

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA.**

AT ARUSHA.

CIVIL REVISION NO. 03 OF 2020

*(C/F District Land and Housing Tribunal Misc. Land Application No. 21 of 2019 for
Manyara Region at Babati.)*

SEBASTIAN AWE..... APPLICANT

VERSUS

DAFAY NICHOLAUS LAWAY.....1st RESPONDENT

JACOB SLAA.....2nd RESPONDENT

DAMIANO JACOB.....3rd RESPONDENT

RULING.

Date of last order:10-5-2022

Date of Ruling:30-5-2022

B.K.PHILLIP,J

The applicant herein being aggrieved by the decision of the District Land and Housing Tribunal for Manyara at Babati (Henceforth " Land Tribunal") lodged this application under the provisions sections 51 and 41 of the Land Disputes Court Act and sections 95, 79 (1) (b) (c) of the Civil Procedure Code, ("CPC") praying for the following order:

- i) That this Honourable Court be pleased to call for the records, examine and revise the proceedings , Ruling and Order of the District Land and and Housing Tribunal of Manyara at Babati in Misc. Land Application No. 21/2019 for the purpose of satisfying itself as to the correctness, legality and/or propriety

of the said decision and the regularity of the proceedings therein and thereby revise the same.

ii) Costs to be borne by the respondent.

Before going into the merit of this application, a short background to this application is necessary for better understanding of the coming discussion.

In 2009 the Applicant filed a suit against 2nd and 3rd respondents at Daudi Ward Tribunal vide land case No. 09/2009. The Ward Tribunal held that the suit land belongs to Gwandumehhi Village Council. Dissatisfied with that decision, appellant lodged his appeal to the District Land and Housing Tribunal (henceforth "the Land Tribunal") for Manyara Region at Babati vide Appeal No. 98/2009. The land Tribunal ruled out that the Ward Tribunal's decision was erroneous since the Gwandumehhi Village Council had not raised any claim over the suit land. Thus, it was not proper to declare it as the rightful owner of the suit land. It ordered that the suit land should be divided to all parties to the suit. Each party should continue to own the portion of the land he has developed.

The appellant was dissatisfied with the aforesaid decision. Undaunted, he appealed to the High Court vide Appeal No.30 of 2011 in which he was declared the sole owner of the suit land. Thereafter the appellant moved the wheels of execution into motion by filing his application for execution of the order of this Court at the Land Tribunal. Upon being aware of the application for execution, the 1st respondent filed an application under the provisions of Order XXI Rule 24 and 57 (1) of the Civil Procedure Code ("CPC"), objecting to the attachment of the suit land and prayed for the following orders;

- i) That the Hon Tribunal be pleased to investigate the claim of ownership of the property wrongly attached to the judgment and decree of the High Court of the United Republic of Tanzania at Arusha in Misc Land Case Appeal No. 30 /2011 which ordered the 1st Respondent the sole owner of the land in dispute which is not true.
- ii) That the Hon Tribunal be pleased to stay execution filed by the 1st respondent under Misc Application No.95 of 2018 pending determination of the present application for objection.

The applicant herein was the 1st respondent in the objection proceedings. The same was heard inter parties and at the end of the day the Land Tribunal declined to execute the judgment of this Court on the ground that there are decisions made by the Daudi Ward Tribunal in land case No.4/2007 and District Land and Housing Tribunal of Manyara in Appeal No.98 of 2008, in respect of the suit Land. Also, it made a finding that the appellant herein (the applicant in the application for execution) was supposed to join the 1st respondent herein (the applicant in the objection proceedings) in land case No. 09/2009 at the Land Tribunal which resulted into the decision of this Court (Hon. Sambo,J as he then was) in Appeal No.30 of 2011.

Back to the application in hand, in his reply to the application the advocate for the 1st Respondent filed a counter affidavit together with a preliminary point of objection couched as follows;

- *"That the applicant's application is bad in law for containing defective affidavit".*

I ordered the point of preliminary objection to be disposed of by way of written submissions. For avoidance of wastage of time I ordered the submissions to include both arguments for the point of preliminary objection and the merit of the application. The 2nd and 3rd respondents did not file any Counter affidavit despite being served with the application. Thus, the hearing of this application proceeded ex-parte against them. Both the applicant and the 1st respondent were unrepresented. However, I noted that the applicant's submission was prepared by the learned Advocate Basil Boay.

