

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

MISC. LAND APPLICATION NO. 447 OF 2020

JOSEPH PETER DAUDI..... 1ST APPLICANT
ZULFA SEIF MTULIA.....2ND APPLICANT

VERSUS

ATTORNEY JOURNEY.....1ST RESPONDENT
**PREVENTION AND COMBATING OF CORRUPTION BUREAU
(PCCB).....2ND RESPONDENT**
SEIF HASSAN SEIF3RD RESPONDENT
MARIAM SAID ABUBAKARY.....4TH RESPONDENT

RULING

S.M. MAGHIMBI, J:

The applicants filed this application under the certificate of urgency. THE Chamber Summons is lodged under the provisions of Sections 68(e), 95 and Rule 2 of Order XXXVII of the Civil Procedure Code, 1966 Cap 33 2002 R.E (herein after "The CPC") and any other enabling provisions praying for the following orders;

1. The declaratory orders to be granted pending to the final determination of Application No. 110 of 2020, between Joseph Peter

Daudi vs. Seif Hassan Self, and Application No. 111 of 2020 between Zulfa Seif Mtulia vs. Mariam Said Abubakary instituted at the District Land and Housing Tribunal for Temeke District on 11/05/2020.

2. Any other relief(s)/ or order(s) this court might deem fit and just to grant.

3. Costs.

On the 23rd September 2020 the 1st and 2nd respondents raised the preliminary objections on points of law that;

1. The application is incompetent or being supported by an incurably defective affidavit which is sworn by the advocate who is representing the applicants.

2. The application is bad in law and incompetent for lacking main case from which it is supposed to arise and hence contravening order XXXVII Rule 2 of the Civil Procedure Code. Cap 33 R.E 2019.

On 25th September 2020, this court ordered hearing by written submissions and the parties adhered to the schedule. During the hearing of this application, the applicant was represented by Mr. Simphorian Revelian Kitare, learned Advocate while the 1st and 2nd respondents were represented by Mr. Yohana Marko, learned State Attorney.

Submitting on the 1st point of preliminary objection Mr. Yohana submitted that the affidavit supporting the application is incurably defective, that the advocate who deposed it has done so in excess of the limits set in the case of **Tanzania Brewaries Limited Vs Herman Bildad Minja, Civil Application No.11/ 18 of 2019, Court Of Appeal Of Tanzania At Dar Es Salaam unreported.** That in this case the Court of Appeal quoted

with approval the holding in **Lalago Cotton Ginnery and Oil Mills Company Ltd Vs. The Loans And Advances Realization Trust (LART)**, Civil Application No. 80 of 2002 (unreported) which stressed that;

"An advocate can swear and file an affidavit in proceedings in which he appears for his client but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during these proceedings."
And that "From the above, an advocate can swear and file an affidavit in proceedings in which he appears for his client but on matters which are within his personal knowledge. These are the only limits which the advocate can make an affidavit in proceedings on behalf of his client."

Mr. Yohana continued to submit that the above authority is self-explanatory as advocate is to swear affidavit on behalf of his client on matters which are in his personal knowledge only and not those in the personal knowledge of his client.

He further submitted that the deponent in the applicant's affidavit is also the applicant's counsel as witnessed under paragraph 1 of the said affidavit. He said that the matters deposed are not in the personal knowledge of deponent as seen under paragraphs 2,3 and 6 of the impugned affidavit. That this makes the counsel play a double role, as an advocate and as a witness both for his client.

In reply, Mr. In reply Mr. Kitare submitted that the applicants disputes the submissions in support of the first preliminary objection that the

application is incompetent for being supported by the affidavit sworn by the advocate who is representing the applicants in which the advocate exceeded limits by swearing contents which are not in his personal knowledge. That the referred contents are paragraphs 2, 3, and 6 of the affidavit. Mr. Kitale submitted that the State Attorney relied on the case of **Tanzania Breweries Limited vs. Herman Bildad Minja**, and the case of **Lalago Cotton Ginnery and Oils Company** (supra) to support their submissions.

Mr. Kitare submitted that the affidavit supporting the application is not defective as alleged by the State Attorney due to the fact that the contents under paragraphs 2, 3, and 6 were verified by the deponent (undersigned applicant's advocate), after stating that he obtained the same from the applicants.

