

**IN THE HIGH COURT OF THE
UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND CASE APPLICATION No. 911 OF 2018

WAZIRI BUKUKU.....APPLICANT

VERSUS

HALIMA KONDO.....RESPONDENT

Date of Last Order: 11.02.2020
Date of Ruling: 14.04 .2020

RULING

V.L. MAKANI, J

The applicant has moved this Court under section 38(1) of the Land Disputes Courts Act R.E 2002, Act No. 2 of 2002 seeking for extension of time to appeal against the judgment and decree of the Kibaha District Land and Housing Tribunal (the **Tribunal**), in Land Appeal No. 118 of 2017. The respondent filed a counter affidavit simultaneously with a Notice of preliminary objection on point of law that:

The application is incurably defective for not disclosing if the deponent is known or identified to the Advocate on the attestation clause.

With leave of the court the preliminary objection was argued by way of written submissions. The respondent's submissions were drawn and filed by Mr. Kitare, Advocate while the submissions by the

applicant were drawn gratis by Legal Aid Clinic of Legal and Human Rights Centre and filed by the applicant himself.

Submitting in support of the preliminary objection Mr. Kitare stated that section 10 of the Oaths and Statutory Declaration Act, CAP 34 RE 2002 provides how the format of a statutory declaration should be. From the format provided the person making the declaration should be known to the person taking declaration. According to him the requirement was emphasized in the case of **Peter Mziray Kuga vs. Anne Kilango Malecela & Others, Misc. Civil Application No. 7 of 2006 (HC-Moshi)** (unreported) where the applicant filed an application supported with an affidavit which did not show how the Commissioner for Oaths came to know the deponent. Mr. Kitare said the court in the said case held that the identity of the deponent in the supporting affidavit must be stated truly in the jurat of attestation. That the identity should be whether the Commissioner for Oaths knows the deponent in person or has been identified to him by another person, the latter being personally known to the Commissioner for Oaths. He said all that has to be stated in the jurat of attestation.

Mr. Kitare said in the present case the person making the declaration is unknown to the person taking the declaration. He argued further that, since the present affidavit does not indicate if the deponent is known or identified to the Commissioner for Oaths, the present application is contrary to the above provision and therefore it is

incurably defective and untenable. He prayed for the application be dismissed with costs.

In reply the applicant argued that he is a lay person and receives legal Aid from Legal and Human Rights Centre (**LHRC**). He said that as per rule of conflict of interest, the document drafted could not be attested by an advocate from the Organisation, hence the applicant had to find assistance from a private practitioner, hence this mistake. He further submitted that the mistake cannot be used to deny justice to the applicant who is seeking justice before this honourable Court. He said being a layman, the applicant cannot be punished on an error committed by a private practitioner. He relied on section 3B (1) of the Civil Procedure Code, CAP 33 RE 2002 and stated that it is the applicant's prayer that the error of the Advocate should not necessarily be vested on him hence the application should not be dismissed. He insisted that if the objection is to be upheld it will only prolong the proceedings and will amount to wastage of the precious time of this honourable court. Further he submitted that, sustaining the objection will delay justice and will be costly to the applicant who is receiving legal aid and residing at Kibaha in Pwani region thus it is his prayer that this court be considerate. He added that the objection raised by the respondent will not dispose the main application to its finality but will only prolong the proceedings, hence should be dismissed.

No rejoinder was filed by the applicant.

Having considered the rival submissions by Counsel for the parties, the point for determination is whether the preliminary objection raised has merit.

I have had time to go through the affidavit the subject of this objection. Indeed, the Commissioner for Oaths did not indicate whether he personally knows the deponent, or the deponent was identified to him by a person personally known to him. The applicant has acceded to the defect in the affidavit.

My brother Hon. Mlyambina, J in **Salma Said Mang'uro vs. Mohamed Amiri, Misc. Civil Application No. 776 of 2018 (HC-DSM)** (unreported) stated:

"That act of not specifically stating whether or not the applicant was known to him or her (the Commissioner) or was identified by a person who is known by the Commissioner for Oaths makes the affidavit fall short of correct declaration in the jurat of attestation."

Hon. Mlyambina, J went further to quote the case of **Peter Mziray Kuga** (supra) which quoted the case of **Ramadhani Pazi & Wambura Malima vs. Tanzania Civil Aviation Authority, Revision No. 375 of 2013 (HC-Labour Division, DSM)** (unreported) where it was stated:

.... the identity of the deponent in the supporting affidavit must be stated truly in the jurat of attestation. Whether the Commissioner for oaths knows the deponent in person or has been identified to him by X the latter being personally known to the commissioner for oaths all that has to be stated truly in the jurat of attestation. The information of identification has to be clearly shown in the jurat"

Now what are the subsequent consequences of a defective affidavit?
In the case of **Omary Ally Omary vs. Idd Mohamed & Others,**
Civil Revision No. 90 of 2003 (CAT-DSM) (unreported):

".....As a general rule a defective affidavit should not be acted upon by a court of law, but in appropriate cases where the defects are minor, the Courts can order an amendment by way of filling fresh affidavit or by striking out the affidavit but if the defects are of substantive nature, no amendment should be allowed as they are a nullity, and there can be no amendment to a nothing".


The question that follows is whether the defect in the applicant's affidavit is minor or of a substantive nature. In my view the defect is substantive because an affidavit is evidence on oath, therefore it has to be stated fully in the jurat of attestation as to whether the Commissioner for Oaths knew the deponent, or the deponent was identified to him for purposes of commitment. Failure to indicate such an important statement in the jurat of attestation renders the affidavit incurably defective for lack of disclosure of the identity of the deponent. The defect is fatal and cannot be amended as it goes to the root of the merit of the application.

The applicant argued that the defective affidavit was not his fault, and that the court should invoke the overriding principle to do away with technicalities. I think this argument has no merit because as stated in the case of **Mondorosi Village Council & 2 Others vs. Tanzania Breweries Limited & 4 Others, Civil Appeal No. 66 of 2017 (CAT-Arusha)**(unreported) the overriding principle should

not be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case (in this instance section 10 of the Oaths and Statutory Declaration Act), and further, as stated above, the defects in the affidavit, go to the root of the matter in that there is no affidavit to support the application and hence no application for this court to consider.

In the result, the preliminary objection is sustained. The application is accordingly struck out for being incompetent. The applicant may, if he so wishes, file a fresh application. There shall be no order as to costs.

It is so ordered.


V.L. MAKANI
JUDGE
14/04/2020