

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOROGORO DISTRICT REGISTRY
AT MOROGORO

MISCELLANEOUS LAND APPLICATION NO. 02 OF 2021

(Originating from Land Application No. 257 of 2020, In the District Land and Housing Tribunal for Morogoro, at Morogoro)

SUVILAGHA ANANGE MAHENGE APPLICANT

VERSUS

JOB GODSON METEIYAN 1ST RESPONDENT

JOYCE JAPHET 2ND RESPONDENT

ANITHA NYESIGA MUTATINA 3RD RESPONDENT

JUSTINE MARTIN KOBELO..... 4TH RESPONDENT

CHRISTINA WILBROD HILONGA 5TH RESPONDENT

R U L I N G

25th Jan, & 31st March, 2022

CHABA, J.

Before the District Land and Housing Tribunal for Morogoro, at Morogoro (the trial tribunal) the applicant herein was sued by the respondents in Land Application No. 72 of 2020 over several farm plots situated at Mvomero District. The respondents also filed Miscellaneous Application No. 257 of 2020 seeking for an order for temporary injunction against the applicant (respondent at trial) to restrain him and his agents, workmen and servants to build or destroy the crops and plants or in any manner whatsoever deal with the suit land at Farm Number 1211 Maili Kumi na Nane (18) in Mvomero, Morogoro Region pending hearing of the main application.

During hearing of the Miscellaneous Application No. 257 of 2020, the applicant filed a preliminary objections on a point of law to the effect



that, the trial tribunal was not properly moved for citing Order XXXVII, Rule 1(a) and Order XLIII, Rule 2 of the Civil Procedure Code [CAP. 33 R.E. 2019] (the CPC) (on the first ground) and that the affidavit supporting the application was defective for failure by the deponent to state whether he believed the information furnished to him to be true, thus offended Order XIX, Rule 3 (1) of the CPC (supra). In addition, the affidavit contained arguments and logic (on the second ground), he so argued.

According to the trial tribunal's record, the first ground was overruled, but the second ground was partly upheld to the effect that the affidavit was defective because the deponent failed to state whether the information given by his clients, he believed to be true in as much as the verification clause was concerned. The trial tribunal then ordered the respondents to rectify the defect and file a supplementary affidavit within 14 days. The respondents complied accordingly, and hearing of the application was conducted. After hearing of the application, the trial tribunal granted the reliefs sought by the respondents and thus issued an injunction against the applicant on the basis of Regulation 22 (a) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations 2003, to the effect that the applicant be restrained (abstained) from conducting any activity on the disputed land such as erecting any building or destroying any crops therein pending determination of the main application.

Discontented with the decision of the trial tribunal's, the applicant has filed Chamber Summons under Section 43 (1) (a) and (b) of the Land Disputes Courts Act [CAP. 216 R.E. 2019] (the Land Disputes Courts Act) seeking the following orders:



- 1. That, this Honourable Court be pleased to call and examine the records and proceedings of the District Land and Housing Tribunal for Morogoro (Hon. M. Khasim, Chairperson) in Misc. Land Application No. 257 of 2020 to see if there has been an error material to the merits of the application involving injustice, revise the proceedings, quash and set aside ruling thereof.*
- 2. That, costs of this application be paid by the respondents, and*
- 3. Any other orders that this Court may deem fit to grant.*

The Chamber Summons is supported by an affidavit sworn by Mr. Baraka Lweeka, learned counsel for the applicant. At the hearing of this application in this court, parties agreed to argue the application by way of written submissions. The applicant was represented by Mr. Baraka Lweeka, learned advocate while the respondents enjoyed the services of Mr. Asifiwe Alinanuswe, learned advocate.

In his written submission in chief, Mr. Lweeka commenced by praying this court to adopt the affidavit in support of this application so as to form part of his submission. The counsel pointed out three grounds upon which this court is invited to revise the proceedings of the trial tribunal:

- 1. That, the trial tribunal failed to struck out the application on 16th November, 2020 after sustaining preliminary objection that the application was supported by defective affidavit.*
- 2. That, trial tribunal granted injunction with effect of evicting the applicant herein from suit land and hence being as final decision in the main application.*



3. That, the trial tribunal granted injunction without assessing the existence of three main principles or tests governing an order for temporary injunction in our jurisdiction as articulated in **Atilio v. Mbowe (1969) HCD 284**.

