

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

MISC. LAND APPLICATION NO. 502 OF 2020

KHALID SIMBA.....APPLICANT

VERSUS

L.H. MALEKO.....RESPONDENT

Date of Order: 13.04.2021
Date of Ruling: 10.05.2021

RULING

V.L. MAKANI, J

This ruling is in respect of the preliminary objections on points of law that were raised by the respondent herein as follows:

- 1. The applicant's affidavit is incurably defective for containing prayers legal arguments and conclusions.*
- 2. The application is not maintainable as the orders sought in the present application upon being granted then the applicant cannot use the intended revision as an alternative for an appeal.*

With leave of the court the objections were argued by way of written submissions. The submissions by the respondent were drawn and filed by Mr. F.A. M. Mgare, Advocate and those by the applicant were drawn and filed by Mr. Godwin Antony Fissoo, Advocate. As regards the first point of objection Mr. Mgare submitted that paragraphs 16

and 25 of the applicant's affidavit contains prayers, while paragraphs 7,8, 9, 10, 13.1,13.2, 16, 21, 22,23.1,23.2,23.3,23.4,23.5,23.6,23.7, 23.8, 24, 24.1, 24.2, 24.3, 24.4, 24.5 and 24.6 contain legal arguments. He further said paragraphs 7, 8, 14 and 19 contain conclusions. Mr. Mgare said since the affidavit has legal arguments, prayers and conclusion then it is incurably defective. He said if the offensive paragraphs are expunged, the remaining paragraphs would not support the Chamber Summons as such would render the application incompetent. He relied on the case of **Uganda vs. Commissioner of Prisons, Ex-parte Matovu (1966) EA 516** and **Chadha & Company Advocates vs Arunaben Chaggan Chitta Mistry & 2 Others [2017] TLSLR 493** and Order XIX Rule 3(1) of the Civil Procedure Code CAP 33 RE 2019 (the **CPC**).

As regards the second point of objection, Mr. Mgare submitted that according to the records, the applicant was aggrieved by the judgment in Land Application No. 369 of 2008 which he termed the said decision as an ex-parte judgment while in fact it was a judgment made under Order XVII Rule 3 of the CPC. Mr. Mgare said the applicant filed an application to set aside the said ex-parte judgment. He said basing on a preliminary objection raised the Tribunal on

01.10.2010 dismissed the application for being incompetent. The applicant was further aggrieved and filed Land Appeal No. 117 of 2010 in this court (Hon. Sambo, J) which appeal was dismissed on 22.06.2012 for being time barred. Still being aggrieved the applicant vide Misc. Land Application No.92 of 2012 applied for leave to appeal to the Court of Appeal and leave was granted on 30.10.2012(Hon. Mziray, J). Mr. Mgare said the applicant has not pursued the appeal to date and has instead come to this court to seek for extension of time to apply for revision to challenge the decisions of the Tribunal stated above. He further stated that since the applicant was allowed to appeal, he cannot again use the intended revision as an alternative to the appeal process. He insisted that an application for revision can only be entertained if the right of appeal is blocked. He relied on the case of **Moses Mwakibete vs. the Editor Uhuru Newspaper Limited [1995] TLR 134** and **Transport Equipment Limited vs. Devram P. Valambhia [19956] TLR 161**. He said the cases emphasized that a party could resort for a revision application where he has no automatic right of appeal or where he has sought leave to appeal but has been refused and thereby blocked her right of appeal or if the right to appeal existed, but it was not taken and good and sufficient reasons are given for not having lodged the appeal. He said

In the present case leave was granted on 30.10.2012 and to date he has failed to pursue that right for no apparent reasons. He thus prayed for the court to sustain the preliminary objections and the application be dismissed with costs.

Mr. Fissoo, responding to the first objection said that paragraphs 8,9 and 10 of the applicant's affidavit are alleged to contain legal arguments but the respondent has failed to clarify which part of the statement have legal arguments. He said paragraphs 13, 13.1 and 13.2 are based on information from Mr. Mkali so they do not contain legal arguments. As for paragraphs 23.1, 23.2, 23.3, 23.4, 23.5, 23.6, 23.7, 23.8, 24, 24.2, 24.3, 24.4 24.5 and 24.6 are particulars on illegality which are grounds for the extension of time. As for paragraphs 14 and 19, Mr. Fissoo submitted that they do not contain any conclusions as alleged at all. He prayed for the court to find that the paragraphs do not offend the law and the objections be dismissed for lack of merit.

