

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

MISC. LAND APPLICATION NO. 31 OF 2023

(Arising from Land Appeal No. 59 of 2020 of the High Court at Shinyanga and originating from Land Application No. 13 of 2020 of the District Land and Housing Tribunal for Kahama)

NYANDI MAKONDA @RAMADHANI MAKONDA.....APPLICANT

VERSUS

ELIZABETH MABULARESPONDENT

RULING

2nd & 17th November, 2023

KAWISHE, J.:

This is a ruling emanating from the objection raised by the respondent's counsel on a point of law that:

"The applicant's application in his affidavit is defective of which in his verification clause it does not disclose the source of information as paragraph 5 and 8 avers that the applicant got information from another source."

Initially, the applicant sought an extension of time within which the applicant may file a Notice of Appeal to the Court of Appeal against an order in Land Appeal No. 59 of 2020 of the High Court at Shinyanga, and extension of time to file an application seeking leave to appeal to the Court

of Appeal of Tanzania. The application is founded under section 11(1) of the Appellate Jurisdiction Act, Cap 141 R.E 2019.

During the hearing of the preliminary objection, the applicant appeared in person, unrepresented whereas, the respondent enjoyed the service of Mr. Stephano Malyengeta John learned counsel. The parties prayed to argue the matter by way of written submissions. The prayer was granted hence, this ruling is in respect of their rival written submissions for and against the affidavit's verification clause.

Arguing on the preliminary objection Mr. Malyengeta stated that, the law is settled that under the provisions of Order XIX rule 3(1) of the Civil Procedure Code, Cap 33 R.E 2019 an affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove. He backed up his submission with the principle laid down in the case of **Anatol Peter Rwebangira vs. Principal Secretary, Ministry of Defence & National Service (Civil Application No. 548 of 2018) [2019] TZCA 106** (10 May 2019), where the Court of Appeal held that:

"Where an averment is not based on personal knowledge, the source of information should be clearly disclosed."

In cementing his argument, Mr. Malyengeta cited the case of **Richard Mgwilanga vs. Paulina Mtandi (Misc. Criminal Application 55 of 2021) [2022] TZHC 10859** (29 July 2022), where it was stated that:

"It is a cardinal rule that the affidavit is the substitute of oral evidence before the court. Verification clause is one of the essential parts of any valid affidavit. It has to show which facts are; first true as to the deponent's own knowledge, second, which facts are exploited from another source and which he believes to be true"

Mr. Malyengeta further referred to the Court of Appeal decision which laid down the reasons for verification. See the case of **Sanyou Service Station Ltd vs. Bp Tanzania Ltd (now Puma Energy T. Ltd) (Civil Application 185 of 2018) [2019] TZCA 144** (20 May 2019) where the Court had this to say:

"The reasons for verification of affidavits are to enable the Court to find out which facts can be said to be proved on the affidavit evidence of rival parties. Allegations may be true to information received from persons or allegation may be based on records. The importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for allegations. In essence verification is required to enable the Court to find out as to whether it will be safe to act on such affidavit evidence. In the absence of proper verification, affidavits cannot be admitted in evidence."

The learned advocate insisted that, the applicant did not state in which capacity he made the verification clause, also failed to differentiate which

paragraphs are true according to the deponent's knowledge and which he was advised to be true, he verified all to be true to his own knowledge. Mr. Malyengeta continued to demolish the applicant's affidavit by stating that, since paragraphs 5 and 8 contain the information which the applicant was advised by a lawyer, should have stated and not verifying all generally as he did. He prayed that this Court struck out the application with costs for being supported with defective affidavit in the verification clause.

In response, the applicant through his written submission avers that, it is illogical to consider the advice given to the applicant by a lawyer as a hearsay while, the same he is able of his own knowledge to prove it as he is the one who was advised by the lawyer. He cited the case of **National Housing Corporation & Yono Auction Mart and Company Limited vs. Anna Francis Maendaenda (Misc. Land Application 106 of 2018) [2020] TZHC 1909** (2 July 2020) where the learned Judge stated:

"Mr. Sekule challenged the respondent's argument that the affidavit contains hearsay arguing that the deponent had personal knowledge of what he was told by her lawyer. I agree with him to the extent that the deponent was informed of the matters deponed in the affidavit by his lawyer. This fact as it stands is not

hearsay. However, as regards the content of what she was informed, that amounts to hearsay as it was not in the deponent's own personal knowledge..."

The applicant further quoted section 62(1) of the Evidence Act, Cap 6 R.E 2019 on hearsay. He disputed the interpretation appended to Order XIX rule 3(1) of the Civil Procedure Code (supra) by contending that, the respondent's counsel confused the interpretation of the same. He maintained that, the contents of paragraphs 5 and 8 of the affidavit do not contain hearsay evidence. He prayed that, the objection be dismissed with costs.

