

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO 385 OF 2022

JOFREY SEMBE RAJABU.....APPLICANT

VERSUS

MAYAYA SHILINDE POLERESPONDENT

RULING

Date of Last Order: 14/09/2022

Date of Judgment: 11/10/2022

T.N.MWENEGOHA.J.

The applicant has approached this court praying for extension of time to enable him to appeal against the decision of the District Land and Housing Tribunal for Mwananyamala at Mwananyamala in application No. 197 of 2017.

The Application is brought under section 41 (2) of the Land Dispute Courts Act [Cap. 216 R.E 2019] and it is supported by the affidavit of the applicant.

Application was argued by way of written submissions. Parties filed their submission as scheduled, whereby the applicant's application was drawn gratis by Benedicto Makelani Fungo (Advocate) under Legal and

Human Rights Centre, while Gabriel M. Maros appeared for the respondent.

Upon perusing submission of both parties, I have noted that Mr. Maros raised a notice of Preliminary objection in his submission that the counsel who administer affidavit of the applicant filed submission of the applicant contrary to section 7 of the Notaries Public and Commissioner for Oath Act, [Cap 12 R.E 2019]. In his submission he stated that the law prohibits the counsel who administer an affidavit to represent the applicant even if the matter has been heard by way of written submission.

In his rejoinder the applicant changed his counsel to Bahati Nyasusi Misso who admitted to the defects in the applicant's affidavit. He prayed that the court to overrule this objection as per Article 107B (2) of the Constitution of the United Republic of Tanzania.

Having gone through the submissions of both parties I know have to determine the merit of the same. However, as I have indicated earlier, I have noted that the respondent has raised preliminary objection in his submissions. This practice is prohibited for the fact that the other party could have been taken by surprise.

But so long as the applicant replied the objection in their rejoinder therefore, I will proceed and determine on the objection raised. The fact

that the applicant admitted that the advocate who administer an affidavit was the one who represented the applicant, it implies that they have acted contrary to section 7 of the Notaries Public and Commissioner for Oath Act [Cap 12 R.E 2019] which provides that;

"No commissioner for oaths shall exercise any of his powers as a commissioner for oaths in any proceedings or matter in which he is advocate to any of the parties or in which he is interested".

With the application of the above provision I find that the applicant affidavit is defective.

I have noted that Mr. Misso prayed for this court to apply oxygen principle to cure the defect found in this application. With due respect to the counsel overriding principle or oxygen principle cannot be applied blindly over the existing provision of the law. This position has been recited in number of cases including the case of **Mondorosi Village Council & 2 Others vs. Tanzania Breweries Limited. 66 if 2017 & 4 Others, Civil Appeal No. 66 of 2017 (CAT-Arusha)** (unreported),

"The Court of Appeal was of the view that overriding objective principle cannot be applied blindly against mandatory provisions of the procedural law which goes to the foundation of the case".

It is clear that provisions of the law must be respected. They cannot be overridden for the sake of reducing technicalities.

Having said that I find this application to have no merits, I proceed to strike out the application for being incompetent. No order as to costs.




T. N. MWENEGOHA.

JUDGE

11/10/2022