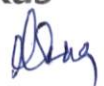
Submitting in support of the first ground, the counsel argued that the Hon. Chairperson failed to struck out the Misc. Application No. 257 of 2020 after sustaining the respondents preliminary objection to the effect that the affidavit which supported the application was defective and it offended Order XIX, Rule 3 (1) of the CPC. He underlined that though the raised preliminary objection was upheld, but the applicants were allowed to file another affidavit to cure the defect. According to him, it was mandatory for the application at trial to be supported by an affidavit as provided under Order XLII, Rule 2 of the CPC. He stated that as the defective affidavit could not support the said application, the only remedy available was to struck out the application. He referred this court to the case of **Njombe District Council v. Edwin Malekela**, Misc. Application No. 10 of 2020, HCT Iringa, where the Court held among other things that, "*defective affidavit renders application incompetent, and the only remedy is for it to be struck out*".

He further submitted that since the affidavit takes place of oral evidence and thus being a statement of evidence taken under oath, the same cannot be amended. To buttress his argument, the counsel placed reliance in the case of **Robert S. Lova and Another v. Ministry of Natural Resources and Tourism**, Revision No. 742 of 2018, HCT Dar Es Salaam. He contended that after the affidavit was ruled to be defective, the trial tribunal had no room of ordering amendment or rectification. He further accentuated that since the said supplementary affidavit did not disclose what it was supplementing, then the

supplementing affidavit could not help as the original document remained intact. He referred this court to what it was voiced in the case of **Robert S. Lova** (supra). The court held inter-alia that, "... *the affidavit was filed as supplementary affidavit which means it was supplementing previous affidavit by the 1st applicant. Since the main affidavit have already been struck out then automatically the supplementary affidavit cannot stand-alone....*" It was Mr. Lweeka's contention that application cannot be supported by two different affidavits, one defective and the other correct.

As regards to the second ground, the learned counsel contended that as both parties claimed ownership over the same land in disputes, thus granting an injunction against any of the parties, was unfair as it amounted to eviction against the party who didn't seek for the orders for injunction. He added that, it was prudent to waive injunction or to bar both parties from using the disputed land. He underlined that paragraphs 7 and 8 of the affidavit demonstrates that the respondents are conducting waste in applicant's properties believing that the applicant was evicted and the respondents were declared to be the lawful owner.

Regarding the third ground, Mr. Lweeka contended that the trial tribunal granted injunction without assessing the existence of three main principles or tests governing issuance of an order for temporary injunction as it was expounded in **Atilio v. Mbowe [1969] HCD 284**. He further cited the cases of **Harold Sekiete Levira and Another v. African Banking Cooperation Tanzania Ltd (Bank ABC) and Another**, Misc. Civil Application No. 886 of 2016 and **Mkurugenzi Ras Nungwi Hotel v. Benjamin Alex Mwakisya**, Civil Appeal No. 100 of 2008 to be the guiding case laws. In the case of **Mkurugenzi Ras**



Nungwi Hotel v. Benjamin Alex Mwakisyala (supra), the Court of Appeal of Tanzania held inter-alia that, "*... when several contentious factual and legal issues are argued, it is desirable to dispose all points and not merely rest its decision on a single point ...*" On the basis of these grounds, Mr. Lweeka submitted that, as the trial tribunal did not bother to assess each test of temporary injunction against facts of the case, the resultants thereof are for this application to be granted.

In reply, Mr. Asifiwe Alinanuswe filed a joint written submission for all respondents. Arguing in respect of the first ground, the learned counsel highlighted that the court has powers to order amendment of an affidavit and the flaw of an affidavit nowadays is no longer a solid ground upon which an application can be struck out due to advent of overriding objective rule. He underscored that it is a trite law that an amendment to a defective affidavit is a discretion of the presiding officer (the chairperson for this matter). To bolster his argument, he cited the cases of **Sanyou Service Station Ltd v. BP Tanzania Ltd (now PUMA Energy) (T) Ltd**, Civil Application No. 185/17 of 2018 and **Stephano Mollel and Four Others v. Al Hotel and Resort Ltd**, Revision Application No. 90 of 2020, insisting that it was wrong for the applicant to argue that a defective affidavit invited striking out of the application.

As regards to the second ground, the counsel submitted that the sale agreement and Ref. No. MGD/376/41 herein Annexure JC1 collectively, revealed that the land belonging to the applicant is situated at Nguru ya Ndege in Morogoro District, whereas the respondents suit land(s) are at Maili 18 kwa Mwarabu, Ranchi Hamlet at Wami Sokoine village in Mvomero District. He stated that since these are two distinct areas, it is wrong to argue that the applicant has been evicted from his

land because the orders for injunction issued by the trial tribunal aimed to estop the applicant from interfering with the lawful occupation of the respondents.

