

**IN THE HIGH COURT OF TANZANIA**

**(MAIN REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 18 OF 2023**

(Originating from Misc. Civil Cause No 39 of 2022 Before Hon. Mzuna J.)

**FREDRICK ANTHONY MBOMA.....APPLICANT**

**VERSUS**

**SERIKALI YA MTAA KIBANGU .....1<sup>ST</sup> RESPONDENT**

**UBUNGO MUNICIPAL COUNCIL.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

*Date of Last Order: 1<sup>st</sup> August, 2023.*

*Date of Ruling: 11<sup>th</sup> August, 2023.*

**E.E. KAKOLAKI, J.**

Under certificate of urgency and by way of chamber summons, the applicant before this court filed an application for leave to appeal to the Court of Appeal against the decision of this court in Misc. Civil Cause No. 39 of 2022 delivered on 05/05/2023. The respondents opposed the application and raised *plea in limine litis* to the effect that, *firstly*, the application is incompetent for being supported by incurably defective affidavit containing legal arguments, opinions, conclusions, issues and law which contravene the

provisions of Order XIX of Civil Procedure Code, [Cap. 33 R.E 2019]. *Secondly*, the application is incompetent and bad in law for being supported by incurably defective affidavit having defective jurat of attestation. Therefore, parties were given an opportunity to address the Court on the raised preliminary objections and by consensus agreed to disposed of them by way of written submission as the applicant appeared in person while respondents had the services of Ms. Jesca Shengena, learned Principal State Attorney. In this ruling I am intending to address and determine each point in order of the arguments by the parties, if need be.

To start with the first ground of preliminary objection, Ms. Shengena relying on the provisions of Order XIX rule 3 (1) of CPC submitted that, as per that provision of the law an affidavit shall be confined to facts within the deponent's knowledge, shot of which the same will be rendered incurably defective. She supported her stance with the case of **Uganda Vs. Commissioner of Prison Exparte Matovu** [1977] E.A 514 as restated in the case of **Phantom Morden Transport (1985) Ltd Vs. DT Dobie (TZ Ltd**, Civil Reference Nos. 15 of 2001 and 3 of 2002 (CAT-unreported), the decision which was also followed in the case of **Dp Shapriya & Co. Ltd Vs. Bish International**, Civil Application No. 53 of 2002 (CAT-unreported).

She then contended that, in this matter applicant's affidavit is defective as it does not contain facts as required by law instead it contains legal arguments, opinions, conclusions, issues and law. She pointed out the defective parts as those found in paragraphs 3-7 of the affidavit that contain matters of law and issues some of which refer to the jurisdiction of the court and paragraphs 8-10 containing arguments when the applicant referred to the ruling sought to be impugned in Civil Cause No. 39 of 2022 delivered on 5<sup>th</sup> May, 2023. She went on point out the defects to include also contents of paragraphs 11-12 of the affidavit asserting to have opinions and conclusions. In her view, as the affidavit has to contain facts only, applicant's averments in paragraphs 3-12 of the affidavit are irrelevant for not containing evidence. She placed reliance in the case of **Onesmo Ole Ngurumwa Vs. Attorney General**, Misc. Civil Cause No. 15 of 2019 (unreported) quoting the case of **Juma Busiyah Vs. The Zonal Manager (South) Tanzania Post Corporation**, Civil Application No. 8 of 2004 (CAT- unreported) where the Court of Appeal held that, an affidavit is essentially facts and therefore evidence and not legal argument or points of law.

In concluding this point Ms. Shengena held a view that, considering the general rule and practice as obtained in **Ex-parte Matovu's** case, this

application is incompetent for being supported by incurably defective affidavit and the only option is for the Court to strike it out as it was decided in the cases of **Jamal S. Mkumba and Another vs Attorney General**, Civil Application No. 240/01 of 2019 and **Mussa M. Rafiki vs The Managing Director, National Insurance Corporation Ltd and Others**, Misc. Civil Application No. 420 of 2013 (both CAT-unreported).

