

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

**IN THE SUB-REGISTRY OF MANYARA**

**AT BABATI**

**MISC. LAND APPLICATION NO. 41 OF 2023**

(Arising from the decision of the District Land and Housing Tribunal for Babati in  
Land Application No. 39 of 2018)

**DANIEL GILEKSA ..... APPLICANT**

**VERSUS**

**MANTLE KWAANGW.....RESPONDENT**

**RULING**

24/8/2023 & 18/9/2023

**BARTHY, J.**

This is a ruling on preliminary objection raised by the above-named  
respondent to the effect that;

*The application is bad in law because it contravene  
(sic) the provision of Order XIX rule 3 of the Civil  
Procedure Code, CAP 33 of Laws of Tanzania, R.E of  
2019*

By parties' consensus the preliminary objection was disposed of by  
way of written submissions. The applicant was represented by Mr. Elibariki  
Maeda learned advocate while the respondent was represented by Mr.



Raymond Kim learned advocate.

In the submission in support of the preliminary objection, Mr. Kim reasoned that, the affidavit in support of the application at hand contravenes with the provision of Order XIX, Rule 3 of the Civil Procedure Code [CAP 33 R.E 2019 now RE 2022], (hereinafter referred to as the CPC).

According to Mr. Kim, paragraph 9 of the affidavit contains pure lies, since the applicant never went to Handeni looking for the chairman. He maintained that the registry of the trial tribunal is located at Babati and not at Handeni.

Mr. Kim further submitted that, there is no evidence that the applicant travelled to tanga, else there should have been evidence from an officer of the tribunal he met at Handeni or the trial Chairman Mr. Ngonyani.

To prop his arguments, he referred to the decision of this court in the case of **Vehicle and Equipment Ltd v. Jeremiah Charles Nyagawa**, Misc. Civil Application No. 246 of 2022 (media neutral citation [2022] TZHC-13168).

A handwritten signature in blue ink, appearing to read "G. Army".

He further submitted that, affidavit shall be free of legal arguments, reasoning, hearsay evidence, speculations and lies. He maintained that the information contained on paragraph 2 of the affidavit were deposed by the advocate for the applicant who did not represent the applicant in any of the proceedings before the trial tribunal.

Mr. Kim was firm that those facts were supplied by the applicant to his advocate, therefore they contravene with the provisions of Order XIX, Rule 3 of the CPC. As the advocate failed to disclose the source of those facts and on the verification clause the learned advocate for the applicant verified that information based on his personal knowledge.

On further submission Mr. Kim contended that the affidavit contains points of law contrary to the requirement of Order XIX, Rule 3 of the CPC. He maintained that, affidavit shall be free from legal arguments, hearsay evidence, speculations and lies.

To buttress his arguments, the learned advocate referred the case of **Vehicle and Equipment Ltd v. Jeremiah Charles Nyagawa** (supra). He therefore urged the court to strike out the application for being supported by a defective affidavit.



On reply submission, Mr. Maeda contended that preliminary objection raised by the respondent is not on pure point of law; as the facts complained of by Mr. Kim need to be ascertained.

To this arguments, Mr. Maeda referred to the decision in the case of **Mukisa Biscuit Co. Ltd v. West End Distributors Ltd** [1969] where the courts observed that objection should be raised on pure point of law and cannot be raised if any fact has to be ascertained.

Mr. Maeda emphatically pointed out that, the arguments that the contents of paragraph 9 of the applicant's affidavit contain pure lies need to be ascertained; since they are matters best known to the applicant himself. He maintained that the contents contained on paragraph 9 of the affidavit do not offend the provisions of Order XIX, Rule 3 of the CPC.

On further submission Mr. Maeda contended that the content of paragraph 2 of his affidavit is within his knowledge, after he represented the applicant in the appeal that was withdrawn.

He also responded to arguments raised on paragraph 16 of the applicant's affidavit, Mr. Maeda maintained his argument that the facts deposed did not offend the provisions of Order XIX, Rule 3 of the CPC.



Since are they based on advice the applicant received from his advocate and on the verification clause the applicant verifies so.

Mr. Maeda opposed the respondent's counsel argument and stated the information contained on paragraph 16 of the applicant's affidavit are based on the impugned decision of the trial tribunal in which the illegalities and irregularities can be seen.

Mr. Maeda added; the facts contained on paragraph 16 of the applicant's affidavit is based on what transpired at the trial tribunal. He maintained that even if the affidavit contains offensive paragraphs, the remedy is not to strike of the entire application rather to expunge the offensive paragraphs. To buttress his arguments, he cited that case of **Jamal S. Nkumba & another v. Attorney General** Civil Application No. 240 of 2019 (unreported).

He therefore urged the court to overrule the preliminary objection as the affidavit has fully complied with Order XIX, Rule 3 of the CPC.