I will start dealing with the arguments in respect of the point of preliminary objection first. Submitting for the point of preliminary objection, the 1st respondent's arguments were made up of two limbs. The 1st one is that paragraph five of applicants' affidavit contains matters of evidence. He reproduced paragraph 5 of the affidavit which reads as follows; "*Thereafter in 2008 being the decree holder, I decided to apply for execution Misc Application No.95 of 2018 District Land and Housing Tribunal for Manyara Region where I contracted serious objection from the respondent herein (Dafay Nicholaus Laway) in which the chairman erroneously decided that the land was wrongly attached hence this application for revision*".

The 1st respondent insisted that the contents of paragraph five are not facts which the deponent or the applicant is able on his own knowledge to prove since evidence is required to prove them. He further contended that the same contravenes provisions of Order XIX Rule 3 (1) of the Civil Procedure Code Cap 33, R.E 2019 ("CPC") which provides that as follows;

"..... Affidavit shall confine to such facts as the deponent is able of his own knowledge to prove, except on interlocutory application on which statements of his belief may be admitted".

The 2nd limb of the 1st respondent's arguments is that the applicant's affidavit is defective in its *Jurat of attestation* because the applicant's affidavit was sworn before Basil Boay, Advocate who drew the applicant's affidavit, thus the applicant is Mr Basil's client. The 1st respondent contended that Mr. Basil contravened the provisions of section 7 of the Notaries Public and Commissioners for Oaths Acts Cap 12 (R.E 2002), (Henceforth " Cap 12"), by attesting his client's affidavit. He went on submitting that aforementioned provision of the law bars an Advocates to make attestation to any document in a which he/she has interest.

In rebuttal Mr. Boay submitted that the contents of paragraph five of applicant's affidavit are not concern with evidential matters but facts of what transpired and necessitated the filing of an application for the revision.

With regard to the second limb of the 1st respondent's arguments, Mr. Boay submitted that objection raised by the 1st respondent is not a pure point of law. Evidence is needed to prove the contentions made by the 1st respondent. He Cited the Case of **Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd (1969) EA 696**. To bolster his arguments. He went on submitting that he attested the affidavit as a Commissioner for Oaths. He was engaged for drawing the application only based on the fact uttered by the applicant as indicated in the said document and had no instruction to represent the applicant in Court. Therefore he has no interest in the matter.

Moreover, he submitted that the 1st respondent cited dead law as the applicable law is the revised Edition, 2019, not the Notaries Public and Commissioners for Oaths Acts Cap 12 (R.E 2002). He concluded his submission by inviting this Court to be guided by the principal of overriding objectives and prayed for the dismissal of the preliminary objection with costs for lack of merit. In his rejoinder the 1st respondent reiterated his submission in chief.

I have dispassionately analyzed the submissions made by both sides. Let me start by pointing out that the preliminary objection raised by the 1st respondent is a pure point of law. No evidence is needed to prove the contentions made by the 1st respondent as the same can be found on the face of the affidavit in question and are based on the provisions of the law cited by the 1st respondent in his submission.

Coming to the merit of the preliminary point of objection, upon reading paragraph 5 of the applicant's affidavit I am inclined to agree with the arguments raised by the 1st respondent that the said paragraph contravenes the provision of Order XIX Rule 3 (1) of the CPC because what is stated in that paragraph leads to some conclusions that the impugned decision is erroneous. In my opinion the assertion that the decision of the Land Tribunal is erroneous is not a matter of fact.

With regard to the second limb of the 1st respondent's preliminary point of objection, I agree with the applicant's advocate that the respondents advocate cited a dead law. The applicable law now is the revised edition 2019. However, the provision of section 7 of Cap 12, R.E.2019 was not changed. It remained intact. The same reads as follows;

"No Commissioner for oaths shall exercise any of his powers as a commissioner for oaths in any proceedings or matter in which he advocates to any of the parties or in which he is interested".

