

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(BUKOBA SUB- REGISTRY)**

AT BUKOBA

MISC. LAND APPLICATION NO. 75 OF 2023

(Arising from the High Court of Tanzania (Bukoba Registry) in Misc. Land Application No. 7 of 2021 and Application No. 85 of 2019 and Land Appeal No. 82 of 2016 from the District Land and Housing Tribunal for Karagiwe at Kayanga and original Land Case No. 12 of 2015 at Bugena Ward Tribunal)

EMMANUEL MPAMBALA APPLICANT

VERSUS

LAURENT RWEYONGEZA RESPONDENT

RULING

14th March & 22nd March 2024

A.Y. Mwenda J.

This is a ruling on Preliminary points of objections raised by the respondent.

The said preliminary objections read as follows and I quote: -

- i) This honourable court is not clothed with jurisdiction to hear and determine this application for extension of time and restoration/re admission of Misc. Land Case Appeal No. 7 of 2021 which was dismissed for want of prosecution;
- ii) This application is incurably irredeemable defective for being preferred as omnibus application;
- iii) The purported application is irredeemable defective for being sprinkled with non mixable prayers under one chamber summons.

- iv) This application is incurably irredeemable defective for being supported by a defective affidavit in the jurat of attestation;
- v) This application is incompetent and bad in law for being accompanied with incurably defective affidavit which is tainted with argumentative prayers and not properly verified.

During the hearing of the raised points of objections the applicant was represented Mr. Diocres Nestory Pasha, learned counsel while the respondent hired the legal services from Ms. Pilly Hussein, learned counsel.

When invited to submit in respect of the raised points of objections, Ms. Pilly abandoned the (ii), (iii) and (v) points of objections. She remained with the (i) and (iv) which she argued separately.

Regarding the (iv) point of objection, Ms. Pilly submitted that the law requires the commissioner for oath before whom any oath or affidavit is taken to append his names and declare the place and date where the said oath/affidavit was taken. In support to this point, she cited section 8 of Notaries Public and Commissioners for Oaths Act [CAP 12 R.E 2019]. She was of the opinion that the word "shall" under the said section is coached in a mandatory terms as per section 53 (2) of the Interpretation of Laws Act [CAP 1 R.E 2019].

Ms. Pilly Hussein went further to submit that in the affidavit at hand, the jurat of attestation does not state a place where the said oath was taken and according to her, failure to do so makes the affidavit in question defective

thereby making this application incompetent. She then prayed this preliminary objection to be sustained.

Regarding the 1st point of objection Ms. Pilly, submitted that, if the High Court dismisses the appeal for want of prosecution the remedy available is to appeal to the Court of Appeal against the dismissal order. She further submitted that in the present application the applicant intends to restore Misc. Land Appeal No. 7 of 2021 which was dismissed for want of prosecution. According to her, this is not a proper forum. She supported this by citing the case of ABDALLAH HEMED HAKIYAMUNGU VS SELEMANI MARANDO, CIVIL APPEAL NO. 12 OF 2004 (H/CRT). She concluded her submissions stating that this court has no jurisdiction to determine this application and prayed this application to be struck out with costs.

Responding to Ms. Pilly's, submission on the (iv) point of objection, Mr. Pesha submitted that, in their affidavit the deponent is one Emmanuel Mpambala. He further submitted that it is true that the place where the said affidavit was sworn is not indicated however, he said, the said defect does not render the affidavit defective. Regarding the word "shall" as stipulated under section 8 of Notaries Public and Commissioners for Oaths Act [CAP 12 R.E 2019], the learned counsel submitted that it is true that the word shall is mandatory but still, he said the law is clear that court should not be bound by technicalities. According to him the said anomalies does not prejudice the respondent. To support this point, he cited the case of FREDRICK SCELENGA & ANOTHER VS

AGNES MASELE [1983] TLR 99. He then concluded his submissions praying that this Preliminary Objection to be overruled.

