

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

MISC LAND APPLICATION NO. 309 OF 2022

(Originating from Land Case No. 50 of 2020 of the High Court Land Division)

NTWA AMBOKILE MWAKASANGA APPLICANT

VERSUS

AMBOKILE NTWA MWAKASANGA 1ST RESPONDENT

KIZITO AUGUSTINI KAUMBA 2ND RESPONDENT

Date of last Hearing: 29/09/2022

Date of Ruling: 29/09/2022

RULING

I. ARUFANI, J

The applicant filed in this court the application at hand praying the court to issue various orders including an order to restrain the second respondent, his agents, relatives, dependants or any person from operating business, transferring ownership, renting or mortgaging, dismantling or pulling down a suit premises with registration No. ILA. 019165 location No. ILA/KWN/MZF.8/22 at Kiwalani Migombani, Minazi Mirefu, Ilala District in Dar es Salaam Region pending determination of Land Case No. 50 of 2020.

The application is made under Order XXXVII Rule 1 (a) and (b) and Rule 4, section 68 (b), (c), (d) and (e) and section 95 of the Civil Procedure Code, Cap 33 R.E 2019 and any other enabling provisions of the law. The application is also supported by an affidavit sworn by the applicant. After

the respondents being served with the chamber summons and its supporting affidavit, they filed in the court their counter affidavit. In addition to that, there are two points of preliminary objections, though indicated were raised by the counsel for the first respondent but in real sense they were raised by the counsel for the second respondent. The stated points of preliminary objections read as follows: -

- 1. That the application does not disclose at which court the same was filed.*
- 2. That the application is incompetent for having defective jurat of attestation for lack of signature of the attesting officer.*

During hearing of the afore quoted points of preliminary objections the applicant appeared in person in the court and while the first respondent was represented by Mr. Victor Kessy, learned advocate the second respondent was represented by Mr. Desidery Ndibalema, learned advocate. The applicant told the court that, after reading the points of preliminary objections raised by the counsel for the second respondent is conceding the raised defects are in existence in his affidavit. He prayed the court to rely on section 95 of the Civil Procedure Code to allow him to amend his affidavit or be allowed to withdraw the affidavit so that he can refile a new affidavit.

In his reply the counsel for the second respondent told the court the defect appearing in the affidavit of the applicant is very fatal and cannot be cured by way of amendment. He argued that, as the applicant has

conceded the jurat of attestation is not signed by the Commissioner for Oaths who attested the applicant and the jurat is not shown the place it was attested then the affidavit is incurably defective as it contravenes section 8 of the Notaries Public and Commissioners for Oaths Act, Cap 12 R.E 2019. He submitted that the remedy available for the stated defect is for the application to be struck out as it is incompetent for being supported by an incurably defective affidavit. He prays the application be struck out with costs.

The counsel for the first respondent told the court is joining hand the submission made to the court by the counsel for the second respondent and said he has nothing more to add to the submission made by the counsel for the second respondent. In his rejoinder the applicant principally reiterated what he prayed in his submission in chief.

After seeing the applicant has conceded to the points of preliminary objections raised by the counsel for the second respondent the court has gone through the chamber summons and the affidavit supporting the application and find it is true that the defects identified in the points of preliminary objections are in existence in the application of the applicant. The court has found it is true that the application is not showing it was filed in which court. The title of the chamber summons and affidavit reads *"In the United Republic of Tanzania, Land Division, at Dar es Salaam"* without mentioning in which court the application was filed.

The court has also found it is true as stated in the second point of preliminary objection that the affidavit supporting the application is not signed by the Commissioner for Oaths who attested the deponent. In addition to that, the court has found the jurat of attestation is not showing the place where the affidavit was sworn. That being the position of the matter the court has gone through section 8 of the Notaries Public and Commissioners for Oaths Act which the counsel for the second respondent has submitted it was violated and find it is providing as follows: -

"Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall insert his name and state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made."

The court has found that, although it is not provided in the above quoted provision of the law that the notary public or commissioner for oaths before whom any oath or affidavit is taken is required to sign in the jurat of attestation of the oaths or affidavit taken before him but to my view the notary public and commissioners for oaths before whom any oath or affidavit is taken is also required to sign in the jurat of the oath or attestation taken before him.

To the view of this court failure to sign the jurat of attestation removes authenticity of who really attested a person taking an oath or swearing an affidavit as unfaithful person may insert in the jurat of attestation of an oath or affidavit a name of commissioner for oaths who

has not attested the person taking an oath or swearing an affidavit to be used in court as evidence. Therefore, omission by the commissioner for oaths who attested the affidavit of the applicant to sign in the jurat of attestation renders the affidavit of the applicant which is supporting the application defective.

The court has also found that, the jurat of attestation of the affidavit of the applicant is not showing the place where the affidavit was sworn while that is one of the mandatory requirements of the law as provided under section 8 of the Notaries Public and Commissioners for Oaths Act quoted hereinabove. Failure to show the place where the affidavit of the applicant was sworn or attested renders the affidavit incurably defective. The above finding of this court is being bolstered by the position of the law stated in the case of **D. P. Shapriya & Co. Ltd V. Bish International B. V.** [2002] E.A 47 cited in the case of the **Director of Public Prosecution V. Dodoli Kapufi & Another**, Criminal Appeal No. 11 of 2008, CAT at DSM (unreported) where it was stated that: -

"The requirement to comply with section 8 of Cap 12 is mandatory and not a sheer technicality and that, irregularities in the form of a jurat cannot be waived at all by parties."

From the wording of the above quoted excerpt and all what I have stated hereinabove the court has found that, the affidavit of the applicant which its jurat of attestation is not showing the place where it was sworn

and it is not signed by the commissioner for oaths who attested the applicant is incurably defective. Having found the applicant's affidavit is incurably defective it is crystal clear that the whole affidavit is incurably defective and it cannot support the chamber summons which has also been found is defective for failure to show in which court it was filed.

Upon finding the whole affidavit supporting the application is incurably defective it is crystal clear that the affidavit of the applicant cannot be amended to cure the observed defects. Besides, the court has found it cannot use section 95 of the Civil Procedure Code cited to the court by the applicant to allow the application which has already been found is defective for being supported by an incurably defective affidavit to be withdrawn from the court as it has already been assailed by preliminary objections raised by the counsel for the second respondent.

To allow that to be done will amount to circumvent the preliminary objections raised by the counsel for the second respondent. The stated view of this court is getting support from the case of **Kantibhai M. Patel V. Dahyabhai F. Mistry** [2003] TLR 437 where it was stated inter alia that, once an objection is taken to the competence of a matter filed in court, it would be contrary to the law to entertain a prayer the effect of which would be to defeat the objection.

In the light of all what I have stated hereinabove the court has found the applicant can neither be allowed to amend nor to withdraw the

application which has been found it is incurably defective. The right remedy as rightly stated by the counsel for the second respondent is for the application to be struck out. Consequently, the preliminary objections raised by the counsel for the second respondent are hereby upheld and the application is accordingly struck out. As the applicant is a lay person the court has found it is proper for the interest of justice to order each party to bear his own costs. It is so ordered.



Dated at Dar es Salaam this 29th day of September, 2022

I. Arufani

JUDGE

29/09/2022

Court:

Ruling delivered today 29th day of September, 2022 in the presence of the applicant in person and in the presence of Mr. Victor Kessy, advocate for the first respondent and in the presence of Mr. Desideriy Ndibalema, advocate for the second respondent. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

JUDGE

29/09/2022