

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB REGISTRY OF MANYARA
AT BABATI**

MISCELLANEOUS LAND APPLICATION NO. 23 OF 2023

(In the matter of an application for leave to appeal to the Court of Appeal of Tanzania in the intended appeal from the decision of the High Court in Land Appeal No. 4 of 2022)

FERDINAND GILGO LULU.....APPLICANT

VERSUS

MAGRETA BASSO.....RESPONDENT

RULING

1st & 7th September, 2023

Kahyoza, J.:

Ferdinand Gilgo Lulu (the applicant) filed an application for leave to appeal to the Court of Appeal. Before hearing the application, **Magreta Basso** (the respondent) raised through his advocate, three points of preliminary objection. However, during the hearing the respondent's advocate abandoned one point and retained two points of preliminary objection as follows-

- 1) that the application is bad in law for contravening Order XIX, rule 3 of the Civil Procedure Code, [Cap. 33 R.E. 2019]; and
- 2) that the application is wrongly supported by an affidavit of an advocate.

The parties' advocates filed written submissions to support or oppose the preliminary objection. Mr. Lengai Nelson Merinyo, Advocate, represented the Applicant, and Mr. Raymond Kim, Advocate, appeared for the respondent. I will refer to the parties' submissions while responding to issues raised pertaining to the points of preliminary objection.

Is the verification clause defective?

Submitting in support of the first point of preliminary objection, Mr. Kim, respondent's advocate, argued that the affidavit is defective as it contains a defective verification clause. He argued further that, the contents of paragraphs 2, 3, 5, and 6 of the affidavit are information, the deponent, who is applicant's advocate, obtained from another source. Since, the applicant's advocate did not represent the applicant in any proceedings, there is no way he would have had such information. The facts he deposed are based on second hand information. For that reason, the affidavit offended Order XIX, rule 3 of the **Civil Procedure Code**, [Cap 33 R.E 2019] (the CPC), for the deponent's failure to disclose the source of information.

The respondent's advocate submitted further that, paragraph 4 of the affidavit contains points of law, contrary to express provision of the law, that is Order XIX, rule 3 of the CPC. He cited the case of **Vehicle & Equipment**

Ltd vs Jeremiah Charles Nyagawa (Misc. Civil Application 246 of 2022) [2022] TZHC 13168 (21 September 2022) to support his contention.

He prayed the affidavit to be expunged as decided in the case of in **Yona Mwakyoma & 8 Others v. Alfred Mwandali**, Misc. Application No. 98 of 2020 (HC Mbeya Sub-Registry-Unreported).

The applicant's advocate, Mr. Lengai replied that, since an appeal to the Court of Appeal is initiated by a notice appeal, the fact he drafted the notice of appeal, he had knowledge of the existence of the notice as well as the pending application. Thus, paragraphs 2, 3, 4, 5 and 6 contains facts he "gathered" from his own knowledge, acquired during the institution of the notice of appeal. He contended that he had an opportunity to go through the impugned High Court ruling, before he advised the applicant, and in turn the applicant instructed him to lodge the instant application. He was therefore conversant with the facts in the affidavit. The applicant's advocate distinguished the present case from the case of **Yona Mwakyoma & 8 Others** (cited supra) based on facts.

The applicant's advocate submitted that paragraph 4 of the affidavit, contains grounds of the intended appeal, which are not facts in the meaning of the decision in **Vehicle and Equipment Ltd v Jeremiah Charles Nyagawa** (cited supra). Rather, they are contentious issues worthy to be

considered by the Court of Appeal. To support his contention, he cited the cases of **Tanzania Sewing Machine Co. Ltd v. Njake Enterprises Ltd**, Civil Application No. 238 of 2014 and **Juliana Martin & 2 Others v. Uru East Mruwia Joint Venture Society Ltd**, Civil Application No. 449/05 of 2021 (unreported).

Regarding, the defects in the verification clause, the applicant's advocate thought to refuge to the provisions of section 47(4) of **the Land Disputes Courts Act**, [Cap. 216 R.E. 2019] and **Tanzania Sewing Machine Co. Ltd v. Njake Enterprises Ltd (supra)**.

