IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT IJC MOROGORO

MISC LAND APPLICATION NO 83 OF 2023

BUGWE MGINA & 526 OTHERS.....APPLICANTS

VERSUS

DISTRICT COMMISSIONER
FOR MALINYI DISTRICT..... 1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

DATE OF RULING- 15/11/2023
MANSOOR J

RULING ON A PRELIMINARY OBJECTION

Against, the application for mareva injunction filed by the Applicants, the respondent took an objection that the application is incompetent as the affidavit supporting the application was sworn in by a Third Party, a person who is not a party to the suit. In fact, the affidavit in support of the

Application was taken by Advocate Jackson Mashankara, an Advocate in conduct of the suit, representing all the applicants.

The Learned State Attorney who appeared for the respondents urged the Court to strike out the application as the Affidavit supporting the application was taken by an advocate who swore for matters which are not within his personal knowledge. In support of his arguments, the Counsel referred to the case of **Pumziko Philemon Mlelwa and others vs Ruvuma Regional Commissioner and another, Misc. Civil Application No. 11 of 2023**, in which at page 20 of the Ruling, the Judge was reproducing the argument of the Counsel of a party in that case who made reference to a case of **Tanzania Breweries Limited vs Herman Bildad Minja, Civil Application No. 11/18 of 2019**, in which the Court of Appeal had said that *"Advocates can swear and file an affidavit in proceedings in which he appears for his client but on matters which are within his knowledge."*

The Counsel did not say, which matters in the affidavit of the counsel for the Applicants are not within the knowledge of the Advocate. He simply said, the Advocate swore an affidavit on matters which are not within the Advocate's own knowledge, and this is contrary to the principles set in the above cited cases.

In response, Advocate Mkilya Daudi who appeared on behalf of the Applicants said, in fact, Advocate Jackson Mashankara had verified in the verification clause of the affidavit that the contents of paragraphs 1,8,9,10,11,12 and 13 are within his personal knowledge and the rest of the paragraphs are information he received from the applicants, which information he verily believed to be true.

Not only that the Counsel who raised the objection did not point out which paragraphs of the affidavit are not within the personal knowledge of the Advocate, but again, he needed to bring proof to court to substantiate his stance, that what was deponed by the Counsel for the Applicant in his affidavit are not matters within the advocate own knowledge. Once the court requires to have proof of a matter in order for it to make a decision, that point disqualifies to be treated as a point of preliminary objection. This was well discussed in the famous case **of MUKISA BISCUT MANUFACTURING CO. LTD v. WEST END DISTRIBUTORS LTD [1969] E.A. 696,** made this pertinent observation. It said:

> *"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. The improper raising of points of*

preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop".

The Court of Appeal in Tanzania in the case of **Hammers Incorporation Co. Ltd vs The Board of Trustees of the Cashewnut Industry Development Trust Fund, Civil Application No. 95 of 2015,** discussed about the court's discomforts on the practices of Advocates raising unnecessary and unfounded and improper preliminary objections, and when referring to **Mukisa Biscuits' case**, the Court had this to say, and I adopt their stand in a language expressed by the Court of Appeal that:

"It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the "improper practice" never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in KARATA ERNEST & OTHERS v THE ATTORNEY GENERAL, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the MUKISA BISCUIT case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate. "

Indeed, the pronouncement in **Mukisa Biscuit's** case fell into the deaf ear of the counsel representing the State, and without any hesitation he continued with the improper practice while knowing that in order to argue whether the paragraphs in the affidavit of the Advocate representing the applicants contains hearsay or they are of his own knowledge as verified in the verification clause of the affidavit, proof was needed, he continued to give a deaf ear to this principle and continued with his objections.

Before raising an objection, I urge the counsels to take the tests set in the **Mukisa Biscuits** case, to see whether proof would be needed to substantiate the points, and whenever the point of objection is raised, and requires proof to substantiate it, the Counsels should be diligent enough to refrain raising it as a preliminary objection and instead argue the issues in the case itself.

In any case, as regards the present point of objection raised, the provisions of Order 19 Rule 3 of the Civil Procedure Code has been taken note of and ultimately, and that it is the duty of the parties to the litigation and advocates, to file affidavits in accordance with the rules to assist the Court in administering justice. The litigant or an advocate representing the litigant may file the affidavit, disclosing the facts which are true to his

personal knowledge, information and belief. And if the statement of fact is based on information, he can disclose the source of information. Applying the restrictions provided under Section 19 Rule 3 of the CPC, nothing prevented the Advocate or the party to the litigation from filing an affidavit, disclosing the facts, in the supporting affidavit. The Advocate pleaded facts which are of his own knowledge and had verified in the verification clause, he as well stated that some of the facts pleaded are information he had received from the litigants, and this was in strict compliance of Section 19 (3) of the CPC.

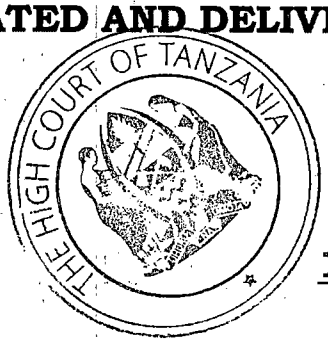
I am also aware that the Advocate Act does not altogether bar an advocate from filing an affidavit in the interest of the client. However, the advocates must be aware that whenever an affidavit is filed on behalf of his party, he assumes the role of a witness. The Court has got a discretionary power to cross-examine the witness, at the instance of either party and that he has to produce the best evidence to prove the contents of the affidavit, thus although they are permitted to take affidavits, the Advocate should also know that he might be examined for the truth of the contents of the affidavit, in that case he would be disqualified from representing the clients as now he has become a witness, and cannot be doing the duo positions of a witness

and an advocate at once. An Advocate should not accept a brief or appear in a case in which he has reason to believe that he will be a witness.

Even assuming that the circumstances of the case forced the counsel on record to file affidavits in support of the applications, they should be aware that they are also required to place the necessary materials before the Court to substantiate the averments made by them in their affidavits, this changes their positions to witnesses, particularly, when the opposite party challenges the correctness or truth of the averments in the affidavit, it is the paramount duty of the advocate who is the deponent of the affidavit to produce the best evidence to prove the contents of the affidavit. Although the practice is permitted, but Advocates should refrain from this as the moment he is required to prove his averments', he cannot be an advocate for the party.

That said, the objection raised are overruled for the above stated reasons, with costs.

DATED AND DELIVERED AT MOROGORO THIS 15TH DAY OF NOVEMBER 2023



(L MANSOOR)

JUDGE

15TH NOVEMBER 2023