

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

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**MISCELLANEOUS LAND APPLICATION NO. 59 OF 2022**

*(Arising from the Decision of the District Land and Housing Tribunal for Moshi at Moshi  
dated 29<sup>th</sup> October, 2022 in Application No. 208 of 2017)*

**ADONIKA AMOSI LEMA SWAY ..... 1<sup>ST</sup> APPLICANT**  
**OBERLIN GODFREY LEMA ..... 2<sup>ND</sup> APPLICANT**  
**EMMANUEL ALBERT LEMA ..... 3<sup>RD</sup> APPLICANT**  
**ELIZABETH ALBERT LEMA ..... 4<sup>TH</sup> APPLICANT**

***VERSUS***

**THE REGISTERED TRUSTEES OF  
CATHOLIC DIOCES OF MOSHI ..... RESPONDENT**

**RULING**

7<sup>th</sup> & 19<sup>th</sup> Sept. 2023.

**A.P.KILIMI, J.:**

The applicants hereinabove filed an application before this court under Section 41(2) of the Land Disputes Courts Act [CAP 216 R.E 2019] seeking for extension of time within which to file an appeal against the decision of the District Land and Housing Tribunal for Moshi in Application No. 208 of 2017. Upon being served with the application the respondent through her advocate Mr. Aristides Ngawiliau raised two preliminary objections on point of law as follows;

1. That the chamber summons and the affidavit are defective for want of signatures of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants.
2. That the court is improperly moved.

The preliminary objections have been argued by way of written submissions. Mr. Aristides Ngawiliau learned advocate represented the respondent while Mr. Fredy Elimbingi Kimaro learned advocate represented the applicants.

In his submission in support of the preliminary objection Mr. Ngawiliau learned counsel submitted that the affidavit supporting the chamber summons is incurably defective as it contravenes Order XIX Rule 3(1) of the Civil Procedure Code CAP. 345 R.E 2019 (hereinafter referred as "CPC") which requires affidavits to be confined to the facts that the deponent is able to prove. He further argued that the application is incompetent as it was filed contrary to Order XLIII rule 2 of the CPC which requires application to be supported by an affidavit.

Expounding his argument, the learned counsel stated that the application at hand has four applicants however the chamber summons supported of the same has only one affidavit sworn by Elizabeth Albert Lema

the 4<sup>th</sup> applicant. That on the second paragraph of the affidavit she stated that she sworn the affidavit in her capacity as the 4<sup>th</sup> applicant but also on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants as her fellows. He argued that nowhere in the affidavit did she state to be issued with power of attorney or otherwise being a legal representative of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants. He thus argued that the content of the second paragraph is incurably defective in the eyes of the law since the 4<sup>th</sup> applicant is not a legal representative of the other three applicants hence incompetent to swear affidavit on their behalf.

Furthering his submission Mr. Ngawiliau stated that since paragraphs 2,3,4,5,6,7,8,9,10,11,12 and 13 of the affidavit contain information related to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants who have neither sworn any affidavit nor signed on the affidavit sworn by the 4<sup>th</sup> applicant, the contents of the said paragraphs remain to be a hearsay. He submitted that this renders the affidavit incurably defective. He contended that pursuant to Order XIX rule 3(1) of CPC the information from a person other than the deponent is hearsay. He supported his contention with the case of **NBC Ltd vs. Superdoll Trainer Manufacturer Co Ltd**. Civil Application No. 31 of 2000 as cited in the case of **Dr. Hamisi S. Kibola & 2 Others vs. Saleh Salim**

**Al Amry.** Misc. Civil Application No. 317 of 2019, HC at Dar es Salaam. It was Mr. Ngawiliau's views that considering that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants did not swear an affidavit and the 4<sup>th</sup> applicant is not in possession of a power of attorney the affidavit has been rendered incurably defective.

In conclusion Mr. Ngawiliau stated that once the affidavit is incurably defective, it logically means that the chamber summons has not been supported by an affidavit contrary to the provisions of Order 43 rule 2 of the CPC. Concluding his submission, Mr. Ngawiliau prayed that the application be struck out with costs.

Mr. Kimaro responded to the submissions above, contended that all the two points of preliminary objection raised by the respondent are not on a pure point of law because evidence would be required to establish whether the 4<sup>th</sup> applicant is instructed and authorized by other applicant to swear affidavit on their behalf contrary to the principle stated in the case of **Mukisa Biscuit Manufacturing Company Ltd vs. West End Distributors Ltd** (1969) EA 696, he said this is because the said point of objection raised contain mixture of facts and points of law hence making it not a pure point of law.

Addressing on the issue of swearing affidavit on behalf of others, Mr. Kimaro submitted that the applicant stated clearly under paragraph 2 of her affidavit that she swore the affidavit on behalf of other applicants and also in verification clause she disclosed the source of that information. The learned counsel submitted further that swearing an affidavit on behalf of others is not prohibited by law and in that regard, he referred to the case of **Rehema Mohamudu and 4 Others vs Kagera Cooperative Union (1990) Ltd** (Misc. Land Application No. 124 of 2021) [2022] TZHC 679.

It was his further submission that the affidavit in support of the application was made on matters which were on the knowledge of the applicant and that she is capable of proving the same and therefore contended that the same meets the requirement of Order XIX Rule (1) of CPC. Fortifying his submission, he referred the Court of Appeal decision in the case of **Benedict Rugemalira and 2 Others vs Mohamed Versi and 2 Others** [1997] TZCA 89 (Tanzlii).