As for the second objection Mr. Fissoo submitted that the said objection does not qualify as preliminary objection in terms of the case of **Mukisa Biscuit Company Limited vs. West Ednd Distributors Limited [1969] EA 696** because there are

paragraphs that oppose each other in the affidavit and counter affidavit as to whether the right to appeal has been blocked or not. He further said that the applicant has not been heard though he took all the necessary steps to secure his right so that justice is done. Mr. Fissoo went on saying that the judgment does not hold qualification to be termed as a judgment under Order XX of the CPC. He concluded by stating that the only remedy for the applicant is for the court to exercise its revisionary jurisdiction to call for the records and inspect the proceedings for clear of any alleged irregularity and illegality therefrom in that respect the objection raised has no merit at all and he prayed for the objection to be dismissed.

In the alternative, Mr. Fissoo said that the respondent's affidavit is incompetent for want of specificity to the status of the deponent in relation to the application. He said in the counter affidavit the deponent is named as Lydia Humphrey Maleko which is unknown to the synonymy L.H. Maleko and the relationship has not been established in her affidavit or anywhere. He relied on the case of **Percy Beda Mwidadi & 5 Others vs. Gaslamp Holdings Corporation, Misc. Commercial Cause No. 276 of 2015 (HC-Commercial Division-DSM)** (unreported). He prayed for the court

to consider the case as it is persuasive and prayed for the counter affidavit to be struck out for want of specificity as to the status of the deponent and the respondent herself.

The respondent did not file any rejoinder submission.

The main issue for determination is whether the objections raised have merit. The first objection as argued by the respondent is that the affidavit is defective for containing prayers, legal arguments, and conclusions. Affidavits are governed by Order XIX Rule 3(1) of the CPC and the courts have on several occasions stated what should be contained in the affidavit. Therefore, in determining this preliminary objection I will be guided by several decisions including the case of **Uganda Vs Commissioner of Prisons, Ex-parte Matovu (1966)**

EA 514 in which it was held that:

"...again as a rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only contain elements of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true. Such an affidavit must not contain an extraneous matter by way of objection or prayer or legal arguments or conclusion"

Further in the case of **Mustapha Raphael vs. East African Gold Mines Limited, Civil Application No. 40 of 98 (HC-DSM)** (unreported) it was stated:

"An affidavit is not a kind of superior evidence. It is simply a written statement on oath. It has to be factual and free from extraneous matter such as hearsay, legal arguments, objections, prayers and conclusions."

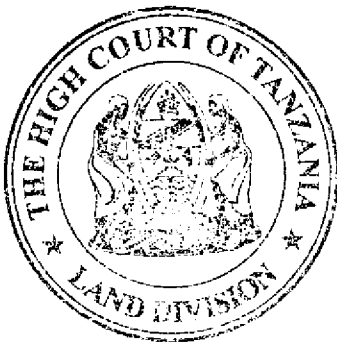
Having gone through the affidavit, indeed, paragraph 25 contains a prayer. Paragraph 7 has conclusions. Paragraphs 21, 22, 23, 23-1 to 23-8, 24, 24-1 to 24-6 contain legal arguments. Though Mr. Fissoo said that paragraphs 13, 13-1 and 13.2 are on information but the basis of these paragraphs are all legally argued. It suffices to say that, though the remaining of the paragraphs may be on facts and information but they are apparently argumentative. As argued by Mr. Mgare, and correctly in my view, the affidavit contains extraneous matters contrary to the provisions of Order XIX Rule 3(1) of the CPC.

Now what is the fate of this affidavit? In the case of **Omari Ally Omary vs. Idd Mohamed and Others, Civil Revision No. 90 of 2003 (HC-DSM)** (unreported) Hon. Massati, J. (as he then was) had this to say:

"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 filing fresh affidavit or by striking out the affidavit. But if the defects are of a substantial or substantive nature, no amendment should be allowed as they are a nullity, and there can be no amendment to nothing I have no doubt in my mind that those paragraphs contain legal arguments, conclusions and prayer."

Looking at the affidavit the defects are of substantive nature and an amendment would mean overhauling the whole affidavit. In that respect the said affidavit is incurably defective and subsequently cannot support the Chamber Summons and hence renders the application incompetent.

In the result, the application is struck out for being incompetent. There shall be no order as to costs as the applicant is under legal aid assistance from A Bridge Community Serve and Legal Aid Organisation of Tanzania (**ABC SLOAT**). It is so ordered.




V.L. MAKANI
JUDGE
10/05/2021