

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF DODOMA
AT DODOMA
MISC. LAND APPLICATION NO. 61 OF 2022

SOFIA FESTO JOHN.....APPLICANT
(Administratrix of the Estate of
FESTO JOHN MSELIA, Deceased)

VERSUS

1. CRDB BANK LTD
2. COMRADE AUCTION MART &RESPONDENTS
COURT BROKER
3. UAP INSURANCE TANZANIA LIMITED

RULING

Date of Ruling: 16/08/2022

Mambi, J.

This Ruling emanates from the preliminary objection on points of law raised by the respondents that the affidavit supporting an application is misconceived for non-compliance with the laws. The applicant had earlier filed her application for an interim injunction against the respondents.

During hearing the respondents' counsels raised the preliminary objection that the affidavit filed by the applicant was bad in law for contravening the requirement of section 8 of the Notaries Public and Commissioner for Oaths Act, Cap 12 [R.E.2019].

In response, the applicant Counsel Mr Owino admitted the omission but briefly submitted that the court may strike out the application.

I have keenly gone through and considered the preliminary objection raised by the respondents and brief submissions from both parties. In my considered view the main issue is whether the affidavit contravenes the provisions of the law and more specifically whether such affidavit is defective or not. If the answer will be in affirmative, whether such omission if any is curable. It is on the records that the affidavit filed by the applicants does not comply with the mandatory requirement under section 8 of the Notaries Public and Commissioner for Oaths Act, Cap 12 [R.E.2019].

Indeed even the applicant herself admitted that omission. The law is clear that every application must be supported by affidavit as per **Order XLIII Rule 2** of the **Civil Procedure Code, Cap 33 [R.E.2002]**. Indeed this rule provides that;

*"Every application to the Court made under this Code **shall**, unless otherwise provided, be made by a chamber summons **supported by affidavit**"*

This in my view means that an affidavit is the heart of every application and such application must be properly made in line with the provision of the law. It should also be noted that an affidavit is substitute of oral evidence. The practice and even the provisions of the law requires that an affidavit must comply with all legal requirements. In my considered view, the effect of an omission of the noncompliance with section 8 of the Notaries Public and Commissioner for Oaths Act, Cap 12 [R.E.2019] renders an affidavit incompetent. In my view the omission under the affidavit cannot be amended apart from the applicant filing the proper affidavit if he wishes to do so. I am of the settled view that the applicant did flout the mandatory procedural requirements, thus making this purported application incompetent. See also ***ULEDI HASSAN ABDALLAH V. MURJI HASNEIN MOHAMED CIV. APPEAL NO. 2 OF 2012 [UNREPORTED]***. The court in ***ZITO ZUBERI KABWE V. THE BOARD OF TRUSTEES, CHAMA CHA DEMOCRASIA NA MAENDELEO AND***

***ANOTHER, CIV. CASE NO. 270 OF 2013 HC AT DA ES SAALAAM,
(UNREPORTED) PG 37***

Generally speaking, the application at hand is not properly before this court. In my considered view, both the application and affidavit before this court have not been properly prepared in line with the requirements of the laws. This means that the application is also contrary to **Order XLIII Rule 2** of the **Civil Procedure Code, Cap 33 [R.E.2002]**.

*made by a chamber summons **supported by** affidavit”*

In this regard, my mind directs me that the provisions of the law mandatorily require that any application must be supported by an affidavit. This means that such affidavit must also comply with the requirements under the provisions of the law. The word “**shall**” under the provision of the law, Order 6 Rule 14 of the Civil Procedure Code, Cap 33 [R.E.2019] implies mandatory and not option and that is the legal position under the Interpretation of Laws Act, Cap 1 [R.E.2019]. Reading between the lines on the above provision of the Rules in line with the records of this court, it is clear that the applicant has not complied with the provision of the law. This was in contravention of the provisions of the law. In my considered view,

since the applicant did not comply with the mandatory requirements of the law, it is as good as saying there is no application at this court

Having observed that the omission on the affidavit by the applicant) that render the application incompetent, the answer suffices to dispose of the matter and thus the preliminary objection raised by the respondent is sustained and upheld.

Now since the affidavit is defective, it means even the application has no legs to stand. Reference can be made to the decision of the court in ***Joseph Ntongwisangue another V. Principal Secretary Ministry of finance & another Civil Reference No.10 of 2005*** (unreported) where it was held that:

"in situation where the application proceeds to a hearing on merit and in such hearing the application is found to be not only incompetent but also lacking in merit, it must be dismissed. The rationale is simple. Experience shows that the litigations if not controlled by the court, may unnecessarily take a very long period and deny a party in the litigation enjoyment of rights granted by the court".

Reference can also be made to the decision of the court of Appeal of Tanzania in ***The Director of Public Prosecutions v. ACP Abdalla Zombe and 8 others*** Criminal Appeal No. 254 of 2009, CAT (unreported) where the court held that:



"this Court always first makes a definite finding on whether or not the matter before it for determination is competently before it. This is simply because this Court and all courts have no jurisdiction, be it statutory or inherent, to entertain and determine any incompetent proceedings."

I am thus of the view that on account of the same defects there is no valid application on which this court can deal with it. From the foregoing brief discussion, I am of the settled mind that the purported application is incompetent and cannot stand as an application with defective affidavit.

In the circumstance, since the applicant's application was invalid due to defective affidavit, it could not have founded a proper forum before this court. For the reasons stated above the application is misconceived. From my findings and reasons I have given above, I am of the settled view that since the application before me is incompetent, what then follows is to strike it and I hereby struck it out. It is so ordered

In the premises and from the foregoing reasons, the application filed by the applicant is hereby struck out without costs.

Order accordingly



A. J. MAMBI
JUDGE
16/08/2022

Ruling delivered in Chambers this 16th of August, 2022 in presence of both parties.



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A. J. MAMBI
JUDGE

16/08/2022

Right of appeal explained.



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A. J. MAMBI
JUDGE

16/08/2022