

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MWANZA SUB- REGISTRY)**

AT MWANZA

LAND REVISION NO. 01 OF 2023

(Arising from Land Application No. 02 of 2022 and Land Application No. 02 of 2023 and Misc. Land Application No. 08 of 2023, Originating from Land Application No 189 of 2022 at the District Land and Housing Tribunal of Mwanza at Mwanza)

SULUS JOHN NYIKERA.....APPLICANT

VERSUS

GODFREY BENEDICT MASSAWE.....1st RESPONDENT

S.L.ISANGI AUCTION MART/COURT BROKER..2nd RESPONDENT

RULING

Last Order date: 27/04/2023

Ruling Date: 30/05/2023

M. MNYUKWA, J.

The Applicant through Chamber Summons moved this court under Section 41(1)(a) and 43(1)(a)(b), 43(2)(3) of the Land Dispute Courts Act, Cap 216[RE:2019], and section 79(1)(a)(b)(c),(2)(3) Order XLIII Rule 2 and section 95 of the Civil Procedure Code, Cap 33 R.E 2019 seeking the following orders;



- a. *That, this Court be pleased to call for, supervise and examine the records, Ruling and Orders of the District Land and Housing Tribunal for Mwanza in respect to its propriety, legality and procedures with respect to the order issued in Application No. 02 of 2022 and in respect to the Order issued Application No. 02 of 2023 and revises the same accordingly.*
- b. *That the honourable court be pleased to hold that the proceedings and subsequent orders issued are bad in law on account of being irregular, improper, irrational and illegal.*
- c. *That the honourable court be pleased to hold that the proceedings in Misc. Land Application No. 08 of 2023 is tainted with illegalities, irregularity and procedural impropriety and thus be heard by the other Chairman.*
- d. *That the honourable court be pleased to revise the appointment of the second respondent and order that it was illegal and thus all done by the second respondent in eviction and attachment of the applicant's properties was tainted with illegalities, thus the 2nd respondent be ordered to return the applicant in the disputed premises and remove the attachment of the properties and not to sell the same.*
- e. *That this honourable grants any other order it deems fit and just to grant*
- f. *Costs to follow the events*



The application was accompanied by an affidavit sworn by William E Chama, the counsel for Applicant herein. Responding to the Application, the Respondent herein filed a counter Affidavit that contained three points of preliminary objection which are;

- a. The application for revision is incompetent for being supported by an incurably defective affidavit containing arguments, hearsay, opinions, sentiment and feelings, impeachment of credibility of the judicial officers and the trial records and negativity on the proceedings of the trial tribunal*
- b. The application for revision is incompetent for being supported by an incurably defective affidavit containing a defective verification clause*
- c. The application for revision is unmaintainable due to the pendency of an appeal before the same honourable court in respect of the matter seeking similar reliefs hence the same is tantamount to an abuse of court process.*

As a matter of practice, this court scheduled the hearing of the preliminary objections raised, before the main application. During the hearing of the preliminary objections, the applicant was represented by William Chama while the respondent was represented by Erick Kahangwa, both learned advocate. The preliminary objections were argued orally. It was the respondent's counsel who kicked the ball rolling in arguing the preliminary objections raised.



Arguing in support of the first preliminary objection, he stated that, the applicant's affidavit contains extraneous matter and does not contain facts which transpired in the tribunal's record. He averred that, paragraphs 3,4,8,9 and 11 of the applicant's affidavit contain an argument that impeaches the credibility of the court record. The counsel gave an example in paragraph 3 which alleged to state contrary to page 14 of the Judgement whereby the record shows that the Judgment was delivered in the presence of the respondent and his counsel and in the absence of the applicant. He referred to the case of **Jacqueline Ntuyabaliwe Mengi & others v Abdiel Reginald Mengi**, Civil Application No 330/01 of 2021.

He went on that, paragraph 8 of the applicant's affidavit shows that the applicant applied for stay of execution which was set for hearing on 16/1/2023 and that he objected the respondents' counsel's assertion, Mr. Denis Kahngwa that the application will be heard by another Chairperson and not by Hon. Kato. C. The counsel averred that, in his affidavit, the counsel deposed that Hon. Kato informed him that the application will be heard before him in the noon. He went on that, as per the records, in the Misc. Land Application No. 8 of 2023 that argument was not featured and



it was not part of the record. He, therefore, submitted that this paragraph impeaches the court record.

