IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISCELLANEOUS LAND CASE APPLICATION NO. 35 OF 2023

(C/F Land Case No. 18 of 2015 in the High Court of Tanzania at Moshi)

MOSHI MUNICIPAL COUNCIL…..…… APPLICANT

VERSUS

J. S. KHAMBAITA LIMITED ……1ST RESPONDENT

EFATHA MINISTRY……..……2ND RESPONDENT

RULING

Date of Last Order: 01.11.2023
Date of Ruling : 06.12.2023

MONGELLA, J.

This is a ruling on preliminary objection raised by the 1st respondent against the applicant's application. The brief background to this matter is that: the 1st respondent filed Land Case No. 18 of 2015 before this court, which was determined his favour. Aggrieved, the applicant filed notice of appeal to the Court of Appeal and complied with other procedures. When the appeal was eventually before the Court of Appeal, it was discovered that the applicant had not served the respondents with the letter requesting for copies of proceedings, judgment and decree as required under **Rule 90 (3) of the Tanzania Court of Appeal Rules.** The appeal was thus struck out for being incompetent.

The applicant then filed the application at hand seeking for extension of time to file notice of appeal in the Court of Appeal. The applicant's chamber summons was taken under the instance of the Office of the Attorney General and supported by the affidavit of one, Sifael T. Kulanga, the applicant's Principle State Attorney and head of her legal services unit.

The 1st respondent challenged the application vide counter affidavit duly sworn by his advocate Mr. Elikunda George Kipoko. He also raised three points of preliminary objection alleging that the application was incompetent for:

1. *Failure to indicate the relevant law, to wit, the specific revised edition on which the application is based.*

2. *The, application is defective as the 1st respondent is different from the person referred to in the alleged Notice of Appeal. The application pleaded the 1st respondent as J.S. Khambaita Limited while the Notice of Appeal refers to the 1st Respondent as J.S. Khambhaita Limited.*

3. *It is based on defective affidavit in which; it contains prayers, the deponent failed to disclose source of information, it contains extraneous matters and omitted to indicate whether the deponent was known or introduced to the commissioner for oaths.*

The preliminary objection was resolved by written submissions whereby the 1st respondent was represented by Mr. Elikunda George Kipoko, learned advocate, while the applicant was represented by Mr. Yohana Marco, learned state attorney.

In his submission, Mr. Kipoko, abandoned the 1st ground of preliminary objection. Arguing on the 2nd ground, he contended that that the names of the 1st respondent in the application varied with the names appearing in previous proceedings. In that respect, he had the opinion that the same rendered facts alleged concerning the party, unconnected to the previous proceedings. He considered the alleged anomaly proving that the evidence in the affidavit contains untrue statements. He supported his stance with the case of **Salim Amour Diwani vs. The Vice Chancellor, Nelson Mandela African Institution of Science & Technology & Another** (Civil Application No. 116 of 2021) [2023] TZCA 33 TANZLII and that of **Robert S. Lova & Another vs Ministry of Natural Resources and Tourism & Another** (Revision No. 742 of 2018) [2020] TZHCLD 136 TANZLII.

Concerning the 3rd point of objection, Mr. Kipoko argued that the sworn affidavit supporting the application, refers to three persons being; the deponent, the applicant who is a jurist person and the 1st respondent. Challenging the affidavit, he contended that the deponent, deposed on matters done by him and those done by the applicant. That, the facts deposed on the part of the applicant are facts by an agent of the applicant. In that respect, he contended that an affidavit ought to have been sworn deponing on such acts done in place of the applicant who is a jurist person as appearing under paragraphs 3, 4, 5 and 7 of the affidavit. He cited the case of **NBC Limited vs. Superdoll Trailer Manufacturing Company Ltd,** Civil Application No. 13 of 2002 (CAT at DSM,

unreported) and that of **Ramadhan Sembejo Mongu vs. District Executive Director of Musoma Municipal and 3 Others** (Civil Case No.6 of 2022) [2022] TZHC 121 TANZLII.

Mr. Kipoko further contended that even if the deponent was presenting facts within his knowledge, he should have used direct speech instead. He challenged the dispatch attached under paragraph 7 of the applicant's affidavit averring that the same had no names of the person issuing the same or the person colleting the same rendering the attachment alien and extraneous.

As to the claim that the affidavit contains arguments, he considered the statement; "*the notice of appeal whose appeal was struck out was filed within time*" being an argument for the same being subject to proof.

