

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

MISC. LAND APPLICATION NO. 304 OF 2019

*(Originating from the decision of the Mkuranga District Land and Housing Tribunal
in Land Application No. 24 of 2015)*

**DIRECTOR, MKURANGA DISTRICT
COUNCILAPPLICANT**

VERSUS

**ISSA BARADYA1ST RESPONDENT
JAMES BERNARD NJAU 2ND RESPONDENT**

Date of Last Order: 13.02.2020
Date of Ruling: 27.04.2020

RULING

V.L. MAKANI,J

This ruling is in respect of the preliminary objection that was raised by the 1st respondent. The said preliminary objection states as follows that:

*"That the affidavit in support of the application is incurably defective for containing prayers in paragraph 9 of the affidavit and arguments, opinions and conclusions in paragraph 4 of the affidavit contrary to Order XIX of The Civil Procedure Code cap 33 R.E 2002(The CPC) and contrary to authorities of famous case of **Uganda v Commissioner of Prisons exparte Matovu (1996) E.A 514** followed in **D.P Shapriya & Co. Ltd v Bish International Civil Application No. 53 of 2002 (CAT) (DSM) (Unreported)** Hon. Justice Ramadhani JA, and **Phantom Modern Transport (1985) limited***

***v D.T Dobie & Company LTD Civil Reference No.
15 of 2001 and many others."***

Preliminary objection was disposed by way of written submission, applicants had the services of Mr. Peter K. Timothy, Advocate and the 1st respondent was represented by Amini Mohamed Mshana, Advocate. The 2nd respondent was absent.

Submitting on the preliminary objection Mr. Mshana for the 1st respondent stated that the affidavit in support of the affidavit was incurably defective as it contained in paragraphs 4 and 9 argument, opinions and conclusions contrary to Order XIX of the Civil Procedure Code CAP 33 RE 2002 (the CPC) and the famous cases of **Uganda vs. Commissioner of Prisons Ex-parte Matovu [1966] EA 514** which was followed in **D.P. Shapriya & Co. Limited vs. Bish International, Civil Application No. 53 of 2002 (CAT-DSM) (unreported)** and **Phantom Modern Transport (1985) Limited vs. D.T. Dobie & Company Limited, Civil Reference No. No. 15 of 2001 and 3 of 2005 (CAT) (unreported)**.

He said paragraph 4 contained opinion and arguments while paragraph 9 contained a prayer. He said on 11/12/2019 the applicant orally conceded to the objection and prayed that the offensive paragraphs be expunged. He said though it is a proper remedy but the question remains as to whether the remaining paragraphs would be capable of supporting the application. He said paragraph 4 contained the main reason for the delay and according to Mr. Mshana, in the absence of this paragraph the remaining paragraphs would

merely be explanatory and cannot support the application. He said the overriding principle cannot be invoked to breach the clear provisions of the law. He prayed for the application to be struck out with costs.

In response to the arguments above, Mr. Peter K. Timothy from the Solicitor's Office, Mkuranga District Council objected that paragraph 4 of the affidavit contains arguments, opinion and conclusion. He submitted that the contention is wrong as it was intended to prejudice justice. He said that it is clear in law that once the fact is put in the counter affidavit, it is a matter of fact which requires proof hence cannot be a point of law. He said the preliminary objection therefore does not pass the test as it contains facts to be proved. He cited the case of **National Insurance Corporation of (T) Limited & Parastatal Sector Reform Commission vs. Shengena Limited, Civil Application No. 20 of 2007** (unreported) where the court of appeal quoted the land mark case of **Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd (1969) at p. 700 & 701** that ... "*preliminary objection consists of a point of law ... which if argued... may dispose of the suit. It cannot be raised if any fact has to be ascertained*"

Mr. Timothy Peter went on to submit further that paragraph 4 is a mere fact and short elaboration of the same in just one sentence. He gave four reasons as to why it is fact. He cited the case of **Msasani Peninsula Hotels Limited & 6 Others vs. Barclays Bank Tanzania Limited & 2 others, Civil Application No. 192 of**

2006 (unreported) where it was stated that *"...an affidavit for use in court... should only contain statements of facts and circumstances to which the witness deposes"*

Mr. Timothy Peter further submitted that the applicant concedes that paragraph 9 of the affidavit should be expunged from the affidavit to leave the remaining parts of the affidavit intact as per decision in **Msasani Peninsula** (supra). What took place on 11/12/2019 applicant conceded to dispose this preliminary objection by way of written submission not the two paragraphs of the affidavit to be expunged.

