

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

MISC. LAND CASE APPLICATION NO.5 OF 2021

*(Originating from the Judgement and Decree of Land Case No. 01 of 2016 at High Court
of Tanzania at Songea)*

NEW KAURU TRANSPORT COMPANY LTD.....APPLICANT

VERSUS

TREASURY REGISTRAR1ST RESPONDENT

THE REGISTERED TRUSTEES OF CATHOLIC

ARCHDIOCESE OF SONGEA.....2ND RESPONDENT

RULING

21.04.2022& 19.05.2022

U. E. Madeha, J.

The Applicant by the way of chamber summons filed this application under Section 14(1) of the Limitation Act, Cap 89 (R.E. 2019), seeking orders of extension of time to file an appeal to the Tanzania Court of Appeal and costs of the application. The chamber summons was supported by an affidavit sworn by Mr. Eliseus Ndunguru, the learned Advocate for the Applicant.

The application was argued by Mr. Eliseus Ndunguru, learned counsel on behalf of the Applicant whereas Mr. Egidy Mkolwe learned counsel

Represented the first Respondent and Mr. Rwezaura Kaijage represented the second respondent.

However, before the application was heard, Mr. Rwezaura Kaijage filed a notice of preliminary objection on the 3rd day of March 2022. The said notice contained the following objections.

- 1. The Applicant is a non-existing legal person not capable of instituting this application.*
- 2. The verification on the affidavit supporting the application is highly defective for contravening Order X1X Rule 3 (1) of the Civil Procedure Code Cap 33 R.E. 2019.*
- 3. The Applicant is abusing the Court process by technically delaying the decree and orders of the Court with malice to cause irreparable loss to the second respondent.*

At the hearing of the preliminary objections Mr. Rwezaura Kaijage, began to submit to the first point of preliminary objection, he said that the person who filed this application is not available and therefore has no right to sue or be sued. He averred further that, it is well known to parties that this objection requires proof, but they have filed this preliminary objection at this time to raise awareness before this Court that the Applicant herein is

unknown. He added that it comes as no surprise that, the Applicant's advocate understands that matter, thus, he may withdraw his application.

He continued to argue further that, if they continue with this application the court will fail to make a decision as per Order 1 Rule 4 (a) of the Civil Procedure Code Cap 33 R.E. 2019 since the Applicant is a person whose identity is not known. In regard to that, the first and second Respondents cannot stand in a case against an unknown Applicant.

In response to this point of preliminary objection, Mr. Eliseus Ndunguru contended that the respondent is playing the delay tactic since his point of objection is baseless. Whether the Applicant is a known or unknown person is a matter of evidence. He submitted that such an argument is based on facts and not law. He referred this Court to the celebrated case of **Mukisa Biscuits Manufacturing Co. LTD v. West End Distributors**, 1969 EA page 696, which stated that a preliminary objection has to be based on points of law, not facts.

He submitted further that; the learned advocate has submitted contrary to the above-stated principle. And added that, if the second respondent learned counsel wants to develop the principle governing

preliminary objection, they must obviously be on points of law only. He prayed that their Preliminary Objection be dismissed with cost.

In his rejoinder, Mr. Rwezaura the learned advocate added that the Applicant's advocate submitted that the Applicant is not known. he consulted BRELA and ended up realizing that the Applicant did not even exist. Being a non-existing person, the Applicant's advocate knows that the Applicant is unknown, he should withdraw this application so as to save the court's precious time and resources.

It is the view of this Court that, the first objection is based on facts that should be proved or disapproved through evidence. The records show that the case from which the Applicant wants to appeal was heard in the name of the same Applicant. Additionally, since this is the application for an extension of time and not a new suit for determination, then the first preliminary objection is meaningless and it is hereby dismissed.

With regard to the second point of Preliminary Objection Mr. Rwezaura Kaijage, the learned advocate argued that the Applicant's affidavit is defective because it does not meet the mandatory requirement of Order X1X Rule 3 of the Civil Procedure Code Cap 33 R.E. 2019. He contended that the

affidavit must state the facts that the deponent is able on his own knowledge to prove. Also, in this application, the deponent is unknown since the verification clause did not disclose the same. Therefore, he prayed that this application be struck out with costs because of the defective verification clause and jurat of the attestation. In support of this preliminary objection, he requested the Court to make reference to the case of **Patrick Mustafa and Ms. Florence Peter Pallangyo v. Pastor Olam Anthony Mustafa, Misc. Civil Application No. 101 of 2017**, unreported on page 03 of this decision it was stated that;

"The law is clear that the affidavit must be signed/ attested by the deponent whereby in the jurat of attestation, his name shall be also stated, the absence of these requirements as it is in the case at hand the affidavit is incurably defective."

He requested that this application be struck out for the defectiveness of the verification clause and the jurat of attestation that the Applicant is required to pay all the case costs until this juncture.

