

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

MISC. LAND CASE APPLICATION NO. 430 OF 2019
(Originating from Land Case No. 80 of 2019)

AFRO-AID DEVELOPMENT CONSULTANTS (T) LTD.....APPLICANT

VERSUS

THE COMMISSIONER FOR LANDS.....1ST RESPONDENT

THE REGISTRAR OF TITLES.....2ND RESPONDENT

KINONDONI MUNICIPAL COUNCIL.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

ABUBAKAR ZUBEIR MBWANA.....5TH RESPONDENT

RULING

Date of first order: 9.6.2021

Date of judgement: 23.8.2021

OPIYO, J.

Jacqueline Kanyasi, the Learned State Attorney, appearing for the 1st, 2nd and 4th respondents above objected the determination of the instant application on point of law that, the Affidavit in support of this application contains statement of arguments and conclusion rather than facts, contrary to Order XIX Rule 3(1) of the Civil Procedure Code, Cap 33, R.E 2019. In her written submissions in favour of the objection, she pointed out categorically paragraphs 5, 6,7,8 and 9 to be the ones having the said statements of arguments and conclusions. She insisted that as per the stated provision of law such affidavit is incurably defective, unreliable and cannot support the application at

hand, hence the entire case is incompetent and should be struck out with costs. To back up her arguments she cited several cases including that of **Juma S. Busiyah v The Zonal Manager (South) Tanzania Post Corporation, Court of Appeal of Tanzania at Mbeya, Civil Application No.8 of 2004, (Unreported which quoted with approval the famous case of Uganda v Commissioner of Prisons, ex parte Matovu, [1966] I EA 514**, where it was held that,

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

Other cases cited by the learned State Attorney to support her arguments were, **Anatoly Peter Rwebangira v The Principal Secretary, Ministry of Defence and National Service & Attorney General, Civil Application no. 548/04 of 2008, Court of Appeal of Tanzania at Bukoba, (unreported) and Jumuiya ya Wafanyakazi v Shinyanga Region Cooperative Union, (1997) TLR 200, High Court of Tanzania.**

In reply to the submissions, the learned counsel for the applicant, Blandina Charles Gawile was of the view that, the objection is not qualified to be a preliminary objection and the learned State Attorney for the respective respondents above has misdirected herself to the nature of the

present application hence, reached to a wrong conclusion that the affidavit in question is incurably defective. The paragraphs stated to have opinion, arguments, and conclusions (5-9) are clear and contain correct statements. Therefore, striking out the whole affidavit and the application in general will be very unfair and unjust to the applicant as there is an alternative way to do away with such mistakes, if any, contained in the said Affidavit. In support of her arguments, the counsel for the applicant also cited a number of authorities including the case of **Rustamali Shivji Karim Merani versus Kamal Bhushan Joshi, Civil Application No. 80 of 2009 Court of Appeal of Tanzania, (unreported)**, where it was observed that:-

"the Affidavit should not be struck out instead the offensive, argumentative paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it. If, however, substantive parts of an affidavit are defective, it cannot be amended in the sense of striking off the offensive parts and substituting there of correct averments in the same affidavit. But where the Court is minded to allow the deponent to remedy the defects, it may allow him or her to file a fresh affidavit containing correct averments."

In her rejoinder, the learned State Attorney for the 1st, 2nd and 4th respondent agreed with the Applicant's counsel that, if certain paragraphs in an Affidavit are found defective, they can be expunged. However, this can only be done if the substantive parts of it will be left intact so that the court can proceed to act on it. The defective paragraphs in the Applicant's Affidavit that is,

paragraph 5, 6, 7, 8 and 9, are the substantive paragraphs. That means, if they are expunged the remaining paragraphs cannot support this Application. The contents of the remaining paragraphs 1 and 2 are description of the parties while paragraphs 3 and 4 contain the description of landed property which the Applicant allege to own and developing. In an absence of the other paragraphs (5-9) this application will be left hanging and therefore it is of no use to continue with such application. This is the position stated in **Rustamali Shivji Karim Merani versus Kamal Bhushan Joshi, (supra)**, which is the same case which was cited by the applicant's counsel in support of her arguments.

I have given a deserving consideration to the submission from both parties through their respective counsels plus their respective affidavits. The issue for determination in this matter is whether the affidavit is incurable defective or not. To answer this issue, I wish to start by reproducing the provision governing affidavits; Order XIX Rule 3 (1) of the Civil Procedure Code, Cap 33 R.E. 2019 as follows:-

"Affidavit shall be confined to such facts the deponent is able of his own knowledge to prove, except in interlocutory application, on which statements of his belief may be admitted."

Looking at the impugned affidavit particularly on the spotted paragraphs, 5, 6, 7 and 9, they truly offend the quoted provision

of law. The said paragraphs contain arguments and somehow accusations to land officers. The said statements are unwanted and offensive by their very nature. As agreed by both counsels, that defect is curable by expunging the paragraphs containing the argumentative statements as I hereby do in terms of the decision in **Rustamali Shivji Karim Merani versus Kamal Bhushan Joshi, supra**. The said four paragraphs that have been expunged are the ones that were holding the substance of the whole affidavit as rightly argued by the learned State Attorney for the 1st, 2nd and 4th respondents. That means removing them leaves us with nothing of substance to deal with in the Affidavit in question. Using the same authority, that is **Rustamali Shivji Karim Merani versus Kamal Bhushan Joshi, supra**, in line with the arguments of the learned State Attorney for the 1st, 2nd and 4th respondents I find the Affidavit in support of the instant application to be incurable defective. Hence the preliminary objection is upheld.

In the event the whole application is struck out for want of competence.

Ordered accordingly.



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

**M.P. OPIYO,
JUDGE
23/8/2021**