He further claimed that paragraph 9 also contains hearsay evidence which is contrary to the principle stated in the case of **Jacqueline Ntuyabaliwe Mengi & others v Abdiel Reginald Mengi**, (supra) and no affidavit supplements his assertion. He also went on to attack paragraphs 13, 14 and 15 that they contain prayer, argumentative and opinion. He went on to pray the Court to disregard or expunge those paragraphs from the record.

On the second objection he submitted that, on his verification clause the applicant's advocate stated that the source of information is based on his personal knowledge and the Proceedings, Ruling, Order, Judgement and Decree of the Tribunal while in paragraph 8 the applicant's counsel said that he was informed by Hon. Kato. This shows that, he got some information from him and yet he did not disclose the source of information in the verification clause. He, therefore, prays the application to be struck out because of an improper verification clause.

On the third ground, the respondent counsel averred that the applicant drove two horses at a time as he filed an appeal and the revision. He said that the relief sought in this Revision is appealable and therefore

the appellant was not justified to bring revision because it is not an alternative to appeal. He cited the case of **Isidori Leka Shirima v The Public Service Social Security Fund**, Civil Application No. 151 of 2016, and prays the Revision Application to be dismissed with costs.

Responding, the counsel for the applicant averred that, the affidavit did not contain extraneous matter and all facts pleaded are supported by annexures. He referred to the case of **Majuto Chikawe & Another v The Trustees of Tanzania National Parks**, Misc. Labour Application No. 8 of 2021. He added that, the evidence cannot be ascertained without hearing the parties on merit since doing it otherwise will pre-empt the application as it was stated in the case of **National Housing Corporation and Another vs Anna Francis Maendaenda**, Misc. Land Application No. 107 of 2018. He also supported his argument by referring to the case of **Ado Sheibu vs Honourable John Pombe Joseph Magufuli**, Misc. Civil Case No. 29 of 2018 that affidavit is evidence and annexures thereto are intended to substitute the allegation made by a party.

He further submitted that there is no prayer in paragraphs 13, 14 and 15 of the applicant's affidavit as the paragraphs contain the circumstances



of illegality and procedural irregularity as the prayer contained in the chamber summons.

On the second point of preliminary objection, he submitted that paragraph 8 contains procedural illegality and irregularity that will be revealed during the hearing of the application and therefore verification clause is not defective.

On the third preliminary objection, he submitted that the Revision Application is against the decision of the Misc. Application No. 2 of 2022 and Misc. Application No. 8 of 2023 and that the present Revision is not related with the appeal filed on 26/1/2023 and that they filed the present Revision due to illegality and irregularity which cannot be left to stand as it was stated in the case of **James Antony Ifada v Hamisi Alawi**, Civil Application No. 482/14 of 2019.

He, therefore, prayed the preliminary objection to be overruled with costs.

Re-joining, the respondent's counsel submitted that the case of **James Antony Ifada vs Hamisi Alawi**, (supra) is distinguishable because it relates to the extension of time and that there was no circumstance in this case if there was Revision and Appeal. He added that the Execution Proceedings originated from the main case, Application No

189 of 2022 in which the Judgement was delivered on 30/12/2022 and the Application for Execution was granted on 3/1/2023 and that all that transpired should be part of the appeal and there was no need to bring the application for Revision.

After hearing the submissions of both parties, the main issue for consideration and determination is whether the preliminary objections are merited.

To start with, I would like to refer to the decision of the Court of Appeal in **Director of Public Prosecutions v Dodoli Kapufi and Another**, Criminal Application No 11 of 2008 which defines what is affidavit and what it should contain. The Court stated that:

In law, an "affidavit" is:-

"A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths": BLACK'S LAW DICTIONARY, 7th edition. at page 58;

Or

"It is a statement in the name of a person, called a deponent, by whom it is voluntarily signed or sworn to or affirmed. It must be confined to such statements as the deponent is able of his own knowledge to prove but

in certain cases may contain statements of information and belief with grounds thereon”:

Taxmann’s LAW DICTIONARY, D.P. MITTAL, at pg. 138.

The essential ingredients of any valid affidavit, therefore, have always been:-

(i) the statement or declaration of facts, etc, by the deponent;

(ii) a verification clause,

(iii) a jurat, and

(iv) the signatures of the deponent and the person who in law is authorized either to administer the oath or to accept the affirmation.

The verification clause simply shows the facts the deponent asserts to be true of his own knowledge and /or those based on information or beliefs.

In determining the preliminary objection, I will start with the third point of preliminary objection, then followed by the first and the second point of preliminary objection.

