

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

MISCELLANEOUS CRIMINAL APPLICATION No. 13 OF 2022

(Originating from Mbinga District Court in Criminal Case No. 65 of 2019)

MODESTUS SAMWEL KAWONGAAPPLICANT

VERSUS

THE REPUBLIC..... RESPONDENT

RULING

15.07.2022

U. E. Madeha, J.

The instant application was brought by way of Chamber Summons made under section 361 (2) of the Criminal Procedure Act Cap 20 (Revised Edition 2022). The Applicant is seeking for extension of time to file an appeal out of time. In support of the application, the Applicant swore an affidavit. At the hearing of the application, the Applicant appeared himself, unrepresented whilst the Respondent was represented by the learned Senior State Attorney Ms. Shose Naiman.

Before of hearing of the application, it transpired today that Ms. Shose Naimani raised a Preliminary Objection on the points that the affidavit in support of the application is defective because it is not signed and the

applicant has not specified the facts which are known to him on his own knowledge vis a vis those known to him on his belief.

Arguing the first limb of the preliminary objection that the affidavit was not signed, she contended that it is the verification clause which is not signed although it encompasses the affirmed date written as 25th day of June 2022.

She stressed that the law that requires that an affidavit to be signed. That in the present case, the Applicant having not signed the affidavit it implies that he has not sworn to the affidavit, in turn that leads to a defective verification clause. To back up her argument she urged this Court to refer to the stand of the Court as discussed in the case of **Rashidi Ally Kadegereke v. Jumanne Masindi** Misc Land Case Application No. 323 of 2019, High Court of Tanzania at Dar es salaam (unreported).

In that view of such omission, Ms. Shose Naiman asserted that the same is as equal to no affidavit at hand which supports the Applicant's application.

Commenting on the other limb of the preliminary objection, the learned Senior State Attorney submitted that, the Applicant through his affidavit has not state facts that are known to him on his belief vis a vis fact he knows on

his own knowledge. She concluded that the Applicant's affidavit was defective and thus the application deserves to be struck out.

In reply, the Applicant had nothing to refute he conceded to the fact that given such a situation his application is incompetent for lacking his signature in the verification clause and for not specifying the facts which he intended to prove. Consequently, Ms. Shoshe Naiman rejoined nothing.

This Court too having gone through the application together with submissions of both parties has been quick to conclude that the present application is incompetent. This is because the Applicant signature is lacking in the verification clause. In addition, the affidavit was not properly verified since the deponent has not verified all the paragraphs of the affidavit by failing to sign on the jurat of attestation. Furthermore, the Applicant being the deponent has not shown that he is aware of the facts contained in paragraphs one (01) up to paragraph nine (09) of the affidavits. In short, the Applicant did not acknowledge if he is knowledgeable of the facts contained in the affidavit.

Also, in the jurat of attestation of the affidavit supporting this application, the commissioner for oath failed to specify whether he knew the

deponent or if the deponent was introduced to him by another person. *Section 8 of the Notaries Public and Commissioners for Oaths Act [Cap. 12 Revised Edition 2019]* is explicit on the requirements of a jurat it states that:

"Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall insert his name and state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made."

Moreover, as rightly argued by the Respondent, the Applicant in his affidavit has failed to state the facts known to him of his own knowledge and those known to him on his own belief something which is fatal in law. In fact, this is contrary to *Order X1X Rule 3 of the Civil Procedure Code Cap 33 (Revised Edition 2019)* which states that:

"Affidavit 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."

Reference can also be made to the case of **Mantrac Tanzania Ltd v. Raymond Costa**, before the Court of Appeal of Tanzania sitting at Mwanza, Civil Application No. 11 of 2010 (Unreported), and the case of **Philip Bernard Mlay versus Iddi Gahu** (L.T. GEN. RTD) High Court of Tanzania (unreported) wherein the former case the Court cited with approval the case of **Uganda v. Commissioner of Prisons. Ex-parte Matovu** [1966] EA 514 in reaching the decision. In the latter case the contents of an affidavit were explained to the effect that: -

"Affidavits intended to be used in the judicial proceedings are by law required to be confined to facts as the deponent is able of his own knowledge to prove and should be properly verified by the deponent..."

"...as a general rule of practice and procedure, an affidavit for use in court being a substitute of oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of his knowledge ..."

Again, in the cases of **Kubach & Saybrook Ltd v. Hasham Kassam & Sons Ltd** [1972] HCD 228 and **Bwaheri Masauna v. Ulamu Wisaka**

Miscellaneous Land Application No.55 of 2020, High Court of Musoma (unreported) the Court insisted on the significance of distinguishing in affidavit matters stated as per the deponent's own knowledge visa a viz his belief. For instance, In the latter it was stated:

"A court will not act upon an affidavit that does not distinguish between matters stated on information and belief and matters deposed to form the deponent's own knowledge or as regards the former which does not set out the deponent's means of knowledge of his grounds or belief."

Having applied the foregoing principle to the instant case, I am contended that the preliminary points of objection raised by the Respondent are meritorious.

In the end results, this application is hereby termed incompetent since it is supported by a defective affidavit. Consequently, the application is hereby struck out.

Order accordingly.

DATED at **SONGEA** this 15th day of **JULY**, 2022.



A handwritten signature in blue ink, appearing to read "Madeha", is written over a horizontal dotted line.

**U. E. MADEHA,
JUDGE.
15.07.2022**