

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB-REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 389 OF 2023

(Arising from the District Court of Kinondoni in Civil Case No. 15 of 2001)

ALEX DAVID CHIBUNU APPLICANT

VERSUS

SARAPHINE KAMARA 1st RESPONDENT

KINONDONI MUNICIPAL COUNCIL.....2nd RESPONDENT

DAR ES SALAAM CITY COUNCIL 3RD RESPONDENT

IGALULA AUCTION MART LTD 4TH RESPONDENT

RULING

02nd February & 09th April, 2024

BWEGOGGE, J.

The applicant herein above named instituted an application herein, among others, praying for an order for stay of execution of a decree in Civil Case No. 15 of 2001 commenced in the District Court of Kinondoni. The application

is brought under Order 39, rule 5(1), sections 68(e) and 95 of the Civil Procedure Code [Cap. 33 R. E. 2019] and supported by the affidavit of the applicant herein.

In tandem with filling the counter affidavit, the 1st respondent has raised the preliminary objections on points of law as follows: -

- 1. That paragraph 6 of the applicant's affidavit states that the 1st respondent does not have an identity recognized by NIDA which is information that can only be obtained from the National Identification Authority (NIDA); yet the applicant stated in his verification that the said information is true according to his own knowledge.*
- 2. That paragraph 6 alleges illegalities based on information obtained from Mr. Samson Edward Mbamba, the applicant's counsel; yet there is no affidavit of the applicant's counsel supporting the application herein. Thus, the purported information amounts to hearsay.*
- 3. That paragraph 10 of the applicant's affidavit contains a prayer which offends the law.*

The applicant is represented by Mr. Samson Edward Mbamba, learned advocate and the 1st respondent is represented by Mr. John Chogolo, learned advocate. The preliminary objections were argued by the written submissions.

In substantiating the 1st limb of the preliminary objections, Mr. Chongolo, charged that the applicant deposed that the 1st respondent does not have the national identity card recognized by the National Identification Authority (NIDA). That the said information can only be given by the said authority (NIDA). That no affidavit of the employee of the authority (NIDA) who conveyed the information deposed by the applicant filed herein. Moreso, the applicant purported to verify that the information is within his personal knowledge.

In respect of the 2nd limb of the objections raised herein, the counsel argued that it is a well-known principle of law that whenever any person who swears an affidavit mentions another person or makes a definitive statement which can only be attributed to another person, amounts to hearsay unless such person swears an affidavit to that effect. That the applicant has deposed to have been informed by his counsel in that there are grounds of illegalities in the impugned decision/proceedings; however, his counsel didn't file an affidavit to that effect, contrary to the law. Hence, the applicant's deposition in this respect amounts to a mere hearsay. The counsel cited the cases; **Sabena Technics Dar Limited v. Michael J. Luwunzu** (Civil Application No 451/18 of 2020) [2021] TZCA 17852, among others, to buttress his point.

In respect of the third limb of the objections preferred herein, the counsel submitted that the applicant's affidavit is bad in law as it contains prayer as depicted under paragraph 10. That the law demands that affidavits should only contain statements of facts and circumstances to which the witness deposes of his own personal knowledge. In bringing the point home, the counsel cited the case of **Uganda vs. Commissioner of Prisons Ex Parte Matovu** [1966] EA 514.

Based on the premises above, the applicant's counsel prayed the offending paragraphs to be expunged from the affidavit supporting the application herein.

In reply, Mr. Mbamba submitted that the 1st limb of the objection is not a pure point of law because it requires proof. That when the purported preliminary objection requires proof and, or explanation, it ceases to be a preliminary objection. The counsel cited the case of **Millicom (Tanzania) N.V vs. James Alan Russel Bell & 3 Others**, Civil Application No. 44 of 2016 [2016] TZCA 972 to validate his argument.

Regarding the 2nd limb of the preliminary objections, the counsel contended that the purported objection is misconceived as well. That advice of an

advocate to his client can never be hearsay.

And, responding to the 3rd limb of the preliminary objection, the counsel contended that the relevant objection is misconceived as well. That the purported objection is not a preliminary objection in the strict legal sense. The counsel failed to comprehend how the statement that; “ **it will be in the interest of justice if the application is positively considered**” amounts to prayer in law.

On the above accounts, the counsel prayed the objections to be overruled with costs.

The point of determination is whether the preliminary objections raised herein have substance in law.