On the third preliminary objection, it is clear that the applicant preferred the revision against the decision in Misc Application No. 2 of 2023 and Misc Land Application No. 8 of 2023 which is not appealable as it mainly challenges the execution proceedings in which its remedy is

Revision and not Appeal. This is the position of the law and this Court on various decisions including the case of **Deogratius Stephen v Anna Apakunda**, Civil Appeal of 55 of 2022 and **Felister Kifulugha v Royal Mwalupembe**, Misc. Land Appeal No. 28/2019. Therefore this ground is not merited too and the same is hereby dismissed.

Coming now to the first point of preliminary objection, it is true that it is settled position of the law that affidavit which contains prayer, argument, hearsay evidence and extraneous matter is defective and the remedy is for the impugned paragraph(s) to be expunged or disregarded. It is my understanding that for the court to reach the decision to expunge or to disregard the defective paragraph, must satisfy itself that the said paragraphs contain an anomaly which is not supposed to be featured in the affidavit.

To appreciate the situation on what is contested by the parties, I have taken the liberty to reproduce the said paragraphs:

8. That the applicant therefrom filed an Appeal to the Court vide the JSDS2 system and thereafter filed an Application for Stay of Execution to the District Land and Housing Tribunal for Mwanza and the same was scheduled to be heard on 16th January 2023 before Hon, Kato C. We appeared before Hon. Kato C, as shown by the summons.



*However the counsel for the Respondent Adv Denis Kahangwa insisted that the said Application for Stay of Aexecution must be heard by Hon. Mrirya and not by Hon. Kato, I personally objected his view as was not backed up with any legal authorities, finally, Hon. Kato ruled out that the matter will proceed on the same date at noon. Surprisingly before noon, **I was informed by Hon, Kato that the matter will proceed to Hon. Mrirya as he was telephoned by the Registrar of Tribunal to leave such matter to proceed to Hon, Mrirya.** Copies of summons and Application for stay of execution that show the matter was assigned before Hon. Kato C, are appended hereto and collectively marked as annexure EL GON4."*

Having examined the above paragraph deponed by the applicant's counsel, I agree with the respondent's counsel that the same is defective. The summons indeed shows that the matter appears before Hon. Kato C, but the same contains hearsay evidence as he categorically states that he was informed by Hon. Kato C, that the Registrar of Tribunal gave him an order to the effect that the matter was supposed to be heard by Hon. Mrirya. As the information deponed was coming from another person while Hon. Kato C. had not sworn an affidavit to show that he informed the applicant's counsel that he was given an order by the Registrar of Tribunal not to proceed with the matter.



Again, in paragraph 3 of the affidavit, the applicant's counsel also states that he was informed by Hon. Mriryia that he will telephone him to inform the date of judgement on Land Application No. 189/2022 that was coming for Judgement on 30th December 2022 and that he was personally present in court and that he was never called and only to be surprised with the summons to appear in the application for Execution. In the above paragraph, the applicant's counsel tried to impeach the authenticity of the court record while it is settled that in our jurisdiction the court record cannot be easily impeached as it is believed that what is in court record is actually what transpired in court. This is the position of the law in the case of **Hellena Adam Elisha @ Hellen Silas Masui vs Yahaya Shabani & Another**, Civil Application No. 118/01 Of 2019 referred to the case of **Halfani Sudi v. Abieza Chichili** [1998] TLR 527. As it was rightly stated by the counsel for the respondents, the record revealed contrary to what has been stated by the applicant's counsel because the Judgement was delivered on that date and the respondent and his counsel entered appearance.

Again, in paragraphs 9, 13 and 14 contain opinion, prayer and argument which is contrary to the rules of affidavit. For example on paragraph 9 part of the paragraph reads:



*"... The applicant being questioning the integrity of Hon. Mriryia even where the Application for stay of execution was returned to him. **Again Hon, Mriryia technically adjourned the matter while knowing he had appointed the other Court Broker to execute the matter without the knowledge of the applicant just to ensure the applicant's application for stay of execution remain nugatory.** A copy of the applicant's letter are appended hereto and marked as annexure EL GON 5."*

It is clear that the above statement contains opinion. As it is settled that the affidavit should not contain hearsay evidence, opinion, prayer and argument. The legal status of the affidavit which does not contain fact was stated in the case of the then East African Court of Appeal in **Uganda vs Commissioner of Prisons Exparte Matovu** (1966) EA 514 thus:-

"The affidavit sworn by counsel is also defective, it is clearly bad in law. Again, as a general rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only constitute statements of facts and circumstances to which the witness deposes either of his own knowledge or from information in which he believes to be true. Such affidavit must not contain extraneous matter by way of objection or prayer or legal argument. The affidavit by the counsel in this matter contravenes Order 17

Rule 3 and should have been struck out." Therefore this objection is merited".