The preliminary objection was opposed by the respondent through his counsel. In reply to the 2nd point of objection, Mr. Marco averred that the misspelling of the names of the 1st respondent appears only on the notice of appeal whereby the name is stated "***J. S. Khambhaita***," but the rest of the documents, that is, the judgment and proceedings in Land Case No. 18 of 2015 contains the names "***J. S. Khambaita.***" In that respect he considered the argument by the 1st respondent that the names in this application are misspelt being unfounded.

Mr. Marco further contended that the case of **Salim Amour Diwani vs. Vice Chancellor Mandela African Institute of Science and Technology and Another** (supra) is distinguished as in the said case the applicant impleaded the Attorney General who was not part of the proceedings at the High Court. In the case at hand, he said, the 1st respondent is the same party in Land Case No. 18 of 2015. That, the error is a mere slip of the pen in the notice of appeal. He therefore asked the court to determine that the pitfall is curable under the overriding objective principle as enshrined under **section 3A of the Civil Procedure Code** [Cap 33 RE 2019]. He supported his averment with the case of **Zuberi Mussa vs Shinyanga Town Council** (Civil Application No. 3 of 2007) [2009] TZCA 16 TANZLII. Mr. Marco further contended that Mr. Kipoko failed to show the prejudice caused to his client rendering the overriding objective principle fit to be invoked.

Addressing the 3rd point of objection, Mr. Marco was of the view that the same was misplaced. He contended that affidavits are governed by **Order XIX of the Civil Procedure Code, Rule 3 (1)** which states that affidavits shall be confined to such facts as the deponents is able to prove in his own knowledge. He argued that the deponent herein stated in the 1st paragraph of the supporting affidavit that he was conversant with the facts of Land Case No. 18 of 2015 and rightfully so because all legal matters including legal proceedings involving the applicant are sanctioned by the deponent as he is the head of legal service unit of the applicant. That this means, his averments in paragraphs 3, 4, 5, and 7 are within

his knowledge. As to the fact that he swore some facts as an individual or mentioned the applicant in some facts, he considered the same being immaterial. He concluded by praying for the points of objection to be dismissed.

Rejoining, on the 2nd point of objection, Mr. Kipoko submitted that Mr. Marco conceded that the names of parties appearing on the application are different from previous proceedings. He thus held the view that since the preliminary objection was raised and heard by written submissions, then it is impossible for the applicant to pray for amendment. That, the only solution is for the same to be struck out for being incompetent and the applicant may file a fresh application.

Rejoining on the 3rd point of objection, he reiterated his submission in chief and averred that Mr. Marco failed to counter the specific defects pointed out in his submission in chief and such omission meant he conceded to the pointed-out defects.

I have duly considered the rival submissions of both parties' counsels on the 2nd and 3rd points of preliminary objection. It should be recalled that the 1st point of objection was abandoned by the applicant's counsel.

As to the 2nd objection, the 1st respondent averred that the party referred to in the application is different from the party referred in the notice of appeal. He argued so saying that the names of the 1st

respondent in the application are "*J. S. Khambaita* Limited" while the names of the respondent appearing in the notice of appeal are "*J. S. Khambhaita*" Limited. On his part, Mr. Marco held the view that the names in the application are similar to the names in other proceedings. That, the only variation is on the notice of appeal and the same can be rectified under the overriding objective principle.

From the record, the names of the 1st respondent appearing in the application are "*J.S. Kham**bai**ta Limited*" which also appears in a a letter dated 11.11.2019 for applying for copy of proceedings, certified copy of judgement and decree in Land Case No. 18 of 2015; also, in Certificate of delay, Memorandum of Appeal and summons by the Court of Appeal. The names appearing in the notice of appeal are; "*J. S. Kham**bhai**ta Limited*" which also appears in letters dated 29.01.2018 and 17.10.2019 for applying for copies of proceedings, certified judgement and decree in Land Case No. 18 of 2015. The variation seems to have also extended to the impugned judgment which reads "*J. S. Kam**baitha** Limited*."

Upon close observation, I find this being a case of mere misspelling of the names as opposed to a case of an entirely different party not party to previous proceedings being joined in subsequent proceedings, as it happened in the case of **Salim Amour Diwani vs. The Vice Chancellor Mandela African Institution of Science and Technology and Another** (supra). I thus agree with Mr. Marco that this is a mere human error which seems to have been occasioned by not only the applicant, but the court as well at some point.

