

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

**MISC. LAND APPEAL NO. 69 OF 2022**

(Arising from Land Case No. 69 of 2005)

**BERNO DIDIER MUHILE** (As Legal Personal Representative of the  
Estate of the Late KAREMERA BONIFACE).....**APPLICANT**

**VERSUS**

**ROWLAND PATRICK SAWAYA**.....**RESPONDENT**

Date of Last Order: 28.07.2022  
Date of Ruling: 12.09.2022

**RULING**

**V.L. MAKANI, J**

This ruling is in respect of the preliminary objection on a point of law that has been raised by the respondent that:

- 1. The application is not supported by the applicant's affidavit but instead by one made and filed by his Advocate who cannot be both a witness and Counsel at the same time;*
- 2. The supporting affidavit is incurably defective for containing matters which cannot be within the personal knowledge of the maker and deponent thereof; and*
- 3. The verification clause fo the affidavit is bad in law for not disclosing therein the source(s) of information and grounds of belief.*

The objections were argued by way of written submissions. Mr. Michael Ngalo, Advocate drew and filed submissions on behalf of the respondent.

As for the first ground Mr. Ngalo said according to Order XLIII of the Civil Procedure Code CAP 33 RE 2019 (the **CPC**) an application is supported by an affidavit and the making of affidavit is governed by Order XIX Rules 1, 2 and 3 of the CPC. He said ordinarily an application as the present one is supported by an affidavit or affidavits of the person who is seeking reliefs from the courts and who is expected to know the facts and circumstances that compelled him/her to seek the courts assistance in getting a remedy to the legal problem. He said much as the law does not make it mandatory that the applicant must make the affidavit but in *strictu sensu* and for practical purposes it is desirable for that to be the case. He said in this case the affidavit is sworn by the advocate and not the applicant himself. He said in paragraph 1 there is an explanation that "*he is duly authorised to swear the affidavit*". He said this is a bare statement with no proof of the authority allegedly given, and more so, no explanation is given as to why the applicant could not himself make and file the affidavit. In the absence of proof or evidence of the

alleged authority, the making and filing of the affidavit by the applicant's advocate is questionable rendering the same affidavit unreliable. He said the purpose of such restriction is to avoid the possibility of an advocate playing the dual role of an advocate and a witness on any given matter as is in this present case. Mr. Ngalo relied on the case of **M/S Consortium of Les Genes (Pty) & Oberoi (Pty) Limited and Medical Store Department & Attorney General, Misc. Civil Application No. 53 of 2019 (HC-DSM)** (unreported) where the court stated that Counsel could not serve both as the Counsel for the applicant and a witness capable of verifying the alleged facts. He said for these reasons, the application is rendered not to be supported by an affidavit hence incompetent and is liable to be struck out.

As for the second ground, Mr. Ngalo said that the narration of events regarding the suit averred under paragraphs 2,3,5,6,7,8, and parts of paragraphs 9, 10,11 and 12 of the affidavit cannot be from the deponent's knowledge hence hearsay. He said the deponent seem to base his deposition on court records, but he does not state or explain which court the records he is referring to belong and when he got involved in the matter prior to the present application, and/or how

and when he obtained those facts and circumstances. He said the deponent of the affidavit was not involved in the proceedings during its trial or immediately after delivery of the judgment on the suit. He said these matters can and would only be within the personal knowledge of the advocates who represented the applicant during the trial of the suit and got involved in the steps taken by then after the judgment. Mr. Ngalo cited the case of **Adnan Kitwana Kondo & 3 Others vs. National Housing Corporation, Civil Application No. 208 of 2014 (CAT)**(unreported) where the affidavit of the advocate who had not represented the applicant at the High Court was declared incurably defective because it was sworn by a person who is incompetent to swear matters stated therein. Mr. Ngalo again relied on the case of **M/S Consortium Of Les Genes (Pty)** (supra) and invited the court to be guided and persuaded with the findings of these cases which reflect the current position of the law and practice in terms of this objection.

The last ground was that the verification clause is bad in law for non-disclosure of the source(s) of information and grounds of belief. Mr. Ngalo submitted that the deponent does not state anywhere in the affidavit or in the verification clause where he obtained the facts

averred in paragraphs 2,4,5,6, and 7 from the court file. Further he said much as he verifies those contents to be true and correct, he does not disclose the grounds of his belief in those facts. He said by omitting to disclose how and when he obtained the facts from the court file and the grounds of his belief, then this renders the verification clause incurably defective.

Mr. Ngalo said the second complaint against the verification is that the facts submitted under paragraphs 1,8,9,10,11,12,13(a)-( e), 14 and 15 cannot all be within the Advocates' personal knowledge and understandings. He said the deponent ought to have disclosed which facts or paragraphs are according to his knowledge and which ones are according to his understanding. He emphasized that the contents of paragraphs 2,3,5,6,7,8 part of paragraphs 9 and 10,11 and 12 cannot be within the personal knowledge of the deponent and even if they were obtained from the court records or file there is no proof when and how they were obtained. Mr. Ngalo said the cumulative effect of the defects pointed out on the verification clause are significant and ones which render the said clause incurably defective and the effect is that there is no affidavit in place supporting the application hence liable to be struck out. He concluded by praying for

the objections to be upheld and the application be declared incompetent for want of a valid supporting affidavit and the application be struck out with costs.

