

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

MISC. LAND APPLICATION NO. 34 OF 2023

(C/F Misc. Land Application No. 125 of 2016)

AUN SAID MSANGI 1ST APPLICANT

HAMAD SAID MSANGI 2ND APPLICANT

VERSUS

COLMAN TITUS MSOKA RESPONDENT

RULING

21/11/2023 & 06/12/2023

SIMFUKWE, J.

The applicants herein filed the instant application under **section 14(1) of the Law of Limitation Act, Cap 89 R.E 2019, section 95, Order XLII Rule 2 of the Civil Procedure Code, Cap 33 R.E 2019** and any other provision of the law. The application is for extension of time to file appeal against the decision of the District Land and Housing Tribunal for

Moshi. The application was brought by way of chamber summons taken at the instance of the affidavit of the second applicant Hamad Said Msangi.

Together with his counter affidavit, the respondent filed notice of preliminary objections on point of law as follows:

- 1. That, this application is incompetent and bad in law for being omnibus.*
- 2. That, the application is incurably defective for not disclosing if the deponent is known or identified to the advocate/RM on attestation clause.*
- 3. That the application is incurably defective for want of jurat.*
- 4. That the application is bad in law as the applicant affidavit is curably defective for want of reason for delay to file an appeal against execution out of time. (sic)*
- 5. That the content of paragraph 4 of the applicant affidavit is offensive as contain legal phrase, (sic) conclusion and opinion which attract argument and not fact as required by law.*

The respondent prayed that the application be dismissed in its entirety with costs.

The raised preliminary objections were ordered to be argued by way of written submissions. Ms. Faygrace Sadallah learned counsel argued the preliminary objections for the respondent, while the second applicant resisted the preliminary objection in person.

Submitting in support of the first raised preliminary objection that the application is incompetent and bad in law for being omnibus; Ms Faygrace simply cited the case of **Fatma Mukaranga and Saidi Omary**

Mwakitosi v. The Administrator General, Misc. Land Application No. 99 of 2012 (unreported).

On the second point of preliminary objection, it was submitted that the affidavit of the applicant does not disclose the person who introduced the applicant to the magistrate. Hence, it is offending the rule which requires to disclose the person who introduced the deponent. She referred to **section 10 of the Oaths and Statutory Declaration Act, Cap 34 R.E 2019** and the case of **Waziri Bukuku v. Halima Kondo, Misc. Land Application No. 911 of 2018** (unreported).

On the third ground that the application is incurably defective for want of jurat; Ms Faygrace stated that the law governing affidavits is clear that the jurat should state when, where the affidavit was made and before whom the said affidavit was made as per **section 8 of Notaries Public and Commissioner for Oaths Act, Cap 12 R.E 2019**. She averred that, the affidavit of the applicant does not show when and where it was deponed, which renders the affidavit defective. She was of the view that the same goes to the root of the matter, thus there is no affidavit to support the application. The learned counsel buttressed her assertion with the case of **Tanzania Railway Corporation and Attorney General v. Reuben Kyengu, Misc. Labour Application No. 04 of 2021** (unreported).

In support of the fourth ground, it was submitted that the affidavit supporting the application does not state the reason for the delay in filing the appeal on time against execution. She was of the opinion that failure to show reasons for the delay is like a game of Tom and Jerry. Therefore,

wasting the precious time of this court and preventing the respondent to continue enjoying his lawful property.

Arguing the fifth ground of objection, Ms Faygrace stated that paragraph 4 of the affidavit of the applicant contains offensive and legal phrase which attract argument which is contrary to the law governing affidavit. She said that such paragraph should be expunged as it was held in the case of **Phantom Modern Transport (1985) Limited v. D.T. Dobie (Tanzania) Limited** (CAT) at page 10 of the judgment and the case of **Harbinder Singh Sethi v. R, Misc. Economic Cause No. 29 of 2017** (unreported). In both cases offensive paragraphs were expunged.

The learned counsel for the respondent prayed that the raised preliminary objections be upheld with costs.

In their reply submission, the applicants contended that the application is not omnibus due to the following reasons:

That, for the application to be omnibus it must contain more than one application like leave to extend time for filing an appeal, stay of execution and appeal itself. They averred that, the applicants in this application are praying for leave to appeal out of time. They were of the view that the argument and the cited case of **Fatma Mukaranga and Said Omary** (supra) does not apply to the case at hand as it is distinguishable from this matter.

