

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY
AT MWANZA

MISC. LAND APPLICATION NO. 12 OF 2022

(Arising from Land case No. 23 of 2009)

IDRISA R. HAYESHIAPPLICANT

VERSUS

EMMANUEL ELINAMI MAKUNDI..... 1ST RESPONDENT

PERMANENT SECRETARY

MINISTRY OF WORKS 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

MWANZA CITY COUNCIL 4TH RESPONDENT

RULING

20th May & 24th June, 2022

Kahyoza, J:

This ruling is in respect of the preliminary objection **Emmnauel Elinami Makundi** raised to the effect that:-

1. The application is bad in law and therefore it is incurably defective for being supported by a defective affidavit as the same is not properly verified.

The appellant and the respondents were represented. The preliminary hearing was heard orally. Mr. Galati the respondent's advocate submitted in

support of the preliminary objection that the applicant did not specify in the verification, which facts are true based on his personal knowledge and which facts are true based on his belief.

Mr. Emmanuel John, the applicant's advocate conceded that the verification clause to the applicant's affidavit was defective.

It is not in dispute that the verification clause to the applicant's affidavit is defective. The only dispute is what is the consequence of a defective verification to an affidavit and to an application.

The applicant's advocate submitted that once it is proved that the verification is defective the affidavit is rendered incurably defective consequently the application which is not supported by an affidavit is incompetent application. It must be struck out. To support his contention, he cited the case of **Anatory Peter Rwechungura V. Principal Secretary Ministry of Defence and Another**, Civil Application No. 548/4 of 2018 (CAT- unreported).

Ms. Subira, the State Attorney who appeared for the second, third and for fourth respondents supported the submission advanced by the first respondent's advocate.

The applicant's advocate opposed the contention that a defective verification clause renders the affidavit incurably defective. He submitted that an affidavit with a defective verification clause was curable by amendment. He cited the case of **Sanyau Service Station Limited V. B.P. Tanzania Limited (Now Puma Energy (T) Limited)** Civil Application No. 185/17 of 2018 (CAT- unreported), where the Court granted leave to amend an affidavit where it found that there was no the verification clause. He submitted that **Sanyau Sevice Station Limited** was decided a few days after the court handed down the decision in **Anatory Peter Rwechungura**. Thus, the Court of Appeal made its in **Anatory Peter Rwechungura** aware of the decision in **Sanyau Sevice Station Limited**.

The applicant's advocate referred to the decision of the Supreme Court of Seychelles in **Myrna Michael V. Jean Chande Michael** [2020] SCSC 302, where it was decided that if the verification clause is defective the court may decide to hear the case on merit or the applicant may be allowed to remedy by filing another affidavit.

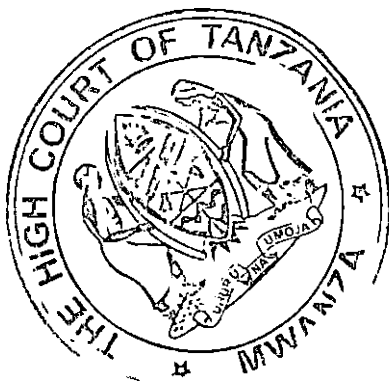
Having heard rival submissions, this Court is called upon to decide on what is the consequence of a defective verification clause to an affidavit and an application. It is not disputed that the affidavit is written evidence. It is

settled that an affidavit must be based on deponent's personal knowledge and if it is based on other sources, then the source should be disclosed. Further, the deponent must specify which facts are based on personal knowledge, on information and which are based on belief. Failure to disclose the source of information renders an affidavit defective.

A defective affidavit cannot support an application. Given the two positions of the Court of Appeal cited by the parties, this court is at liberty to take any of the two positions. I am at liberty to order an amendment of the affidavit or to strike out the application for want of an affidavit. I wish to state my position categorically that the law as it stands, a defective affidavit may be amended. The problem with the applicant's prayer for amendment is that the applicant's advocate prayed to amend the affidavit after the first respondent's advocate had raised a preliminary objection. It is trite law that an amendment would not be ordered to pre-empt a preliminary objection. See **Yazidi Kassimu t/a Yazidi Auto Electric Repairs v AG.**, Civ. Application No. 354/05 of 2019 (CAT unreported). Not only that but also this case has been in courts' corridor for a long time it is important for the applicant to put records proper if he wishes to further prosecute his case.

To allow the applicant to amend the affidavit would amount to pre-empting the preliminary objection raised by the first respondent and the law regarding the consequences of a defective affidavit is uncertain.

In the upshot, I sustain the preliminary objection, that the affidavit is incurably defective. A defective affidavit cannot support an application. Consequently, the application is incompetent as a result I strike it out with costs.



A handwritten signature in black ink, appearing to read "J.R. Kahyoza".

J.R.Kahyoza
Judge
24/06/2022

Court : Ruling delivered in the virtual presence of Mr. Emmanuel the applicant's advocate and Mr. Galati, Advocate for the first respondent and the rest of absent.

A handwritten signature in black ink, appearing to read "J.R. Kahyoza".

J.R.Kahyoza
Judge
24/06/2022