

**IN THE HIGH COURT OF TANZANIA  
BUKOBWA DISTRICT REGISTRY  
AT BUKOBWA**

**MISC. LAND APPLICATION No. 55 OF 2023**

*(Arising from Land Case No. 05 of 2023 in the High Court of Tanzania at Bukoba)*

**1. GOZIBERT KAJUMA  
2. KARAGWE CHANGAMOTO CO. LTD ..... APPLICANTS**

**VERSUS**

**MARYCENT SHUKURU ..... RESPONDENT**

**RULING**

*09<sup>th</sup> November & 08<sup>th</sup> December 2023*

**OTARU, J.:**

This Ruling is in respect of Preliminary Objection (PO) raised by the respondent through Mr. Dustan Mutagahywa, learned Advocate. The PO is based on the following points;-

- i. That, the affidavit is incurably defective for containing a defective jurat of attestation*
- ii. That, the affidavit contains a defective verification clause.*
- iii. That, the Application is bad in law for non-joinder of a necessary party.*

The Affidavit which is the subject of this Ruling has been filed by the applicants in support of the Application to set aside the order to strike out their Written Statement of Defence. What led to the POs is first, the deponent of the Affidavit, one Gozbert Kajuma appears to have taken the oath in Dar es salaam

while the Commissioner for Oaths was in Ngara. It also appears that the verification clause is not signed by the deponent. Lastly, the applicants who were the defendants in the original suit were three in number yet only two of them made the application to restore the WSD.

On the date set for hearing of the POs, parties prayed for the same to be disposed of by way of written submissions and a schedule was agreed. The applicants were represented by Mr. Mutabazi Dickson Tigalyama and the respondent enjoyed the services of Mr. Dustan Mutagahywa, both learned Advocates. I appreciate that both learned counsel adhered to the agreed schedule.

Counsel for the respondent began by arguing that section 8 of the **Notaries Public and Commissioners for Oaths Act** requires that a person taking an oath must swear before the Commissioner of Oaths who will administer the said oath, however in this Affidavit, the oath was not taken and administered in the presence of the Commissioner for Oath, because, the two were in completely different locations making the jurat of attestation to be incurably defective, thereby rendering the whole Affidavit to be defective as well. In support of this argument Counsel cited the case of **Osward Philip Silwamba v. Tanzania Zambia Railway Authority**, Civil Application No. 70 of 2016 (CAT Dsm) (unreported).

On the defective verification, Counsel argued that Order VI Rule 15 (3) of the **Civil Procedure Code** (Cap 33 R.E. 2019) requires the verification to be signed by the maker on the date and place the Affidavit is made. However, the verification clause is not signed by the maker meaning that the applicants cannot be accountable for the contents thereof. In other words, counsel argued that the applicants did not swear the Affidavit. Counsel referred the court to the case of **Richard Mgwilanga v. Paulina Mtandi**, Misc. Criminal Application No. 55 of 2021 (CAT Iringa) (Unreported) on importance of having a proper verification clause. In the absence of it, the whole Affidavit becomes defective and liable for dismissal.

On non-rejoinder of the necessary party, Counsel referred to the Written Statement of Defense in Land Case No. 05 of 2023 (supra) which was made by three defendants, the applicants and one William Emmanuel Nyanungu, but in the instant Application he does not appear as a party thereby the court will be rendering an ineffective relief.

In response, the applicants' Counsel conceded to the 1<sup>st</sup> and 2<sup>nd</sup> points of Objection. He however prayed to the court to be guided by the principles enunciated in the case of **Univeristy of Dar es Salaam v Mwenge Gas and Lub Oil Limited**, Civil Application No. 76 of 1999 (CAT) (unreported), **Sanyou Service Station Ltd v. BP Tanzania**, Civil Application No. 185/17 of 2018, also drew inspiration from Rule 9 of **Tanzania Court of Appeal Rules** of 2009 as amended via GN 345 of 2019, and a persuasive decision in the case of **Alliance**

**one Tobacco Tanzania Limited and Another v. Mwajuma Hamisi (Administratrix of the estate of the late Philemoni Kilenyi and another)**, Misc. Civil Application No. 803 of 2018 and finally prayed for the court to use its discretion and grant leave to file another Affidavit with a rectified verification clause and a proper jurat of attestation.