On the second ground of objection, it was replied that the Hon. Resident Magistrate knew the applicant thus, there was no need of disclosing what he did in conformity to **section 10 of the Oaths and Statutory Declaration Act** (supra). They replied further that the cited case of **Waziri Bukuku** (supra) is distinguishable from this scenario.

On the third ground of objection, the applicants submitted that the same was a repetition of the second ground.

Concerning the fourth ground of objection, the applicants were of the view that the learned counsel for the respondent misleads this court as the affidavit stated reasons for the delay. Moreover, they argued that the point of illegality and procedural irregularity are sufficient cause for the higher court to call for revision as it was stated in the case of **Principal Secretary Ministry of Defence and National Services v. Devram Valambia [1992] TLR 185.**

On the fifth ground of objection, the applicants were of the opinion that what they averred in the affidavit was the evidence to call upon the court's intervention and not legal argument as stated by the respondent.

On the issue that the jurat is defective for non-disclosure of where, when and how the applicants were known to the magistrate, the applicants replied that, the record is clear that the said jurat bears the date and the place where and when the second applicant deponed. For that reason, the provision of **section 8 of the Notaries Public and Commissioner for Oaths** (supra) was complied with.

The applicants implored this court to direct its mind to the case of **Mukisa Biscuits**. Also, they reminded this court to observe and consider the overriding objective principle.

In conclusion, the applicants prayed that the raised preliminary objections be overruled with costs.

Having considered the submissions of both parties, the issue for determination is ***whether the raised preliminary objections have merit.***

Starting with the first preliminary objection that the application is omnibus, the applicants contended that the application is not omnibus and gave an example of an omnibus application which contains more than one application. They distinguished the case of **Fatma Mukaranga and Another** (supra) cited by the learned counsel for the respondent. I agree with the applicants that the instant application is not omnibus as it contains only one application for extension of time to appeal. Unfortunately, the learned counsel for the respondent did not explain how the application is omnibus.

On the second and third preliminary objections, the applicants were of the opinion that the jurat of the affidavit of the second applicant is not defective. I have examined the jurat of the said affidavit, it reveals that it was dated at Moshi on 21st day of July 2023. Moreover, it was not indicated whether the deponent was known to the attesting officer or he was introduced by someone. However, it is settled that a defective jurat is not fatal. In the case of **Beatrice Mbilinyi V. Ahmed Mabkhut Shabiby, Civil Application No. 475/01 of 2020**, CAT, at page 16 it was held that:

"The third point of objection relates to non-indication in the jurat of attestation whether the deponent was known to the attesting officer or identified to him by another person. As rightly argued by Mr. Mwitasi, it is our considered view that since the attesting officer did

not indicate that the deponent was introduced to him by someone else, it means that he knew her personally.”

Guided by the above cited case, in this case, I am of the same view that, impliedly the attesting officer knew the deponent.

Concerning the fourth point of objection that the applicant's affidavit is defective for want of reasons for the delay; the applicants submitted that the affidavit stated the reasons for the delay. This being an application for extension of time, I am of the opinion that whether the affidavit discloses reasons for the delay or not, it is not a pure point of law to be determined at a preliminary stage. That issue goes to the root of the application, as the same is the basis of granting or dismissing the application. After full trial, in case it is found that the applicants have not established reasons for the delay, then their application will be dismissed.

On the last point of objection that paragraph 4 of the affidavit of the second applicant contains legal phrase, conclusion and opinion which attract argument, the applicants stated that what they stated in the affidavit is not legal argument as stated by the respondent. Paragraph 4 of the affidavit of the second applicant reads that:

"4. That, hearing of Misc. Application No. 125 of 2016 was full tainted by serious legal procedural irregularities which deprived the rights of the applicants."

I join hands with the applicants that paragraph 4 of the affidavit does not contain conclusion and opinion as alleged by the learned counsel of the respondent. Rather, it shows that there are procedural irregularities in the proceedings of Misc. Application No. 125 of 2016.

I therefore agree with the applicants that the raised preliminary objections lack merit. In the upshot, I overrule the raised preliminary objections for lack of merit and dismiss the same with costs. The application should be heard on merit.

It is so ordered.

DATED and DELIVERED at Moshi this 06th day of December 2023.



X

S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

06/12/2023