Mr. Mayenga drew and filed submissions in reply on behalf of the applicant. He said it is known that there is no law which bars Counsel from swearing an affidavit. He said the argument that there was no proof of authorization by the applicant automatically disqualifies the raised objection and places it in a factual demanding category. He said the court cannot be put in a fishing expedition during objection stage to be a factual seeker. He said Order XLIII Rule 2 of the CPC governs the filing of an application, but it does not give conditions prohibiting Counsel to swear an affidavit. He said this is also the case with Order XIX of the CPC. He said the argument that the maker of an affidavit may be called for cross-examination is prohibited by section 2 of the Evidence Act CAP 6 RE 2019. Mr Mayenga said paragraphs 3,5,6 and 8 of the affidavit demonstrates clearly the source of the deposed facts. He said even the verification of the challenged affidavit shows the source of information. He pointed out that in the cases cited by Mr. Ngalo the source of information was not disclosed. He said whether certain facts are within or not within the

knowledge of the deponent does not make it qualify as an objection. He was of the view that this argument is intended to pre-empt the hearing of the application.

As for the third objection, Mr. Mayenga submitted that it does not qualify to be an objection as the argument therein is misplaced. He said he was engaged to pursue the appeal which was struck out and as regards the two phrases that the facts obtained in the knowledge of Counsel and those obtained in the understanding of Counsel and their distinction is a confusion which intends to delay the disposal of the matter. He said Counsel who has direct interest on the matter is barred from deposing of the affidavit as was discussed in the case of **The Registered Trustees of Social Action Trust Fund & 2 Others vs. Happy Sausages Limited & 10 Others, Civil Application No. 48 of 2000 (CAT-DSM)** (unreported), **Convergence Wireless Networks (Mauritius) Limited & 3 Others vs. WIA Group limited & 2 Others, Civil Application No. 263B of 2013 (CAT-DSM)** (unreported). And in the case of **DT Dobie (Tanzania) Limited vs. Phantom Modern Transport, Civil Application No. 141 of 2001(CAT-DSM)** (unreported) it was categorically stated that if the court finds that the verification has

defects then the same can be amended and a new affidavit be lodged. He further cited the case of **Stephen Mollel & Others vs. A1 Hotel and Resort Limited, Civil Revision No. 90 of 2020 (HC-Arushah)**(unreported). Mr. Mayenga prayed for the preliminary objections raised be dismissed with costs.

In rejoinder Mr. Ngalo reiterated what he submitted in the main submissions. He emphasized that the objections qualify as objections on points of law because the requirements of Order XIX Rule 3(1) of the CPC are clear that affidavits shall be confined to the facts which the deponent is on his own able to prove. As for the case of **DT Dobie vs. Phantom** (supra), Mr. Ngalo said the decision of the said case was reversed by a panel of three Justices of Appeal in Consolidated Civil Reference No. 9 of 2002. He went on saying that these two cases on defective affidavits and verification clause said if the defects are inconsequential, then the offensive paragraphs can be expunged and/or amendments can be ordered. He said in the present case if the offending paragraphs are expunged there would be no material left to enable the court to determine the merits or otherwise of the application. He went on reiterating his prayers for the objections to be upheld and the application to be struck out for being incompetent.



I have gone through the rival submissions by the learned Advocates, and the main issue is whether the preliminary objections raised by the respondent are meritorious.

It is not in dispute that an application must be supported by an affidavit as provided for under Order XXXLIII Rule 2 of the CPC. It is also not in dispute that affidavits are governed by Order XIX of the CPC. In all these provisions it is not stated that Counsel cannot swear an affidavit on behalf of their clients. However, it is clear from case law, amongst them being **Lalago Cotton Ginnery and Oil Mills Co. Ltd vs. The Loans and Advances Realization Trust (LART) Civil Application No. 80 of 2002** (unreported) that there are circumstances that Counsel cannot swear an affidavit because he either was not part of the proceedings or he is not properly authorised to swear the affidavit. In the said case the Court of Appeal stated:

*"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 those proceedings."*

(Also see the cases of **Adnan Kitwana Kondo** (surpa) and **M/S Consortium Of Les Genes (Pty)** (supra)

