

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

**MISC. LAND CASE APPLICATION NO. 534 OF 2021**  
(Arising from Land Appeal No. 236 of 2020 of the High Court Land Division)

**CLAY APIYO ..... APPLICANT**

**VERSUS**

**ESHEN M. MUTARAMBIRWA ..... RESPONDENT**

*Date of last Order: 09/05/2022*

*Date of Ruling: 01/07/2022*

**RULING.**

**I. ARUFANI, J**

The applicant filed in this court the application at hand seeking for leave to appeal to the Court of Appeal against the decision of this court made in Land Appeal No. 236 of 2020. The application was made under section 47 (1) of the Land Disputes Courts Act, Cap 216, R.E 2019; Rules 45 (a) and 47 of the Court of Appeal Rules, R.E 2019 and Order XLIII Rule 2 of the Civil Procedure Code Cap 33, R.E 2019. The application is supported by the affidavit sworn by applicant.

After the respondent being served with the chamber summons and the affidavit of the applicant, the respondent filed in the court the counter

affidavit sworn by him to oppose the application together with a notice of preliminary objection containing the following points of law: -

- 1) Being guided by Rule 45 (a) of the Tanzania Court of Appeal Rules, 2019 and mindful that the High Court (Land Division) decision being impugned was delivered on 3<sup>d</sup> day of September, 2021 this application seeking leave to appeal filed on 4<sup>th</sup> October, 2021 is inordinately, inexcusable and hopelessly time barred.*
- 2) The supportive affidavit to the said application is incurably defective for containing extraneous matters by way of objection, prayer, legal arguments and conclusion. Once offensive paragraphs are expunged the affidavit lacks legs to stand on. And an application without supportive affidavit is incompetent in law.*
- 3) The verification clause of the affidavit is equally defective mindful that the deponent is not Knowledgeable to facts deposed on all six paragraphs.*

When the application came for hearing the above points of preliminary objection the applicant was represented by Mr. Joseph John Manzi, learned advocate and the respondent was represented by Mr. Christian Rutagatina, Senior learned advocate. The counsel for the respondent prayed to abandon the first point of preliminary objection and argued the rest of the points of preliminary objection.

In arguing the second point of preliminary objection the counsel for the respondent referred the court to the Case of **Uganda V.**

**Commissioner of Prisons Ex Parte Matovu**, [1966] EA 514 where it was stated what is supposed to be contained in an affidavit to be used in court. He stated it was held in the cited case that, an affidavit which is a substitute of oral evidence should contain the statement of facts which a deponent deposes in his or her own knowledge or information he believes to be true provided he discloses the source of the said information. It was stated in the cited case that, affidavit should not contain extraneous matters by way of objection, prayer, legal argument or conclusion.

He argued that, the position of the law stated in the above referred case is similar to what is provided under Order XIX Rule 3 (1) of the Civil Procedure Code. He said after going through the affidavit of the applicant he has found what is deposed at paragraph 2 and 3 of the affidavit of the applicant are irrelevant to the current application as were supposed to be taken in the intended appeal. He stated there was no need of comprising them in the affidavit.

He went on arguing that, what is deposed at paragraph 4 of the affidavit is a legal argument. He stated that, the applicant was a party in Land Appeal No. 236 of 2020 which was heard by Hon. Mango, J and as he never made any cross appeal against the appeal lodged in the court by the respondent what is doing now is an empty cry which cannot assist him. He stated paragraphs 5 and 6 are deposed in the same manner as

the 2 and 3 paragraphs of the affidavit of the applicant are deposed which is contrary to what was stated in the case of **Uganda V. Commissioner of Prisons Ex Parte Matovu** (supra).

He argued in relation to the third point of preliminary objection that, verification clause of the affidavit of the applicant shows the deponent verified the affidavit as if is knowledgeable to all facts deposed in the affidavit while it is not true. He stated that, although the deponent verified paragraph 5 of the affidavit is deposed on his own knowledge but he verified the same paragraph as an information he received from his advocate Manzi and believed to be true.

He argued that the intention of having paragraph 5 in two set of verification is to delude the court and not to enable it to reach a reasonable decision. He prayed the court to expunge the paragraphs which are offensive from the affidavit supporting the application and submitted that, after those paragraphs being expunged the affidavit will remain with paragraphs which cannot support the application. He prayed further that, as the application will remain unsupported, the application be dismissed with costs.

In his reply the counsel for the applicant told the court that, there is nowhere in the affidavit supporting the application the applicant raised a legal issue or extraneous matters as argued by the counsel for the

applicant. He argued that, the applicant has deposed in his affidavit the facts giving background of the matter and show why he was not satisfied with the decision of the court delivered by Hon. Mango, J in Land Appeal No. 236 of 2020. He stated Order VI Rule 3 of the Civil Procedure Code is clear that pleadings are supposed to contain material facts of the case and not legal arguments. He argued that, all paragraphs of the affidavit of the applicants contain material facts and not legal arguments as argued by the counsel for the respondent. He prayed the second point of preliminary objection to be overruled.

