

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA – SUB REGISTRY

AT MUSOMA

MISC. LAND APPLICATION NO. 18 OF 2022

(Arising from Misc. Land Application No. 18 of 2022 of the District Land and Housing Tribunal for Tarime at Tarime, Originating form Land Application No. 168 of 2022 of District Land and Housing Tribunal for Tarime at Tarime)

KABATE KASIMU NYANKENA..... APPLICANT

VERSUS

NDEGE GOGOIDO WANG'ILA RESPONDENT

RULING

25th May & 20th June , 2022

F. H. MAHIMBALI, J.

The applicant Kabate Kasimu Nyankena through chamber summons supported by his affidavit prayed for an extension of time to file appeal to this Court against the judgment and decree of the District Land and Housing Tribunal for Tarime at Tarime.

In opposition to the application, amongst other things the respondent lodged a notice of preliminary objections with two points, namely: -

- 1. That since the deponent to the affidavit supporting the chamber application does not distinguish in his verification what matters are deponed to on his belief and source thereof from those deponed to of his knowledge, the same is incurably defective.*
- 2. That since it is case law that every day of delay should be accounted for failure to state categorically what befell the applicant (intended appellant) between the date of the impugned order on 19/2/2022 to 4th may 2021 and between 8/9/2021 to 4th march 2022 the application is incompetent.*

Both, the preliminary objection and the application were ordered to be heard simultaneously. It was thus the Court's duty upon consideration of the submissions made, to decide what submission will dispose of the matter as per law.

During the hearing of the application, Mr. Makowe learned advocate who represented the respondent argued only the first preliminary objection, dropping the second point of preliminary objection. The applicant had a self-representation.

In his submission supporting the first point of preliminary objection, Mr. Makowe stated that the applicant's application is incompetent for being accompanied by the defective verification clause. He argued so, pointing the verification clause which states that: "I

*honestly and truly do verify that all what has been stated above in paragraphs 1,2,3,4,5,6,7,8,9,and 10 are true to the best of my **knowledge and belief***". He challenged this as being a bad verification clause in law as there ought to be clear that which matters are of his own knowledge and which are of his own belief. On this he submitted that, such an affidavit renders the emanating application being defective (see **Calco Textile Industries LTD Vs Zenon Investment and Another (1999) TLR 100**). As what is the effect of it, he urged this court not to act on such defective affidavit for failure to distinguish between facts of the deponent's own belief and facts as per information. To buttress his position, he referred this Court to the case of **SMS Vs Farid Mohamed Abdallah (1998) TLR 355** that defective affidavit renders the application invalid. He concluded his submission on this by praying that the court should strike out the application with costs.

In his brief reply, the applicant whose affidavit was being challenged, maintained that his application is proper as per law and that the said affidavit in his considered view is not defective as alleged, and stated further that he left it for the court to rule accordingly as per law.

As far as the application itself is concerned, the applicant submitted that his application be allowed as prayed as per reasons

contained in his affidavit in which he prayed that the same be adopted to form part of his submission. In essence, the applicant in his challenged affidavit deposed that the reason for failing to appeal on time is because of sickness. That in between he fell sick and was admitted at one traditional doctor for a long time. As to from when was he admitted to the said traditional doctor and when was he discharged if that assertion is taken to be true and convincing, the relied affidavit is silent. Be it known that the decision of the DLHT in which leave is sought to be appealed against but out of time was delivered on 19th February, 2021 and this application was filed on February 2022. This suggests that, there is a delay of one year (12 months). However, there is no any proof that accompanies the alleged explanations that the applicant was really admitted before the said unknown traditional doctor and his herbalist clinic or hospital as the case may be. That notwithstanding, under paragraphs 8 and 9 of the deponed affidavits, the applicant raises issues of illegality on the trial tribunal's membership and locus standi of the respondent.

Resisting the application on its merits, Mr. Makowe on his reply submitted that the applicant has failed to establish his claims. Starting with paragraph 3 of the applicant's affidavit, the same is unestablished

as the copy of the said application's ruling has neither been annexed nor established before the court. As per paragraph 5 of the affidavit, the applicant alleged sickness yet he does not state from when he was sick and when did he recover. In essence, Mr. Makowe sufficiently challenged the issue of sickness as not established. Further the fact that the applicant is just a layman has never been a good ground for extension of time. That, he spent much time in accessing legal aid services in between before he filed this application, is equally not an established fact. This application being sufficiently made out, Mr. Makowe prays that this application be dismissed for want of merit or struck out for being incompetent as it does not qualify any. However, Mr. Makowe could not say anything on the illegality issues raised by the applicant.

