

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(IN THE DISTRICT REGISTRY)**  
**AT MWANZA**

**Misc. LAND APPLICATION NO. 114 OF 2021**

*(Arising from the decision of the High Court Land Appeal No. 05 of 2021 Originated from the Land Case No. 08 of 2020 of the DLHT for Chato at Chato.)*

**THOMAS MISALABA----- APPLICANT**

**VERSUS**

**WILLIAM NGUNULE----- RESPONDENT**

**RULING**

*Last Order: 27.05.2022*

*Ruling Date: 30.05.2022*

**M. MNYUKWA, J.**

This is a Misc. Land Application No. 114 of 2021 whereas the Applicant Thomas Misalaba, by way of Chamber Summons supported by Affidavit deposed by the applicant's learned counsel, one Constantine Ramadhan, moved this court for leave to appeal to the Court of Appeal against the decision of this Court in Land Appeal No.05 of 2021 before M.K.Ismail, J. dated 10.11.2021 which was dismissed for the ground that the applicant appeal was time-barred. Aggrieved, the applicant resolved

to prefer an appeal to the Court of Appeal, thus he had to obtain leave to appeal in terms of section 47(2) of the Land Dispute Court Act, Cap. 216 RE:2019 and therefore, the applicant prays this court to grant leave to appeal to the Court of Appeal.

The applicant had engaged the service of Mr. Constantine Ramadhan, learned counsel and the respondent afforded the service of Mr Joram Kuboja learned advocate for drawing only as indicated. When the respondent was served with the pleadings, he filed a counter-affidavit together with a notice of preliminary objection fronting three points: -

- i. That, this honourable court has not been properly moved in view that section 47(2) of the Dispute Courts Act which cited by the applicant do not apply in the application for leave to appeal to the court of appeal, the said provision is applied in the application for certification on point of law.*
- ii. That, the affidavit of the applicant is incurably defective on the ground that it has been sworn by the person who is not a party in the application hence contravening the requirement of Order XIX Rule 3 (1) and (2) of the CPC Cap 33 RE: 2019.*



*iii. That, the applicant's application is incurably defective on the ground that the application is not accompanied with the notice of appeal contrary to the mandatory provision of Rule 46(1) of Tanzania Court of Appeal Rules 2009 as amended.*

The preliminary objection was argued by the way of written submissions vide the court order dated 24.03.2022 where both parties complied.

The respondent was the first to submit on the first point of preliminary objection. He submitted that, the applicant cited a wrong section for the cited section 47(2) of the Land Dispute Courts Act Cap 216 R.E 2019 did not deal with the application for leave to appeal to the court of appeal but for the certification on point of law. He cited the case of **Husein Mgonja vs the Trustee of Tanzania Episcopal Conference**, Civil Revision No. 02 of 2002 CAT where it was held that when a party cites a wrong provision of law the matter becomes incompetent for the court will not have been properly moved. Insistingly, he also cited the decision of this court in the case of **Ally Hamisi Lyumba vs Republic** Criminal application No. 114 of 2021 (unreported).

On the second point of preliminary objection, Mr, Kuboja avers that the person who swears the affidavit is not the applicant contrary to Order



XIX Rule 3(1) of the Civil Procedure Code, Cap 33 RE 2019. He went further that; Advocate is the officer of the court and no way that he turns to be the witness. He cited the case of **Aristides A. Kashasira vs Prof. Anna Kajumulo Tibaijuka & 2 Others**, Civil Application No. 44 of 2015 and the case of **Elihaki Giliadi Mbwambo vs Mary Mchome Mbwambo & Amos Mbwambo**, Civil Application No. 449 of 2019. He insisted that the advocate is borne to swear an affidavit unless, it is an interlocutory application which is different from the application at hand.

On the third point of preliminary objection, the respondent submitted that, the applicant filed this application without adhering to the mandatory requirement of Rule 46(1) of the Court of Appeal Rules of 2009 as amended by GN. No. 344 of 2019, which requires the application for leave to be accompanied with a notice of intention to appeal. He therefore, prays this court to uphold the 3 points of preliminary objections raised by the respondent with costs.

In reply to the respondent's submissions, Mr. Constantine Ramadhan, the learned advocate submitted on the 1<sup>st</sup> point of preliminary objection that the applicant was right to cite section 47(2) of the Land Dispute Courts Act. Cap 216 RE 2019 for it is the proper section and the respondent aimed at misleading the court. He went on aver that the cited

case of **Ally Hamis Lyumba vs Republic** (supra) is not relevant to the case at hand. He went on to insist that even though the section was improper the law allows the applicant to amend the section.