As for the third point of preliminary objection the counsel for the applicant prayed the same to be overruled as the applicant has deposed all paragraphs 1 to 5 on his own knowledge and verified paragraph 5 as an information, he received from his advocate. At the end he prayed the court to overruled both points of preliminary objection with costs.

In his rejoinder the counsel for the respondent assailed the submission by the counsel for the applicant by stating what is before the court is not pleading but an affidavit. He rightly stated an affidavit is not a pleading as pleadings includes plaint, written statement of defence, counter claim and set off. He stated what the applicant was supposed to show in his affidavit is that he has a thick and strong ground for going to the Court of Appeal. He argued that, as the paragraphs supporting the

application are defective and they are supposed to be expunged from the affidavit then once expunged from the affidavit the application will have no legs to stand on.

He submitted that, the counsel for the applicant has not made any defence in relation to what he argued in relation to paragraph 5 of the affidavit which has been verified twice which is superfluous. He stated as it was said the said paragraph was verified on the knowledge of the deponent it was not proper to verified the same again as an information obtained from the advocate for the applicant. He prayed the said paragraph to be expunged from the affidavit supporting the application and stated once that paragraph is expunged the application has no legs to stand on.

After hearing the counsel for the parties, the court probed the counsel for the parties to address it if the application is made under the correct provision of the law. The counsel for the applicant conceded the application is made under wrong provision of the law as the application is made under section 47 (1) of the Land Disputes Courts Act, Cap 216 R.E 2019 which was wrongly invoked in the application. Having conceded to the said defect the counsel for the applicant prayed to be allowed to amend the application. On his side the counsel for the respondent told

the court the application was supposed to be made under section 47 (2) of the Land Disputes Courts Act.

After considering the submission made to the court by the counsel for the parties the court has found proper to start with the point of law raised by the court that the application is made under wrong subsection of the law. As stated earlier, both counsel for the parties conceded the application was wrongly made under section 47 (1) of the Land Disputes Courts Act instead of section 47 (2) of the Land Disputes courts. The court has found as the counsel for the parties have conceded the application is made under wrong subsection of the law the remedy of that defect will be considered after determining the points of law raised by the counsel for the respondent and argued by the counsel for the parties.

Starting with the second point of preliminary objection the court has found it states the affidavit supporting the application is incurably defective for containing extraneous matters by way of objection, prayer, legal argument and conclusion. The court is in agreement with the position of the law stated in the case of **Uganda V. Commissioner of Prison Ex Parte Matovu** (supra) that an affidavit should not contain the above stated matters. The court has also found that, as rightly argued by the counsel for the respondent the position of the law stated in the above

cited case is similar to the position of the law provided under Order XIX Rule 3 (1) of the Civil Procedure Code which states as follows: -

*"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted: Provided that the grounds thereof are stated."*

That being the position of the law the court has found the counsel for the respondent argued in his submission that, paragraphs 2 and 3 of the affidavit of the applicant is containing matters which were not supposed to be included in the affidavit but to be taken to the appeal intended to be filed in the Court of Appeal. The court has carefully read the referred paragraphs of the affidavit of the applicant but failed to see anything deposed in the said paragraphs showing it would have not been deposed in the affidavit supporting the application at hand.

The court has found as rightly stated by the counsel for the applicant the said paragraphs are giving historical background of the application at hand which to the view of this is not prohibited by the law cited hereinabove. The court has also found the counsel for the respondent has argued paragraph 4 of the affidavit is containing legal argument. The court has carefully read the said paragraph 4 of the affidavit of the applicant but failed to see any legal argument in the said paragraph.



To the contrary the court has found the impugned paragraph is showing the applicant was aggrieved by the impugned judgment and the steps he has taken up to now. To the view of this court it cannot be said that is a legal arguments which cannot be deposed in an affidavit filed in the court to support the application of this nature.

As for paragraphs five and six of the affidavit of the applicant which the counsel for the respondent argued they are contravening what is stated in the case of **Uganda V. Commissioner of Prison Ex Parte Matovu** (supra) and what is provided under Order XIX Rule 3 (1) of the Civil Procedure Code the court has not seeing how those paragraphs contravene the cited laws. The court has come to the stated view after seeing what is contained in paragraph five of the affidavit of the applicant is grounds which the applicant wants to be considered and determined by the Court of Appeal if leave to appeal will be granted.

