

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

MISC. LAND APPLICATION NO. 118 OF 2021

*(Arising from the decision of the High Court of Tanzania in Land Appeal No.
06 of 2021)*

LEMI N. SEKAGI -----APPLICANT

VERSUS

CHARLES NGUSA SEKAGI -----RESPONDENT

RULING

*Last Order: 14.07.2022
Ruling Date: 14.07.2022*

M. MNYUKWA, J.

This application is brought under Section 5(1)(c) of the Appellate Jurisdiction Act, Cap 141 R.E 2019, and section 47(2) of the Land Disputes Courts Act, Cap 216 R.E 2019 and Rule 45(a) of the Court of Appeal Rules, 2019. The applicant sought leave to appeal to the Court of Appeal against the decision of this Court delivered on 30th November 2021 before Mnyukwa, J. The applicant's application is supported by an affidavit sworn by Bernard Otieno, the learned counsel for the applicant. The application



is opposed by the respondent who filed a reply to the Affidavit sworn in by Charles Ngusa Sekagi, the respondent in this application.

Briefly, it goes thus; before the District Land and Housing Tribunal for Geita at Geita (the trial tribunal), the applicant in this application was the 1st respondent and the respondent in this application was the applicant who sued the respondents claiming vacant possession on rented business rooms built on plot No. 31 Block E, Geita against the second respondent, one Japhet Sekagi and prayed for the trial tribunal to declare that the late Charles Sekagi was the owner of the house situated at Plot No. 34 Block E, Geita against the first respondent. The applicant prayed for an eviction order against the respondents.

At the end of the trial, the trial tribunal held that, the applicant in this application who was the first respondent before the trial tribunal is the lawful owner of the property on Plot No 34 Block E, Geita and the property on Plot No. 31 Block E, Geita belongs to the deceased Charles Sekagi of whom the respondent is the administrator of his estate. Aggrieved with the said decision, the respondent in this application one Charles Ngusa Sekagi appealed to this court and upon determination of the appeal, this court overruled the decision of the trial tribunal in respect



of plot No. 34 Block E, Geita thus the late Charles Sekagi was the rightful owner.

Aggrieved, the applicant is now before this court in respect of section 47(2) of the Land Dispute Courts Act Cap 216 RE 2019 with the prayers that:-

- i. That this honourable court be pleased to grant leave in respect of Land Appeal No. 06 of 2021 with a view to allow the applicant to appeal to the court of Appeal of Tanzania against the decision of that appeal.*
- ii. That the respondent to bear the costs of this appeal.*
- iii. Any other reliefs this court may find just and fit to grant.*

The application was argued orally, whereas the applicant who has the service of Mr. Vianey Mbuya, learned counsel, was the first to submit and the respondent appeared and submitted in person, unrepresented.

In his submissions, the applicant's learned counsel avers that, the applicant was dissatisfied by the decision of this court in Land Appeal No 06 of 2021 delivered on 30.11.2021 and therefore, prays for leave to appeal to the Court of Appeal. He went on that, the law requires the applicant to apply for leave under section 5(1)(c) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 and section 47(2) of the Land Disputes



Courts Act Cap 216 RE 2019 and Rule 45(a) of the Tanzania Court of Appeal Rules, 2019.

He went on that, the application is supported by the applicant's learned counsel affidavit and prays this court to adopt it and form part of his submissions. He refers to the affidavit specifically at paragraph 4 (a)-(e) which contains the reasons as to why she asked for leave to go to the Court of Appeal, he prays this court to allow the application.

Responding to the applicant's submissions, Mr. Charles Ngusa Sekagi, the respondent herein, prays to adopt his counter affidavit to form part of his submissions. He opposed the applicant's submissions for the reasons stated on his counter affidavit adding that the land officer was not his witness and the payment receipt is not a proof of the ownership. He went on that, the use of audio teleconference to hear the appeal was the Order of the court and parties did not complain if they were not able to follow properly the proceedings. He therefore prays the application to be dismissed since the applicant is also the heir of the diseased.

The respondent went on that, the affidavit sworn by the applicant's advocate is fatal defective on the verification clause. He avers that, the counsel, Bernard Otieno was not engaged to represent the applicant in the trial tribunal and in this Court rather for drawings only and thus the



advocate is not aware of the facts. He retires prays this application to be dismissed.

The applicant's learned counsel was brief on his rejoinder as he reiterates his submissions in chief.

After the submissions by both parties, I noted that the respondent introduced a legal point that the affidavit is incurably defective in the verification clause, at the end of his submissions. The point raised needs to be determined before embarking into the submissions by the parties on merit. In the circumstance, as the matter was raised by the respondent and the applicant did not respond to it, that being the point of law, I called upon parties to address this court specifically on the point.

The applicant's learned counsel, denied the affidavit to be defective, for what is stated, is based on the point of law. He avers that, on the first paragraph of the affidavit, it shows that, he was instructed by his client and agrees that, the source of information of paragraph 2 was not stated. He went on that, the contents of paragraph 3, 4 and 5 based on his personal knowledge. He went further, citing the case of **Nomreco Construction (Nomreco) vs DSM Water and Sewage Authority (DAWASA)** HCT, Commercial Case No. 47 of 2009 that the error is curable by amendment.



The respondent insisted that the affidavit is defective. Referring to paragraph 4(d) of the affidavit, he claims that the claim that the applicant was not afforded with the right to cross examine and since the advocate did not represent parties, he was required to disclose the source of information.

Having heard both parties, specifically on the point of law as to whether the application is incompetent and bad in law for being supported by a defective verification clause, the issue for determination is whether or not the verification under attack is defective and if yes, what is the consequence.