In response, the applicant attacked Ms. Shengena's contention that affidavit should strictly be confined to facts only. According to him, the contents of affidavit supporting an application for leave to appeal to the Court of Appeal from the High Court exercising its original jurisdiction must raise issues of general importance or a novel point of law, or raise facts showing prima facie or arguable appeal as prescribed in the case of **Rutagatina C.L. vs The advocate committee and Another**, Civil Application No. 98 of 2010 [CAT-unreported]. According to him, his affidavit followed the approach prescribed in the above cited case by separating issues of novel importance, novel points of law and issues of general importance. He also attacked the authorities relied on by Ms. Shengena arguing that, none of them concerned an application for leave to appeal to the Court of Appeal against the decision of the High Court exercising its original jurisdiction like his.

The applicant went on submitting that, it is now trite law that, remedy for any offending paragraphs in the affidavit is to expunge them from the affidavit and then see whether the remaining paragraphs can sufficiently support the application, in which he submitted even after expunging paragraphs 3,4,5,6 and 7 of the affidavits, his application will still survive as paragraphs 8 and 9 of the affidavit read together with the paraphrased issues in the chamber summons can support it. He relied on the case of **Jamal S. Nkumba & Another** (supra) and invited the Court to dismiss the ground and allow the application to be heard and determined on merit.

I have taken time to consider the contending submission by the parties in light of the raised ground of objection and accord it with the deserving weight. I have as well thoroughly perused the impugned applicant's affidavit in order to establish the soundness of respondent's contentions in this application. It is gathered from Ms. Shengena submission as to the position of the law that, under Order XIX Rule 3(1) and (2) of the CPC, an affidavit must be confined to the facts in the deponent's knowledge only and which he is able to prove, while contrary view is held by the applicant that, in an application for leave to appeal to the Court of Appeal, the affidavit must contain issues of general importance or a novel point of law, or grounds

showing existence of prima facie or arguable appeal as provided for in the case of **Rutagatina C.L.** (supra). To disengage parties from this tag of legal war, I wish to quote the provisions of Order XIX Rule 3(1) of the CPC that 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:*

*Provided that, the grounds thereof are stated.*

The wording of Order XIX Rule 3(1) as rightly submitted by Ms. Shengena suggests that, affidavit should confine itself only to the facts which deponent is able to prove. It was held in the case of **Ex-parte Matovu** (supra) on what is an affidavit should contain, that:

*"...as a general rule of practice and procedure, **an Affidavit for use in Court being a substitute for oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of his own knowledge or from information which he believes to be true. Such an Affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion.**" (Emphasis supplied)*

The above legal position was reiterated and made clear by the Court of Appeal in the case of **Jumuiya ya Wafanyakazi Vs. Shinyanga Regional Cooperative Union** [1997] TLR 200 at page 202 when echoed that:

*"An affidavit is essentially a substitute for oral evidence, and should only contain statements of fact and circumstances."*

Similar stance was taken by the Court of Appeal in the case of **The Zonal Manager (South) Tanzania Post Corporation** (supra) where the Court observed thus:

*"...an affidavit is essentially, facts and therefore evidence, not points of law or legal arguments."*

In view of the above authorities it is evident that, an affidavit for use in Court must be confined to the facts only in which the deponent is able to prove unless the same is aimed at supporting an interlocutory application, where statements on his beliefs may be allowed. It does not therefore has to contain extraneous matter by way of objection or prayer or legal argument or conclusion.

Having that knowledge of settled legal stance in mind concerning what an affidavit should contain, the remaining issue for determination by the Court is whether the paragraphs 3-7 contain law and issues, paragraphs 8-10 contain arguments and paragraphs 11-12 have opinions and conclusions as

alleged by Ms. Shengena. In order to to get a clear picture of respondents' contention, I find it apposite to reproduce paragraphs 3-7 of the applicant's affidavit going thus:

***Part 2: Issues of General Importance & Novel Points of Law***

*3. Whether it is mandatory requirement to attach evidence in an application for leave to apply for judicial review (or whether stating the facts/averments and mere allegations, without attaching evidence is enough.*

