

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(IRINGA DISTRICT REGISTRY)
AT IRINGA

MISCELLANEOUS CIVIL APPLICATION NO.43 2020

(Originating from Matrimonial Appeal No. 05 of 2020)

DEOGRASIA RAMADHAN MTEGO APPLICANT

VERSUS

DEODATUS RUTANGWERELA RESPONDENT

15/3 & 28/4/2022

RULING

MATOGOLO, J.

The applicant herein above mentioned has filed an application to this court for extension of time to enable her to file Notice of Appeal to the Court of Appeal out of time.

The application is by way of chamber summons made under Section 11 (1) of the Appellate Jurisdiction Act (Cap 14 R.E 2019). The same was supported by an affidavit sworn by Barnabas Pascal Nyalusi. After been served, the respondent raised notice of preliminary objection on point of law as follows:-

1. The application is incompetent for being supported by a defective affidavit which contains hearsay evidence.
2. The Affidavit in support of application is defective for containing an incurably defective verification clause.

The respondent prayed for the application to be struck out with costs.

At the hearing of the said Preliminary objection the applicant was represented by Mr. Barnabas Nyalusi the learned Advocate while the respondent appeared in person (unrepresented). The hearing was by written submissions.

With regard to the first point of objection, the respondent submitted that the application is incompetent before this court for offending the provisions of Order X1X Rule 3(1) and (2) of the Civil Procedure Code (Cap 33 R.E 2019) by containing hearsay evidence. He argued that, the Deponent in the affidavit is the one required to prove on the facts therein. He said paragraphs 6,7,8, and 9 contains hearsay evidence whereby the deponent talks of one Honourable Agatha Chugulu, Deputy Registrar of the High Court of Iringa and One Honourable Nkya, the Deputy Registrar, Court of Appeal at Dar es Salaam who however failed to swear an affidavit in support of the Applicant's averments.

He prayed before this court not to act upon paragraphs 6,7,8 and 9 of the Applicant's Affidavit, as the court is duty bound not to act upon on the affidavit which contain hearsay evidence and/ or on unspecified sources of information. To support his argument, he cited the case of ***Salima Vuai Foun versus Registered Cooperative Societies and Others [1995] TLR 75***, it was held that:-

"Where an affidavit is made on information, it should not be acted upon by any court unless the sources of information are specific".

As to the second point of preliminary objection he submitted that, the application contains defective verification clause thus offending the provisions of Order X1X Rule 3(1) and Order VI Rule 15(2) of the Civil Procedure Code. He went on contending that, the provisions of Order VI Rule 15 (2) requires every person verifying to specify by reference to the numbered paragraphs of the pleading what he/she verifies according to own knowledge and he/she verifies upon information received and believed to be true. But in the affidavit supporting this application the deponent verified all paragraphs to be true to the best of her own knowledge and belief while paragraphs 6,7, 8 and 9 he mentions one Honourable Chugulu, Deputy Registrar of the High Court of Iringa and one Honourable Nkya, the Deputy Registrar Court of Appeal at Dar-es – Salaam as the persons who gave him the information and advice on his inquiry on e- filling system.

The respondent submitted further that, given seriousness the intended application in which the applicant is desirous of applying for extension of time to file notice of appeal out of time, he is duty bound to bring application in accordance with the dictates of the law, failure on it renders the application being incompetent before the court.

He went on contending that, in the case of ***Aloys Lyasenga versus Inspector General of Police and Another*** [1997] TLR 101, the court

dismissed the suit for having a defective verification clause as the one in the case at hand.

He submitted further that, the court several times has insisted on important on stating sources of information in verification clause, he cited the cases ***of Anatol Peter Rwebangira versus The Principal Secretary, Ministry of Defence and National Service and Attorney General***, Civil Application No. 548/04 of 2018 (CAT at Bukoba unreported), ***Yobu Sikilo & 16 Others versus Furahini Vahaye***, Miscellaneous Land Application No. 105 of 2018 High Court of Tanzania at Mbeya (unreported) page 7 and ***Octavian Kaitan Mbungani (EX E.8648 CPL) versus The Inspector General of Police & Honourable Attorney General***, Civil Application No. 21 of 2018, High Court of Tanzania at Iringa (unreported) at page 5-6.

