

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 293 OF 2020

*(Arising from Misc. Land Appeal No. 65 of 2015, by the High Court of Tanzania,
Land Division at Dar Es Salaam)*

1) FRANCIS KONASI

2) DOTO KONASI

3) SARAFINA KONASI

4) CHESKO KONASI

5) ELIZABETH KONASI

6) ESTHER KONASI

7) MAGRETH KONASI

8) JOHN KONASI

.....**APPLICANTS**

VERSUS

FELIX SHIRIMA.....RESPONDENT

RULING

Date of Last Order:02.08.2021

Date of Ruling: 24.08.2021

OPIYO, J.

The application before me is for extension of time to enable the eight applicants here in above to apply for a certificate on point of law to enable them appeal to the Court of Appeal of Tanzania. The same was brought under section 11(1) of the Appellate Jurisdiction Act, Cap 141, R.E 2019

and accompanied by the affidavit of the 1st applicant, Francis Konasi, sworn for and on behalf of other applicants. The respondent did file his counter affidavit and a notice of preliminary objection on point of law to the effect that, the affidavit in support of the application is incurably defective for contravening Order 1 Rule 8 of the Civil Procedure Code, Cap 33 R.E 2019. Unfortunately, the respondent's counter affidavit was struck out after was met with an objection from the applicant's counsel that the same was not attested.

The application was heard by way of written submissions. Mr. Richard Rweyongeza, learned Advocate appeared for the applicants while the respondent enjoyed the legal services of Advocate Rajab Mrindoko. The court further ordered the respondent reply submissions to be only on the point of law so raised owing to the fact that the respondent's counter affidavit had already been struck out for the reasons here in above stated. In his submissions in chief, the Mr. Rweyongeza maintained that, the delay by the applicants to pursue their intended course was caused by their former Advocate Kumwaga as seen at paragraphs 11 and 12 of the applicants' affidavit. In other words, the applicants through the said Advocate have been struggling to pursue their matter in order to reach to the court of appeal for years as evidenced by the institutions of several cases, namely Misc. land Application No. 756 of 2015 which was struck out, then Misc. land Application No. 557 of 2017, which was dismissed. That, this reason is sufficient enough to make this court grant the prayers sought by the applicants as they have also well accounted for the days they delayed to file their intended application. Mr. Rweyongeza cited among others the case of **Yusuph Same & Another versus Hadija**

Yusuph, Civil Appeal No. 1 of 2002, Court of Appeal of Tanzania, (unreported), where it was held that,

"It should be observed that the term sufficient cause should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or causes which are outside the applicant's power to control or influence resulting in delay in taking any necessary step".

In reply, Mr. Mrindoko for the respondent maintained that the affidavit in support of the chamber summons is defective as the 1st applicant seems to represent other 7 applicants without any leave of the court. That is contrary to Order 1 Rule 8 of the Civil Procedure Code, Cap 33 R.E 2019, he argued. The said provision allows the applicant to file the present application on behalf of others only if there is a leave of the court. Since the leave was not sought and granted, the applicant cannot swear an affidavit on behalf of the rest of the applicants, hence his affidavit in support of the current application is incurably defective as stated in the case **Karata Ernest and Others versus The Attorney General, Civil Case No. 95 of 2003, High Court of Tanzania, (unreported)**.

In rejoinder, Mr. Rweyongeza reiterated his submissions in chief and added that the objection by the counsel for the respondent with regard to the affidavit of the 1st applicant is highly misguided and his submissions in support of his objection are misplaced. He insisted that, Order 1 Rule 8 of the Civil Procedure Code, Cap 33 R.E 2019 basically deals with representative suits. The instant application is not a representative suit

instead the applicants above named are suing in their personal capacities. Therefore, the 1st applicant, being acquainted with the facts of the case can depose for himself as well as for the other applicants. This is because, in law an affidavit is simply a substitute of oral evidence. There is no need for a large number of witnesses to testify on an issue because the number do not matter rather the weight of the evidence in question as stated in section 143 of the Evidence Act, Cap 6, R.E 2019. Therefore, the remaining applicants were not bound to testify on their own to prove what was averred if the same can be deposed by the 1st applicant.

I have given the submissions by both counsels on behalf of their parties the considerations they deserve. Because I have two matters to deal with, I will prefer to start with the determination of the preliminary objection on point of law before I turn to work on the main application. If the objection is found to have merits, that will mark the end of the entire application.

Now, the laws on affidavit are well settled that, 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 matters such as hearsay, legal arguments, objections, prayers and conclusions, (see **Mustapha Raphael vs East African Gold Mines Ltd, Civil Application No.40 of 1998, Court of Appeal of Tanzania, at Dar Es Salaam (unreported)**).

It is was observed in **NBC Ltd vs Superdoll Trailer Manufacturing Co. Ltd. Civil Application No.13 of 2002, Court of Appeal of Tanzania at Dar Es Salaam, (unreported)** that:-

"Affidavit which mentions another person is hearsay unless that other person swears as well. One Mr. Mkongwa, advocate, asserted that he commenced and prosecuted this suit on the instructions of Dr. Nkini who in turn had been authorized or instructed by NBC (1997) Ltd to commence the proceedings.....Dr. Nkini however, did not file an affidavit in reply to confirm the averment by Mr. Mkongwa. Therefore, Mr. Mkongwa's averment was clearly hearsay, and it could not be relied on as proof of the assertion that the proceedings and this judgment was given, with the knowledge of the applicant Bank".

The same stand was taken in the case of **Benedict Kimwaga vs Principal Secretary, Ministry of Health, Civil Application No. 31 of 2000, Court of Appeal of Tanzania at Dar Es Salaam (unreported), that;**

"If an affidavit mentions another person, then that other person has to swear an affidavit. However, I would add that that is so where the information of that other person is material evidence because without the other affidavit it would be hearsay. Where the information is unnecessary, as is the case here, or where it can be expunged, then there is no need to have the other affidavit or affidavits."

In the case at hand, the 1st applicant appears to swear the affidavit on behalf of the other seven applicants. He claims that he has the consent of others to do so and they are aware of his actions. In my opinion, this affidavit is defective as it covers or mentions other persons. The same

falls short of the rules so emphasized in the list of authorities provided here in above. It was necessary for the other applicants to swear their affidavit in support of the application too as each of them is appearing in his or her personal capacity. Their information is necessary to prove if what were stated by the deponent in his affidavit are true or not. Therefore, in absence of their affidavits, the affidavit by the 1st applicant becomes a hearsay, incapable of supporting the application in question as the defect in the said Affidavit is incurable. That being said, I find the objection by the counsel for the respondent to have merit and the same is sustained.

In the event, the application is struck out with no order as to costs.



A handwritten signature in black ink, appearing to be "M.P. Opiyo", written over a horizontal line.

M.P OPIYO
JUDGE
24/08/2021