On the 2<sup>nd</sup> point of preliminary objection, he submitted that the law did not deter or bar an advocate to swear an affidavit. Referring to the cited Order XIX Rule 3(1) and (2) of the Civil Procedure Code, Cap 33 RE 2019, he insisted that the advocate may depone facts known to him personally and not informed by the applicant. He went on that, what he deposed from para 1-9 of the applicant affidavit is the information known to him personally from the proceedings as he was the advocate of the applicant in Appeal No. 05 of 2021 appealing against Land Case No.08 of 2020. He cited the case of **Veronica John Singano & Others vs Samwel Lewis Kwambu MM Auctioners & Debt Collectore Co. Ltd**, Misc. land Application No. 423 of 2021 where this court referred to the case of **Lalago Cotton Ginnery & Oil Mills Co. Ltd vs Loans & Advances Realisation Trust (LART)**, Civil Application No. 80 of 2002 (Unreported) where among other things, he claims that the Court of Appeal held that, an advocate can swear an affidavit for matters known to him personally. The applicant learned counsel went on that, the cited cases of **Alistides A. Kashasira** (supra) is distinguishable to the case at



hand and acknowledging the case of **Elihaki Giliadi** (supra) that supports the applicant's assertions.

On the 3<sup>rd</sup> point of preliminary objection, he avers that the respondent misquoted the wording of Rule 46(1) of the Court of Appeal Rules to mean that notice of appeal shall be attached. He avers that, the law did not give the directives as stated rather it only requires that for the application to be filed, notice of appeal must have been lodged. He retires and prays this court to overrule the preliminary objection with costs.

Re-joining, the respondent learned counsel reiterates his submissions in chief but, in the process, he agrees with the applicant's submissions on the first point of preliminary objection. On the 2<sup>nd</sup> point of preliminary objection he insisted that, the law bars the advocate to swear solely on behalf of the client. He insisted that, the second point of preliminary objection is maintainable and the court should sustain the same.

On the 3<sup>rd</sup> point of preliminary objection, he avers that, it is not provided by the law that the notice should be attached but it is the requirement for the court to take a judicial notice that the notice of appeal was indeed lodged. He, therefore, prays this court to sustain the raised preliminary objection and struck out the application with costs.



After the rival submissions by the learned counsels for both the respondent who raised the Preliminary Objection and the Applicant who responded, the law is trite that before embarking to the determination of the application, the preliminary objection raised has to be first resolved. (See **Shadida Abdul Hassanal Kassam v. Mahedi Mohamed Gulamali Kanji**, Civil Application No. 42 of 1999 (unreported), **Salimini Ali Jaffar vs Fatma Tangawizi Ngura & Another** Civil Appeal No. 299 of 2019. Going to the matter at hand, the respondent leaned counsel raised three points of Preliminary Objection which I will determine.

The general rule of practice and procedure on affidavits was stated in **Uganda v. Commissioner of Prison Exparte Matovu** (supra) and was restated in **Phantom Modern Transport (1985) Ltd v. DT Dobie (TZ) Ltd**; Civil References Nos. 15 of 2001 and 3 of 2002 (unreported) as follows: -

*"As a general rule of practice and procedure on affidavit for use in Court being a substitute for oral evidence, it should only contain statement to which the witness disposes either of his own knowledge or such an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion."*

(See also **DP Shapriya & Co. Ltd v. Bish International**, Civil Application No. 53 of 2002 (unreported).)



On the 1<sup>st</sup> point of Preliminary Objection, Mr.Kuboja avers that this honourable court is not properly moved in view of section 47(2) of the Land Dispute Courts Act, Cap 216 RE: 2019 which has been cited by the applicant does not apply in the application for leave to appeal to the Court of Appeal rather, the said provision is applicable in the application of certification on point of law. The applicant's counsel objected and insisted that this court was properly moved.

Going to the records, it is evident that the Chamber summons is made under section 47(2) of the Land Dispute Courts Act, Cap 216 RE: 2019. I find it wanting to revisit the disputed section and it reads as I reproduce the same hereunder: -

*47(2) A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may, with leave of the High Court or Court of Appeal, appeal to the Court of Appeal.*

From the wording of the cited section, I agree with the applicant's learned counsel that the counsel for the respondent either overlooked the law or misplaced his argument on improper citation of the law. However, this court was rightly moved by the applicant's application under the cited section of law. It is on that basis I overrule the first point of preliminary objection.





On the second point of Preliminary Objection, Mr. kuboja claims that, the applicant's affidavit is incurably defective on the ground that it has been sworn by the person who is not a party to the application hence contravening the requirement of Order XIX Rule 3 (1) and (2) of the Civil Procedure Code, Cap. 33 RE: 2019.

He avers that, the law bars the advocate to swear an affidavit solely on behalf of the client. He insisted that, it was wrong for the counsel of the applicant to swear an affidavit on behalf of his client. Responding, the applicant's learned counsel, denied the fact and insisted that, the law is clear that an advocate may swear an affidavit on behalf of the client for matters that he had personal knowledge.