Mr. Kitare continued to submit that Order XIX, rule 3(.1) of the CPC provides that:

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted:

Provided that the grounds thereof are stated."

Therefore, since the deponent stated in the verification clause that he obtained the said information from the applicants, he complied with the above provision which regulate swearing information not borne within oneself but obtained from another person. Accordingly, the affidavit cannot be vitiated by the presence of the contents of the said paragraphs.

Mr. Kitare distinguished the case of cases of **Tanzania Breweries Limited vs. Herman Bildad Minja and the case of Lalago Cotton Ginnery and Oils Company** on which it relied to the fact that in this case the advocate deposed on internal procurement procedures of sourcing a law firm to represent it in court, the knowledge is not supposed to be in his knowledge but was supposed to be in the knowledge of the Principal Officer of the company; while in the present case the advocate obtained the information under paragraphs 2, 3, and 6 of the affidavit from the applicants for which he verified to this effect.

Mr. Kitare submitted further that even if the affidavit is impugned by the contents of the said paragraphs, the assertion which the applicants do not subscribe, the remedy is to expunge or disregard the same while leaving the rest of the contents to subsist. To support his argument he cited the case of **D.T. Dobie (Tanzania) Limited vs. Phantom Modern Transport (1985) Ltd. C A.T. Dar es Salaam**; Civil Application No. 141 of 2001, at page 3 (unreported) wherein the affidavit contained an improper paragraph, the trial judge held:

"that the presence of the said paragraph does not render the affidavit incurably defective. That the improper paragraph can be removed without harm."

Mr. Kitare submitted the position was adopted by the full bench in the case of **Phantom Modern Transport (1985) Limited vs. D. T. Dobie (Tanzania) Limited; C A.T., Dar es Salaam, Civil References No. 15 of 2001 and 3 of 2002; at page 10** (unreported).

Mr. Kitare submitted further that even if paragraphs, 2, 3 and 6 of the affidavit are expunged or ignored yet the remaining paragraphs suffice to extend the awareness to court that the second respondent extorted the applicant's documents from their advocate. That the documents were intended to be tendered to court, while knowing that there are pending cases at the Tribunal hence interfering the independence of the judiciary and contravening the doctrine of separation of powers.

I have considered the substance of the first objection and the submissions of both parties. My determination will be in line with the holding of the Court of Appeal in the case of **Tanzania Breweries Limited Vs Herman Bildad Minja, Civil Application No.11/ 18 of 2019, Court Of Appeal Of Tanzania At Dar Es Salaam unreported**. That in this case the Court of Appeal quoted with approval the holding in **Lalago Cotton Ginnery and Oil Mills Company Ltd Vs. The Loans And Advances Realization Trust (LART)**, Civil Application No. 80 of 2002 (unreported) which stressed that;

"An advocate can swear and file an affidavit in proceedings in which he appears for his client but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during these proceedings."
And that "From the above, an advocate can swear and file an affidavit in proceedings in which he appears for his client but on matters which are within his personal knowledge. These are the

only limits which the advocate can make an affidavit in proceedings on behalf of his client."

The decision is clear that what an advocate may depone are matters that are within his personal knowledge with regard to representation of his client. Mr. Kitare admits that para 2, 3 and 6 are not of his knowledge meaning that they are contrary to the holding in the case. The main question then is whether in the absence of the 2nd, 3rd and 6th paragraphs, the affidavit of the applicant can still stand. On the 2nd and 3rd para is where the narration of the main part of the dispute lies and what led to the current dispute. If the two paras are expunged, then the affidavit will start with instruction of the applicant to write demand notes to the respondents to vacate the suit houses. Obviously it will be a statement that drops out of nowhere and there will not be any meaning to the dispute or anything for the court to determine in the application.

Para 6 may be harmless if expunged, but in the absence of the 2nd and 3rd para, the affidavit would not have a meaning to establish facts that may call for the court's intervention. Therefore on the basis of the cited case of Tanzania Breweries above, I see that the affidavit of the applicant in support of the Chamber summons is fatally defective making the application beforehand incompetent as well. Consequently, the application is hereby struck out with costs.

Dated at Dar es Salaam this 09th March, 2021.


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S.M.MAGHIMBI.
JUDGE.