He went on submitting that, in all cited cases above the Courts insisted on stating sources of information in the verification clause where the same is not within the deponent's knowledge but this was skipped by the applicant in the instance case.

The respondent concluded by submitting that, the applicant's Affidavit is incurably defective for non-compliance with the requirements of the law and that the Application is incompetent before this Court, hence he prayed before this court to strike out the entire application with costs.

In reply the Counsel for the applicant with regard to the first point of objection submitted that, the respondent cited Order XIX Rule 3(1) and (2) of the Civil Procedure Code, but if you read this provision there is no anywhere which talks about the hearsay evidence rather it talks about

affidavit contain facts, so the respondent has cited the law which is not relevant with the preliminary objection raised, he invited this court to disregard the preliminary objection raised.

He also invited this court to determine if the point of objection as to whether it qualifies to be a preliminary point of objection. He said the Court of Appeal in the case of ***NIC Bank Tanzania Limited versus Hirji Abdallah Kapukulila*** Civil Application No. 561/16 of 2018 at pages 7,8 and 10 the court referred the case of ***Mukisa Biscuits Manufacturing Company Ltd versus West End Distributors Ltd (1969) EA 696***, the court stated that a preliminary objection is in the nature of what used to be demurer, it raises a pure point of law which if argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained, to support his argument he referred the case of ***Director of Public Prosecutions versus Amin Talib Mselem and 5 Others***, Criminal Appeal No. 561 of 2016 at page 8 the Court referred in the case of ***Mukisa Biscuits Manufacturing Company Ltd versus West end Distributors Ltd [1969] EA 696***. The court held that, where the preliminary objection raised is indeed required evidence to ascertain it the court should not entertain it.

He went on submitting that, looking at the first preliminary objection it requires evidence as to whether what is stated by the applicant in his affidavit is hearsay or not? He argued that, to answer this question the court must invite evidence from the parties to answer it. He contended further that, in the foregoing circumstances the preliminary objection

raised does not meet the requirements of a point of objection and for that reason he invited this court to overrule it.

With regard to the second point of objection, Mr. Nyalusi contended that, the preliminary objection does not indicate the provision or principle of law offended and that being the case the preliminary objection raised lacks necessary particulars to enable the court and the applicant to grasp the nature and its scope hence he invites this court to overrule the same. To support his argument, he referred the case of **James Buchard Rugemalira versus The Republic and Mr Harbinder Singh Sethi**, Criminal Application No. 59/19 of 2017 at page 10,11 the court insisted that when the preliminary objection raised the respondent shall provides such necessary particulars to enable the court and the other party to grasp the nature and scope of such objection setting out the grounds of objection such as the specific law, principle or decision relied upon.

The counsel for the applicant contended that, paragraph 6,7,8 and 9 alleged to be offensive, if this court is of the opinion that indeed contravened the law, invites the court to invokes overriding objective principle and overrule this preliminary objection.

With regard to the cases of **Yobu Sikilo & 16 Others** and the case of **Octavian Kaitan Mbungani** cited by the respondent in his submission in chief is not binding this court because it's clear this cited cases are the High Court of Tanzania cases and according to the Court's decision as was remarked by Kyando,J in the case of **Freita Walter & Others versus R** [1991] TLR 62 the Court held that:-

"It is elementary, too, that a decision of one judge of this court (the High Court) does not bind another or other judges of the same court. It is only decisions of the Court of Appeal, which bind this Court...."

Mr. Nyalusi went on contending that, the applicant's affidavit is not defective and the first preliminary objection raised by the respondent is not grounded on point of law while the second preliminary objection contravenes the requirements set out in the above cited case. Thus, the applicant's advocate prayed before this court to overrule preliminary objections and allow parties to proceed on merits with the hearing of application for extension of time.

In rejoinder, the respondent basically reiterated what he submitted in chief and added further that, the Applicant in his reply to submission on the first preliminary point of law had submitted that the cited provision does not talk about hearsay evidence rather it talks about the affidavit to contain facts; with due respect from the counsel for the Applicant, it might be she had misdirected herself because the said provisions provides inter alia for a hearsay evidence, the said provision gives a mandatory requirement to a deponent to provide facts that he is able of his own knowledge to prove, meaning if he is not in the position of to prove in his own knowledge is a hearsay.

