

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA**

MISC. LAND APPLICATION NO. 77 OF 2021

(From the High Court of Tanzania at Mbeya in Land Appeal No. 56 of 2019. Originating from the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 73 of 2017)

CATHERLINE O. AMBAKISYE.....APPLICANT

VERSUS

MARIA SYANGYOMBO.....RESPONDENT

RULING

Date of Hearing: 21/04/2022
Date of Ruling : 01/06/2022

MONGELLA, J.

This is a ruling on preliminary objection filed by the respondent against the applicant's application for leave to appeal to the Court of Appeal. The applicant's application is against the decision of this Court rendered in Land Appeal No. 56 of 2019. The preliminary objection is on one major point to the effect that the application is incompetent for being supported by an incurably defective affidavit which offends the mandatory provision of section 7 of the Notaries Public and Commissioner for Oaths Act. The preliminary objection was argued orally by the parties' counsels.



Mr. Dickson Mbilu, learned counsel for the respondent found the applicant's application incompetent for offending the provisions of **section 7 of the Notaries Public and Commissioners for Oaths Act, Cap 12 R.E. 2019**. Referring to the provision he submitted that the provision prohibits a commissioner for oaths to exercise any of his powers as commissioner for oaths in any proceeding or matter in which he is advocate to any of the parties or in which he is interested. Commenting on the applicant's affidavit, he argued that the same was prepared by one, advocate Rosemary Brasius Haule, attested by her and she is the one representing the applicant in the matter at hand.

He was therefore of the view that the act offends the requirement under **section 7 of the Notaries Public and Commissioners for Oaths Act**. He referred the case of **Thadei Paul Komu & 2 Others vs. Michael Paul Komu**, Misc. Civil Application No. 519 of 2017 (HC at DSM, unreported) in which it was held that non-compliance with section 7 of Cap 12 renders the application incompetent. To pre-empt the applicant, Mr. Mbilu further cited the case of **Abubakar G. Kushoka & Another vs. Bank of Africa & 2 Others**, Misc. Land Application No. 97 of 2020 (HC at Mbeya, reported at Tanzlii) arguing that the defect cannot be cured even under the overriding objective principle, which in essence is not a panacea of all ills. He prayed for the application to be struck out with costs.

Mr. Patience Maumba, learned advocate, represented the applicant. He started by conceding that the applicant's affidavit has been attested by Ms. Haule who works in the chambers that prepared the pleading. On the other hand however, he disputed the argument that the affidavit is



incurably defective. He distinguished the case of **Thadei Komu** (supra) cited by Mr. Mbilu on the ground that no critical analysis of section 7 of the Notaries Public and Commissioner for Oaths Act was provided in that case.

He contended that the court in that case only defined the word "shall" which is currently ineffective. Analysing the contents of the provision, he submitted that it provides for two things being: One, that it prohibits an advocate to be a commissioner for oath in proceedings in which he is an advocate; and two, that it prohibits the advocate to be a commissioner for oaths in a matter in which he has interest.

Explaining what amounts to proceedings, he contended that proceedings start from the time the case is filed to the judgment stage. In consideration of his view, he argued that Ms. Haule attested the application documents while there were no proceedings in place in court. In support of his argument, he referred the case of **NADDS Bureau de Change Limited & Another vs. Y2K Bureau de Change Ltd.**, Commercial Application No. 8 of 2021 (HC at DSM, Comm. Div., reported at Tanzlii) in which the import of section 7 was discussed. He thus prayed for the preliminary objection to be overruled.

On the other hand however, he argued that in the event the court agrees with the preliminary objection raised, it should not punish the applicant on the mistake of the advocate. He added that even if the matter is struck out it shall be re-filed by the applicant thus prolonging the court process. In the premises he argued that the remedy is not striking out the



application, but ordering an amendment. In support of his argument he referred the book titled **Law of Pleadings in India, 14th Edition, Eastern law House at page 58-59**; and the case of **VIP Engineering & Marketing Ltd. vs. Said Salim Bhakresa Ltd.**, Civil Application No. 47 of 1996.

