

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

MISC. LAND APPLICATION NO. 45 OF 2023

(Arising from the decision in Land Revision No. 1 of 2023 Hon. Kahyoza, J. dated
8/5/2023)

KONSTANTINE ADOLFU APPLICANT

VERSUS

MARTIN ADOLFU.....1ST RESPONDENT

SIXFRIDI ROGATI.....2ND RESPONDENT

JIBRIL ADOLFU.....3RD RESPONDENT

RULING

18/9/2023 & 12/10/2023

BARTHY, J.

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

- 1. That, the 2nd & 3^d respondents' joint counter affidavit
is fatally incompetent as its contents in paragraph 3, 4,
5, 6, 7 and 8 contain either argumentative, prayers,
legal opinion and or conclusions.*
- 2. That, this application is incompetent for being*

supported by a defective affidavit.

3. That, the jurat of attestation is defective.

4. That, the 2nd and 3^d respondents' joint counter affidavit is incompetent as joint counter affidavit contains the names of "SIXFRID MINJA" who does not feature in record boiling in this application.

At the hearing of the preliminary objections, Mr. Erick Mbeya learned advocate appeared for the applicant while Mr. Masanja learned advocate appeared for the respondents. The preliminary objections were disposed of orally.

In his submission in support of the preliminary objection, Mr. Mbeya submitted that paragraphs 3, 4, 5, 6 and 8 of the joint counter affidavit sworn by the second and third respondents are fatal for containing either argumentative, prayers, legal opinion or conclusion.

He further argued that, in terms of Order XIX Rule 3(1) of the Civil Procedure Code [CAP 33 RE 2022], (hereinafter referred to as the CPC), it requires affidavit to contain facts which the deponent may on his own knowledge able to prove.

Mr. Mbeya was firm that, the mentioned paragraphs violate the provision referred above. He submitted that, paragraph 4 pleads facts in relation to advocate remuneration order while other mentioned paragraphs are on baseless argument not deposed in the applicant's affidavit.

To buttress his arguments, Mr. Mbeya referred to the case of **Uganda v Ex-Parte Matovu** [1966] EA 514 in which the court among other things stated that, the affidavit should not contain extraneous matters.

He was content that, the impugned paragraphs should be expunged from respondent's joint counter affidavit as decided in the case of **Editor Msanii Newspaper v. Zacharia Kabengwe**, Civil Application No. 2 of 2009 Court of Appeal of Tanzania at Mwanza (unreported).

He went further to argue that, the court should see if the remaining paragraphs save any purpose. Should the court find there is no any purpose in the same, the recourse should to expunge the counter affidavit from the record. He referred to the case of **Ludovick Michael Massawe v. Samson Herman**, Civil Application No. 258/08 of 2021 Court of Appeal of Tanzania at Mwanza (Unreported).

Submitting on the fourth objection, Mr. Mbeya argued that, in the joint counter affidavit by the respondents, the name of the third respondent is styled as Sixfrid Minja but the record of this case does not bear such name.

Mr. Mbeya was of the view that, the second and third respondents' joint counter affidavit bears a name of the person who is not a party to this matter, he pointed out the anomaly is legally fatal. To this point, he referred to the case of **Hindu Abdallah Kagoma v. Rajabu Salum**, Misc. Civil Application No. 12 of 2018 and **Prime Catch Export Ltd v. Milton Chikwalakala**, Civil Revision No. 3 of 2020 (both unreported).

On reply submission Mr. Masanja argued that, the preliminary objections raised by the applicant are not on pure point of law. He went on stating that, the second and third respondents countered to what the applicant deposed in his affidavit. He was therefore firm that, joint affidavit of the second and third respondents is correct.

To prop his arguments, he cited the case of **Babito Ltd v. Freight African NV Belgium**, Civil Appeal No. 355 of 2020, Court of Appeal of Tanzania (unreported), where the court observed that preliminary objection must be on point of law. He therefore urged the court to

overrule the preliminary objections raised by the applicant.

Having gone through parties' rival submissions, the sole issue for my determination is whether the preliminary objections raised by the applicant have the merits.

From the submissions of Mr. Mbeya, he did not address the second and third preliminary objections, therefore the same are considered to have been abandoned. The court will therefore proceed to determine the remaining two preliminary objections.

Mr. Mbeya arguments were to the effect that, the joint counter affidavit sworn by second and third respondents 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.

It was argued that the second and third respondent's joint counter affidavit was defective for two major reasons; first paragraphs 4, 5, 6 and 8 were either argumentative, contained prayers, legal opinion and conclusion.

Again, Mr. Mbeya was of the view that, paragraph 4 of the joint

counter affidavit contains baseless argument as it did not relate to what was deposed in the affidavit in support of the application. On the other hand, Mr. Masanja was content that the facts deposed were correct and in response of applicant's affidavit.

I have considered the arguments of both learned counsels, but before addressing this ground, I wish to refer to the case of **Mukisa Biscuit Co. Ltd v. West End Distributors Ltd** (supra), where the court held that, the preliminary objection must be on pure point of law and not on ascertained facts.

