

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

MISC. APPLICATION NO. 3572 OF 2024

*(Originating from the District Court of Temeke at the Stop Judicial Centre
in Matrimonial Cause No. 69 of 2021)*

ARON BRASIUS MAPUNDA.....APPLICANT

VERSUS

TURUFENA ANDREA GERUT.....RESPONDENT

RULING

06/05/2024 & 24/05/2024.

SARWATT, J.;

This is an application for an extension of time for the restoration of an appeal against the decision of the District Court of Temeke at the Stop Judicial Centre in Matrimonial Cause No. 52 of 2023. The application was made under section 14(1) and section 19 of the Law of Limitation Act [Cap 89 R.E 2019], and order IX Rule 3 and section 95 of the Civil Procedure Code.

The application was made by way of chamber summons and supported by the affidavit of Aron Brasius Mapunda, the applicant. It was contested by the respondent, who filed her counter affidavit to that effect.

The respondent also filed a preliminary point of objection on two grounds, namely;

- 1. The applicant's affidavit is incurably defective for containing extraneous matters and hearsay.*
- 2. The applicant's affidavit is incurably defective for containing a defective verification clause.*

When the matter was called for hearing of the raised points of preliminary objection, it was agreed by both parties that the matter be disposed of by way of written submission. Pascal Livin Mshanga learned advocate, prepared the submission of the respondent in support of the preliminary objection, while Rose Charles Nyatega, learned advocate from the Legal and Human Rights Centre, prepared the applicant submission.

Arguing in support of the first ground of preliminary objection, Mr. Mshanga started his submission by referring the Court to the provision of Order IX, rule 3 of the Civil Procedure Code (the Code), which requires affidavits to

contain only facts and not arguments, conclusions, or opinions. According to Mr. Mshanga, the applicant's affidavit under paragraphs 3,5, and 6 contains argument, conclusion, and opinion contrary to order XIX Rule 3 of the Code. He said that the phrase "*for the reason that is untenable by the applicant*" appearing in paragraph 3 is the conclusion, and the phrase "*time has lapsed*" appearing in paragraph 5 is the conclusion and opinion. Also, the phrase "*delay was caused by late supply with a copy of dismissal order*" is the applicant's opinion on what he thinks might be the cause of delay, and equally, the phrase "*he was supplied with the order on 7th February 2024*" is the conclusion and the averment that "*the appeal has overwhelming chances of success*" appearing in paragraph 6 is a legal argument as well as the phrase "*he will suffer irreparable loss*" is legal argument, opinion and conclusion.

Mr. Mshanga further submitted that Courts of Records have on several occasions held that an affidavit containing extraneous matters is incurable defective, and the same ought to be struck out. He cited the decisions in the cases of **Uganda v Commisioner of Prisons Ex- parte Matovu** (1966) E.A, and of **Jacqueline Ntuyabaliwe Mengi and Others v Abdiel Reginald Mengi and Others**, Civil Application No.332/01 of 2021.

According to the counsel, if the defective paragraphs are expunged, the remaining paragraphs cannot support the application. He added since a defective affidavit supports the application, it is therefore incompetent and liable to be struck out.

On the second point of preliminary objection, that the affidavit contains hearsay and defective verification clause, Mr. Mshanga submitted that, in paragraph 4, the applicant states;

"That, in the course of pursuing the right to appeal and the right to be heard, I consulted and seek assistance from the Legal and Human Rights Centre, who advised me to file for an application for an extension of time."

According to Mr. Mshanga, the phrase indicates that the applicant was advised by someone from the Legal and Human Rights Centre, and he did not know the course of action to take but rather was advised by the lawyer, who is not disclosed in the said paragraph and even in the verification clause. The counsel further submitted that since the applicant failed to disclose the source of information, then the omission is fatal and renders the affidavit

incurably defective. To support his assertion, he cited the case of **Jacqueline Ntuyabaliwe Mengi and Other (supra)**.