Mr. Timothy also wanted the court to do away with technicalities and invoke Article 107A and 13(6)(a) of the Constitution of the United Republic of Tanzania as found in the case of **Cyprian Majura Musiba & 3 Others vs. Beranard Kamilius Member, Misc. Civil Application No. 119 of 2018 (HC-DSM)** (unreported). He also observed the overriding objectives popularly known as "oxygen principle" to do away with technicalities and afford parties to be heard. He relied upon the cases of **Yakobo Magoiga Gichere vs. Penina Yususph, civil Appeal No. 55 of 2017 (CAT- Mwanza)** (unreported). He prayed for the preliminary objection to be dismissed with costs.

I have read the rival arguments presented by the learned Advocates. The issue is whether the application is incompetent.

Affidavits are regulated by the provisions of Order XIX Rule 3(1) and

(2) of the CPC, which lays down the general principle of law on affidavits in the following terms:

"Order XIX Rule 3 (1) Affidavits shall be confined to such facts as the deponent is able of his won knowledge to prove, except on interlocutory applications on which statement of his belief may be admitted:

Provided that the grounds thereof are stated.

(2) The costs of every affidavit which unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall (unless the court otherwise directs) be paid by the party filing the same".

In the case of **Phantom Modern Transport (1985) Limited** (supra) Mroso, J.A. (as he then was) quoted with approval the general rule of practice and procedure on affidavits stated in **Uganda v. Commissioner of Prisons Ex Parte Matovu** (supra) as follows:

"...as a general rule of practice and procedure, an affidavit for use in court being a substitute for oral evidence, should only contain statement to which the witness deposes either of his own knowledge or...Such an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion".

I have perused the affidavit of Mart H. Kavula, the District Council Solicitor Advocate and paragraph which is complained of states:

"9. That, it is in the interest of justice, the prayers sought in the chamber summons be granted."

The wording of paragraph 10 above depicts an obvious prayer to the court for grant of the application with costs. As correctly stated by Mr. Mshana and conceded by Mr. Timothy Peter the paragraph is simply a statement of request to the court to allow the application to

be granted This is a prayer and they are no facts to be proved in the said paragraph. In that respect and according to the principle in **Phantom Modern Transport and Uganda vs Commissioner of Prisons Ex Parte Matovu** (supra), an affidavit that contains a prayer is defective and I declare that the said paragraph of the affidavit is defective.

Another contested paragraph in the said affidavit is paragraph 4 which states:

"4. That, the judgment was vague to the extent that the applicant knew that the decision favoured him as the same as the 1st Respondent. This is because of nature of judgment from citation of parties and the contents thereof by lacking analysis and reasons for decision."

The contents of paragraph 9 above are clearly conclusive and argumentative. In other words, the contents of the said paragraph reflects the opinion of the deponent that "*the judgment was vague*", and is also argumentative in that *the "judgment lack analysis and reasons for the decision"*. This is in contravention of Order XIX Rule 3(1) and (2) of the CPC makes the affidavit defective.

Now what is the subsequent remedy to a defective affidavit? Mr. Mshana suggested the said paragraphs be expunged. I totally agree with Mr. Mshana, and as observed the removal of paragraph 4 will leave the application with no legs to stand on. Mr. Timothy argued the court to invoke the principle of overriding objective and do away with technicalities. With this suggestion then the court would have inclined to order amendment of the affidavit. However, Hon. Samatta CJ (as he then was) in the case of **University of Dar es Salaam vs.**

Mwenge Gas and Luboil Limited, Civil Application No. 76 of 1999 (unreported) stated that:


"...the discretionary power to grant leave to amend an affidavit must be exercised with justice and common sense in that something which is null and void is incapable of being amended. You cannot amend nothing".

In any case, the principle of overriding objectives cannot be invoked to was not meant to enable parties to circumvent the mandatory rules of the Court or to turn blind to the mandatory provisions of the procedural law which go to the foundation of the case (see **District Executive Director, Kilwa District Council Vs. Bogeta Engineering Limited, Civil Appeal No. 37 Of 2017 (CAT-Mtwara)** (unreported))

In the end result, the defective affidavit by MARY J. KAVULA is declared incurably defective and is hereby struck out and with it the application also collapses, and it is accordingly struck out with costs.

It is accordingly ordered.




V. L. MAKANI
JUDGE
27/04/2020