

xIN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

MISC. LAND APPLICATION NO. 28 OF 2022

(Originating from Land Case No. 10 of 2021 of the High Court of Dodoma)

PAULO WILSON MADOLE & 180 OTHERS.....APPLICANTS

VERSUS

THE CITY COUNCIL OF DODOMA.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

28/06/2022 & 11/08/2022

KAGOMBA, J.

Before this Court is the application filed by the applicants seeking from the Court orders for maintenance of *status quo*, costs and any other relief the Court may deem fit and just to grant. Following the filing of this application, the respondents, through the service of Mr. Camilius Ruhinda, Senior State Attorney raised a preliminary objection on point of law, that, the application is incompetent for being supported by a defective affidavit containing hearsay and prayers.

During hearing of the preliminary objection, Mr. Ruhinda, appeared for the respondents and Mr. Emmanuel Bwile, Advocate, appeared for the applicants.

Mr. Ruhinda in support of the preliminary objection, submitted that the affidavit supporting the application by being sworn by Emmanuel Bwile, the

learned advocate for the applicants, renders the application incompetent as the affidavit contains hearsay and prayers. He argued that order XIX rule 3(1) of the Civil Procedure Code, [Cap 33 R.E 2019] requires an affidavit to be sworn by a deponent from the facts of his own knowledge.

Mr. Ruhinda submitted that paragraph 4, 5, 6 and 7 of the affidavit contains hearsay statements as there are information which Mr. Bwile has sworn not from his own knowledge as the deponent.

He submitted further that the affidavit under paragraph 4 states that the 1st respondent has been demolishing applicants' structures thereby causing suffering to the applicants who become homeless. Mr. Ruhinda contended that the statement is hearsay as it is not stated which applicants whose buildings have been demolished and who got sufferings and have been rendered homeless.

Mr. Ruhinda submitted that the averment in paragraph 5 of the affidavit, that the 1st respondent has been issuing threats to the applicants is unsubstantiated. He stated that there is no threat revealed by the deponent but mere imagination.

Mr Ruhinda further contended that under paragraph 6 of the affidavit there are arguments which is also not proper as in that paragraph it is stated that the acts of the 1st respondent have put the properties of the applicants at jeopardy unless the Court intervened.

Mr. Ruhinda argued that paragraph 7 of the affidavit contains lies, hearsay and prayers as it states that if the application is not granted the

applicants are likely to suffer immeasurably loss as they solely depend on the property in dispute.

To cement the above submission, Mr Ruhinda referred this court to its decision in **Yobu Sikilo and 16th Others vs Furahini Vahaye**, Misc. Land Application No. 105 of 2018 High Court, Mbeya, where the Court quoted the decision in **Salima Vuai v. Registrar of Cooperative Societies and 3 Others** (1995) TLR 75 in which it was held that;

"Where an affidavit is made on information, it should not be acted upon by any Court unless the Source of information are specified".

Mr. Ruhinda also cited the case of **Anatol Peter Rwebangira vs The Principal Secretary, Ministry of Defence and National Service and Another**, Civil Application No. 548/04 of 2018, CAT, Bukoba which as well insisted the requirement for the deponent to disclose the source of information not based on his own knowledge.

In the light of the above holdings, Mr. Ruhinda argued that Mr. Bwile had to specify the source of his information for the contents of paragraph 4, 5, 6 and 7. That, following the applicant's failure to disclose the source of such information, Mr. Ruhinda prayed the Court to struck out the application with costs.

Mr. Bwile replied by raising two questions and addressing them. Firstly, whether the affidavit supporting the application is incurably defective, and secondly, if the first question is answered in affirmative, what is the remedy.

In answering the first question, Mr. Bwile submitted that the affidavit is not incurably defective as the paragraphs which were identified to be offensive by Mr. Ruhinda are paragraph 4, 5, 6 and 7. Mr. Bwile argued therefore that paragraph 1, 2 and 3 are reliable. For the said reason, Mr. Bwile contended that paragraph 3 makes the application competent. He stated that the 3rd paragraph of the affidavit is concerning the notice of demolition by the 1st respondent published in *the Daily News* mentioning properties in dispute and because the notice is in public domain, it is as well known to him personally.

He added that due to the fact that the 1st respondent went further to demolish the properties in dispute, that is when such facts under paragraph 4, 5 and 6 came to his knowledge.

On the second question regarding the remedy, Mr. Bwile referred the Court to the case of **Leighton Offshore Pte Ltd Tanzania Branch vs D. P. Shaprya & Co Ltd**, Misc. Commercial Application No. 153 of 2018, High Court, Commercial Division, Dar es salaam, where the Court referred to the case of **Phanton Modern Transport (1985) Ltd vs D. T Dobie (T) Ltd**, Reference No. 15 of 2001, 3 of 2002 and Civil application No. 141 of 2001, CAT (Unreported) in which the Court only expunged offensive paragraphs and dealt with the remaining paragraphs.