I have gone through the submissions of both parties and found out that, the objection is anchored on the verification clause. The objection seeks to prove that the affidavit is defective since, the contents of paragraphs 5 and 8 are information supplied to the deponent. The paragraphs read as follows:

5. that, on 31.08.2021 I approached a lawyer for legal consultation whereby the same instructed me to apply for an application of extension of time within which to appeal against the order in Land Appeal No. 59/2020.

8. that, on 12.06.2023 when my condition got better, I went to a lawyer for legal consultation whereby the same instructed me to file this application so as to

get my right of appeal against the order in Land Appeal No, 56/2020. [emphasis added]

The issue to be answered is what are the consequences of an application that is supported by an affidavit bearing a defective verification clause.

There are various decisions of the High Court and the Court of Appeal which give varied positions depending on the matter concerning affidavits. The current preliminary objection is on the defective clause for non-disclosure of the source of information. The applicant contended that, the information supplied to him by the lawyer cannot amount to a hearsay, as the deponent is capable of proving the same.

The applicant in his affidavit under paragraph 5 verified that, on 31st August, 2021 he approached a lawyer for legal consultation, the lawyer instructed him to apply for an application for extension of time, and under paragraph 8 states that, on 12th June, 2023 he went to a lawyer for legal consultation and he instructed him to file an application for extension of time to file Notice of Appeal to get his right of appeal against the order in Land Appeal No. 56 of 2020. This gives me an impression that, the

applicant did not know his right of appeal even the requirement of filing an application for extension of time.

Since, the applicant was not aware of the requirement of application for extension of time or right of appeal, in my view, he was supplied with the information which he should have disclosed the source as argued by Mr. Malyengeta. In line with this preliminary objection, a reference is made to the case of **Anatol Peter Rwebangira** (supra), the Court of Appeal stated that:

"... a verification clause is one of the essential ingredients of any valid affidavit and what amounts to a verification clause simply shows the facts the deponent asserts to be true of his own knowledge and/ or those based on information or beliefs."

The Court further stated that:

"Where an averment is not based on personal knowledge, the source of information should be clearly disclosed."

From the position of the Court of Appeal in **Anatol Peter Rwebangira** (supra), it is a requirement that, the source of information should be clearly disclosed. The rule governing the *modus* of verification on the contents of the affidavit that can be acted upon and the consequences for non-compliance were considered by the Court of Appeal in the case of **Silima**

Vuai Fom vs. Registrar of Cooperative Societies and 3 Others

[1994] TZCA 44 (5 July 1994). The Court stated:

"1. Where an affidavit is made on information it should not be acted upon by any court unless the sources of information are specified.

2. As nowhere in the affidavit either as whole or in any particular paragraph it is stated that the facts deposed to or any of them and if so which ones, are true to the deponent's knowledge, or as advised by his advocate, or are true to his information and belief, the affidavit was defective and incompetent, and was properly rejected by the Chief Justice." [emphasis added]

It is a trite law that, if the facts contained in the affidavit are based on knowledge, then it can be carefully verified as such. Nevertheless, the law does not allow a blanket or rather a general verification that the facts contained in the entire affidavit are based on what is true according to knowledge, belief and information without specifying the respective paragraphs. See **Paul Makaranga vs. The Republic, Criminal Appeal No. 3 Of 2010, Director of Public Prosecutions vs. Dodoli Kapufi and Patson Tusalile, Criminal Application No. 11 of 2008** (both unreported).

From the reasoning hereinabove, I concur with Mr. Malyengeta that, the applicant should have disclosed the other sources of information,

through the verification clause specifying the paragraphs which are based on knowledge, belief and those which the information was supplied by the lawyers. I hold so because, without the specification, neither the Court nor the respondents can safely gauge as to which of the deponed facts are based on the applicant's own knowledge and what are based on his belief.

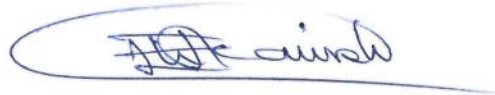
Accordingly, for those reasons aforementioned, I sustain the preliminary objection, thus, the application is hereby struck out for being supported by a defective affidavit. I make no orders as to costs.

It is so ordered.

DATED at **SHINYANGA** this 17th day of November, 2023.


E.L. KAWISHE
JUDGE

Court: Ruling delivered in Chambers this 17th day of November, 2023 in the presence of Mr. Stephano Malyengeta John learned counsel for the respondent and in the presence of the respondent in person and in the absence of the applicant.



E.L. KAWISHE
JUDGE
17/11/2023