In response, advocate Nyatenga conceded that the raised objections are valid as per the provision of the law. However, she differs from Mr. Mshanga's prayer that the application should be struck out with costs. It was the counsel's contention that the Court as an institution of justice cannot abandon justice for the sake of errors that can be made anywhere, even by the institution itself.

She further argued the Court is to be guided by Article 107A(1) and (2) of the Constitution of the United Republic of Tanzania, which requires the Court in delivering justice not to be tied up with technicalities that may obstruct justice, thus urged the Court to allow the applicant to amend the affidavit by letting him withdraw the same and refile, so as to save the Court's time.

In rejoinder, Mr. Mshanga insisted that the position of the law is that the application is rendered incompetent, and the only available remedy is to strike it out. This was held in the case of **Jacqueline Ntuyabaliwe (supra)**. He went further and attacked the applicant's prayer of focusing on substantive law. According to him, it would set a bad precedent that seeks

to disarm procedural requirements of the law that are in place to facilitate the orderly, consistent, and predictable functioning of the courts of justice.

Having heard the submissions of both parties, I'm tasked to determine if the raised preliminary points of objections have merit. The respondent prayed for the application to be struck out because a defective affidavit supported it. On his part, the applicant conceded that the affidavit was defective. However, he quickly reverted and urged the Court to allow the applicant to amend the affidavit by letting him withdraw the same and refile, as the Court should not be bound by the rules of procedure, which could defeat the end of justice.

As per order XIX Rule 3 of the Code an affidavit should be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory application on which statements of his belief may be admitted. Though the respondent conceded that the cited paragraphs are defectives, unlike Mr. Mshanga's contention that the whole application should be struck out, the law is clear from numerous authorities that when certain paragraphs within an affidavit are defective, they can be expunged or overlooked, leaving the substantial paragraphs intact. The remedy to the affidavit, which contains extraneous matters, is to expunge those offensive paragraphs so

as to allow the Court to proceed with the hearing of the application based on the remaining paragraph. The whole affidavit will be vitiated when it is shown that after the expunging of the defective paragraphs, the remaining paragraphs are shown not to be enough to sustain the affidavit. This is the view of The Court of Appeal of Tanzania in the case **Samweli Kimaro v Hidaya Didas**, Civil Application no. 20 of 2012 at Mwanza quoted with approval the decision the case of **Phantom Modern Transport (1985) Ltd v D.T Dorbie(Tanzania) Ltd**, Civil Reference no 15 of 2001 and no 3 of 2005 where in the latter case the Court had this to say;

'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, the substantive parts of an affidavit are defective, it cannot be amended in the sense of striking of 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 defects, it may allow him or her to file a fresh affidavit containing averments. What, in effect, it means is that a fresh affidavit is substituted for the defective one. To

what extent may one possibly say that the original affidavit is being amended.”

In the present case, the issue is whether or not the impugned paragraphs are seriously defective so as to vitiate the whole affidavit.

According to Mr. Mshanga, paragraphs 2,5, and 6 of the affidavit are defective as they contain arguments, conclusions, and opinions. The applicant conceded the arguments. If those paragraphs are expunged, it is obvious that the remaining paragraphs in the affidavit cannot support the application.

Apart from that, the respondent also attacked the affidavit for being defective since it contains a defective verification clause, a fact which the applicant also conceded. The Court of Appeal of Tanzania elaborated that the effect of the affidavit containing a defective verification clause in the case of **Jacqueline Ntuyabaliwe Mengi and Others (supra)** renders the whole application incompetent. Guided by the above authorities, since the affidavit contains extraneous matters and a verification that does not disclose the source of information, then the defects render the application incompetent. Therefore, it is hereby struck out and I make no order as to costs.

Dated at Dar es Salaam this 24th day of May, 2024.



A handwritten signature in blue ink, appearing to be "S. S. Sarwatt", written in a cursive style.

S. S. SARWATT

JUDGE

Delivered in the presence of the appellant and the respondent in persons and Godwill David Kyegeko advocate for the respondent.

Right of appeal is fully explained.