On the 3<sup>rd</sup> point on non-joinder of the necessary party, the Applicants contended that because there is no relief claimed against William Emmanuel Nyanungu, by virtue of Order I Rule 5 of the **Civil Procedure Code** (Cap 33 R.E. 2019) he cannot be termed as a necessary party. Nevertheless, he informed the court that Mr. Nyanungu no longer wished to pursue the matter jointly with them.

Having read the rival parties' submissions, examined the application together with the supporting Affidavit, the duty of the court is to consider if the P.O. is meritorious.

On the question of non-joinder of parties, I am in agreement with the applicants that this is not a proper case of non-joinder of parties. If Mr. Nyanungu did not wish to file the application for restoration of the WSD, he can not be forced to do so. It is a matter of choice and that is what he chose. The Court of Appeal in the case of **Stanislaus Kalokola v. Tanzania Building Agency and Mwanza City Council**, Civil Appeal No. 45 of 2018 (CAT) (unreported), commenting on this aspect cited **Mulla, the Code of Civil Procedure**, 13<sup>th</sup> edition, volume 1, page 620 that;

*'As regard non joinder of parties, a distinction has been drawn between non joinder of a person who ought to have been joined as a party and the non joinder of a person whose joinder is only a matter of convenience or expediency. This is because Order I Rule 9 is a rule of procedure which does not affect the substantive law. If the decree cannot be effective without the absent parties, the suit is liable to be dismissed.'*

The applicants did not join Mr. William Emmanuel Nyanungu as a party in this Application simply because he himself is not interested in persuading the case. no decree can be rendered ineffective in the absence of Mr. Nyanungu. Such that, the applicants had a choice either to argue the case jointly or separately. Since Mr. William Emmanuel Nyanungu chose not to pursue the case, his decision to stay mute does not lead to non joinder nor mis joinder as the decision will still be effective even in his absence.

On the grounds of jurat of attestation and verification clause, it is trite that defective jurat of attestation and verification clause make the Affidavit supporting the application to be incurably defective thereby warranting its dismissal. The applicants have conceded to that. They however prayed to the court to use it's discretionary powers and allow them to file a rectified Affidavit.

It is within my knowledge that rectification prayers need to be made before POs are raised otherwise it is intended to pre-empt the POs. I have nevertheless looked into the prayer and the supporting cases cited by the applicants applicants and have given much thought and consideration to them. In the case of

**University of Dar es Salaam** (supra), the verification clause contained the phrase '*...and belief...*' while the Affidavit was based wholly on the deponent's own knowledge. The allowed amendment was to remove the superfluous words '*and belief*'. And the defect in the **Sinyau's** case (supra) was wrong numbering of the paragraphs of the Affidavit. In the case of **Alliance One Tobacco** (supra) the application was dismissed for failure of the Affidavit to disclose reasons for the delay. The court did not allow any rectifications to the Affidavit. Having so stated, it is the cherished legal principle that every case is to be decided on its own merits; that is, having regard to all the circumstances of each particular case. The gravity of the defects in the Affidavit at hand are serious such that the Affidavit cannot be admitted as evidence. Basically stating, it can no longer be referred to as an 'Affidavit', so it cannot be amended as was done in the **University of Dar es salaam** and **Sinyau's** cases (supra).

Having considered the circumstances of this case, the prayer to amend the Affidavit cannot be granted. Consequently, the Application is dismissed for being accompanied by an incurably defective Affidavit.

It is so ordered.

**DATED at BUKOBA** this 8<sup>th</sup> day of December, 2023.



  
M.P. Otaru  
**Judge**