He contended further that, it is a trite law that an Affidavit which mentions another person is hearsay unless that other person swears as

well to that effect. To support his argument he cited the case of **Sabena Technics Dar Limited V. Michael J. Luwunzu**, Civil Application No. 451/18 of 2020, Court of Appeal Tanzania at Dar es salaam (Unreported) at page 11 when referring the Court of Appeal Cases of **Benedict Kimwaga V. Principle Secretary Ministry of Health**, Civil Application No. 31 of 2000 Court of Appeal of Tanzania at Dar Es Salaam and the case of **NBC Ltd V. Superdoll Trailer Manufacturing Co. Ltd.** Civil Application No. 13 of 2002, Court of Appeal of Tanzania at Dar Es Salaam (Both Unreported) the Court had this to say:-

"An affidavit which mentions another person is hearsay unless that person swears as well"

In the instant case it is undisputable facts that the Applicant had mentions other persons in his affidavit under paragraphs 6, 7, 8, and 9, further it is undisputable facts that there is no any affidavit of the persons mentioned by the deponent that has been appendixes to the Applicant's Affidavit so as to render credence to his application. Therefore, in absence of their affidavits, the affidavit of the applicant becomes hearsay, incapable of supporting the application in question as the defect in the said Affidavit is incurable.

With regard on the issue of the Applicant's allegation that the second preliminary point of objection does not indicate the provisions of law that has been offended, the respondent submitted that, his averments does not bold any water because the Respondent's submission in chief clearly states

the offended provision which are Order XIX Rule 3(1) and Order VI Rule 15 (2) of the Civil Procedure Code Cap 33 R: E 2019.

The Applicant further invited this Honorable Court to invoke a principle of overriding objective if the court is of the opinion that paragraphs 6, 7, 8 and 9 contravened the law. He submitted that the provision offended uses the word "**Shall**" which imports the mandatory obligation as per Section 53(2) of the Interpretation of Laws Act, Cap 1 R: E 2019 meaning the Affidavit must comply with the said requirement and the overriding objective principle cannot be blindly applied on the mandatory requirement of the law. To support his argument he referred the case of ***Mondorosi Village and Others V. Tanzania Breweries and Others***, Court of Appeal of Tanzania, at Arusha (2018) (Unreported) at page 15 where the Court had this to say:-

"The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms...."

He submitted further that, the Applicant had further contented that cases cited by the Respondent in submission in chief does not bind this court on the only reason that the decision of one Judge of the High Court does not bind another Judges of the same court and that it is only decisions of the Court of Appeal which binds the High Court.

There are many Court of Appeal decisions which provides to this effect. To support his argument he cited the case of **Benedict Kimwaga V.**

Principal Secretary, Ministry of Health, Civil Application No. 31 of 2000, (Supra) where it was held that:-

"If an affidavit mentions another person, then that other person has to swear an affidavit. However, I would add that that is so where the information of that other person is material evidence because without the other affidavit it would be hearsay. Where the information is unnecessary, as is the case here, or where it can be expunged, then there is no need to have the other affidavit or affidavits."

Furthermore in the case of ***NBC Ltd V. Superdoll Trailer Manufacturing Co. Ltd.*** Civil Application No. 13 of 2002, (Supra) the Court of Appeal held that:-

"Affidavit which mentions another person is hearsay unless that other person swears as well. One Mr. Mkongwa, advocate, asserted that he commenced and prosecuted this suit on the instructions of Dr. Nkini who in turn had been authorized or instructed by NBC (1997) Ltd to commenced the proceedings.....Dr. Nkini however, did not file an affidavit in reply to confirm the averment by Mr. Mkongwa.

Therefore, Mr. Mkongwa's averment was clearly hearsay, and it could not be relied on as proof of the assertion that the proceedings and this judgment was given, with the knowledge of the applicant Bank”.

The respondent concluded by insisting for this application to be strike out with costs.