In his rejoinder, Mr. Kim was emphatic that the deponent's source of information was court's record and the applicant, his client, of which he ought to disclose in the verification clause in his affidavit. The authorities cited by the applicant's advocate are all distinguishable. He concluded that the supporting affidavit was incurably defective.

After the recital of rival arguments, I find it in order to recite the relevant provisions. Order XIX, rule 3 of the CPC provides:-

"3. Matters to which affidavits shall be confined

(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.

(2) The costs of every affidavit which unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall (unless the court otherwise directs) be paid by the party filing the same.” (Emphasis added)

The same is amplified in a celebrated case of **Uganda v. Commissioner of Prison Ex parte Matovu**, [1966] EA 514 thus: -

“The affidavit sworn to by counsel is also defective. It is clearly bad in law..... 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 personal knowledge or from information which he believes to be true. Such an affidavit must not contain an extraneous matter by way of objection or prayer or legal argument.”

I wish to state that, the position in **Uganda v. Commissioner of Prison Ex parte Matovu** that an advocate may not swear an affidavit has since changed. The position is now settled that an advocate may swear an affidavit on behalf of his client. The only condition before an advocate swears an affidavit is that, he must be conversant with the facts of the case. I am persuaded by the decision of the Court of Kenya in **Horticultural Exporters (1997) Ltd v. Part** (1986) KLR 706 it was held that “...*there is no prohibition against an advocate who of our knowledge can prove some facts to state them in an affidavit on behalf of his client.*”. The Court of Appeal of Tanzania took a similar position in **Arbogast C. Warioba V.**

National Insurance Corporation (T) Ltd and Consolidated Holding Corporation, Civil Application No. 24 of 2011 where it observed that-

*"The Court did not therefore lay down a general rule that advocates cannot swear affidavits in their clients' cases, but in my understanding, such affidavits should not contain hearsay. In AUGUSTINE MREMA's case, again the High Court said nothing about whether or not advocates could swear affidavits, but in a way supported the position in **RAJPUT'S** case that, whether the deponent is an advocate or not it was, just like other evidence, subject to scrutiny."*

The next question is whether the affidavit is fatally defective for not disclosing the source of information in the verification clause. It is settled that where an affidavit is made on information *it should not be acted upon by any court unless the sources of information are specified*. See the case of **Salima Vuai Fom v. Registrar of Cooperative Societies & 3 Others**, (1995) TLR 75.

I quickly add, that a court has discretion to allow a party to amend the defective affidavit even where the defects is on the verification clause or the affidavit has no verification clause. The court has mandate to order amendment of the affidavit at any stage even after the adverse party has raised the preliminary objection. I wish to refer to the decision of the Court

of Appeal in **Sanyou Service Station Ltd v. Bp Tanzania Ltd (now Puma Energy T. Ltd)** [2019] TZCA 144 (20 May 2019), (tanzlii) where it stated that- .

"I wish to emphasize that from the foregoing, it can safely be concluded that the Court's powers to grant leave to a deponent to amend a defective affidavit, are discretionary and wide enough to cover a situation where a point of preliminary objection has been raised and even where the affidavit has no verification clause. Undoubtedly, as the rule goes, the discretion has to be exercised judiciously. On the advent of the overriding objective rule introduced by the Written Laws (Miscellaneous Amendments) (No.3), Act, 2018, the need of exercising the discretion is all the more relevant."

It is beyond dispute that the applicant's advocate, who sworn an affidavit to support the application, did not represent the applicant at any stage. He only instituted an application for leave to appeal. I cannot think of the advocate who did not represent the applicant to have knowledge of the facts averred in the paragraphs 2, 3, 5 and 6. I have no doubt that the facts in paragraph 4 are based on the applicant's advocate knowledge. I am of the firm view that the applicant had no personal knowledge of the facts he deposed in the affidavit under paragraphs 2, 3, 5 and 6. He acquired the information from the court's record or from the applicant or the applicant's record.

In addition, the applicant's contention that he gathered information in the affidavit from own knowledge acquired during the institution of the notice of appeal, supports this Court's findings that the applicant's advocate had no *own personal knowledge* of the facts he deposed in the affidavit. It puzzled the Court, how the advocate who did not represent the applicant, acquaint himself with the facts of the case without being told or reading the proceedings of the case. If, the applicant's advocate was frank, he must have disclosed the source of information. The source of information not necessarily need to be a person. Information may be obtained from reading books, law, and proceedings, judgments, and order of the court.

