

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 3 OF 2023**

**ALIPO BERNARD CHIKOKO 1ST PLAINTIFF
MOSES GODFREY MWAKALONGE 2ND PLAINTIFF
HONESTI FELISIAN BAIMU 3RD PLAINTIFF
FRANK JORAM ALUTE 4TH PLAINTIFF
DORIS ANSIBERT MUTALEMWA 5TH PLAINTIFF
ROZALIA ZENO 6TH PLAINTIFF
DIANA RICHARD AMANI 7TH PLAINTIFF
BEATRICE MHINA 8TH PLAINTIFF
PROJEST MASSAWE 9TH PLAINTIFF
EMMANUEL VITALS 10TH PLAINTIFF
FATMA RAMADHAN 11TH PLAINTIFF**

VERSUS

AKIBA COMMERCIAL BANK PLC DEFENDANT

RULING

Date of last Order: 09.03.2023

Date of Ruling: 09.03.2023

A.Z. MGEYEKWA, J

At the centre of controversy between the PlaintiffS and the three Defendant the Plaintiffs claims that in the cause of employment with the Defendant they secured staff housing loans, whereas the Defendant issued staff loans and

The application has encountered formidable opposition from the 1st respondent and he has demonstrated his resistance by filing a counter-affidavit affirmed by Saad Sadiki, the 1st respondent. The application stumbled upon preliminary objections from both learned counsels. The learned counsel for the first respondent raised one point of preliminary objection as follows:-

- 1. The applicant's affidavit sworn by Adam Kessy is incurably defective for containing grounds and/or extraneous matters and prayers contrary to the law governing the form of the affidavit.*

When the matter was called for hearing on 21st March 2023, the applicant enjoyed the legal service of Mr. Stephen Mayombo, learned counsel whereby the 1st respondent enjoyed the legal service of Mr. Erick Simon, learned counsel.

As the practice of the Court, I had to determine the preliminary objection first before going into the merits or demerits of the application. That is the practice of the Court founded upon prudence which I could not overlook.

Mr. Erick, learned counsel for the 1st respondent was the first one to kick the ball rolling. He argued that the application is incompetent for being supported by a defective affidavit. To buttress his submission, he referred this Court on page 3 of the applicant's affidavit, the applicant's deponent

that he intends to pursue the matter to the Court of Appeal of Tanzania. In his view, this is not a fact because the facts entailed chronological events. He added that the same is an extraneous matter which was not supposed to be included in the affidavit. Mr. Erick went on to submit that in paragraph 4 of the applicant's affidavit, the applicant stated that he was never served with a notice of taxation as per the requirement of the law. He stated that whether the respondent complied with the law to effect service is a matter of argument, not fact. Mr. Erick further submitted that the applicant in paragraph 6 of his affidavit included grounds for reference whereas he defaulted the Taxing Master when she proceeded to determine the Bill of costs. In his view, this is an argument.

The learned counsel for the 1st respondent continued to argue that prayers cannot be included in an affidavit, the same contravenes Order XIX Rule 3 of Civil Procedure Code Cap. 33 [R.E 2019]. Fortifying his submission he cited the cases of **Junior Construction Ltd v MMST Tanzania Ltd**, Civil Application No. 134 of 2020, and **Lusian Amsi v George John Nawat (Administrator of the Estate of late John Nawet)**, Misc. Land Application No, 44 of 2021.

On the strength of the above argumentations, the learned counsel for the 1st respondent urged this Court to strike out the application.

In his reply, the learned counsel for the applicant was brief and focused. He submitted that paragraph 3 of the applicant's affidavit is not an extraneous matter. He added that they have annexed a notice of appeal to prove that they have lodged an appeal to the CAT, however, the same was struck out but when the application was brought before this Court the Notice of Appeal was in place. He went on to paragraph does not contain arguments, it is a fact that the applicant was not served with a notice as per the requirement of the law. Mr. Stephen further submitted that in 6 paragraph of the applicant's affidavit, they have raised grounds for their applications. He stressed the applicant has shown sufficiently the grounds on which he wants to rely upon in order not to surprise the other party when the matter is called for a hearing. Fortifying his submission, he cited the cases of **Moses Mchunguzi v Tanzania Cigarette Co. Ltd**, Civil Reference No. 3 of 2018. and **Cthaerine Singundali v Salima Amir**, Misc. Land Application No. 375 of 2020.

The learned counsel for the applicant continued to submit that it is not fatal for an affidavit to contain arguments. Mr. Stephen admitted that paragraph 7 of the applicant's affidavit contains prayers. He urged this Court to expunge the paragraphs which contain prayers of extraneous matters and in his view after expungement of offensive paragraphs, the same will not

affect the application. He urged this Court to consider the rules of overriding objective since the respondents will not be prejudiced.

In his rejoinder, the learned counsel for the 1st respondent maintained his submission in chief. He insisted that the remedy of an affidavit that contains offending paragraphs is not an amendment but to strike out the application. Supporting his stand he cited the case of **Phaton Modern Transport (1985) Ltd v D.T Dobbie Tz Ltd**, Civil Reference No. 15 of 2001. He valiantly argued that the cited case of Moses (supra) does not support the contention that the grounds of reference be stated in the affidavit.

I have considered the learned counsels' submissions for and against the application and the issue for determination is *whether the preliminary objections are meritorious*.

