit in support of application is one Ms. Bora Msafiri Mfinanga. It was contended by the Respondent that, Bora Mfinanga is working with Karatu District Counsel thus unqualified to practice as private advocate. The award from the CMA was attached to the Respondent's submission trying to convince this court as to the status of Bora Mfinanga. In that award one Bora Mfinanga was recorded as State Attorney.

The Applicant on the other denied such fact and insisted that Bora Mfinanga is a private advocate with roll No. 9630 and in possession of renewed practicing certificate. The Applicant attached the Government

Notice No. 1011 of 2020, the Attorney General (Appointment of Law Officers and State Attorney) Notice of 2020 listing all Law Officers and State Attorneys employed in the ministries, local government authorities, independent departments, agencies and similar public institutions so appointed. It is on that basis the Applicant claim that Bora Mfinanga is not among the listed State Attorneys or Law Officers in that GN. No. 1011 hence not a State Attorney or Law Officer within the meaning of the law. The Applicants maintained that, Bora Mfinanga possesses a valid practising certificate hence a private advocate not bound by the provisions in the Attorney General (Discharge of Duties) Act Cap 268 R.E 2019 thus qualified to practice as private advocate.

It is clear that, section 17A (1) of the Office of the Attorney General (Discharge of Duties) Act Cap 268 R.E 2019 restricts a Law Officer or State Attorney from practising as an advocate. The said provision states that,

*"A Law Officer or State Attorney shall not, for the whole period of service as a Law Officer or State Attorney, practise as an advocate."*

This court is aware of the existence of paragraph 4(1) of the Office of the Attorney General (Discharge of Duties) Guidelines GN No. 1008 of 2020 which states that,

*"Subject to section 34 of the Advocates Act, a Law Officer or State Attorney shall not, for the whole period of service as a lawyer or State Attorney, **be issued with practising certificate as an advocate.**"*(Emphasis mine)

The question to be answered here is as to whether one Bora Msafiri Mfinanga is a Law Officer or State Attorney within the meaning of the law hence restricted in practicing as a private advocate. While such question arises, I am of the mindful of the requirement of law that point of objection must be on pure point of law. It is settled law that a pure point of law does not arise if there are contentions on facts yet to be ascertained by evidence. For this see the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] E.A 696.**

It is in record that, Bora Mfinanga denied being employee of Karatu District Counsel. However, the address to reach Bora Mfinanga as per the documents filed in court is through Karatu District council and she introduced herself as advocate. In my view, that does not conclusively mean that she is a State Attorney or a Law Officer but just a mere address.

It is also my view that, whether Bora Msafiri Mfinanga is an employee of Karatu District Council as a State Attorney or Law Officer is a fact that needs evidence to prove. That being the case, it cannot be a pure point of Law. This would have been different if no dispute that the said Bora Mfinanga was actually an employee of Karatu District Council as State Attorney.

Assuming we maintain that it is a point to be determined, it is in record that during their submissions each party attached document in need to prove the status of Bora Mfinanga. While the Respondent attached the CMA award acknowledging Bora Mfinanga as State Attorney, the Applicant attached the notice which appointed all State Attorneys and Law Officers and in which Bora Mfinanga is not among the listed. Thus, in my view, Bora Mfinanga remain a private advocate until proved otherwise. Such a status is also found under the Advocate Management system (e-wakili).

I therefore maintain that, where an objection raises a need for proof then, such objection turns to be matter of fact that cannot be raised of preliminary stages of the case. That being said I find no merit in the 1<sup>st</sup> preliminary point of objection and it is dismissed.

The second point is that, the Applicant's application is incompetently before this Honourable Court for being supported by incurable defective affidavit. The defects so appointed are that, the Applicants' affidavit did not indicate whether the deponent is known or identified to the Commissioner for oath in the jurat of attestation. That, there was failure to cancel the word which could show if the deponent was known to the attesting officer or was so identified thus rendering the affidavit incurably defective.