It was Mr. Bwile's further submission that if the Court finds paragraphs 4, 5, 6 and 7 offensive, it should expunge or ignore them but apply paragraph 3 of the affidavit which is enough to maintain the application.

In addition, Mr. Bwile found all the cases cited by Mr. Ruhinda irrelevant and distinguishable. Hence, he prayed the Court to dismiss the

preliminary objection with costs and allow the application to be heard on merit.

In his rejoinder, Mr. Ruhinda submitted that the principle adopted by Mr. Bwile is appropriate. He clarified that paragraph 3 of the affidavit which Mr. Bwile relies on to support the application cannot avoid the defective verification clause.

Mr. Ruhinda reiterated that since Mr. Bwile is the advocate for the applicants, he is precluded from swearing the affidavit as he can't aver that the demolition of applicants' properties as a fact is of his own knowledge, hence the affidavit was to be sworn by the applicants themselves. He wound up by reiterating that the entire affidavit is not proper, thence prayed the application be struck out for incompetency.

Having heard the rival submissions of the both parties, the first issue for determination by this Court is whether the supporting affidavit is defective.

To answer this issue, I have re-examined paragraphs 4, 5, 6 and 7 of the affidavit which Mr. Ruhinda attacked for being offensive. The assault by Mr. Ruhinda is based on argument that the cited paragraphs contain information not in the knowledge of deponent, who is the advocate for the applicants thus contain hearsay, lies as well as arguments and prayers.

It is not disputed that it is Mr. Bwile, the advocate for the applicants, who has sworn the affidavit. It is also not disputed that the verification

clause has stated that all the statements under paragraph 1, 2, 3, 4, 5, 6 and 7 are true to the best of his knowledge. It is the principle of the law under order XIX rule 3(1) of the Civil Procedure Code (Supra) that an affidavit should confine to the facts that are in the deponent's own knowledge. The cited provision states;

"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:

Provided that, the grounds thereof are stated".

In **Tanzania Breweries Limited vs Herman Bildad Minja**, Civil Application No. 11/18 of 2019, the Court of Appeal at Dar es salaam held that an advocate can swear and file an affidavit in proceedings in which he appears for his client but on matters which are within his own knowledge. The Court in stating this position referred to 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) where 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."

With this position of the law, Mr. Bwile being an advocate for the applicants and the deponent to the affidavit had to state only those facts

in his own knowledge or his belief by stating grounds for such belief. Failure to do so renders the affidavit defective.

As correctly submitted by Mr. Ruhinda, not all the facts stated in paragraphs 4,5,6, and 7 are from the deponent's own knowledge, as stated in the verification clause. In no circumstance any person other than the victim themselves would be able to know the extent of demolition of their structures, the impact and the loss suffered thereof. In paragraph 4 the deponent states that the demolition has caused some of the applicants to become homeless. He also states that the demolition has caused "much suffering to their entire families". In view of the fact that there are 181 applicants, it is unimaginable that the learned Advocate has personal knowledge of each of them. Also, the issue of threat to the applicants is subject to verification by the victims of threat themselves and not their advocate.

On the other hand, the contention of Mr. Bwile that he came to know about demolition of the applicants' structures upon reading the public notice vide *the Daily News* is unfounded since the said notice which is marked as annexure BLC-1 to the affidavit, neither states the names of the persons to whom the notice was intended nor specifies the exact structures which were subject of the said demolition. Therefore, there is no doubt that Mr. Bwile was notified by the applicants on such facts but did not disclose the source of his information. In his capacity as an advocate, he couldn't identify one person to another to whom the notice was intended as the notice only mentioned the location which shall be affected by the demolition order.

For the above reasons' the affidavit deponed by Mr. Bwile is found to be defective as it consists of facts which were not in the deponent's own knowledge, which amount to hearsay.

The second issue to determine is whether the affidavit is incurably defective. It is the established position of law that where the affidavit is held to be defective, the offensive paragraphs in it shall be expunged as correctly submitted by Mr. Bwile. In this matter at hand, as reasoned above, the offensive paragraphs are paragraph 3, 4, 5, 6 and 7. I therefore expunge the same accordingly.

After expunging paragraph 3, 4, 5, 6 and 7, the remaining issue is whether the application can be sustained by what remains in the affidavit. In my considered view, the answer is obviously in the negative. The remaining paragraphs 1 and 2 do not carry the reasons for the application, as they are mere introduction paragraphs. Consequently, the second issue is answered in affirmative.

That said, I find and hold the application incompetent for being supported by an incurably defective affidavit. I therefore sustain the preliminary objection and proceed to strike out the application. No order to costs.

Dated at **Dodoma** this **11th** Day of **August, 2022**




ABDI S. KAGOMBA
JUDGE