On the third ground, Mr. Alinanuswe maintained that the trial tribunal considered well all the three principles articulated in **Atilio v. Mbowe's** case (supra) when granting injunction against the applicant. He accentuated that the counsel for the applicant did not bother to explain as to what extent his client would suffer if the sought orders for injunction would have positively considered. He concluded that the case of **Mkurugenzi Ras Nungwi Hotel's** (supra) is distinguishable as the trial tribunal did not lump the three points, but rather it looked at them and decided thereon. He then prayed this application be dismissed with costs.

Upon considered the rival submissions by the parties, the grounds advanced by the applicant seeking for revision and the proceedings of the trial tribunal, I think in my view that, the following are relevant issues for deliberations:

- 1. What was the proper remedy when the affidavit supporting an application before the tribunal was found defective?*
- 2. Was there any sufficient grounds upon which to grant the injunction in line with **Atilio v. Mbowe's case** (supra)?*
- 3. Propriety of the nature of injunction sought by the respondents and whether regarding to the circumstances of the case, it was proper for the court to grant it.*

Commencing with the first issue, I have in mind that both parties submitted and exhibited valid legal authorities to support their stances. Whereas Mr. Lweeka holds that the only remedy available to a defective

affidavit is to strike out the application, on his part Mr. Alinanuswe is of the view that with the advent of the overriding objective rule, there is a room for amending the defective affidavit and that it would be contrary to the spirit of dispensation of justice if the application would be struck out. On this point, there is no doubt that courts or tribunals have been vested with powers to order and or grant an order to amend a defective affidavit and such powers must be exercised judiciously as it was expounded in the case of **Sanyou Service Station Ltd case** (supra). On its deliberation on matters revolving around a defective affidavit, the Apex Court of our Land had the following to say:

"I wish to emphasize that from the foregoing, it can safely be concluded that the Court's powers to grant leave to a deponent to amend a defective affidavit, are discretionary and wide enough to cover a situation where a point of preliminary objection has been raised and even where the affidavit has no verification clause. Undoubtedly, as the rule goes, the discretion has to be exercised judiciously. On the advent of the overriding objective rule introduced by the Written Laws (Miscellaneous Amendments) (No.3), Act, 2018, the need of exercising the discretion is all the more relevant,

The Court went on further to state that:

... even where the verification clause is missing, the Court while exercising its discretionary power judiciously, may or can allow a party to amend the defect".


To walk the talk, I had time to read the affidavit in dispute and studied it thoroughly. My observation is that the verification clause contains a statement by the deponent, herein the respondents' counsel that all what is contained in paragraph 3, 4, 5, 6 and 7 are true and

correct according to the information supplied to him by the respondents. It follows therefore that vital words in a verification clause namely; "... *the information which I believe to be true*" or a phrase to that effect was missing or it was skipped as contended by the applicant. Under section 3 (1) of the Civil Procedure Code [CAP. 33 R.E. 2019] provides that:

"Affidavits 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".

Before me, the crucial question on this facet is, whether the order issued by the trial tribunal directing the applicant to file a supplementary affidavit was in the circumstance of this case, an appropriate order or not as the same aimed to cure the defective affidavit. On this point, Mr. Lweeka contended that the trial tribunal's order was wrong. He highlighted that instead of giving an order to file a supplementary affidavit, the trial tribunal ought to have struck out the application for such defect. As hinted above, I had ample time to read the contested affidavit, in particular the verification clause. That part read:

"VERIFICATION

That, I **ASIFIWE ALINANUSWE**, Esq,,, the Counsel for the Applicants herein verifies that all that has been stated herein above save for paragraph 1 and 2 which is true according to my knowledge the remaining paragraphs which are 3, 4, 5, 6 and 7 are true and correct according to the information supplied to me by the applicants. 

