

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

LAND REVISION NO.5 OF 2019

*(Originating from Kibaha District Land and Housing Tribunal, Application No. 3 of 2018,
before Hon Njiwa, Ruling Dated 07/02/2019)*

ERASTO MWAHALENGA.....APPLICANT

VERSUS

ELITANTE MUNUO.....1ST RESPONDENT
ROZI LUANDA.....2ND RESPONDENT
LAURANCE MSAADA.....3RD RESPONDENT
KARAN RAMADHAN.....4TH RESPONDENT
RAMADHANI HAMDUL.....5TH RESPONDENT
PAUL JOHN NJAU.....6TH RESPONDENT

RULING

M. OPIYO, J.

By Chamber Summons made under section 43 (1) (b) of the Land Disputes Courts act, Cap 216, R.E 2002, supported by his affidavit, Ersato Mwakahenga is seeking from this court, the following orders:-

- 1 *This court be pleased to revise the ruling of the District Land and Housing Tribunal of Kibaha entered in Misc. Land Application No. 03 of 2018 and declare the same as nullity for being issued without giving the parties an opportunity to be heard.*

2 That, the Court should order a retrial of the execution application No 03 of 2018.

The factual background giving rise to this application briefly is that; in the year 2017, the applicant lodged a complaint at Pangani Ward Tribunal vide Case No 58 of 2017. Everything went on smoothly and the decision came in favour of the applicant. The respondents never appealed the decision of the Pangani Ward tribunal. The applicant went on to apply for execution of the said decision at the District Land and Housing tribunal for Kibaha District. His application was not heard on merits. Instead, the Chairman of the District Land and Housing Tribunal, Honourable Jerome Njiwa decided *suo motu* to revise the decision of the Pangani Ward tribunal for reasons that, the respondents were condemned unheard.

When the respondents were served with the copies of the application, the 1st and 6th respondents advanced four preliminary objections on point of law against the instant application to the effect that, the affidavit of the applicant is incurably defective for containing prayers, matters of law and arguments. Also the two respondents above further objected this application for being improperly filed into this court. It is on the basis of this background, this ruling is made.

Hearing of the objections was by written submissions, the applicant was represented by Advocate H.J Mwakenja, while the 1st and 6th respondents enjoyed the legal services of Advocate Finias Ladslaus Kinigwa who prayed to abandon the 2nd objection and remained with three objections.

Submitting in support of the 1st and 3rd objections, Mr. Finiasi, for the 1st and 6th respondents was of the view that, paragraphs 2, 5 and 6 of the applicant's affidavit contain prayers while paragraph 6 has arguments. This is contrary to Order XIX Rule 2 and rule 3 (2) of the Civil Procedure Code, Cap 33 R.E 2019 (CPC). He argued that, the affidavit offends the settled rules given in the celebrated case of **Uganda versus Commissioner for Prison, Exparte Matovu(1966) E.A 514**, where it was observed that:-

"As a general rule of procedure and affidavit for use in court, being a substitute for oral evidence, should only contain statement of facts and circumstances to which the witness deposes either of his own knowledge or such an affidavit should not contain extraneous matters by way of objection or prayers or legal arguments or conclusion."

He went on to argue that, the same position was taken by **Makani J**, in **Director of Mkuranga District Council versus Issa Baradya and James Benard Njau, Misc Land Application No. 304/ 2019, unreported** and **MMG Gold Limited versus Hertz Tanzania Limited, Misc. Commercial Case No. 118 of 2015, (unreported)**.

On the 4th objection, Mr. Finias submitted that, the applicants' affidavit contains matter of law such as fundamental rights like the right to be heard, and that goes against the decision of Court in **MMG Gold Limited versus Hertz Tanzania Limited, Misc. Commercial Case No. 118 of 2015, (unreported), supra**.

In reply, Advocate Mwakenja for the applicant argued firmly that, the objections by the 1st and 6th respondents above are baseless and intended to mislead the court. The same have no legal justifications and do not touch the merit of the application at hand hence, ought to be overruled. He insisted that, the two respondents intend to end the applicant's case on technicalities contrary to the case of **Samweli Kimaro versus Hidya Didasi, Civil Application No. 20 of 2012, Court of Appeal of Tanzania at Mwanza**, where **Msofe JA** observed that,

"In dispensing justice, the courts are no doubt rendering or giving a very valuable service to the society at large and to the consumers of our justice system in particular. If so, the society/ consumers must continue to have trust and faith in our system. These will be lost if cases are sometimes struck out on flimsy, cheap or too technical reasons. I think it is to the best interest of any one that cases should reach a finally without being hindered in the process by preliminary objections which could be avoided or which do not ultimately determine the rights of the parties."

The applicant's counsel also cited the case of **Princial Secretary Ministry of Defense versus Delam Valambia, (1992) TLR 182** in support of his argument.

I have considered the parties' application and went through both sides affidavits. The objections intend to challenge applicant's affidavit that it contains prayers and arguments, thus, violating the settled principle of law. Going through the affidavit of the applicant challenged, indeed paragraphs 5, 6, 7 and 8 are contrary to the provision of Order XIX rule 2 of the Civil

Procedure Code. They contain arguments (paragraphs 5, 6 and 7). The paragraphs put forward how the impugned decision is unlawful. Paragraph 8 also contains prayer that the prayers in the chamber summons be granted. This is contrary to law.

Mr. Mwakenya, learned counsel, for the applicant brushed away the objection by stating that they are baseless and do not go on the merits of the application. He insisted on the importance of abiding to substantive justice rather than reliance on disposing this application on technicalities.

In my considered view, it is unfortunate for the applicant that, the kind of defect speckled on the above paragraphs are not curable. Order XIX rule 2 CPC mandatorily describes how an affidavit should be, thus, failure to abide to it leads to incurable defect (See **Mondorosi Village Counsel and 2 Others v. Tanzania Breweries Limited and 4 Others, Civil Appeal No.66 of 2017 CA**).

The consequence of that is for the defective paragraphs being expunged from the affidavit, as I hereby do. After expunging those paragraphs (5, 6, 7, 8) the remaining paragraphs (1st – 4th) are insufficient to constitute a valid affidavit. Consequently, the application supported by defective authority is also defective. The same is therefore struck out with no order as to costs.



M. P. OPIYO,
JUDGE

16/12/2020