In the instant application the affidavit in question indicates that it is drawn and filed by Basil Bayo, Advocate and it is the same advocate who attested the affidavit in support of the application . Not only that even the submissions in this application indicates that they have been drawn by same advocate Basil Boay. It is obvious that the learned Advocate Basil Boay is the appellant's advocate in the sense that he has been engaged by the applicant to assist him to prepare all legal documents for this application though he has not entered appearance in Court. So, the applicant is Mr. Basil Boay's client .Thus, I disagree with the Mr. Boays' contention that he is not involved in this matter. In my understanding being engaged to draw documents amounts to involvement in a matter to that extent. The import of section 7 of Cap 12 is that an advocate cannot draw his/her client's affidavit and then attest it as a Commissioner for oath . By drawing the affidavit an advocate is involved in the matter in question in giving his professional expertise. Thus, as rightly argued by 1st respondent the *Jurat of attestation* in the affidavit in support of this application contravenes the provision of section 7 of Act Cap 12.R.E.2019. It is the finding of this Court that the second limb of the preliminary point of objection has merit.

Now, the next question is; what is the fate of the affidavit in question? In the case of **Omari Ally Omary Vs Idd Mohamed and others , Civil Revision No.90 of 2003(HC-DSM)** (unreported) Hon. Massati J, as he then was, had this to say on defective affidavits; *" As a general Rule a defective affidavit should not be acted upon by the Court of law, but in appropriate case where the defects are minor, the Courts can order an amendment by the way of*

filing a fresh affidavit or by striking out the affidavit. But if the defects are of substantial or substantive nature, no amendment should be allowed as they are a nullity and there can be no amendment to nothing. I have no doubt in my mind that those paragraphs contain legal arguments, conclusions and prayers."

On the strength of the above quoted remarks made by the Court and having in mind the principle of overriding objectives, upon examining the defects of the affidavit in question I am of settled view that the same are not substantial or of substantive in nature, thus an order for amendment of the Counter affidavit could cure those defects. However for the reasons which shall be put into light soon in the coming discussion, I will not order the amendment of the affidavit.

Upon perusing the Courts records, I noted that there are serious irregularities on the face of the record of the impugned decision and the proceedings of the Land Tribunal in the objection proceedings (Misc Application No.21 of 2019) which culminated into the impugned decision. The 1st respondent herein (the applicant in the objection proceedings) filed the objection proceedings under Order XXI Rule 57 (1) and (24) of the CPC in which he stated clearly in the chamber summon that the order of this Court (Hon. Sambo, J as he then was) in Misc Land case Appeal No 30 of 2011 in which the applicant was declared as the sole owner of the suit land is erroneous. The 1st respondent's arguments before the Land and Housing Tribunal were to the effect that the Order of this Court aforesaid was erroneous on the ground that there were judgments made by the Daudi Ward Tribunal in land case No.4/2007 and District Land and Housing Tribunal of Manyara in Appeal No.98 of 2008, in respect of the

suit land. As I have alluded at the beginning of this application the Land Tribunal allowed the application for objection proceedings.

It is noteworthy that the objection proceedings are not aimed at challenging the decision presented for execution as it was done in the objection proceedings in this matter. The objector is supposed to establish that the attached property is not liable to attachment. (See Order XXI Rule 57 (1) of the CPC). In the instant application the Court's records show that the objector / the 1st respondent herein was specifically challenging the findings and the judgment of this Court. Unfortunately the Land Tribunal entertained the application and involved itself in an erroneous exercise by discussing the appropriateness of the case that was decided by this Court and made a finding that the applicant was supposed to join the 1st respondent in that case. In short the decision of the Land Tribunal overturned the decision of this Court which was supposed to be executed. The position of the law is that the executing Court has no powers to question the findings /orders made by the trial Court, leaving alone the fact that in this case the order which was overturned was made by this Court (the High Court).

It is due to the irregularities stated herein above I have not ordered for amendment of the affidavit in support of this application since doing so will be wastage of time and won't serve the interests of justice. Thus , I hereby invoke the revisional powers bestowed to this Court under the provisions of section 43 (1) (b) of the Land Disputes Courts Act, set aside the Ruling of Land and Housing Tribunal of Manyara at Babati, the subject of this application dated 24th April 2020 and order that the execution of the

judgment of this Court (Hon Sambo ,J as he then was) should proceed forthwith.

Each party shall bear its own costs as the findings in this Ruling are based on issues raised by the Court *suo motu*.

Dated this 30th day of May 2022




B.K.PHILLIP
JUDGE