I am in total agreement with the respondent's advocate that the applicant's advocate ought to have disclosed the source of information for facts in paragraph(s) 2, 3, 5 and 6 in the verification clause. I uphold the preliminary objection that the affidavit supporting the verification clause bears a defective verification clause.

The next question is what is the consequences of the verification clause. As held in cases without number, the verification clause is one of the essential ingredients of a valid affidavit. The absence of the verification clause or when it is defective, the affidavit is unacceptable, such an invalid affidavit cannot support an application. An affidavit with a defective

verification clause is defective but not fatally defective. A court has discretion to order the applicant to amend the affidavit.

It is now settled as the Court of Appeal held in **Sanyou Service Station Ltd v. Bp Tanzania Ltd (now Puma Energy T. Ltd)** (supra) the court may instead of striking out an application for want of an affidavit order the affidavit to be amended. I wish also to refer to an earlier decision of the Court of Appeal in **DDL Invest International Limited v. Tanzania Harbours Authority & Two others**, Civil Application No. 8 of 2001 (unreported) where it observed that-

“whether or not to allow a party to amend an affidavit with a defective verification is a matter in the discretion of the Court.”

I uphold the preliminary objection that the affidavit is defective for the deponent's failure to disclose the source of information in the verification clause. However, I refrain from striking out the application, and order the affidavit to be amended to rectify the verification clause only.

The respondent's advocate submitted further that the affidavit was defective for its paragraph 4 contains hearsay and pure legal arguments. The applicant's advocate replied that paragraph 4 of the affidavit contains intended grounds of appeal. He contended that the contents of paragraph 4

are not facts in the meaning stated in **Vehicle and Equipment Ltd v. Jeremiah Charles Nyagwa** (supra).

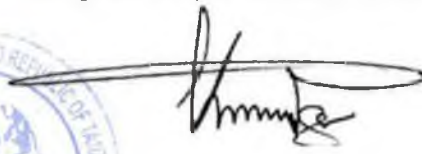

It is axiomatic that leave to appeal to the Court of Appeal is granted when an applicant **raises a legal point worth the consideration of the Court.** See **Nurbhai N. Rattansi v. Ministry of Water, Construction, Energy and Environment and Hussein Rajabali Hirji**, [2005] T.L.R. 220, or where on prima facie, it appears that there are grounds of appeal which merit serious judicial consideration. See **Sanga Bay Estates Ltd & Others V. Dresdner Bank** (1971) EA 17. Hence, an affidavit in support of application for leave cannot skip to raise legal points or arguments to establish the prima facie the existence of **disturbing feature as to require the guidance of the Court of Appeal.** I find that the objection that the affidavit is defective for containing legal argument in the circumstance of this case, misplace. I overrule it.

In the end, uphold the point of preliminary objection that the affidavit is defective for deponent's failure to disclose the source of information of the contents in paragraphs 2, 3, 5, and 6. Consequently, instead of striking out the application for being incompetent, I order the applicant to amend only the verification clause to indicate the source of information of contents in

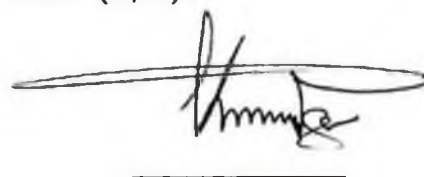
paragraphs 2, 3, 5, and 6 of the affidavit. I overrule other points of preliminary points of objection.

I award, the half costs to the respondent as only one point of the preliminary objection has been sustained. I proceed to tax the costs at Tzs 150,000/= under item 44 of **the Advocates Remuneration Order, 2015** GN. No. 263/2015. The amount taxed include Tzs. 50,000/= as costs for appearance and Tzs.100,000/= which is instruction fee to prosecute the preliminary objection.

Dated at **Babati** this **7th day** of September, 2023.



J. R. Kahyoza
JUDGE

Court: Ruling delivered virtually in the presence of Mr. Lengai merinyo for the applicant and Ms. Fatina (B/C).



J. R. Kahyoza

JUDGE

07.09.2023