**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB-REGISRY OF ARUSHA**
**AT ARUSHA**

**MISC. LAND CASE APPLICATION NO. 176 OF 2022**

*(C/F Land Application No. 37 of 2019 in the District Land and Housing Tribunal for Karatu at Karatu)*

**ABEL LOHAY SLAA** _____ **APPLICANT**

***VERSUS***

**SIMON JOHN QUWANGA** _____ **1ST RESPONDENT**

**DEOGRATIUS KISENGE** _____ **2ND RESPONDENT**

*03/08/2023* **&** *25/08/2023*

**RULING**

**BADE, J.**

The applicant has moved this Court under section 41 of the Land Disputes Court Act (Cap 216 RE 2019) and section 14 (1) of the Law of Limitation Act, (Cap 89 RE 2019) seeking an extension of time within which the Applicant may file a petition of appeal out of time. The 1st respondent filed a counter affidavit simultaneously with a notice of preliminary objection on points of law that;

i. *That, the applicant's affidavit is incurably defective for containing hearsay, legal arguments, opinion and prayers.*

*ii. That, the affidavit in support of the application is incurably defective in its verification clause.*

Parties appeared in person, were unrepresented, had sought and were granted leave to file written submission, which order was complied with. The argument as per the 1st Respondent is mainly that the affidavit is defective. In supporting the 1st point of preliminary objection that the Applicant's affidavit is incurably defective for containing hearsay, legal arguments, opinion, and prayers he submitted that paragraph 6 and 9 of the Applicant's affidavit contains legal argument and conclusion on the phrases that and the offending paragraphs were reproduced in parts that in para 7 and 10;

" ..... *merit of the application that resulting (sic) to infringe the applicant's rights to enjoy his rights... (sic)"*

"*The applicant is the rightful owner of the suit land".*

"*.....In 2018 the 2nd respondent trespassed into the applicant's plot..."*

He supported his position by citing Order XIX Rule 3 (1) of the Civil Procedure Code (Cap 33 RE 2019) which provided that an affidavit being a substitute for oral evidence is to be confined to statements of facts capable of being deponed by a deponent. In his opinion, an affidavit is

required to be free from extraneous matters by way of hearsay evidence, opinions legal arguments, and conclusions.

Moreover, he submitted that section 62 (1) (a) (b) (c) and (d) requires oral evidence to be direct evidence, and since affidavits are a substitute for oral evidence, a sworn affidavit as written evidence has to be direct evidence, cementing the provisions in Order XIX Rule 3 of the CPC. He further contended that given the seriousness of the intended application in which the applicant is desirous of applying for an extension of time to file an appeal out of time, he is duty-bound to bring the application in accordance with the dictates of the law, failure of which renders the application incompetent before the court. To buttress his position, he cited the case of **Vehicle and Equipment Ltd vs Jeremiah Charles Nyagawa, Misc. Civil Application No. 246 of 2022, HC at Dar es Salaam (unreported)** where it was held that a defective affidavit cannot stand to support the chamber application rendering the Application as incompetent and struck out the same.

With regard to the 2nd point of preliminary objection, he contends that the affidavit contains a defective verification clause thus offending the provisions of Order XIX Rule 3 (1) and Order VI Rule 15 (2) of the CPC. He insists that the provisions of Order VI Rule 15 (2) require every

person verifying to specify by reference to the numbered paragraphs of the pleading what he or she verifies according to his own knowledge and which ones he verifies upon information received and believed to be true.

He added that the counsel for the Applicant verified the information given to him without even indicating the one who gave him the said information, thus the source of the information is unknown to him. To support his position, he cited the case of **Uganda vs Commissioner of Prison *exparte* Matovu** (1966) EA 514.

The 1st Respondent further contended that in the circumstance the deponent was informed of the matters deponed by an unknown person. To support his stance, he cited the case of **Aloys Lyasenga vs Inspector General of Police and Another,** [1997] TLR 101 where the court dismissed the suit for having a defective verification clause. It is the 1st Respondent's further contention that the courts of law have always insisted on the importance of stating sources of information in the verification clause. To cement this position, he cited the case of **Anatoli Peter Rwebangira vs The Principal Secretary, Ministry of Defence and National Service and Attorney General,** Civil Application No. 548/04 of 2018, CAT at Bukoba (unreported).