Briefly stated the first objection according to Mr. Ngalo is to the effect that the affidavit is unreliable because it was not made by the applicant himself, and the advocate who swore the affidavit did not state how and when he got authority to make the said affidavit. Indeed, the affidavit was not sworn by the applicant, and Mr. Mayenga was not Counsel who had conduct of the case from the beginning, that is, at the High Court. His appearance is vividly reflected when he represented the applicant in at the Court of Appeal in Civil Appeal No. 41 of 2017 which was duly struck out on 11/02/2022. The firm West End Law Group Advocates which Mr. Mayenga practices informed the Court of Appeal that they were new Counsel representing the applicant vide their letter dated **30/09/2021** (Annexure DIDIER-1 to the affidavit). Subsequently, Mr. Mayenga and his firm were on the picture on behalf of the applicant from that date when information was relayed to the Court of Appeal on 30/09/2021. In that respect, all the issues before that date cannot be in Mr. Mayenga's knowledge because he was not in conduct of the case, but from information from the applicant. I have

perused the verification clause and there is no information sourced from the applicant. The deponent Mr. Mayenga stated that he was duly authorised, but he did not say to what extent he was authorised to depone to the facts in the affidavit. Nevertheless, the said authorisation cannot be pegged on hearsay information. We can also borrow a leaf from the decision of Supreme Court of Kenya, which in my view is highly persuasive, where Counsel were recently warned on the issue of swearing affidavits on behalf of their clients. The Supreme Court of Kenya in the case of **Raila Odinga & Others vs. William Ruto & Others, Presidential Election No. E0005 of 2022** (Consolidated with Presidential Election Petitions Nos. E001, E002, E003, E004, E007 and E008) stated:

*"...This Court cannot countenance this type of conduct on the part of Counsel who are officers of Court. Though it is elementary learning it bears repeating that affidavits filed in court must deal only with the fact which a deponent can prove of his own knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their client in contentious matters, like this one before us, because they run the risk of unknowingly swearing to falsehood and may also be liable to cross examination to prove the matters deponed."*

In view thereof, since the learned Advocate was not representing the applicant at the High Court and in the absence of proof or evidence of the alleged authority to make the affidavit, then the sworn affidavit by

the applicant's Advocate, Mr. Mayenga, is questionable resulting to its unreliability. I am strongly persuaded in terms of the cited cases above that it is quite irregular for Counsel to swear affidavits on behalf of their clients in contentious matters because they run the possibility of unsuspectingly swearing to facts unknown or rather create their own facts which are likely to be false to make the story better. It should also be noted that with the swearing of an affidavit the Counsel may also be liable to cross examination to prove the matters deponed. In the present case as already established the affidavit is unreliable hence defective and, in that respect, there is no affidavit in support of the application contrary to Order XLIII Rule 2 of the CPC. This objection therefore has merit.

Without prejudice to the above, as for the second objection Mr Ngalo has argued that paragraphs 2,3,5,6,7,8 and parts of paragraphs 9,10,11 and 12 are hearsay as the information is from "*court records*." I have gone through the affidavit; indeed, the contents therein show that the deponent (the learned Advocate Mr. Mayenga) retrieved the information therein from the record of the court in Land Case No. 232 of 2005 (Hon. Bongole, SB, J). This can be found in paragraphs 2, 3 and 5 of the affidavit, and paragraphs 6, 7 and 8 goes further to reflect Annexures

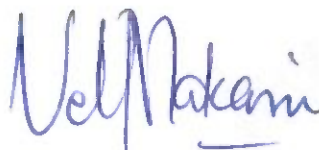
attached to form part of the affidavit which are the judgment, decree and a request letter which clearly shows that the matter was heard and concluded at the High Court Dar es Salaam Registry. However, the manner/modality in which the court records were obtained by Mr. Mayenga is not stated. The most notable practice by Advocates when retrieving information from court records is by way of perusal, but the affidavit and even the submissions is silent on this. And if for the sake of argument there was such perusal, then definitely a letter requesting for perusal and the receipt to prove payment of perusal fees would have been attached to the affidavit to show the process in which Counsel underwent to retrieve information from the court records. The court cannot rely on bare assertion that Counsel has information from the court records in the absence of the modality in which the said information was obtained. Subsequently, paragraphs 2,3,5,6,7,8 and parts of paragraphs 9,10,11 and 12 cannot be in Counsel's personal knowledge because he has not stated how he obtained the said information from the court records. In other words, the deponent was not competent to swear the affidavit as he did not state how and when he obtained information from the court records.

The reasoning above has also covered the argument by Mr. Ngalo on the defective verification clause for failure by the deponent to state how and when he got information from the court records. These objections therefore have merit.

Mr Ngalo raised a very interesting argument that the deponent ought to have stated facts which are from the deponent's own knowledge and those facts which are from his own understandings. Mr. Mayenga was of the view that this is just semantics in the language and the words have similar meaning. However, I beg to differ with Mr Mayenga in that though these two concepts may be interrelated in a way, but they differ, as knowledge refers to facts gathered from skills, education, information or experience, while understanding is the ability or the process of an individual's perception on a situation or subject matter. So as correctly pointed out by Mr. Ngalo, for a verification clause to comply with the law, the deponent has to clearly state the facts which are from his knowledge, belief or understanding. In this present instance this was not done rendering the verification clause defective.

For the reasons I have endeavoured to explain herein above, I find the objections raised to have merit and they are sustained. The application is hereby struck out with costs.

It is so ordered.



**V.L. MAKANI**  
**JUDGE**  
**12/09/2022**