On the other hand, Mr. Egidy Mkolwe the learned State Attorney for the first respondent supported the submissions of the Mr. Rwezaura Kaijage the learned advocate for the second respondent, and said that it is true that the affidavit submitted did not have a proper verification clause and at the same time it did not state the verifier. Mr. mkolwe further argued that if the court finds that the paragraph and the verification clause did not mention the name of the verifier, it is advisable to strike out this application because it has not followed the right procedures. He also supported that, this application to be struck out with costs.

Responding to the second point of Preliminary Objection relating to the verification clause. Mr. Eliseus Ndunguru learned counsel stated that; the respondent advocate did not cite any law/case compelling the presence of the Applicant's name in the verification clause. In support of his submission, he cited the case of **Sanyou Service Station LTD v. B.P Tanzania LTD (Now Puma Energy (T) LTD) Civil Application No. 185/2017 of 2018 CAT Dar es Salaam, the CAT**, where it was stated that defectiveness in the affidavit does not render the whole affidavit defective, the only remedy is to amend the defects. He insisted that the above is the provision of the

Court of Appeal case and it is more recent than the High Court decision cited by the second respondent counsel.

In supporting Mr. Rwezaura Kaijage, Mr. Egidy Mkolwe reiterated that the case of **Sanyou** (supra) cited by the Applicant advocate is distinguishable and cannot in this scenario be used to allow his amendment. The core issue in this objection is that the verifier is not disclosed (defective verification) which needed to be struck out. That affidavit is the evidence, if it lacks the verifier, it authentically becomes questionable. Whilst submitting Mr. Egidy made reference to Section 10 of the Oath and Statutory Declaration Act Cap 34 R.E. 2019 as elaborated on the schedule to the said Act, and observed the Applicant affidavit does not comply with the said provision. He, therefore, requested the court to dismiss this application.

After having gone through the application it is the view of this court that, in the affidavit, there is a signature, date, and place. So, the jurat of attestation is the same as specified under *Section 8 of the Notaries Public and Commissioners for Oaths Act [CAP. 12 R.E. 2019]* which states that.

"8. Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act

shall insert his name and state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made."

Concerning this application, the problem is with the verification clause. The respondent's advocate observed that the applicant's advocate was not in a position to prove the facts contained in the paragraph of the affidavit. Reference can be made to the cases of **Mantrac Tanzania Ltd v. Raymond Costa**, in the Court of Appeal of Tanzania at Mwanza, Civil Application No. 11 of 2010 (Unreported), and the case of **Philip Bernard Mlay v. Iddi Gahu** (L.T. GEN. RTD). They cited the case of **Uganda v. Commissioner of Prisons. Ex parte Matovu** [1966] EA 514 in reaching the decision, whereby the contents of an affidavit were explained to the effect that.;

"Affidavits intended to be used in the judicial proceedings are by law required to be confirmed to facts as the deponent is able of his own knowledge to prove and should be properly verified by the deponent..."

"...as a general rule of practice and procedure, an affidavit for use in court being a substitute of oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of his knowledge ..."

It's correct as argued by the respondent's counsel that, **first**, the Applicant's advocate had sworn an affidavit in which he has failed to prove that, he is knowledgeable of the information contained in the affidavit. **Second**, the affidavit does not indicate whether he is the one who had requested copies of the judgment on behalf of his client. **Third**, he has not shown that he is aware of the facts contained in paragraphs three (3), seven (7), eight (8), and nine (9) of the affidavits. In short, the advocate did not acknowledge if he is knowledgeable of the facts contained in the affidavit.

I am left with no doubts that as per the affidavit, the verification clause was signed by the Applicant advocate as the deponent. But he did not show where he got the Applicant's information as rightly argued by the respondent's advocate. This is contrary to Order X1X Rule 3 of the civil procedure code cap 33 (R.E. 2019) which states that; -

"Affidavit 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."

Back to the verification clause of the affidavit supporting the application at hand, the court has found that as per the arguments of the respondent's advocate. The affidavit was not properly verified since the deponent has not verified all the paragraphs of the affidavit. That cannot be said would have been verified on the personal knowledge of the Applicant's counsel, as stated in the case of **Uganda vs Commissioner of Prisons, ex-parte Matovu (Supra)**.

In regard to that, the verification clause in the affidavit supporting this application, the commissioner for oath failed to specify whether he knew if the deponent was introduced to him by a person, he knew. Reference is made to the case of **Kubach & Saybrook Ltd vs Hasham Kassam & Sons Ltd** [1972] HCD 228 and the case of **Bwaheri Masauna v. Ulamu Wisaka** Miscellaneous Land Application No.55 of 2020. High Court Musoma (unreported), where it was stated:

"A court will not act upon an affidavit that does not distinguish between matters stated on information and belief and matters deposed to form the deponent's own knowledge or as regards the former which does not set out the deponent's means of knowledge of his grounds or belief."

For the foregoing reasons, I find merits in the second preliminary point of objection raised by the second respondent advocate.

In the uphost, this application is incompetent because the affidavit supporting it is defective to the extent indicated above. Conclusively, the application is hereby struck out with costs. It is accordingly ordered.

DATED at SONGEA this 19th day of MAY, 2022




**U. E. MADEHA,
JUDGE.
19.5.2022.**