**Responding,** the Applicant countered the 1st preliminary objection submitting that the points raised by the 1st Respondent are not pure points of law which do not bring the litigants to the end of the dispute. In his view, the 1st Respondent has misconstrued the law and came up with a misleading and confusing interpretation of Order XIX Rule (1) which provides that;

> *"A court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable".*

He further submitted that the rational answer as to whether the applicant's affidavit contained hearsay, legal arguments, opinion and prayers is found in what was observed in the case of **Mukisa Biscuits Manufacturing Company Ltd** (1969) EA 696 where it was held that:

> *"a preliminary objection consists of point of law which has been or which arises by clear implication out of the pleadings and which if argued as a preliminary objection may dispose the suit".*

He is of the view that the preliminary objection that the applicant's affidavit contains hearsay is not a pure point of law and it needs more

evidence to prove and thus cannot qualify to be a preliminary objection on point of law.

He further contended that the need for substantial justice as enshrined under article 107 A (2) (e) of the Constitution of the United Republic of Tanzania was promulgated just to ensure that substantive justice prevail. That the word "shall" as used in Order XIX Rule 1 of the CPC does not mean it is always mandatory because the court is at liberty to construe the general purpose of the provision and provide justice to parties. He sought support for his position, in the case of **Arcopar (O.M) SA vs Harbert Marwa and Family Investment Co. Ltd,** Civil Application No.94 of 2013 (unreported) where the court held that:

> *"Depending on the nature of the procedural violation of the rules, but the courts do ignore or overlook some of them and order the matter to proceed on merit and in most cases if the said violation did not occasion injustice to the other party".*

Countering the 2nd point of preliminary objection, that the Applicant's affidavit sworn by his advocate one Tumaini Isara Iteremi in the verification clause indicates that;

*"Paragraphs 1,2,3,4,5,6,7,8,9,10,11,12,13,14, and 15 is true to the information given to me".*

He argues that this is not fatal and is curable by way of amendment under the provisions of Order VI Rule 17 of the Civil Procedure Code, Cap 33 RE 2019.

In rejoinder, the 1st Respondent reiterated his submission in chief and added that the allegation by the Applicant that 1st point of preliminary objection is not a pure point of law which may finalize the controversy between the parties is a misleading argument because the point to be regarded as a pure point of law it is not necessary for it to bring litigation to the end as the Applicant argues. That the proper provision as submitted earlier by the 1st Respondent is Order XIX Rule 3(1) of the Civil Procedure Code and not Order XIX Rule 1 as submitted by the Applicant.

Distinguishing the case of **Mukisa Biscuits (supra)** he clarifies that the same does not answer the question as to whether the affidavit contains hearsay, legal arguments, opinion, and prayers as alleged by the Applicant, rather the case provides for the test as to whether the raised point of preliminary objections qualifies to be pure point of law. Further, the argument that the Applicant's affidavit is incurably defective

for containing hearsay, legal arguments, opinion, and prayer is in law a pure point of law.

He finalized his rejoinder by concluding that the argument as submitted by the Applicant that this defect may be cured by an amendment is untenable, and thus he prayed that this application be struck out with cost.

Having read the submissions made by both parties and going through the pleadings filed in court the issue worth determining is whether the raised preliminary objections have merits. Now looking at Order XIX Rule 3 (1) of the Civil Procedure Code, Cap 33 provides that;

> *"Affidavit shall be confined to such facts as deponent is able of his own knowledge to prove, except in the interlocutory applications on which statements of his belief may be admitted provided that the grounds thereof are stated".*

Basing on this legal requirement this Court has gone through the Chamber Summons and the supporting Affidavit of the Applicant to see whether the paragraphs mentioned by the 1st Respondent are contravening the provisions of Order XIX Rule 3(1) of the Civil Procedure Code, Cap 33. The Court is of the firm view that paragraph 6 contains

both legal arguments and conjectures as it states that parties in Application no. 100 of 2017 were different from the parties in Application no. 37 of 2019 and the boundaries of the suit land in both two Applications were different however the Chairman of the Tribunal decided to treat them as the same, while paragraph 7 is argumentative, contains suppositions and legal argument as it states that the Applicant is the rightful owner of the suit land claimed in Application no. 37 of 2019. On the other hand, paragraph 9 is argumentative that the action of the Chairman of the Tribunal to dismiss the Application infringes the Applicant's right. Similarly, Paragraphs 10 and 11 are argumentative and contain legal arguments as well as inferences that the tribunal maliciously refused to supply the applicant with copies of the Tribunal Order, and that the 2nd Respondent trespassed into the Applicant's plot. Further paragraph 12 has the deponent's opinion as well as hearsay evidence that the Applicant's body high pressure raised up (sic) due to the fear of losing his house and piece of land (sic).