*4. Whether its legally proper for the trial court to decide on the merit of the intended judicial review case at the stage of application for leave to apply for judicial review*

*5. Whether a Serikali ya mtaa is capable of suing or being sued in general, and whether it is capable of suing or being sued in this particular case.*

*6. Whether it is improper to join two unrelated applications if the applicant and the respondents are the same and the applicable law used to move the court to hear the joined application is the same.*

*The two applications are:*

(a) Application for leave to apply for judicial review of the decisions of the *Serikali ya mtaa* kibangu in the street/roads naming exercise and



*(b) Application for leave to apply for judicial review of the decision of the serikali ya mtaa kibangu regarding information requested by the applicant*

*7. (a) whether there is a mandatory legal requirement to attach evidence (such as documents and exhibits) to an application for leave to apply for judicial review or whether the allegations in the affidavit and the statement are enough to establish the grounds for granting leave to apply for judicial review.*

*(b) If from paragraph 7 (a) above, is mandatory, does it mean for section 8 (1) (a) of the Law Reform (Fatal accidents and Miscellaneous Provisions) (Judicial Review Procedure and fees) Rules, 2014 [ GN 324 OF 2014] the applicant has to re attach the evidence and pay the necessary court fees for attachment, or will the evidence attached at the leave stage be used.*

*(c) If from the paragraph 7(a) above, it is mandatory, does it mean for section 8 (1) (a) of GN 324 of 2014 the applicant will be barred from attaching the evidence?*

While I am in agreement with the applicant that in an application for leave to appeal the applicant must demonstrate existence of issues of general importance or a novel point of law, or grounds showing existence of prima facie or arguable appeal, facts must be deposed to that effect informing the Court that they do exist and that the Court of Appeal is invited to determine, in the event the application is granted. To the contrary in the paragraphs

identified above the applicant assigned the heading on what he claims to be facts disclosing existence of issues of general importance and novel point of law the practice which is obtained in the submission, instead of stating them precisely in the paragraphs. In other words there is nothing to inform this Court in terms of evidence that, the alleged listed issues of general importance and novel point of law are intended to be raised in the Court of Appeal as the applicant would want this Court to believe since facts to that effect must be specifically stated bearing in mind the settled legal position that, affidavit is a substitute of oral evidence. I so view as mere listing of the purported issues without any introductory or informative facts deposed on how are they related or connected or supporting the application cannot entitle the applicant with the right to claim the same are made to the best of his knowledge. Further to that, in the present matter no doubt the purported raised issues, for instance paragraph 7 carries matters of law, thus in contravention of the provision of Order XIX Rule 3 of the CPC and the principles enunciated and restated in the cases of **Commissioner of Prison, Ex Parte Matovu** (supra) and **The Zonal Manager, (South) Tanzania Port Corporation** (supra).

Moving to the contents of paragraphs 8-10 of the applicant's affidavit, a glance of an eye unearths the obvious fact that, apart from being assigned under the heading ***"Part 3: Prima Facie or Arguable Appeal (i.e. Disturbing features from the Ruling and/or the Proceedings)"*** in contravention not only of the law but also practice, same contain arguments in which the applicant is challenging the ruling delivered by High Court of Tanzania Dar es Salaam Registry in Civil Cause No. 39 of 2022 delivered on 5<sup>th</sup> May, 2023, intended to be appealed against to the Court of Appeal. Thus, in total contravention of law as discussed in the above authorities.

Reverting to paragraphs 11-12 of the affidavit, the same are not spared from the attack by Ms. Shengena as they contains opinions and conclusions. For instance, in paragraph 11 of the affidavit the applicant states that:

*11. From paragraph 10 above, the trial judge holds that the application for leave to file for judicial review was for one issue only, being that of reviewing the street naming exercise, instead of two issues, the second issue being the access to information from the 1<sup>st</sup> and 2<sup>nd</sup> respondent.*

On the face of it the above paragraph purely contain opinion, totally barred by the law as it was stated in the case of **Mustapha Raphael Vs. East**

**African Gold Mines Ltd**, Civil Application No. 40 of 1998, where the Court of Appeal held thus:

*"An affidavit is not a kind of superior evidence. It is simply a written statement of oath it has to be factual and free from extraneous matters such as hearsay, legal arguments, objections, prayers and conclusions."*

In view of the above legal stance, I find paragraphs 11 and 12 to be defective for containing extraneous matters. As alluded to above and rightly submitted by Ms. Shangena, the affidavit containing opinions and arguments renders the application incompetent.

