

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**MISC LAND APPLICATION NO. 8 OF 2022**

*(C/f Land Appeal No. 32/2021 High Court of Tanzania Moshi District Registry;*

*Original Application No. 22/2017 Same District Land and Housing Tribunal)*

**ELIESIKIA EMMANUEL MGONJA ..... APPLICANT**

**VERSUS**

**FIRIMINI STEPHENO MBUGU ..... RESPONDENT**

11/5/2022 & 29/06/2022

**RULING**

**MWENEMPAZI, J:**

The applicant is applying for leave to appeal to the Court of Appeal citing Section 47(1) of the Land Disputes Courts Act, Cap. 2016 R.E. 2019. He intends to challenge the decision of this court (Hon. B.R. Mutungi, J). The application is supported by an affidavit sworn by Eliesikia Emmanuel Mgonja, the applicant herein named.

The Respondent is opposing the application and has duly filed counter affidavit to that effect. He has also filed a notice of Preliminary objection with the point of law as follows:



*"that applicant's affidavit is incurably defective for not disclosing if the deponent was known or identified to the advocate on the attestation clause contrary to section 10 and the schedule thereto of the Oaths and Statutory Declarations Act, Cap. 34 R.E. 2019."*

Hearing of the preliminary objection proceed by way of written submission pursuant to the order of the court dated 16<sup>th</sup> March 2022. The applicant was unrepresented and the Respondent was being represented by Mr. Sylvester Kahunduka, learned advocate. Both the objection and main application were ordered to proceed simultaneously.

The counsel for the applicant has submitted commencing with position of the law. Section 10 of the Oaths and Statutory Declaration Act, Cap. 34 R.E. 2019 provides that's: -

*"Where under any law for the time being in force any person is required or is entitled to make any statutory declaration, the declaration shall be in the form prescribed in the schedule to this Act.*

*Provided that where under any written law a form of statutory declaration is prescribed for use for the purposes of that law such form may be used for that purpose."*

The schedule indicate that the commissioner administering the Oath must indicate in the jurat of attestation how he came to know the deponent. In

the affidavit of the applicant, the jurat of attestation does not show how the deponent was known to the Commissioner for Oaths. The jurat is ambiguous as it does not show if the deponent was known to the Commissioner personally or was introduced to him by some other persons.

In order to support the position he has argued, the counsel cited the case of **Omary Ally Omary vs Iddi Mohamedi and others, Civil Revision No. 90 of 2003**, Court Appeal of Tanzania at Dar es Salaam where the court held that:

*"...as a general rule a defective affidavit should not be acted upon by a court of law, but in appropriate cases where the defects are minor, the courts can order an amendment by way of filing fresh affidavit or by striking out the affidavit but if the defects are on substantive nature, no amendment should be allowed as they are a nullity and there can be no amendment to a nothing."*

The above quoted case was referred in the case of **Waziri Bukuku vs Halima Kondo, Misc Land Case Application No. 911 of 2018**, where Hon. V.L. Makani, J had the following observation, namely: -

*"...an affidavit is evidence on oath; therefore, it has to be stated fully in the jurat of attestation as to whether the Commissioner for oaths knew the deponent or the deponent was identified to him for the purpose of Commitment. Failure to indicate such an important statement in the jurat of*



*attestation renders the affidavit incurably defective for lack of disclosure of the identity of the deponent."*

In the case of **Nelson Mwakenya vs Mbawala David**, Misc. Land Application No. 65 of 2018, High Court Mbeya Registry, Hon. Utauwa J. held that:-

*"the courts must indeed be certain that it was in fact, the deponent mentioned in the jurat, and not any other person, who took the oath before the Commissioner. This stating clearly that, he either knew the deponent personally or that, the deponent was introduced to him (commissioner) by a person known to him (commissioner) personally. The rationale of the provisions of law affidavits are vital in law, they take place oral evidence."*

In the above case the honourable judges concluded by stating that courts should not act on affidavits sworn by persons whose identity was not certain to the commissioner administering the oaths, otherwise there will be an eminent danger of being misled. At conclusion the respondent prays the application to be struck with costs.

In the submission by the applicant to counter the submission in support of the preliminary objection he argues that the counsel for respondent is "trying to waste time" for nothing relying on the case of **Nelson Mwakenja vs Mbawala David** (supra).



The jurat of the applicant's affidavit reads:

*"Affirmed at Same by the said Elisikia Emmanuel  
Mgonja who is known to me/introduced to  
me by.....  
the latter being known to me personally in my  
presence this ..... Day of .....2022."*

.....

*Deponent*

The applicant has submitted that I quote: -

*"the dash/track symbol at the blank, obviously proves that the  
applicant was not known/introduced to the Commissioner for  
Oaths by any person but himself/personally, any written place  
which is stricken by a ball pen means that such words are  
eliminated from the said written paragraph/sentence. For this  
reason, the applicant prays the preliminary objection raised by  
respondents to be dismissed and the application to proceed."*

I have read the submission and gauged them in relation to the document's  
in the application; as shown above in the quote, the affidavit by the  
applicant is indeed defective. It is not clear whether the applicant was  
known to the Commissioner for Oaths or was identified to him. It is  
ambiguous. I have the view, it would be clear if 'the striking through' would  
have been made in the words "introduced to me by".

Though the applicant has attempted to justify the mistake by referring to the respondent's counter affidavit that there are same errors as in the applicant's affidavit still I find it not tenable to justify as he would like to convince this court.

The counter affidavit has a jurat which read as follows: -

*"Affirmed at Same by the said FRIMINI STEPHANO  
MBUNGU known to me personally/identified to  
me by Sylvester Kahunduka; the latter being  
known to me personally in my presence  
this 22<sup>nd</sup> day of February 2022."*

.....  
Deponent

One thing is clear in this case, the deponent was introduced by Sylvester Kahunduka. That is not the case in the applicant's affidavit. It is not clear whether the deponent was known or introduced by ..... person. As shown clearly in the authorities cited, an affidavit is a substitute of oral evidence. An identity of the witness must be certain to avoid being misled. The defect is fatal and goes to the root of the case to the extent of not being remedied by an overriding objective.

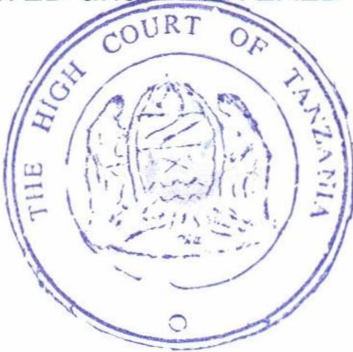
Under the circumstances, the application is defective for lack of the affidavit supporting the application. Hence, the application has be struck out. The objection is therefore sustained and the application is struck out with costs.





It is ordered accordingly.

DATED and DELIVERED at Moshi this 28<sup>th</sup> day of June, 2022.



  
**T. MWENEMPAZI**  
**JUDGE**

Ruling delivered in court in the presence of both parties.

  
**T. MWENEMPAZI**  
**JUDGE**