In rejoinder, Mr. Mbilu challenged the argument by Mr. Maumba to the effect that when preparing the application, the same was not part of the proceedings. He argued that the documents were part of the proceedings because they are related to the matter at hand. He further countered the argument that the striking out of the application shall amount to punishing the applicant for the mistake done by her advocate. On this, he argued that the applicant engaged and entrusted the advocate, therefore whatever mistake committed by the advocate is deemed to have been committed by the party.

Referring to what had transpired since the filing of the application; he added that the applicant was given room to amend the application whereby he filed a supplementary affidavit. However, he has still filed a defective application amounting to an abuse of the court process. He insisted for the application to be struck out with costs.

After considering the arguments by the learned counsels, I have noted that there is no dispute on the fact that the commissioner for oaths who attested the applicant's affidavit in support of the application, that is, Ms. Rosemary Brasius Haule, is one of the advocates in the law chambers representing the applicant and has attended the matter on several occasions. The dispute therefore lies on whether the defect is incurable to



the extent of vitiating the application. While Mr. Mbilu argued that the defect is incurable even with the overriding objective principle, Mr. Maumba was of the argument that the defect is curable by an order to amend the affidavit.

To start with, I wish to reproduce hereunder, the provisions of **section 7 of the Notaries Public and Commissioner for Oaths Act**. It provides:

“No commissioner for oaths shall exercise any of his powers as a commissioner for oaths in any proceeding or matter in which he is an advocate or in which he is interested.”[Emphasis added].

Mr. Maumba based his argument on what entails “proceedings” in law. He had a view that proceedings start from where the case is filed in court to the judgment. With that notion he argued that while the affidavit was being prepared and attested, the proceedings had not yet started, thus it cannot be said that Ms. Haule was an advocate in the proceedings in this matter. To that effect, he referred the case of ***NADDS Bureau de Change Limited & Another vs. Y2K Bureau de Change Ltd.*** (supra).

I have gone through the cited case, and with all due respect, I find it distinguishable from the circumstances in the matter at hand. In fact, I find that Mr. Maumba misconceived the reasoning of the Court in that case. In this case the Court dealt with only one limb of the provision of section 7 of the Act, which prohibits a commissioner for oaths with an interest in the case to exercise powers as commissioner for oaths in the particular case.



In this case the commissioner for oaths who attested the counter affidavit contesting the application for extension of time to file an appeal was a witness in the same case while being tried in the subordinate court. The Court in consideration of the facts and evidence adduced in that case ruled that the said commissioner for oaths had no interest in the case, though appeared as a witness.

The matter at hand does not involve a commissioner for oaths with an interest in the case, but a commissioner for oaths who is an advocate in the case she attested the affidavit in support of the application. In my view, pleadings are the ones initiating the proceedings in court. In the premises, whatever is contained in the pleadings cannot be disassociated with the proceedings. I therefore find Mr. Maumba's argument lacking merit.

Mr. Maumba prayed for the application not to be struck out, but for an amendment to be ordered. Considering the defect, I am of the view that for being attested by the applicant's advocate, the affidavit becomes a nullity. I agree with Mr. Mbilu that this is a defect incurable even under the overriding objective principle. The same cannot be amended, but struck out. Once struck out the application remains incompetent before the Court for lack of supporting affidavit.

Having observed as above, the application is hereby found to be incompetent before this Court and consequently struck out. Considering that the defect resulted from the negligence of the applicant's



advocate, the advocate shall bear the costs of the application. It is so ordered.

Dated at Mbeya on this 01st day of June 2022.


L. M. MONGELLA
JUDGE

Court: Ruling delivered in Mbeya in Chambers on this 01st day of June 2022 in the presence of the respondent and the parties' counsels, Mr. Patience Maumba and Mr. Ibrahim Athumani, respectively.




L. M. MONGELLA
JUDGE