I am alive to the position of the law as rightly put by the applicant that, offensive paragraphs of affidavit can be expunged or disregarded and the Court proceed to determine the application based on the remaining paragraphs if the expunged paragraph(s) is/are inconsequential. See the case of **Jamal S. Mkumba and Another** (supra) and **Phantom Morden Transport (1985) Ltd** (supra). It was held in the later case that:

*"It seems to us that where defects in an Affidavit are inconsequential, those offensive paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the Court can proceed to act on it."*

Further to that, I am aware of the settled position of the law that, in appropriate cases where the defects are minor, the Court can order an amendment by way of filing a fresh affidavit or by striking out the affidavit where the defects are of substantial or substantive nature as no amendment is allowed under the circumstances for being a nullity. See the case of **Omary Ally Omary Vs. Idd Mohamed and Others**, Civil Revision No. 90 of 2003 (HC-unreported) when made reference to the cases of **Lalago Cotton Ginnery and Oil Mills Company Limited v. LART**, Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 8 of 2003. **Phantom Modem Transport (1985) LTD** (supra) and **Manorial Aggarwal v. Tanganyika Land Agency Ltd. & Others**, Court of Appeal of Tanzania at Dar es Salaam, Civil Reference No. 11 of 1999.

Guided with the above settled legal stance and given the fact the defects shown in the applicant's affidavit are such grave as no amendment can be allowed, I proceed to expunge paragraphs 3-7 from the applicant's affidavit for containing issues and law, paragraphs 8-10 for containing legal arguments and paragraphs 11 -12 for containing opinions, arguments and conclusions.

Now having expunged paragraphs 3-12 of the affidavit the next question is whether with the remaining paragraphs the application can survive. It is Ms. Shengena's submission that the same should crumble while the applicant is of the contrary view that it can survive on the ground that the facts raising disturbing features, novel points of law and issues of general importance are also well spelt in the chamber summons. I subscribe to Ms. Shengena proposition that under the circumstances the application cannot survive. The reasons I am so holding is that, having expunged the above paragraphs, the surviving paragraphs are paragraphs 1 and 2 which do not containing any evidence to support the application. With due respect to the applicant and under the circumstances, I am not convinced at all with his proposition that, the application can survive basing on the grounds spelt in the chamber summons intended to be dealt with by the Court of Appeal if the application is heard on merit and granted. The reason I am so holding is simple to tell, as summons must contain prayers sought in the application and not grounds in its support as the applicant would like this Court to believe. In other word I would say stating grounds in support of the application in the chamber summons instead of reducing them in the affidavit in its support is an alien practice to this jurisdiction which the applicant cannot be allowed to

introduce. It is from that fact I refrain from taking the invitation by the applicant to consider the grounds stated in the chamber summons as grounds supporting the application, hence conclude that the application is incurably defective for want of affidavit to support it.

In the event, I find the 1<sup>st</sup> point of objection meritorious and sustain the same. Since the same has effects of disposing of the application, I don't find any need to further determine the second point of objection. I therefore proceed to struck out the application for being supported by defective affidavit hence incompetent.

I order, each party to bear its own costs.

It is so ordered.

Dated at Dar es Salaam this 11<sup>th</sup> day of August, 2023.



E. E. KAKOLAKI

**JUDGE**

11/08/2023.

The Ruling has been delivered at Dar es Salaam today 11<sup>th</sup> day of August, 2023 in the presence of the applicant in person, Ms. Caroline Lyimo, State Attorney for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and Mr. Oscar Msaki, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI  
**JUDGE**  
11/08/2023.