VERIFIED at Morogoro this 09th day of June, 2020

Signed by: A. Alinanuswe

COUNSEL FOR THE APPLICANT"

In her ruling dated 16th November, 2020 the trial tribunal gave an order to the effect that, *"... The applicant is ordered to file a supplementary affidavit within 14 days, the same to be in compliance with the requirements of the law..."*. In compliance with the orders issued by the trial tribunal's, the counsel for the respondents herein on 24th day of November, 2020 he filed an **Amended Chamber Summons supported by an amended affidavit** in respect of Misc. Land Application No. 257 of 2020 having similar contents save the verification clause and dates which read as hereunder:

"VERIFICATION

That, I **ASIFIWE ALINANUSWE**, Esq,, the Counsel for the Applicants herein verifies that all that has been stated herein above save for paragraph 1 and 2 which is true according to my knowledge the remaining paragraphs which are 3, 4, 5, 6 and 7 are true and correct according to the information supplied to me by the applicants **the information which I believe to be true and correct.** (Underline is mine).

VERIFIED at Morogoro this 24th day of November, 2020

Signed by: A. Alinanuswe

COUNSEL FOR THE APPLICANT"

From the above quoted parts of the verification clauses dated 09th day of June, 2020 and 24th day of November, 2020 there is no doubt that what the counsel for the respondents (applicants at trial) did is to



amend the affidavit he deposed on 09/06/2020 and inserted the words **the information which I believe to be true and correct** at the end of verification clause. Other words in the contested affidavit remained undisturbed. Now, if that is the position, does this justify striking out of the application on the ground of defect affidavit? Upon meditated the nature of the defect and the application as whole and the surrounding circumstance, I think in my view that it does not. I say so because, the spotted defect in the verification clause are the words which were added following amendment of the affidavit to exhibit the information which the deponent believed to be true and correct. As correctly submitted by the counsel for the respondents, the advent of the overriding objective as provided under Sections 3A (1) and (2) and 3B of the CPC (supra), requires to dispense justice without tied up with technicalities.

What I have gathered from the ruling of the trial tribunal is that the presiding chairperson instead of stating that the applicant had to amend the affidavit, he holds that the applicant had to file a supplementary affidavit. It should be noted that if the counsel for the respondents did not file the alleged supplementary affidavit, and instead thereof he filed an amended chamber summons and the supporting amended affidavit, then it is obvious that the chairperson skipped the key word when giving the respective order. This act can be calculated as slip of the pen on the side of a chairperson. At this point, in as much as my mind is concerned, it is a place where the overriding objective principle comes into play. Considering the analysis made above, it is apparent that defectiveness in the verification clause is mendable. In the end, this issue is answered in affirmative.

The second issue is whether there were sufficient grounds upon which to grant the injunction in line with **Atilio v. Mbowe's** case

(supra). Going through the trial tribunal's record, the respondents lucidly detailed in their joint affidavit that the applicant was destroying the crops in the farm (disputed land) while undertaking construction activities therein. Even though both parties claimed to have ownership of the land in disputes, but upon a close scrutiny, I have found and so satisfied that the trial tribunal was correct to rule that the respondents were in a position to suffer an irreparable loss if the order sought could not be granted, compared with the applicant's allegation. The assertion that the respondents have been vandalizing or conducting waste in the applicant's properties as indicated in paragraphs 7 and 8 of the applicant's affidavit, hold no water and cannot be believed in absence of cogent evidence. Since an affidavit takes place of oral evidence as rightly submitted by Mr. Lweeka, it was necessary for the applicant to at least exhibit the respondents' conducts so as to convince the trial tribunal decide otherwise.

Having answered the first two issues in affirmative, I don't see the need to labour on the third issue. As discussed above, the propriety of the nature of injunction granted by the trial tribunal in favour of the respondents, in my opinion that was proper considering the fact that the trial tribunal did exercise her discretionary power judiciously when granting injunction against the applicant.

On the strength of Section 41 (1) of the Land Disputes Courts Act [CAP. 216 R.E. 2019] and upon considered the grounds for revision and the prayers advanced by the applicant, and upon examined the proceedings of the trial tribunal, in my view, I have found nothing genuine to warrant this court interfere with the trial tribunal's decision through revision. Since it is elementary that the purpose of a temporary injunction is to maintain the status quo until the main suit is finally

determined, I am satisfied that my holding in this application will pave the way for substantive justice to take place.

In the end, this application is hereby dismissed with costs. **Order accordingly.**

DATE at MOROGORO this 31st day of March, 2022.



M. J. Chaba

Judge

31/03/2022

Court:

Ruling delivered at my hand and Seal of this Court in Chambers this 31st day of March, 2022 in the presence of the applicant and his learned counsel Mr. Baraka Lweeka, but in absence of the respondents.



M. J. Chaba

Judge

31/03/2022

Rights of the parties fully explained.



M. J. Chaba

Judge

31/03/2022