As claimed that paragraphs 3,4,5,6,7 and 8 are offensive for either being argumentative, containing prayers, legal opinion or conclusion., The Mr. Mbeya was not specific on offensive words referred in the joint counter affidavit of the second and third respondents. For easy reference these paragraphs are reproduced here under;

3. That, the contents of paragraph 9, 10,11,12,13 and 14 of the Applicant's affidavit are partly admitted and disputed and the Respondents asserts that the explanations made by the Applicant that the chairman of the tribunal refused to proceed with hearing of application

until adjournment costs is paid is a mere speculation, of no merits and therefore of no legal effect. On the contrary, the Applicant shall be put into strict proof thereof.

4. That the contents or paragraphs 15, 16,17,18,19,20,21,22,23,24 and 25 of the Applicant's affidavit are partly admitted and strongly disputed; the Respondents avers that some of explanations made in these paragraphs that on that the Applicant has been aggrieved with whole ruling and drawn order are baseless and of no any legal value. On the contrary, the Applicant shall be put into strict proof thereof.

5. That, the contents of paragraphs 26 and 27 of the applicant's affidavit are disputed. The explanations advanced in these paragraphs are of no legal effect before this Honourable Court on reason that adjournment cost was duly taxed and is according to the Advocates remuneration order. On the contrary, the Applicant shall be put into strict proof thereof.

6. That, the contents of paragraph 28 of the applicant's

affidavit are disputed. The Applicant has no sound explanation under this paragraph to enable this Honourable Court certify that there is a point of law and grant a certificate. On the contrary, the Applicant shall be put into strict proof thereof.

7. That, the contents of paragraphs 29 and 30 of the applicant's affidavit are disputed. The reliefs sought are of no legal effect before this Honourable Court. On the contrary, the Applicant shall be put into strict proof thereof.

8. That, in further reply, the 2nd and 3^d Respondents asserts that Applicant has filed this application as a delaying tactics for the Respondents to enjoy the fruits of the orders of this Honourable Court and of the Trial Tribunal.

Having gone through the contents of alleged paragraphs and considered the submissions made by counsels for both parties indeed there are words such that;

"...mere speculation, of no merits and therefore of no legal effect."

Words on paragraph 3;

"...The explanations advanced in these paragraphs are of no legal effect before this Honourable Court... that adjournment cost was duly taxed and is according to the Advocates remuneration order"

words on paragraph 5;

"...the applicant has no sound explanation under this paragraph to enable this Honourable Court certify that there is a point of law and grant a certificate" words on paragraph 6; and

"...that Applicant has filed this application as a delaying tactics for the Respondents to enjoy the fruits of the orders of this Honourable Court and of the Trial Tribunal" words on paragraph 8.

It is clear these words are either argumentative, containing legal opinions or conclusion. Guided with decision made by court in the case of in the case of **Uganda v. Commissioner of Prisons Ex-parte Matovu** (supra) as cited by Mr. Mbeya, also quoted in the case of **Standard Chartered Bank & Others v. VIP Engineering & Marketing Limited & Others** (Consolidated Civil Application 76 of 2016) [2022] TZCA 302,

the Court held 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... such **affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion.** [Emphasis supplied].*

In the light of this position of the law I find that paragraph 3,5,6, and 8 of joint counter affidavit for the second and third respondents to have contained argumentative, prayers, legal opinion and conclusion words. Thus, defective paragraphs deserve to be expunged from the records and leaving paragraph 1, 2,4 and 7 intact. The first preliminary objection has the merit and it is partly sustained to the extent stated above.

Turning to the last limb where it was claimed that the joint counter affidavit bears the name of a person who is not party to the instant application, I have gone through chamber application initiating the matter before this court, where it shows the name of the second respondent to be Sixfrid Rogati.

Whereas, the counter affidavit filed in the instant application the name of the person signing the counter affidavit as a second respondent is styled as "Sixfrid Minja".

Again, the verification of the said counter affidavit was made by "Sixfrid Rogati" while the person making the verification was said to be "Sixfrid Minja". Also, on the jurat of attestation the name is indicated to be signed "Sixfrid Rogati".

This ground will not detain me much, I am of the settled view that, the joint counter affidavit has been signed by second respondent and verified by another person who is not a party to the instant matter as the law requires. It is clear that that Sixfrid Rogati and Sixfrid Minja are not one and same person without any indication or proof.

I am in agreement with decision of the court as cited by Mr. Mbeya in the case of **Prime Catch Export Ltd vs Milton Chikwarakara** (supra) where the court stated; the person giving the statement of fact of the affidavit is also required to affirm/swear and sign the said affidavit.

The pertinent question now to be addressed is, what is the way forward? Mr. Mbeya has invited the court to expunge the counter affidavit

from the record. I have considered such prayer, but for the interest of justice I would embrace the overriding objectives as set out under section 3A of the Civil Procedure Code, Cap 33 R.E. 2022 and I find it convenient to allow amendment to the joint counter affidavit of the second and third respondents.

Hence, the fourth preliminary objection is partly sustained. I grant a restrictive order to amend joint counter of affidavit for the second and third respondent to have the extent of amending and insert the correct name of the second respondent. The same to be done within 7 days from the date hereof. Costs to be in the course.

It is so ordered.

Dated at Dar es salaam this 12th October 2023.



G. N. BARTHY

JUDGE