Having read the submissions by the parties and upon going through the chamber summons and the affidavit under attack, as well as the court record, the main issue for determination is whether the preliminary objections raised has merit.

With regard to the first preliminary objection, the complaint here is that, the affidavit supporting the application is incompetent before this Court for offending the provisions of Order XIX Rule 3(1) and (2) of the Civil Procedure Code (supra) by containing hearsay evidence. Having read the affidavit in support of the application specifically paragraphs 6,7,8 and 9 contains hearsay evidence from one Agatha Chugulu, Deputy Registrar of the High Court of Iringa and one Nkya, the Deputy Registrar, Court of Appeal at Dar-es- Salaam but there is no affidavit sworn by the named Deputy Registrars in support of the Applicant's averments.

It is a trite law that, where an affidavit is made on information it should not be acted upon by any court unless the sources of information are specific.

As paragraphs 6,7,8 and 9 of the affidavit mentions another person and as there is no affidavit attached to the application sworn by the persons mentioned in those paragraphs the said affidavit is defective and cannot be relied upon by this court.

Thus, the first preliminary objection has merit.

As to the second point of preliminary objection, the complaint here is that, the affidavit supporting this application contains a defective verification clause for offending the provisions of Order XIX Rule 3(1) and Order VI Rule 15 (2) of the Civil Procedure Code.

The respondent contended that, the above provisions requires a person verifying to specify by reference to the numbered paragraphs of pleadings what he/she verifies according to own knowledge and he/she verifies upon information received and believed to be true. But the affidavit in support of the application at hand, the deponent verified all the paragraphs to be true to the best of his knowledge and belief while at paragraph 6,7,8 and 9 he mentioned one Honourable Agatha Chugulu, Deputy Registrar of the High Court of Iringa and Honourable Nkya, the Deputy Registrar, Court of Appeal at Dar-es-Salaam as the persons who gave him the information and advice on his inquiry on e- filing system.

Having carefully perused the affidavit complained of it was verified as follows:-

"I Barnabas Pascal Nyalusi being an Advocate for the applicant in this application do hereby verify and state that all what is stated above under paragraph 1,2,3,4,5,6,7,8,9,10 and 11 are true to the best of my own knowledge and belief".

The provision of Order VI Rule 15(1) and (2) of the Civil Procedure Code provides:-

" save as otherwise provided by any other law for the time being in force, every pleading shall be verified at the foot by the party or one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case".

Whereas Rule(2) provides:-

"the person verifying shall specify, by reference to a numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true"

Basing on the above provisions it is settled law that, if the verifier had received information from other sources he must disclose the said sources of information and failure to disclose renders the affidavit defective as a result the entire application is incompetent.

The reason is that he lied as he verified information from his own knowledge while under paragraph 6,7,8 and 9 were information obtained from other persons. As the affidavit in support of the application is defective renders the application incompetent and the only remedy is for it to be struck out.

The applicant's advocate contended that, the preliminary objection raised is not on pure point of law, as the same requires evidence, with due

respect to the learned counsel for the applicant, the preliminary objection raised is a pure point of law and it does not require evidence.

The counsel for the applicant also invited this court to invoke a principle of overriding objective if the court is of the opinion that the paragraphs 6,7,8 and 9 contravened the law. I join hand with the submission by the respondent that, the word "**Shall**" which is used imports mandatory obligation per Section 53(2) of the Interpretation of Laws Act, meaning the affidavit must comply with the said requirement and the overriding objective principle cannot be blindly applied against the mandatory requirement of the law.

Having discussed as herein above, it is my considered opinion that, the preliminary point of objections has merit as the affidavit supporting the application is defective, it renders the application incompetent and the same is hereby struck out with costs.

It is so ordered.




F.N. MATOGOLO
JUDGE
28/4/2022.

Date: 28/04/2022
Coram: Hon. F. N. Matogolo – Judge
L/A: B. Mwenda

Applicant: }
For the Applicant: } Absent
Respondent: } Present
C/C: Grace

COURT:

Ruling delivered in the absence of the applicant and her advocate but in the presence of the Respondent.



F. N. Matogolo
F. N. MATOGOLO

JUDGE

28/04/2022