The respondent opted not to file any rejoinder.

Having gone through the parties' rival submissions the issue for my determination is whether the preliminary objection raised by the

respondent has merits.

The respondent's argument is that, the affidavit in support of the application offends the provisions of Order XIX, Rule 3 of the CPC which reads;

*3.-(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove,*

The respondent's arguments were to the effect that, the affidavit in support of the application at hand is defective for number of reasons; first the facts contained on paragraph 9 of the applicant's affidavit are not true. The contention was that, the applicant did not travel to Handeni to look for the trial chairman, since there is no proof from any official of the tribunal to support the assertion.

I have keenly gone through the said paragraph however, the same cannot be read in isolation, it has to be read with other paragraphs. The applicant deposed that after delivery of the impugned decision, the trial chairperson who is working at the District Land and Housing Tribunal for Handeni; after the hearing of the matter, he returned to Handeni with the case file. Therefore, the applicant decided to make follow up of the copy



of the judgment to Handeni. He attached travelling tickets as proof that he travelled to Handeni.

Rightly as submitted by Mr. Maeda, whether the applicant truly travelled or not it is the issue of facts, which needs to be proved by further evidence. The said matter that cannot be resolved through hearing of preliminary objection.

It is clear that, the preliminary objection raised has to be on point of law and not of facts. In the case of **Mukisa Biscuit Co. Ltd v. West End Distributors Ltd** (supra), it was clearly held that preliminary objection has to be on pure point of law and not that can be ascertained facts.

A similar position was emphasized by the Court of Appeal in the case of **The Soitsambu Village Council v. Tanzania Breweries Ltd and Tanzania Conservation Ltd**, Civil Appeal No. 105 of 2011 (Unreported) in which it was held that;

*Where a court needs to investigate facts, such an issue cannot be raised as preliminary objection on a point of law...*

Hence, the respondent's claim that paragraph 9 of the affidavit in

support of the application contains false information needs further evidence to prove, the argument is therefore based on facts and not law. The arguments are devoid of merits.

Reverting to the argument made by Mr. Kim making reference to paragraph 16 of the applicant's affidavit, claiming to contain legal arguments.

I have visited the impugned paragraph in which the applicant deposed that there are several illegality and irregularity on the decision of the trial tribunal which he wants this court to address once extension of time is granted.

Rightly as submitted by Mr. Maeda, the averments contained on paragraph 16 of the applicant's affidavit are facts trying to establish illegality of the decision of the trial tribunal as the ground to be considered for extension of time.

After all, in the application for extension of time, where there is an allegation of illegality; then the complained illegality must be pointed out in the affidavit for the court to determine whether they exist. This is what the applicant has done in his affidavit.





A similar stance was reached by the Court of Appeal in the case of **Rose Irene Mbwete v. Phoebe Martin Kyomo** (Civil Application No. 70 of 2019) [2023] TZCA 111 where the court considered the ground of illegality pleaded to be the ground to be considered for extension of time to appeal.

Moving further to the arguments made on what was deposed on paragraph 2 of the applicant's affidavit; it was argued not to be within the knowledge of the applicant's advocate, as the applicant's counsel has never represented the applicant before the trial tribunal. This was said to be in contravention with Order XIX, Rule 3 of the CPC. The said paragraph reads;

*2. That, the applicant in this application was also the applicant in the District Land and Housing Tribunal for Babati (hereinafter **'the Tribunal'**) in Land Application No. 39 of 2018 whereas the respondent herein was the respondent in said Land Application at the Tribunal.*

According to the records, it is not in dispute that Mr. Maeda did not represent the applicant before the trial tribunal, but available record shows that he represented the applicant before this court in Land Appeal No. 11 of 2022.



The law requires the deponent to depose facts that are within his knowledge or reveal the source of information. In the case of **Anatol Peter Rwebangira v. The Principal Secretary, Ministry Of Defence and National Service and another**, Civil Application No. 548/04 of 2018, Court of Appeal at Bukoba. It was held among other things 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 on his own personal knowledge or from information which he believes to be true...*

Thus, there is no doubt that, the applicant's counsel being an advocate and officer of the court, after reading the documents he knew what had transpired with respect to the matter. I therefore find that paragraph 2 of the applicant's counsel affidavit contains facts based on his own knowledge. Hence, the applicant's counsel affidavit was properly verified.

In the light of the foregoing, I find the preliminary objection raised by the respondent lacking merits. In the circumstances I overrule the



preliminary objection raised and costs to be in cause.

It is so ordered.

**Dated at Babati** this 18<sup>th</sup> September 2023.



**G. N. BARTHY,**

**JUDGE**

Delivered in the presence of Mr. Joseph Masanja learned advocate holding brief of Mr. Elibariki Maeda for the applicant and Mr. Raymond Kim for the respondent and in the absence of both sides.