In his rejoinder submission, the applicant reiterated what he stated in his submission in chief and prayed that this application be granted as prayed.

In digest of the submissions made for and against preliminary objection and the application itself in merit, I will first deal with preliminary objection to consider if the same is capable of disposing of the application. If need be, I will then proceed with the merit of the

application. This is because, where there are issues of law raised, they are first to be determined before going to the merit of the case which is on issues of facts.

In determining the legal point of objection, on issue of verification clause as pointed out that the verification clause does not state as per applicant's affidavit what facts constitute knowledge and also what facts constitute belief, the application is then bad in law as the affidavit is defective. The defectiveness of the affidavit lies on the legal presumption that a deponent cannot possess both knowledge and belief of facts without clearly stating which facts are of his own knowledge and which facts are of his own belief. The law requires there to be a clear spell out and distinction of facts in that respect. In the case of ***Jamal s. Mkumba and Abdallah Issa Namangu Vs Attorney General, Civil application no 240/01/2019 CAT,(unreported)*** one of the issues for our determination was whether or not the verification under attack was defective and if yes, what is the consequence. The Court of Appeal in that case, faced a similar situation like the one at hand. In the current matter for ease of reference, I reproduce the said verification clause which appears as hereunder: -

VERIFICATION

"I Kabate Kasimu Nyankekena, the applicant and deponent herein, honestly and truly do hereby verify that what has been stated above in paragraphs 1,2,3,4,5,6,7,8,19 and 10 above are true to the best of my knowledge and belief".

The Court of Appeal in that case, demonstrated what amounts to a verification clause making reference to their earlier decision in the case of **Director of Public Prosecution v. Dodoli Kapufi and Patson Tusalile**, Criminal Application No. 11 of 2008 (unreported) simply defined verification clause 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"*. A similar definition was also given in **Paul Makaranga v. Republic**, Criminal Application No. 3 of 2010 (unreported). As to the rationale of verifying an affidavit, the Court 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".

Basing on the above cited cases, 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. On further instance on the importance of a verification clause, the Court in **Anatol Peter Rwebangira** (supra) quoted the book in Civil Procedure by C.K. Takwani 5th Edition where it was stated at page 21:-

"Where an averment is not based on personal knowledge, the source of information should be clearly disclosed."

In the verification clause under attack, Mr. Makowe has argued that the deponent did not specifically disclose the source of information from which he derives for each paragraph in the affidavit at issue. I entirely agree with him that as per the said verification clause, the same is bad in law, thus defective. As what is the way forward, **Mr. Makowe** has submitted that the application be struck out

for being incompetent. The Court of Appeal (in **Jamal S. Nkumba** (supra)) in another instance which is of recent decision took a different approach while relying the case of **DDL Invest International Limited vs. Tanzania Harbours Authority & Two others**, Civil Application No. 8 of 2001 (unreported) wherein the Court has also observed that whether or not to allow a party to amend an affidavit with a defective verification is a matter in the discretion of the Court. In another instance, the Court in **Sanyou Service Station LTD v. BP Tanzania LTD** (Now PUMA ENERGY (T) LTD), Civil Application No. 185/17 of 2018 (unreported) though found that the defect in the verification clause was caused by wrong numbering of the paragraphs, invoked the overriding objective and allowed the applicant to amend the affidavit so as to cure the pointed-out defect in the verification clause. I am inclined to agree with the position taken in **Sanyou's case**. Much as I appreciate the stance taken in **Anatol Rwebangira's case**, but it is the cherished legal principle that every case is to be decided on its own merits; that is, having regard to all the circumstances of each particular case. See: **Amos Kabota v. The Republic**, Criminal Application No. 24/11 of 2017 (unreported). On account of the facts presented especially on illegality and for the interest of justice, I think this is one of those cases

which demands for substantive justice in its determination. But further to that, I am satisfied that the respondent will not be prejudiced by an order of amendment of the affidavit so as to accord a chance to the applicant to insert a proper verification clause according to law and parties be heard on merit.

On that basis, as per illegality grounds as deposed under paragraphs 8 and 9 of the applicant's affidavit, the same being undisputed by Mr. Makowe, I order that the PO raised succeeds only to the extent explained above. The applicant is therefore given 30 days from the date of this ruling within which to file an amended affidavit with a proper verification clause. Costs to be in the cause. For avoidance of confusion, the case is set for hearing of the application upon filing the amended affidavit on 4th August 2022 at 14.00hrs. The respondent shall timely file his counter affidavit to the amended affidavit.

It is so ordered.

DATED at MUSOMA this 20th day of June, 2022.



F. H. Mahimbali
Judge