The court has failed to see any problem with what is stated in the referred paragraphs of the affidavit of the applicant after seeing the position of the law as stated in the case of the **British Broadcast Corporation V. Erick Sikujua Ng'imaryo**, Civil Application No. 138 of 2004, CAT at DSM (unreported) is very clear that the applicant is required to satisfy the court he has an arguable appeal or his grounds of appeal in the intended appeal raise issues of general importance or that the

proceedings as whole reveal such disturbing features as to require the guidance of the Court of Appeal. Under that circumstance the court has failed to see anything meritorious in the submission of the counsel for the respondent in respect of the second point of preliminary objection.

As for the third point of preliminary objection the court has found it states the verification clause of the affidavit supporting the application is defective as the deponent is not knowledgeable to the facts deposed in all paragraphs. The court has found that, as rightly argued by the counsel for the respondent verification clause of the affidavit of the applicant shows paragraph 5 of the affidavit is verified twice basing on the knowledge of the deponent and on the information obtained from his counsel. The court is in agreement with the counsel for the respondent that is not proper because is creating uncertainty as to whether the facts deposed at paragraph 5 of the affidavit are within the knowledge of the deponent or is an information obtained from his advocate and believed to be true.

The requirement to verify an affidavit properly was emphasized by the Court of Appeal in the case of **Lisa E. Peter V. Al-Hushoom Investment**, Civil Application No. 147 of 2016, CAT at DSM (unreported) where when the Court of Appeal was dealing with importance of verification clause in an affidavit it referred to the decision given by the

Supreme Court of India in the case of **A. K. K. Nambiar V. Union of India** (1970) 35CR 121 where it was held that: -

*"The reasons for verification of affidavits are to enable the Court to find out which facts can be said to be proved on the affidavit evidence of rival parties. Allegations may be true to information received from persons or allegation may be based on records. **The importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for allegation.** In essence, verification is required to enable the Court to find out as to whether it will be safe to act on such affidavit evidence. In the absence of proper verification, affidavits cannot be admitted in evidence."*  
[Emphasis added.]

Basing on the position of the law stated in the above quoted excerpt that court has found that, as it is not certain as to whether what is deposed at paragraph 5 of the affidavit of the applicant was deposed basing on the personal knowledge of the applicant or on the information he received from his advocate and believed the same to be true, the court has found the said paragraph 5 of the affidavit of the applicant is not properly verified. That being the position the question here is what is the remedy for the stated defect.

Although the court is in agreement with the counsel for the applicant that the court has discretionary power to allow an affidavit containing a

defective verification clause to be amended as it was stated so in the case of **The University of Dar es Salaam V. Mwenge Gas and Lub-Oil Limited**, Civil Application No 76 of 1999 (Unreported) but not all defects in an affidavit which can be allowed to be amended. As held in the case of **Phantom Modern Transport [1985] Ltd V. D. T. Dobie (T) Ltd**, Civil Application No. 141 of 2001, CAT at DSM (Unreported) it is only defects which are inconsequential which can be allowed to be amended.

The Court of Appeal stated in the above cited case that: -

*"...where defects in an affidavit are inconsequential, those offensive paragraphs can be expunged or overlooked, leaving the substantive parts intact so that the court can proceed to act on it. If, however, substantial parts of an affidavit are defective, it cannot be amended in the sense of striking off the offensive parts and substituting there for correct averments in the same affidavit. But when 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."*

While being guided by the position of the law stated hereinabove the court has found if the offensive paragraph of the affidavit of the applicant will be expunged from the affidavit of the applicant the remaining

paragraphs of the affidavit of the applicant will not manage to support the application of the applicant. The court has come to the stated view after see the impugned paragraph 5 of the affidavit of the applicant is the one carrying the grounds proposed to be taken to the Court of Appeal for consideration and determination.

As the applicant is required to satisfy the court that he has arguable appeal and the remaining paragraphs do not show any arguable ground worth to be determined by the court of appeal the court has found the remaining paragraphs of the affidavit of the applicant cannot support his application. If the remaining paragraphs cannot support the application, it is crystal clear that the application is remaining with no legs to stand on.

The court has considered the prayer by the counsel for the applicant that they be allowed to amend the verification clause of the affidavit supporting the application so that, the court can proceed to entertain the application but found that, as the court has already found the application is made under wrong subsection of the law the appropriate remedy is not to allow the affidavit to be amended in its verification clause. To the view of this court the appropriate remedy for the defects found in the affidavit of the applicant is to strike out the application for being incompetent.

Consequently, the third point of preliminary objection raised by the respondent is hereby upheld and the application is accordingly struck out for being incompetent. The costs to follow the event. It is so ordered.

Dated at Dar es Salaam this 01<sup>st</sup> day of July, 2022



I. Arufani

**JUDGE**

01/07/2022

**Court:**

Ruling delivered today 01<sup>st</sup> day of July, 2022 in the presence of Mr. Joseph John Manza, advocate for the applicant and in the presence of Mr. Christian Rutagatina, senior learned advocate for the respondent. Right of Appeal to the Court of Appeal is fully explained.



I. Arufani

**JUDGE**

01/07/2022