I have scrutinized the applicant's affidavit specifically paragraphs 3 and 4 and I am ready to find out if the same contains facts or arguments. For ease of reference, I find it apposite to reproduce the third and fourth paragraphs of the applicant's affidavit hereunder:-

3. That, immediately after the judgment on 24/11/2020, the Applicant lodge the notice of appeal to the Court of Appeal for purpose of challenging the whole decision of the High Court in respect of Land Case No. 370 of 2017 and still the notice of appeal is still intact and has never been withdrawn by the Applicant. The Applicant is till

intending to pursue the intended appeal to the Court of Appeal. The copy of the notice of appeal is hereby annexed as ANNEXURE EFC-2 and the leave of this Court is craved to form part of this affidavit.

4. *That, despite of the said of notice of appeal, the 1st Respondent lodged the bill of costs No. 146 of 2020 and was assigned before Hon. W. Hamza-Taxing Master. The Bill of Costs was lodged on 17th November, 2020 and Applicant was never served with the notice of taxation as per the requirement of law.*

Reading paragraph 3 of the applicant's affidavit, as correctly stated by the counsel for the applicant, the same does not contain arguments, It is a fact that when the applicant filed the instant application, he had lodged a Notice of Appeal to the Court of Appeal for purpose of challenging the decision of this Court. Therefore, in my considered view that paragraph 3 is not argumentative.

As to paragraph 4 of the applicant's application, I am in accord with the submission made by Mr. Erick that this paragraph may attract an argument from the respondent who may oppose that, the applicant was summoned to appear in court. Therefore, paragraph 4, in my view is argumentative. In the cases of **Leandri Leonard Tairo** (supra) and **Uganda v Commissioner of Prison Ex Parte Matovu** (supra), the Court held that an

affidavit should not contain extraneous matters by way of objection or prayer or legal arguments, or conclusion.

After noting that paragraph 4 of the applicant's affidavit contains argumentative facts, the remedy is to expunge the offensive paragraph from the record. The Court of Appeal of Tanzania in **Jamal S. Nkumba & Another v Attorney General**, (Civil Application 240 of 2019 [2021] TZCA 756 (Tanzlii 15 December 2021), the Court held that:-

"It is now settled that an offensive paragraph can be expunged or disregarded and the court can continue to determine the application based on the remaining paragraphs if the expunged paragraph is inconsequential."

Similarly, in the case of Phantom Modern Transport (supra) cited by tMr. Erick, the Court held that: -

"Where defects in an affidavit are inconsequential, those defective 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 thereof correct averments in the same affidavit"

Concerning paragraph 7 of the applicant's affidavit, the counsel for the applicant has conceded that the same contains prayers. The remedy is to expunge paragraph 7 from the affidavit.

Guided by the above authorities, I find that paragraphs 4 and 7 of the applicant's affidavit which contains argumentative facts are contrary to the law, thus, I proceed to expunge t paragraph 4 for being argumentative.

In addition, I have scrutinized the contents of paragraph 6, it contains grounds of reference. I have read the grounds of reference and found that (a) and (b) contain legal arguments. For ease of reference, I reproduce hereunder:-

- a) That, the Taxing Master proceeded to determine the Bill of Costs No. 146 of 2020 while there is a pending notice of appeal to the Court of Appeal lodge on 24/11/2020, hence lacks jurisdiction to entertain the same.
- b) That, the Taxing Master erred in law to determine the Bill of Costs No. 146 of 2020 while the same contravened Order 6 (2) of the Advocates Remuneration Order, 2015, which require that, upon lodging the taxation proceedings, the notice of taxation has to be served upon the respondent within five (5) days before the date of taxation.

The above-mentioned paragraphs are grounds of reference which contain legal arguments In the case of **Jamal S. Mkumba and Another v Attorney General**, Civil Application No. 240/01 of 2019 CAT (unreported) the court, while citing the case of **Uganda v Commission of Prison Exparte Matovu** [1966] EA 514 held that:-

"As a general rule of practice and procedure an affidavit for use in court being a substitute for oral evidence, it should only contain a statement to which the witness disposes either of his own knowledge or such an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion.

From the above findings, the consequences, in the case of **Jamal Mkumba and another** (supra) the court, while citing the case of **Chadha and Company Advocates v Arunaben Chaggan Chita Mistry & 2 Others**, Civil Application No. 25 of 2013, the Court held that:-

"where the offensive paragraphs are inconsequential, they can be expunged leaving the substantive parts of an affidavit remaining intact so that the court can proceed to act on it.

Similarly, in the case of **Uganda v Commissioner of Prisons Ex-parte Matovu** (supra), the court held that:-

*" With respect to prayers contained in the affidavit, prayers have to be made in court at the hearing otherwise there is no point in making the application. So **making them prematurely in an affidavit should not be a reason for avoiding determination of the application.**"*

[Emphasize added].


Guided by the above authorities, paragraphs 4, 6, and 7 of the applicant's affidavit are expunged. Having expunged these paragraphs from the

affidavit, it is vivid that the remaining paragraphs cannot support the applicant's application.

Having said so, I sustain the points of objection. The present applicant lacks no legs to stand on and consequently, I proceed to strike out the instant application without costs.

Order accordingly.

Dated at Dar es Salaam this date 23rd March 2023.



A.Z. MGEYEKWA
JUDGE
23.03.2023

Ruling delivered on 23rd March 2023 in the presence of Mr. Stephen Mayombo, counsel for the applicant and Mr. Erick Simon, counsel for the 1st respondent.



A.Z. MGEYEKWA
JUDGE
23.03.2023