Going to the records, and for ease of reference, the verification clause reads as I reproduce:-

VERIFICATION

"I BERNARD OTIENO, being the counsel for the Applicant do hereby verify and state that what has been stated in paragraph 1,2,3,4 and 5 is true to the best of my own knowledge".

As it was stated in **Director of Public Prosecution v. Dodoli Kapufi and Patson Tusalile**, Criminal Application No. 11 of 2008 (unreported) the verification clause is simply defined as:-



"...that part of an affidavit which shows the facts the deponent asserts to be true of his own knowledge and those based on information or beliefs".

As to the rationale of verifying an affidavit, the Court of Appeal in **Lisa E. Peter v. Al- Hushoom Investment**, Civil Application No. 147 of 2016 (unreported) quoted with approval the Indian case of **A.K.K. Nambiar v. Union of India (1970) 35 CR 121** which explained the importance of a verification clause in affidavit as follows:

"The reason for verification of affidavits is to enable the court to find out which facts can be said to be proved on the affidavit evidence or rival parties' allegations may be true to information received from persons or allegation may be based on records. The importance of verification is to test the genuineness and authenticity of allegation and also to make the deponent responsible for allegations. In essence verification is required to enable the court to find out as to whether it will be safe to act on such affidavit evidence. In the absence of proper verification clause, affidavits cannot be admitted as evidence".

From the cited cases above, verification clause is one of the essential ingredients of any valid affidavit which must show the facts the deponent asserts to be true of his own knowledge and those based on information or beliefs.



Reverting to the application at hand, the respondent claims that, the affidavit by the applicant is defective for wanting of proper verification. He avers that, the applicant learned counsel did not represent the applicant in the courts below and specifically on the Land Appeal No. 06 of 2021 before this court and the information he sworn on the affidavit, were from the applicant and not from his personal knowledge and therefore renders the affidavit defective as he gave an example by referring to paragraph 4(d) of the affidavit. The applicant's counsel, though denied that, the affidavit is not defective as claimed by the respondent, he admitted that the information on paragraph 2 of the affidavit were handled down to him by his client, the applicant and it was less of his personal knowledge.

To ascertain the respondent's claims, it is with no doubt that the applicant learned counsel admitted that the content of paragraph 2 of the affidavit were information from his client and consequently were not a grasp of his personal knowledge. Much as observed, I had time to revisit the records of this court in Land Appeal No. 06 of 2021, and it is on records that, parties prosecuted their case in person without engaging the service of advocates, and therefore, the applicant learned counsel has no chance to grasp what was sworn on his affidavit from his own knowledge rather the information was handled down to him from a person who was aware



of the matter in court, probably the applicant. And as a matter of law, the learned counsel was required to state the source of information.

It is a settled position of law that, an affidavit must base 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.

As I went through the whole affidavit, from paragraph 1 to 5, all what was stated and sworn were not from the applicant's learned counsel personal knowledge and therefore, as agreed to by the applicant's learned counsel that, paragraph 2 was not obtained by his personal knowledge, and the respondent claims were therefore valid that the applicant affidavit is defective for want of proper verification. The position is settled as reflected in the case of **Tanzania Breweries Limited vs Herman Bildad Minja**, Civil Application No. 11/18 of 2019 which referred with authority the case of **Lalago Cotton Ginnery and Oil Mills Company Ltd Vs The Loans and Advances Realization Trust (LART)**, Civil Application No. 80 of 2002 (Unreported) the Court said:



"An advocate can swear and file an affidavit in proceedings in which he appears for his client but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during these proceedings."

In the application at hand, the learned counsel for the applicant deposed on internal affairs of his client which affairs are only within the knowledge of the applicant and not within the advocate's personal knowledge. As agreed to, by the learned counsel, paragraph 2 of the applicant's affidavit did not contain information based on his personal knowledge as he provided for under the verification clause. To that end as also stated in **Adrian Kitwana Kondo & 3 others vs Republic vs National Housing Corporation** Civil Application No. 208 of 2014, the affidavit is incurable defective.

As I noted and ruled out, the law is clear 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.

As to what is the remedy when the affidavit is incurable defective, there are two positions based on the circumstance of the case. **First,**



when the matter is raised against the applicant and determined, the remedy is to struck out the application. The position was stated in the case of **Anatory Peter Rwechungura vs. Principal Secretary Ministry of Defence and Another**, Civil Application No. 548/4 of 2018 (CAT- unreported).

Secondly, when the affidavit is found with a defective verification clause is curable by amendment. This was stated in 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 verification clause.

I am at liberty to order an amendment of the affidavit or to strike out the application for want of an affidavit. Categorically, based on the circumstance of this application at hand, and the law as it stands, a defective affidavit may be amended but I will not pick this option. The situation when the prayer for amendment can be granted is when the applicant prays for the amendment. The situation in our application is different for the matter was raised by the respondent and allowing the applicant to amend would be ordering to pre-empt the respondent point



of law. See **Yazidi Kassimu t/a Yazidi Auto Electric Repairs v AG.,**
Civil Application No. 354/05 of 2019 (CAT unreported).

In the upshot, and for the reasons that a defective affidavit cannot support an application, consequently, the application is incompetent and as a result, I proceed to struck out the Misc. Land Application No 118 of 2021 with no order as to costs. Had any party wishes to file the same before this court, is at liberty to do so within 21 days' time from today.

It is so ordered.




M.MNYUKWA
JUDGE
14/07/2022

Court: Ruling delivered on 14th July 2022 in the presence of parties.


M.MNYUKWA
JUDGE
14/07/2022