

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA

MISC LAND APPLICATION NO. 44 OF 2021

(C/F Land Appeal No.24B of 2019 in the High Court of Tanzania at Arusha , Originating from Misc Application No.110 of 2017 and Land Application No. 2 of 2014 at the District Land and Housing Tribunal for Karatu at Karatu.)

LUSIAN AMSI.....APPLICANT

VS

GEORGE JOHN NAWET *(Administrator of the*

The estate of the late John Nawet).....RESPONDENT.

RULING

Date of last order: 23-5-2022

Date of Ruling: 25-5-2022

B. K.PHILLIP,J

This application is for leave to appeal to the Court of Appeal of Tanzania. It is supported by an affidavit sworn by the learned Advocate Dr. Ronilick E.K.Mchami, the applicant's advocate .The respondent is unrepresented. He appeared in person. Upon being served with the application the respondent filed his counter affidavit together with a point of preliminary objection , to wit;

- *That the applicant's application is bad in law for being supported by an incurably defective affidavit for containing arguments , law and extraneous matters.*

This ruling is in respect of point of preliminary objection mentioned herein above. I ordered the same to be argued by way of written submissions. Both sides filed their written submissions as ordered. The written submission for the respondent has been prepared by the learned Advocate Emmanuel Safari of Prime Attorneys, who has indicated in the written submission that he has been retained by the respondent for preparation of the submission only.

Submitting for the point of preliminary objection, Mr. Safari argued that the affidavit in support of this application is bad in law for contravening the provisions of Order XIX Rule 3(1) of the Civil Procedure Code ("The CPC") because it contains legal arguments, conclusions and extraneous matters. Mr. Safari pointed out that paragraphs 3,4,5,6,8, and 9 of the affidavit in support of this application contains legal arguments, conclusions and extraneous matters. To cement his arguments, he reproduced in his submission the provisions of Order XIX Rule 3(1) of the CPC and referred this Court to the case of **Uganda Vs Commissioner of Prisons Ex-Parte Matovu (1966) EA 514** in which the Court said the following;

".... Again, as a rule of practice and procedure, an affidavit for use in Court, being a substitute for oral evidence should only contain element of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true. Such an affidavit must not contain an extraneous matters by way of objection or prayer or legal arguments or conclusion...."

Mr. Safari was of a view that the applicants' affidavit is incurably defective ,thus this Court is compelled to struck out this application. He cited the case of **Khalid Simba Vs L.H. Maleko , Misc Land Application No. 502 of 2020**, (unreported) to cement his argument.

In rebuttal, Dr. Mchami submitted as follows; That since this application is for leave for to appeal to the Court of Appeal of Tanzania, it is imperative that the affidavit in support of the same must contain explanations concerning the legal errors found in the impugned judgment as well as the legal points which the Court of Appeal is called upon to decide in the intended appeal, otherwise the Court will not be able to know the legal points in dispute and might decline to grant the leave sought.

Moreover, Dr Mchami contended that the contents of the affidavit in support of this application are all based on what is contained in the impugned decision.The cases cited by Mr. Msafiri are distinguishable from the instant application because they were not for leave to appeal to the Court of Appeal. Dr. Mchami prayed for the dismissal of the point of preliminary objection with costs.

In rejoinder, Mr. Msafiri submitted that ,the provisions of Order XIX Rule 3(1) of the CPC applies to any affidavit filed in Court regardless of the type of the application it supports. To cement his arguments he cited the provisions of Rule 45 of the Court of Appeal Rules which provides that an application for leave to appeal to the Court of Appeal can be made informally or by chamber summons according to the practice of the High Court.The practice of the High Court in filling application is provided under

Order XLIII Rule 2 of the CPC which provides that every application to the Court made under the Code shall unless otherwise provided be made by a chamber summons supported by affidavit and what information should be contained in an affidavit is provided in Order XIX Rule 3(1) of the CPC contended, Mr. Msafiri. He insisted that this application is supported by a defective affidavit. It has to be struck out.

Having dispassionately analyzed the rival arguments made by the learned Advocates as well as perused the affidavit in question, I have noted that all paragraphs in the affidavit in question contains legal arguments, laws, conclusions and extraneous matter with exception of the 1st and 2nd paragraphs which contains introductory information, that is background of the matter and the last paragraph in which it is stated that if the application will not be granted the applicant and his family will suffer irreparable losses. Let me reproduce hereunder the contents of paragraphs 3 and 4 only as samples since reproducing all paragraphs will make this Ruling unnecessarily long.

*"3 .That it is clear from the records of the District Land and Housing Tribunal for Karatu at Karatu , Misc. Application No.110 of 2017 that the respondent's District land and Housing Tribunal for Karatu at karatu Misc Application No.110 of 2017 which was **not filed in the appropriate form prescribed in the second Schedule to the Regulation contrary to the mandatory requirement of regulation 23(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation , 2003**, but all the same the first appellate Court disallowed the applicant's High of the United Republic of Tanzania in the Arusha District Registry Land Appeal No. 42B of 2019.*

*4. That it is clear from the records from the District Land and Housing Tribunal for Karatu at Karatu Misc Application No.110 of 2017 that the respondent's District Land and Housing Tribunal for Karatu at Karatu Misc Application No. 110 of 2017 which was heard and **ordered to proceed for execution contrary to section 33(3) of the Land Disputes Courts Act, 2002, but all the same the first appellate Court disallowed the applicant's High Court of the United Republic of Tanzania, in the Arusha District Registry land Appeal No.42B of 2019**"*

(Emphasis is added)

In short, all paragraphs are written in the same style like the ones quoted herein above. In his submission Dr. Mchami did not dispute that his affidavit contains legal arguments and conclusions. With due respect to Dr. Mchami his arguments in justification of the contents of his affidavits are not correct. No wonder he failed to support them with any provision of the law or case law. I am inclined to agree with Mr. Msafiri that the affidavit in support of an application for leave to appeal to the Court of Appeal has to comply with the legal requirements stipulated in Order XIX Rule 3(1) of the CPC. The submissions on the points of the laws and legal arguments are made during the hearing of the application. An affidavit is a statement of evidence in which a deponent states things which he is able of his own knowledge to prove. The cases cited by Mr. Msafiri in his submission are quite relevant in this application.

I am alive that this Court has powers to strike out the paragraphs which are defective and if the contents of the remaining paragraphs are sufficient to support the chamber summons, the application can proceed to be heard. As I have alluded earlier in this application, it is only the 1st

,2nd and 3rd paragraphs which are not defective , the rest of the paragraphs deserve to be strike out . The remaining paragraphs cannot support the chamber summons.Now, what is the fate of this application?. In the case of **Khalid Simba** (supra) my sister Hon. Makani, J was confronted with a similar issue to the one in hand and had this to say;

" Looking at the affidavit the defects are substantive in nature and an amendment would mean overhauling the whole affidavit.In that respect the said affidavit is incurably defective and subsequently cannot support the chamber summons and hence renders the application incompetent.....in the result the application is struck out for being incompetent"

Amendment of the affidavit in support of this application would mean overhauling the whole affidavit as the defects in the affidavit are substantive in nature. Since the affidavit in support of the application is incurably defective, it is the finding of this Court that the same cannot support the chamber summons. Thus, the application is incompetent and same is hereby struck out with costs.

Dated this 25th day May 2022




B.K. PHILLIP

JUDGE