It is undisputed that there was no cancelling of the word to show if the attesting officer knew the deponent or was just introduced by someone else. However, I do not agree with the Respondent's contention that such defect is incurable. In my view, it does not go the root of the matter hence can be cured by the overriding objective principle by allowing the parties to do the needful and rectify such an omission. I therefore find no merit in this objection and proceed to dismiss the same.

Regarding the 3<sup>rd</sup> point of preliminary objection it was contended that the Applicants' affidavit is incurably defective for being based on hearsay. It was alleged that the Applicants' counsel deponed to be conversant with all facts of the case but the truth to some of the facts

proves that she lied in court and she was not aware of some of the facts. The Applicants' counsel on the other hand admitted that she had no direct knowledge to some of the fact, but claimed that she was able to show the source of information.

As a general rule of practice and procedure, an affidavit for use in court being a substitute for oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of own personal knowledge or from information which she/he believes to be true.

It is the claim by the Respondent that the affidavit should be confined to the facts known to the deponent as required under Order XIX Rule 3(1) of The Civil Procedure Code Cap 33 R.E 2019. The said provision is reproduced for easy of reference.

*"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"*

Again, the court of Appeal of Tanzania in the case of **Anatol Peter Rwebangira Vs the Principal Secretary, Ministry of defence and National Services and the Honourable Attorney General**, Civil Application No. 548/04 of 2018 CAT at Bukoba (Unreported) held that,

*"It is thus settled law that, if the facts contained in the affidavit are based on knowledge, then it can be safely verified as such. However, the law does not allow a blanket or rather a general verification that the facts contained in the entire affidavit are based on what is true according to knowledge, belief and **information without specifying the respective paragraphs.** In the present application, according to the Applicant's verification clause which we have earlier on reproduced, it is not possible to decipher the facts which are true based on the Applicant's knowledge and those based on his belief. "(Emphasis provided)*

Now turning to the affidavit filed in support of the application, the same contains facts which are in her knowledge and facts which must have been obtained from other people or record and other source as so depicted by the Respondent. It was expected that, the verification clause will clear the doubt and show which facts were to the best knowledge of the deponent which facts were obtained from other people or other source. However, there was a general verification as depicted here under: -

*"I, BORA MSAFIRI MFINANGA being the counsel for the Applicant do hereby verify that what is stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 ,17 ,18 and 19 are true to the*



*best of my own knowledge and record of the case which I verily believe to be true."*

The quoted paragraph contains verifications on facts that the deponent believes to be true on his own knowledge, others basing on the record of the case which she believes to be true. The deponent in her verification clause has not stated as to which facts are within her personal knowledge and those she obtained from the records of the case which she believes to be true. This act to me amounts to a blanket or general verification which is not allowed under the law.

In the case of **Augustino Lyatonga Mrema & others V The Attorney General & others** [ 1996] TLR 273 it was held that,

*"Failure to disclose the source of information renders the affidavit defective"*


Basing on what has been stated above, I find merit in the 3<sup>rd</sup> point of preliminary objection that the affidavit filed in support of the application is incurably defective and the same is upheld.

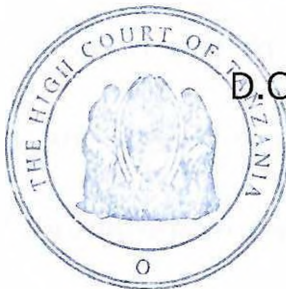
Since it is a requirement of the law that the application like the one before this court is to be made by way of a chamber summons supported by an affidavit, and since the affidavit filed in support of this application has been found to be defective, the whole Applicants' application is incompetent before this court.

That being said, uphold the 3<sup>rd</sup> preliminary point of objection and accordingly strike out the incompetent application with costs.

It is so ordered.

**DATED** at **ARUSHA** this 13<sup>th</sup> day of June 2022.

  
D.C. KAMUZORA  
JUDGE

The seal of the High Court of Tanzania is circular. It features a central emblem depicting three figures, possibly judges or historical figures, seated under a canopy. The text "THE HIGH COURT OF TANZANIA" is inscribed around the perimeter of the seal, and a small "0" is visible at the bottom center.