For that reason, paragraphs 3, 8,9,13,14 and 15 are expunged from the affidavit

On the second objection, it is my view that the verification clause is defective because it does not state the source of the information on the part of the information gathered from Hon. Mrirya as the law requires. The deponent verified that the source of information is from his own knowledge and the decisions of the court such as Judgement, Ruling, Order and Proceedings. As it was rightly observed by the counsel for the respondents who supported his submission by the case of **Jacqueline Ntuyabaliwe Mengi** (supra), that : -

"The purpose of the verification is to enable the court to know which facts can be said to be proved on the affidavit evidence and those which may be true from the information received from other persons or allegations based on records. As I have highlighted above, the verification clause does not state the source of the part of information on paragraph 8 and therefore the verification clause is incompetent. This objection is merited.

As to the rationale of verifying an affidavit, the Court of Appeal in **Lisa E. Peter v. Al- Hushoom Investment**, Civil Application No. 147



of 2016 (unreported) quoted with approval the Indian case of **A.K.K. Nambiar v. Union of India (1970) 35 CR 121** which explained the importance of a verification clause in affidavit as follows:

"The reason for verification of affidavits is to enable the court to find out which facts can be said to be proved on the affidavit evidence or rival parties' allegations may be true to information received from persons or allegation may be based on records. The importance of verification is to test the genuineness and authenticity of allegation and also to make the deponent responsible for allegations. In essence verification is required to enable the court to find out as to whether it will be safe to act on such affidavit evidence. In the absence of proper verification clause, affidavits cannot be admitted as evidence".

From the cited cases above, verification clause is one of the essential ingredients of any valid affidavit which must show the facts the deponent asserts to be true of his own knowledge and those based on information or beliefs.

Reverting to the application at hand, the respondent claims that, the affidavit by the applicant is defective for wanting of proper verification. He avers that, the applicant learned counsel got some information from Hon. Kato, C and he did not disclose the source of information in the verification clause.



It is a settled position of law that, an affidavit must base on the deponent's personal knowledge and if it is based on other sources, then the source should be disclosed. Further, the deponent must specify which facts are based on personal knowledge, on information and which are based on belief. Failure to disclose the source of information renders an affidavit defective.

The position is settled as reflected in the case of **Tanzania Breweries Limited vs Herman Bildad Minja**, Civil Application No. 11/18 of 2019 which referred with authority the case of **Lalago Cotton Ginnery and Oil Mills Company Ltd Vs The Loans and Advances Realization Trust (LART)**, Civil Application No. 80 of 2002 (Unreported) the Court said:

"An advocate can swear and file an affidavit in proceedings in which he appears for his client but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during these proceedings."

As I noted and ruled out, the law is clear that once it is proved that the verification is defective the affidavit is rendered incurably defective



consequently the application which is not supported by an affidavit is incompetent application.

As to what is the remedy when the affidavit is incurable defective, there are two positions based on the circumstance of the case. **First**, when the matter is raised against the applicant and determined, the remedy is to struck out the application. The position was stated in the case of **Anatory Peter Rwechungura vs. Principal Secretary Ministry of Defence and Another**, Civil Application No. 548/4 of 2018 (CAT- unreported).

Secondly, when the affidavit is found with a defective verification clause is curable by amendment. This was stated in the case of **Sanyau Service Station Limited V. B.P. Tanzania Limited (Now Puma Energy (T) Limited)** Civil Application No. 185/17 of 2018 (CAT- unreported), where the Court granted leave to amend an affidavit where it found that there was no verification clause.

I am at liberty to order an amendment of the affidavit or to strike out the application for want of an affidavit. Categoricaly, based on the circumstance of this application at hand, and the law as it stands, a defective affidavit may be amended but I will not pick this option. The situation when the prayer for amendment can be granted is when the



applicant prays for the amendment. The situation in our application is different for the matter was raised by the respondent and allowing the applicant to amend would be ordering to pre-empt the respondent's point of law. See **Yazidi Kassimu t/a Yazidi Auto Electric Repairs v AG.**, Civil Application No. 354/05 of 2019 (CAT unreported).

The application is hereby struck out for being supported by a defective affidavit. No order as to costs




M.MNYUKWA
JUDGE
30/5/2023

Court: Ruling delivered today the 30th day of May, 2023, in the presence of the counsel for parties.


M.MNYUKWA
JUDGE
30/5/2023