Mr. Kimaro went on submitting that for one to swear an affidavit on behalf of others the deponent has to state that he is swearing on behalf of others as the applicant did in her affidavit in support of this application. Buttressing this point, he referred the case of **Mohamed Abdilah Nur and**

**Others vs Hamad Masauni & Another**, Civil Application No. 436/16 of 2022 CAT at Dar es Salaam as cited in the case of **Mustafa Seif Ngane & 2 Others vs. the Registrar of Titles & 2 Others** (Land Application No. 537 of 2022) [2022] TZHC.

Submitting in alternative to his submission in chief Mr. Kimaro stated that suppose this court finds merit in the preliminary objection raised, it is his prayer for this court to invoke the principle of overriding objective and allow the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants to file supplementary affidavit. He then urged this Court to overrule the preliminary objection with cost.

In brief rejoinder Rejoining by Mr. Ngawiliau avowed that the applicant's learned counsel had misconceived the point of law raised. He thereafter argued that it was necessary for the 4<sup>th</sup> Applicant to identify herself as donee of the power of attorney if at all she was authorized by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants to represent them. He contended that it was not enough to just say she was authorized to represent them without disclosing the manner in which she was authorized to represent them and that in that way it would not require her to prove anything. Hence, he argued that it was a pure point of law and not fact as alleged by applicant's counsel.

I have dispassionately considered the submissions of both learned counsel, in fact the counsel for respondent based his objections asserting the same is against Order XIX Rule 3(1) and Order XLIII rule 2 of the CPC. For ease of reference, I reproduce the said provisions hereunder;

*"Order XLIII (2). Every application to the Court made under this Code shall, unless otherwise provided, be made by a chamber summons supported by affidavit:*

*Order XIX rule 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."*

I have entirely gone through the affidavits and rival submissions for and against the preliminary objection. The issue for consideration is whether this preliminary objection is meritorious or not. Starting with the first point of objection where the respondent's counsel alleges that the affidavit in

support of the application is incurably defective for want of signatures of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants.

The counsel for respondents advanced that the mere assertion by the 4<sup>th</sup> applicant to have been instructed by her fellows under paragraph 2 of her affidavit is not enough proof that she was indeed instructed. He contended that there had to be proof of power of attorney giving her the authority as that would be legal authority.

In my view, the above issues of swearing an affidavit on behalf is settled in our jurisdiction, In the case of **Benedict Rugemalira and 2 Others vs Mohamed Versi and 2 Others** (supra) the court relied in the case of **Standard Goods incorporation Ltd. vs Horakhand Nathu & Co.** (1350) 17 EACA 99 and **Bombay Flour Mill vs Hunibhai M. Patel** (1962) E.A 803 and observed that an affidavit is based on information, it should not be acted upon unless the source of the information is disclosed. The court went on to say that affidavit is valid if the court satisfy that apart from the mere assertion in the affidavit that the deponent was swearing on behalf of the others, in substance, the deponent himself swears on matters which were within his personal knowledge.



As rightly submitted by Applicant' counsel, the above was expounded in the case of **Mohamed Abdiallah Nur & Others vs Hamad Masauni & Others** (supra) when the court of appeal at page 8 had this to say;

*"We must quickly observe that, a person purporting to swear an affidavit on behalf of another person who is a party to a court proceeding must do so after consultation with and obtaining instructions from the party on whose behalf the affidavit is being sworn. We also hasten here to emphasize that, such instructions and authorisation must be expressly reflected in the relevant affidavit"*

[ Emphasis is mine]

In the premise, it is also my considered opinion that a person is not prohibited to swear an affidavit on behalf of another person as long as that other person has authorized to do so and the same is reflected in his affidavit.

Now, on the strength of the above observation from the court of appeal decisions, in the present application the 4<sup>th</sup> applicant did state under

paragraph 2 of the affidavit and for purpose of clarity I reproduce the same to the effect that;

*"That I have been instructed and authorized by my fellow Applicants named ADONIKA AMOS LEMA SWAY, OBERLIN GODFREY LEMA and EMMANUEL ALBERT LEMA. (Hereinafter referred to as my fellows) to swear this affidavit **on their behalf in support of an application** for extension of time to file an appeal as prayed for in chamber summons."*

[ Emphasis added]

Moreover, as cited court of appeal provides above, the fourth applicant in verification clause verify that herself has knowledge of what she sworn but also verify that what she stated in paragraph 2 quoted above is the information which she received from fellow applicants.

Therefore, basing on above statement from the applicant's affidavit which clearly depicts what is required when one swears an affidavit on behalf of others. It shows that the deponent was authorized and this statement is enough since it is stated in the affidavit. Affidavit being a substitute of oral evidence is evidence in itself hence one should not take lightly the contents of the same as the learned counsel for the Respondent endeavored to say.

The foregoing said and done, I decline the invitation by Mr. Ngawiliau to see that the affidavit is defective, thus I hold the same to be valid. The first limb of the preliminary objection is therefore overruled. Having determined the first objection, the second limb of the preliminary objection dies a natural death as the same would only stand if the first limb was sustained.

In conclusion thereof, I find preliminary objections raised devoid of merits and consequently I proceed to dismiss them with costs.

It is so ordered.

**DATED** at **MOSHI** this 19<sup>th</sup> day of September, 2023



X



JUDGE

Signed by: A. P. KILIMI

**Court:** Ruling delivered today on 19<sup>th</sup> day of September 2023 in the presence of advocate Aristides Ngawiliau for Respondent and fourth plaintiff present while second to third respondents absent.

**Sgd: A. P. KILIMI**  
**JUDGE**  
**19/09/2023**