

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT TABORA

MISCELLANEOUS LAND APPLICATION NO. 14 OF 2012

(Arising from land appeal No. 5/2010)

BOAZ LEONARDAPPLICANT

VERSUS

JUMA MOHAMED FUNDIRESPONDENT

RULING

13/8 & 2/9/2013

S.M.RUMANYIKA, J.

Boaz Leonard (the applicant) applies under sections 68 (e), 93,95 and 98 of the Civil procedure code 1966 cap.33 R.E 2002, for extension of time within which to refile appeal. Following order of this court on 20/4/2011 striking out his appeal No. 5 of 2010 as it was instituted by way of a petition, instead of a memorandum of appeal as required by the land dispute courts settlement Act, Cap. 216 R.E. 2002.

The application is supported with his own affidavit.

He appears in person. Mr. Yusuf Mwangazambili represents Juma Mohamed Fundi (the respondent).

However, when the application came up for hearing, I had to hear and determine a two – limb preliminary point of objection (p.o) raised by the respondent, but taken by his counsel. In that one; being a christian, the applicant was incapable of making both oath and affirmation at the same time. Two; the jurat of attestation attached to the material affidavit did not disclose place where the attestation was made. Contrary to the notary public and commissioner for oaths Act Cap. 12 R.E 2002. Counsel submitted as such. He prayed the application be struck out.

The respondent submitted that he was a christian save for the typographical error. And as on the jurat of attestation, he stated that the rubber stamp of a magistrate (officer) clearly shows the place of attestation.

In his rejoinder, Mr. Yusufu submitted that the use of words “swear” and “affirm” simultaneously was practically not accidental/clerical error. That the place of attestation could not be established by rubber stamp of attestation officer. Nor was it conclusive that the address shown was the real place the oath was taken. There was no affidavit, no application. Counsel submitted.

In fact the courts of law are not religious tied. But they respect every individual's religious beliefs. In which case, I trust by swearing or making affirmation as the case may be, the deponent expresses his/her being honest to God. If both oath and affirmation brings the same results so much the better. Much as here, the triable issue is not on the applicant's religious belief. This is also to say that the possibility of the use of the word of "affirm" being a clerical error as pleaded by the applicant can not be ruled out. The 1st limb of the p.o is overruled.

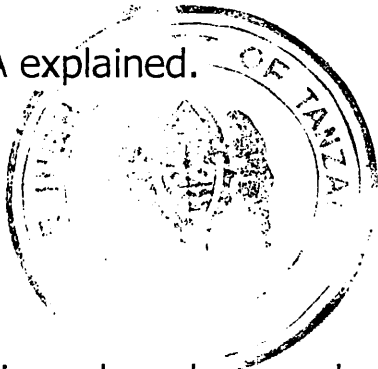
However, the non disclosure of the place the attestation of the affidavit was made is ever since the fundamental ingredients of any affidavit. Omission of which renders the material affidavit, and therefore the whole application it supports incompetent, and is liable to be struck out. As it was held in the case of Simplisius Felix Kijuu Issaka V. The National bank of Commerce Ltd, Civil application No. 24 of 2003 (CAT) – DSM cited quite relevantly by Mr. Yusuf Mwangazambili learned counsel. I quote from it, few words of wisdom of the court.

..... a defective affidavit in support of a notice of motion renders the application incompetent. It leaves the application without legs on which to standSince the application is incompetent for being supported by a defective affidavit, it must be struck out.....

As said, the supporting affidavit being glaringly defective the entire application is incompetent and liable for being struck out.

For all the reasons aforesaid, the 2nd limb of p.o is sustained. I strike out the entire application, with costs.

R/A explained.

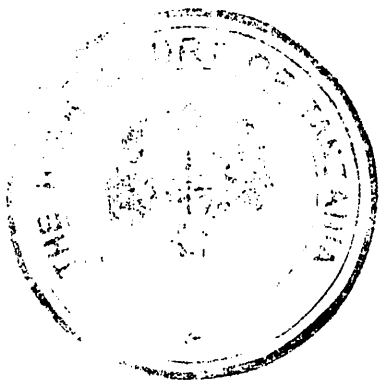


S.M.RUMANYIKA

JUDGE

29.08.2013

Delivered under my hand and seal of the court in chambers this 02/09/2013. In the presence of the parties Mr. Y.Mwangazambili is present also.



S.M.RUMANYIKA

JUDGE

02 – 08 - 2013