

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

MISC. LAND APPLICATION NO. 185 OF 2019

*(Arising from application number No.198 of 2007 decided
by Temeke District Land and Housing Tribunal)*

ABDALLAH HITLER RAMADHANI..... APPLICANT

Versus

HASSAN ABUBAKAR MWINCHUMU.....RESPONDENT

Date of Last Order: 2.9.2019

Date of Ruling: 27.9.2019

RULING

OPIYO J.

Hassan Abubakar Mwinchumu(the respondent), has raised a preliminary objection on a point of law that, the applicant's affidavit is defective for contravening Order XIX Rule 3(1) of the Civil Procedure Code, Cap 33, and R.E 2002. And further that, the affidavit contains hearsay facts. Both parties argued in this preliminary objection by written submissions. Alex Enock appeared for the applicant, while the respondent was represented by Advocate Simba Pius Kipengele.

Mr Kipengele, submitting in support of the preliminary objection argued that, the affidavit annexed with this application as sworn by applicant's Advocate contains information supplied by the applicant to his Advocate. It

is not based on the Advocate's knowledge as stated in paragraph 1 of the affidavit. He insisted that, according to Order XIX Rule 3(1) of the Civil Procedure Code, Cap 33 R.E 2002, it is only in interlocutory applications where statements of belief are admitted. This application being of extension of time to file an appeal, these statement of belief by the applicant's Advocate are not admissible.

On the 2nd ground of the objection, the respondent's Advocate maintained that, the applicant's affidavit is defective for containing hearsay facts. Paragraph 2 and 3 of the affidavit states that, the applicant was suffering from pressure and that he assigned Mr Said Hamis Mtepa to collect the copies of judgment, but the Said Hamisi Matepa did not swear an affidavit to confirm that information from the applicant. This too is contrary to Order XIX Rule 3(1) of the Civil Procedure Code R.E 2002. Therefore, the applicant's application for extension of time to file an appeal should be dismissed for lack of merits with costs.

Mr. Alex Enock for the applicant maintained that, the preliminary objection by the respondent has no merit and should therefore be dismissed. The affidavit annexed with the applicant's application is not defective at all, the information contained therein are correct according to the applicant's knowledge except on the Advocates paragraph. He argued against the preliminary objection basing on the decision of court in COTWO (T) OTTU AND ANOTHER vs HONOURABLE IDD SIMBA MINISTER OF TRADE AND OTHERS, T.L.R 2002, at page 88 where it was decided that:-

"A preliminary objection consists a point of law which has been pleaded, or which arises by clear implication out of pleadings,

and which if argued as a preliminary point may dispose of the suit. Examples are the jurisdiction of court, or a plea of limitation or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration...A preliminary objection is in the nature of what used to be demurrer. It rises a pure point of law which is argued on assumption that all facts pleaded by the other side are correct. It cannot be raised if a fact has to be ascertained or if what is sought is the exercise of jurisdiction"

He thus argued that the respondent's point of objection does not meet the above standard; it ought to be dismissed with costs.

Submitting in his rejoinder, the counsel for the respondent, insisted that, the preliminary objection raised by the respondent is on the point of law. It is based on the contents of affidavit annexed with this application, under Order XIX Rule 3(1) of the Civil Procedure Code, Cap 33 R.E 2002."

I have carefully considered the rival submissions of learned counsels in respect of the preliminary objection. However, before determination of the preliminary objection on merits, I thought it is prudent to first decide whether the so called preliminary objection by the respondent qualifies to be called a preliminary objection within the ambit of our law.

The definition of preliminary objection as given in MUKISA BISCUITS MANUFACTURING CO. LTD versus WEST END DISTRIBUTERS LTD (1969) E.A. 696, will lead us into affirmative answers on the above question, that

“ A preliminary objection consists a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”.

The preliminary objection by the respondent was based on two grounds, which are (i) the applicant’s affidavit is defective for contravening Order XIX Rule 3(1) of the Civil Procedure Code, Cap 33, and R.E 2002, and (ii) the affidavit contains hearsay facts.

Both the points in my view pass the test as all are based on point of law that is not subject to proof by some other material facts as argued by the applicant. That is the reason the applicant is unable to explain with clarity the additional facts that needs to be ascertained that bars the points raised from being on pure point of law.

I will start with second point of objection. Going through paragraphs 2, 3,4,5,6 and 7 which we are told are based on the information supplied to deponent by the applicant; they, in my view, indeed violate the rules against hearsay in affidavits. The deponent, an advocate stated that the applicant was suffering from pressure, thus, he had to assign a duty of collecting the copy of judgement to one Said Hamisi Mtepa who reported the difficulties in procuring the same. Saidi Hamisi Mtepa did not affirm an affidavit to prove that claim. So in essence, the advocate is reporting what the applicant was told by the third person. It follows that all the facts deponed in paragraphs 2, 3,4,5,6 and 7 are not those which the deponent is able to prove on his own knowledge or based on information of his source of information as he deponed, rather they are based on information

from the third person which he got through the applicant. So, they entail facts to be proved by a third person, Said Hamisi Mtepa not the one who is the source of information acknowledged by the deponent. They are not within the allowable parameters. It would be different if deponent was the applicant referring to Hamisi Mtepa as his source of information. Affidavit that contains hearsay facts is defective.

It is equally true that in such circumstances, the law is that if the Court finds that the defects are inconsequential, it can order that the offensive paragraphs be expunged and proceed with the application if there is still substance in the affidavit to support the motion. But if there is no substance left, the application would not stand, although a fresh one may be filed **(see Civil Application No. 24 of 2011, Arbogast C. Warioba v. Applicant National Insurance Corporation (T) LTD and Consolidated Holding Corporation. In the instant case if in paragraphs 2, 3,4,5,6 and 7 are expunged, there remain only one paragraph (introductory paragraph for that matter that cannot sustain the affidavit. In the situation, the affidavit that can no longer stand is fatally defective. It is a well settled position that legally a defective authority cannot support an application.**

For the foregoing reasons I uphold the preliminary objection to the extent of the 2nd ground, that I need not dwell on the remaining ground. Consequently, this application for extension of time to file an appeal is hereby struck out with no order as to costs.

Ordered accordingly.



M. P. OPIYO
JUDGE
27/9/2019