In the case of **Male Mabirizi vs Attorney General** [2018] UGSC 50 (14 December 2018) the Supreme Court of Uganda held in persuasion while guiding on an argumentative affidavit:

*"An affidavit as we understand it is meant to adduce evidence and not to argue the application. We find that the affidavits of the applicant fall short of meeting this standard. The length of the affidavits by itself is not the issue but we find that the contents are argumentative and prolix. They argue the case instead of laying down the evidence to be relied on in deciding the application..... Prolixity is defined in the Black's Law Dictionary, Ninth Edition at page 1331 as "The unnecessary and superfluous stating of facts and legal arguments in pleading or evidence."*

In further expounding of this point the Supreme Court Justices insisted that an affidavit should contain facts and not arguments or matters of law. Giving import to Order 19 Rule 3 which is in *pari materia* with our own Order XIX Rule 3 of Civil Procedure Code, Cap 33, they stated

*"It is further noted that under Order 19 Rule 3 of the Civil Procedure Rules, the deponent who makes an argumentative affidavit which is incurable can be penalized by paying for the costs of the application.....While we do not find anything scandalous in the affidavits of the applicant, we find that they are prolix and non-compliant with Order 19 Rule 3 of the Civil Procedure Rules and we strike them out."*

Accordantly, the legal status of a non-conforming affidavit is quite settled with a plethora of legal pronouncements including in the case **of Uganda vs Commissioner of Prisons exparte Matovu** (supra). That is the position of the law and the Applicants has not cited any other authority that goes against this position.

> *"The affidavit sworn by counsel for is also defective. It is clearly bad in law. Again, as a rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only constitute statements of fact and circumstances to which the witness deposes either of his own knowledge or from information to 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 counsel in this matter contravenes Order 17 Rule 3 and should have been struck out".*

I must hasten to add that the quoted provision above is The Court also observed that section 62 (1) (a) (b) (c) and (d) of the Tanzania Evidence Act, (Cap 6 RE 2022) qualifies oral evidence to be direct evidence, and since affidavits are a substitute for oral evidence, a sworn affidavit is written evidence, cementing the provision of Order XIX Rule 3 of Civil Procedure Code, Cap 33. The arguments by Applicant that the raised

preliminary points of law are not pure points of law is utterly misconceived as the requirement of how an affidavit should be or not be emanates from legal provisions as canvassed above. More importantly, it is true that they do not need any evidence to prove it. They are glaringly clear on the affidavit itself.

Similarly important, is the lack of proper verification clause to verify the facts stated. For the sake of argument, even if the facts stated in the body of the affidavit were to be found as valid facts as should be contained in the written evidence, the said affidavit would not be able to stand as it lacked a verification clause.

It is a cardinal rule that an affidavit is the substitute for oral evidence before the Court. The verification clause being one of the essential components of any valid affidavit, it has to show and distinguish which of the facts are

i) true as to the deponent's own knowledge,

ii) exploited or related from some other source that the deponent believes to be true; and

iii) there must be a disclosure of the source of information.

(See the case of **Anatory Peter Lwebangira** (supra))

The Court of Appeal while underscoring the importance of a verification clause in an affidavit, was categorical that an affidavit that contains a defective verification clause cannot be admitted as evidence; stating in the case of **Sanyou Service Station Ltd vs BP Tanzania Limited,** Civil Application No. 185/17 of 2018, that the reasons for verifying an affidavit are first, to help the Court find the facts which have been proved by the parties; and secondly, to test the genuineness and authenticity of the allegations and hold the deponent responsible for the said allegation.

It is the finding of this Court as contended by the Respondent that the affidavit supporting the application is incurably defective, which in effect, is the same as having no affidavit at all.

Correspondingly, the Chamber Summons is found to have no supporting affidavit and thus cannot stand. It is incompetent. In the final analysis, this application is wholly struck out with costs.

It is so ordered.

**DATED** at **ARUSHA** on the **25th August 2023**

**A.Z. BADE**
**JUDGE**
**25/08/2023**

**DELIVERED** at **ARUSHA** on **25th August 2023** in chambers in the presence of the parties/ and or their representatives.


**A.Z. BADE**
**JUDGE**
**25/08/2023**