In respect of the 1st limb of preliminary objection, it is my considered opinion that the information that the 1st respondent has no national identification card issued by the National Identification Authority (NIDA) bearing her name, can only be verified by the relevant authority (NIDA). Thus, the applicant could not have verified that the information was based on his personal knowledge. The provision of Order XIX, rule 3(1) in mandatory terms provides that:

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove..." See also the decision in the case of **Uganda vs. Commissioner of Prisons, ex parte Matovu** (supra).

I, therefore, subscribe to the 1st respondent's counsel in that the deposition made by the applicant above, which was not in his own knowledge, amounts to hearsay. It is a law that affidavits should be free of hearsay, among others. There are many decisions to that effect tallying the decision in the case of **Uganda vs. Commissioner of Prisons, ex parte Matovu** (supra) cited by the 1st respondent's counsel. In the case of **Mustapha Raphael v. East African Gold Mines Ltd**, Civil Application No.40 of 1998, CA (unreported), the Apex Court held:

"An affidavit is not a kind of superior evidence. It is simply a written statement on oath. It has to be factual and free from extraneous matters such as hearsay, legal arguments, objections, prayers and conclusions. See the case of Uganda vs. Commissioner of Prisons, ex-parte Matovu [1966] EA 514".

Pertaining to the 2nd limb of the objections raised herein, I am alive to a well-known principle of law that where an affidavit mentions another person, it will be hearsay unless there is an affidavit of that other person supporting

the fact. See in this respect the cases: **Sabena Technics Dar Limited vs. Michael J. Luwuzza** (supra); and **Benedict Kimwaga vs. Principal Secretary Ministry of Health**, Civil Application No. 31 of 2000 CA (unreported). However, in this case, the applicant deponed that her counsel enlightened him, among others, that the time to appeal has lapsed; hence, required to lodge the application for extension of time to take necessary action. This is a common fact. And, the applicant has rightly verified that this information was obtained from his counsel. Thus, in the circumstances of this case, it is my considered opinion that lacking affidavit of the applicant's counsel doesn't render the applicant's deposition a hearsay.

Lastly, concerning the 3rd limb of the objections, unarguably, it is settled law that an affidavit should only contain statements of facts and circumstances to which the witness deposes and it should not contain extraneous matters by way of prayer, legal arguments or conclusion. See in this respect the cases; **Uganda vs. Commissioner of Prisons, Exparte Matovu** [1966] E.A. 514; **Phantom Modern Transport (1985) Ltd vs D.T. Dobie (Tanzania) Ltd**, Civil Reference No. 15 of 2001 and 3/2002 [unreported]; **Judicate Rumishael Shoo & 64 Others vs. The Guardian Limited**, Civil

Application No. 43 of 2016, CA; and **Jacqueline Ntuyabaliwe Mengi & Others vs Abdiel Reginald Mengi & Others** (Civil Application 332 of 2021) [2021] TZCA 583

Based on the principle enunciated in the decided cases above, it is my considered opinion that the statement that; *"it will be in the interest of justice if this application is positively considered"* amounts to an opinion and, or conclusion. It should not have been deponed.

That said, I find that paragraphs 6 and 10 of the applicant's affidavit supporting the application herein offend the law on affidavits. Now, what is the remedy? The guiding principle is found in the case of **Phantom Modern Transport (1985) Limited vs. D.T. Dobie (Tanzania) Limited**, Civil References No. 15 of 2001 & 3 of 2005, CA (unreported), the Apex Court opined:

"Where defects in an affidavit are inconsequential, those defective paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it. If, however, substantive parts of an affidavit are defective, it cannot be amended in the sense of striking off the offensive parts and substituting thereof correct averments in the same affidavit. But where the court is minded to allow the deponent to remedy the defect, it may allow him or her to file fresh affidavit 9

containing correct averments. What in effect it means is that a fresh affidavit is substituted for the defective one to that extent one may possibly say that the original affidavit is being "amended".
[Emphasis mine].

It is my considered opinion that the defects found in the affidavit supporting the application herein do not constitute the substantive part of the same. Therefore, those defective paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it, which I hereby do.

In fine, I find the 1st and 3rd limbs of the preliminary objections advanced by the 1st respondent's counsel with substance. I accordingly sustain the same.
So ordered.

DATED at DAR ES SALAAM this 09th April, 2024



O. F. BWEGOGÉ
JUDGE