Going to what is disputed, specifically the allegation that the applicant contravenes the provisions of Order XIX Rule 3 (1) and (2) of the CPC Cap. 33 RE: 2019, the law reads:-

*3.-(1) 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:*

Going to the records, and in fact, to the challenged affidavit, it is no doubt that the applicant learned counsel Mr. Constantine Ramadhani was the one who swore the affidavit on behalf of the applicant for what he



claimed at the verification clause that, what was stated in the affidavit are matters known to him and true to the best of his knowledge. Taking a literal interpretation of the disputed Order XIX Rule 3(1) of the Civil Procedure Code, Cap 33 R.E 2019, I did not agree with Mr. Kuboja that when a person has a personal knowledge can not swear an affidavit on the ground that he is not the applicant but his advocate or representative. The provision of the law is clear that any person who is acquainted with a personal knowledge, whose statements of his belief may be admitted may swear an affidavit. I agree with the cited case of **Lalago Cotton Ginnery & Oil Mills Co. Ltd vs Loans & Advances Realisation Trust (LART)**, Civil Application No. 80 of 2002 which among others it was held that: -

*"An advocate can swear and file an affidavit in proceedings which he appears for his client but on matters which are in advocate personal knowledge only"*

(See also the case of **Adrian KitwanaKondo and 3 others vs National Housing Corporation**, Civil Application No. 208 of 2014)

As it appears in the raised Point of Preliminary Objection, Mr.Kuboja is disputing the situation on which the applicant learned counsel swore an affidavit on behalf of the applicant. The applicant learned counsel avers



that, he was the applicant's advocate in Land Case No. 05 of 2021 which is the subject to this application which was the appeal against Land Appeal No. 08 of 2020. He also enlightens this court that, he is still representing the applicant and he was the one who lodged the notice of appeal. In that regard, I revisit the records and specifically on the attached Ruling and the affidavit, it is clearly reflected that the applicant learned counsel was the advocate for the appellant in Land Appeal No. 05 of 2021.

That being the fact, as reflected on the affidavit, from paragraph 1 to 9 as it reads, they are matters that are personally known to the applicant's learned counsel. As provided for under Order XIX Rule 3(1) of the Civil Procedure Code, Cap 33 RE: 2019, the applicant learned counsel had personal knowledge for what he deposed and therefore, the assertion by the respondent learned counsel serves no legal purpose and therefore the second point of Preliminary Objection is equally overruled.

On the 3<sup>rd</sup> point of preliminary objection, Mr. Kuboja claims that the applicant's application is incurably defective on the ground that the application is not accompanied by the notice of appeal contrary to the mandatory provision of Rule 46(1) of the Tanzania Court of Appeal Rules, 2009 as amended by GN. No. 344 of 2019. Both parties submitted and the appellant learned counsel claims that the law did not provide the



requirement as claimed by Mr. Kuboja. I have had time to revisit the cited provision of law that is rule 46(1) of the Court of Appeal Rules as it provides: -

*"46(1) Where an application for a certificate or for leave is necessary, it shall be made after the notice of appeal is lodged"*

Going to what is stated by the law, I agree with the applicant's learned counsel that, the assertion by Mr. Kuboja is of no legal basis for what the law provides, is different to what is submitted by the respondent's learned counsel as the basis for his Point of Preliminary Objection. In that regard, the third point of preliminary objection is as well overruled for lack of legal justification.

Before wingding up i find it wanting to remark on the issue of Preliminary Objection and the court process. As stated in the case of **Mukisa Biscuits Manufacturing Limited vs West End Products Limited** [1989] EA 696 and rightly copied with authority at page 8 of the recent case of **Jackline Jonathan Mkonyi & Another vs Guasal Properties Limited** Civil Appeal No. 311 of 2020 (decided on 17 May 2022) where it was held that: -

*"The improper rising of preliminary objection does nothing but unnecessarily increases costs and, on occasions, confuses issues. This improper practice should stop".*



Reverting to the matter at hand, it shows that the respondent learned counsel did not make a logical and proper evaluation on the legal issues in regards to the application for leave to appeal to the Court of Appeal and in the process abdicate his legal duty as an officer of the court to assist the court in the determination of the matter timely, justly and expeditious.

That said, I proceed to overrule the raised Preliminary Objections with no order as to costs. The matter will be heard on merit.

It's so ordered.



  
**M. MNYUKWA**  
**JUDGE**  
**30/05/2022**

**Court:** Ruling delivered in the presence of the counsel for the applicant and in the absence of the respondent.

  
**M. MNYUKWA**  
**JUDGE**  
**30/05/2022**