Regarding the 1st limb of preliminary objection, the learned counsel submitted that Order XXXIX Rule 19 of Civil Procedure Code [CAP 33 R.E 20] provides the remedy for appeals dismissed for want of prosecution. He stated that the said remedy is re admission before this court which is the proper forum for the present application.

Regarding the case law cited by the learned counsel for the respondent, Mr. Pasha submitted that the same is a dead law as it cannot prevail over the Civil Procedure Code. On that basis he prayed this preliminary objection to be overruled. On the other hand, he stressed that if this court finds merits on the preliminary objection, this application should be struck out without costs.

In rejoinder Ms. Pilly Hussein said that, the argument that this court should not be tied with technicalities is improper as this principle should not be applied blindly where there is mandatory requirements of the law. She therefore reiterated to her previous submissions that, the affidavit in support of chamber summons is defective and this application should be struck out.

Regarding the remedy for appeals dismissed under Order XXXIX Rule 19 of the Civil Procedure Code, Ms. Pilly rejoindered that the said order cannot be applied where an appeal is dismissed for want of prosecution. According to her, the

said order can be applied where appeal is dismissed for non-appearance. She thus concluded her submissions praying this appeal to be struck out with costs.

Having gone through submissions by both parties the issue for determination is whether or not the raised preliminary points of objections are meritorious.

In law section 8 of The Notaries Public and Commissioners for Oath Act [CAP 12 R.E 2019] provides that the commissioner for oath before whom any oath or affidavit is taken shall insert the name, date and state the place where the said oath or affidavit is made. The said section reads as follows;

"Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall insert his name and state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made."

From the foregoing section, since the word "shall" is used, that entail the said section is couched in mandatory terms. It is elementary that whenever the word "shall" is applied in a provision, it means that the provision is mandatory. This is by virtue of section 53 (2) of the Interpretation of Laws Act, Cap. 1 of the Revised Edition, 2019. The said section reads as follows:

"Where in a written law the word "shall" is used in conferring a function such word shall be interpreted to

mean that the function so conferred **must** be performed." [emphasis added]

In the present application, the jurat of attestation in an affidavit sworn by Emmanuel Mpambala the commissioner for oath did not state the place where the said affidavit was made. The said jurat read as follows and I quote;

"SWORN AND DELIVERED to me by the said

Emmanuel Mpambala ~~who is known to me~~/was

introduced to me by AMAN DAWSON

and later known to me personally

this 18 day of September 2023."

In the above extract, the commissioner for oath ought to have indicated the place where the affidavit supporting the application was taken in the jurat of attestation. Failure to do so renders the affidavit incurably defective. This position has also been stated by the Court of Appeal in the case of GODFREY KIMBE VS PETER NGONYANI CIVIL APPEAL NO. 41 OF 2014 where the Court held inter alia that;


"... the applicant ought to have mandatorily indicated in the jurat of attestation the date on which the affidavit supporting the application for extension of time to file the application for leave to file an appeal to this Court was taken. Failure to do

that made the affidavit incurably defective and, for that reason, the application lacked the necessary support and therefore incompetent.”

For that reason, the applicant’s affidavit is defective thereby making this application incompetent. The respondent’s point of objection is thus sustained.

From the foregoing observations this court finds merits in the (iv) limb of preliminary objection in that failure to indicate the place in which the affidavit was taken in the jurat of attestation renders an affidavit incurably defective. Since this point suffice to dispose of this matter, I found no need to delve in the (i) limb of preliminary point of objection. In upshot, this application is hereby struck out with costs for being incompetent.

It is so ordered.


A.Y. Mwenda.
Judge

22.03.2024

Judgment delivered in chamber under the seal of this court in the presence of the applicant Mr. Emmanuel Mpambala and in presence of Ms. Pilly Hussein learned counsel for the respondent.


A.Y. Mwenda.
Judge

22.03.2024