Further, Mr. Kipoko did not state which were the correct names of the 1st respondent. So, while there is a slight variation in the 1st respondent's names, it is still unclear as to which of the names are correct.

Mr. Kipoko also argued on the names on a former notice of appeal being different from the one in the application at hand. I find the argument misplaces at this point whereby the applicant is seeking for extension of time to file another notice of appeal. The previous one is no longer on record and time cannot be wasted to ponder on it.

By invoking the overriding objective principle, I am of the considered view that, if at all the 1st respondent's names appearing on record are the incorrect, then upon Mr. Kipoko stating the correct names, the applicant shall be allowed to rectify the same as allowed by the Court of Appeal in the case of **Chang Quing International Investment Ltd vs. Tol Gas Ltd** (Civil Application 292 of 2016) [2016] TZCA 190 TANZLII. With regard to the names on the judgement being incorrect, I am of the view that the proper procedure is for the parties to file an application for review in the issuing court for the mistake, if any, to be rectified. In conclusion on this point, I am of the stance that without assurance as to which names are correct it is impossible to note whether the applicant cited incorrect names or not. In the premises, this point of objection fails.

With regard to the 3rd point of objection, the 1st respondent's counsel challenged the competence of the application for being supported by a defective. His challenge is based on two points, to wit, **one**, that the applicant's affidavit mentions the applicant in his juristic personality and as the deponent at the same time; and **two**, that the applicant's agents ought to have also sworn their respective affidavits on acts performed by them. with due respect to the learned counsel, I am of the considered view that such arguments hold no substance. The law is trite that affidavits are to be confined to facts within the deponent's knowledge. This is well settled under **Order XIX Rule 3 of the Civil Procedure Code**, which provides:

> "3. (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted:"

I do not think Mr. Kipoko captured the essence of this provision. The standard is that the deponent must have knowledge of the facts deponed to and the ability to prove the same. In that respect, I find the arguments by Mr. Kipoko that since the deponent spoke of the applicant as the actor in his affidavit, he was thus stating facts known to the applicant alone, being hugely misconceived. As evident, the deponent did state that he was in knowledge of all facts he was deponing in place of the applicant because he was the Principle State Attorney and head of the legal service unit of

the applicant. He did not state any fact that seemed to be hearsay. Him stating that "the applicant acted" doesn't render it a mention of an act by different person. Given that he is acting on behalf of the applicant, mentioning the act by the applicant amounts to mere narration of events within his knowledge.

Concerning the contents of paragraph 7 of the applicant's supporting affidavit and its annexture not showing who issued the copy of Ruling or collected it; I find the fact calling for evidence and thus not qualifying as a point of law. See: ***Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors Ltd*** (1969) EA 696; and ***The Soitsambu Village Council v. Tanzania Breweries Ltd and Tanzania Conservation Ltd***., Civil Appeal No. 105 of 2011 (CAT, unreported) Mr. Kipoko further averred that the affidavit contained extraneous matters. However, he did not show what matters were extraneous rendering his contention not holding water.

Mr. Kipoko also argued that the applicant's affidavit was argumentative. Specifically, he referred to the statement "*the notice of appeal whose appeal was struck out was filed within time*" as an argument. With due respect, I do not find this statement being an argument, but a fact. Even if the same was an argument, it does not have the effect of rendering the whole application defective and liable of being struck out. This is because the law allows expunging of offensive paragraphs in affidavits and proceeding with hearing on merits where the remaining paragraphs still hold the main application. See: See: ***Stanbic Bank***

Tanzania Limited vs. Kagera Sugar Limited, Civil Application No. 57 of 2007; ***Phantom Modern Transport (1985) Limited v. D. T. Dobie (Tanzania) Limited***, Civil References Nos. 15 of 2001 and 3 of 2002. ***Peter Lucas v. Pili Hussein & Another***, Misc. Civil Application No. 33 of 2003 and ***MMG Gold Ltd v. Heartz Tanzania Limited***, Misc. Commercial Cause No. 118 of 2015. In my opinion, even if the alleged offensive paragraphs are expunged, the remaining paragraphs are strong enough to hold the application to hearing on merits. The 3rd objection is also found to be unmeritable.

In the foregoing, I overrule the points of objection and order the application to proceed on merits. Costs to follow events.

Dated and delivered at Moshi on this 06th day of December 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA