

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO.130 OF 2023**

MELCHIADES HENRY KALENZI APPLICANT

VERSUS

ASHA ABDALLAH SUNGWE RESPONDENT

RULING

Date of the last order: 27.04.2023

Date of the Ruling: 28.04.2023

A.Z.MGEYEKWA, J

In this application, the Court is moved to exercise its discretion and grant leave to the applicant to go to the Court of Appeal of Tanzania by way of appeal. The application has been preferred under the provisions of Section 5 (1) (c) and (2) (c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019], section 47 (1) and (2) of the Land Disputes Courts Act, Cap. 216 [R.E 2019] and Rules 45 (a) and 47 of the Tanzania Court of Appeal Rules, 2009. The Application is premised on the grounds appearing on the Chamber Summons together with the supporting

affidavit of Christian Rutagatina, the applicant's counsel sworn on 6th March 2023 setting out grounds on which the prayer for leave is based. The respondent has demonstrated his resistance by filing a counter affidavit deponed by Makaki Masatu, the respondent's counsel and he lodged a Notice of Preliminary Objection comprised of three limbs as follows: -

1. *That, the application before this court is incompetent and bad in law for containing a defective verification clause that is verified by a different person.*
2. *That the application is incompetent for being supported by an incurable defective affidavit containing hearsay, legal arguments, and conclusions contrary to the mandatory provisions of Order XIX Rule 3 (1) of the Civil Procedure Rules of the Civil Procedure Code Cap. 33 [R.E 2019].*
3. *The affidavit in support of the application is incurably defective for containing a defensive verification clause contrary to the mandatory provisions of Order XIX Rule 3 (1) of the Civil Procedure Rules of the Civil Procedure Code Cap. 33 [R.E 2019].*

When the matter was called for hearing on 27th April 2023, the respondent enjoyed the legal service of Mr. Christian Rutagatina, learned counsel, and the applicant enlisted the legal service of Mr. Malick Hamza, learned counsel.

The learned counsel for the respondent opted to abandon the 1st objection and combined the 2nd and 3rd objections because they are intertwined. Mr. Malick was brief and focused, he submitted that the 2nd and 3rd limbs are centered on the incurable defective affidavit contrary to Order Rule 3 (1) of the Civil Procedure Rules of the Civil Procedure Code Cap. 33 [R.E 2019]. Mr. Malick submitted that the affidavit contains legal arguments, conclusions, and hearsay. To buttress his submission, he referred this Court to paragraphs 3 and 4 of the applicant's affidavit. He stressed that the said paragraphs contain a conclusion and legal arguments.

The learned counsel for the applicant went on to argue that the verification clause does not state the name of the person who verified the affidavit contrary to the requirement of the law. Supporting his submission he cited the case of **Uganda v Commissioner of Prisoners Ex parte Matovu** [1966] EA 514 520. He urged this Court to find that the objection raised has merit and dismiss the application that is supported by a defective affidavit with costs.

In rebuttal, Mr. Rutagatina, counsel for the applicant submitted, the raised preliminary point of objection is misconceived as it does not qualify to be a pure point of law under the principle enunciated in the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd** (1969) EA 606, for containing facts requiring additional evidence or

supplementary evidence to be proved. Mr. Rutagatina went on to submit that the first point of the preliminary objection raised by the respondent does not meet the definition and requirements stated in the cited cases. He firmly submitted that the Chamber Summons was intended to cater for two purposes; expedience for leave to appeal and to issue a certificate on point of law since the matter originated from Vianzi Ward Tribunal. The learned counsel for the applicant stressed that the preliminary objections need ascertainment of the facts to decide this point. Supporting his submission he cited the case of **Mohamed Enterprises Ltd v Masoud Mohamed Nasser**, Application No. 133 of 2012.

Reverting to the raised points of objection, Mr. Rutagatina who is also a deponent of the challenged affidavit, refuted Mr. Malick's arguments by submitting that there is nothing wrong with the said paragraphs in the affidavit. Mr. Rutagatina went on to stress that the verification clause does not infringe on the law. He distinguished the cited case of **Uganda Commissioner** (supra) he insisted that the purpose of having a verification clause is to verify deponed knowledge and indicate the source of information to be true.

In conclusion, the learned counsel for the applicant stressed that the objections are non-meritorious the same deserve to be dismissed in its entirety with costs.

In his rejoinder, the learned counsel for the applicant reiterated his submissions. He added that the argument that the objections are not a pure point of law is misplaced since the objections are related to the applicant's affidavit as per Order XIX Rule 3 (1) of the Civil Procedure Code Cap. 33 [R.E 2019]. He stressed that paragraphs 3 and 4 of the applicant's contain hearsay and conclusion hence the same renders the applicant's affidavit incurably defective and the same cannot support the application at hand. He insisted that the verification clause is silent as to the person who verified the paragraphs. Ending, he urged this Court to dismiss the applicant's application for being incompetent with costs.

In determining the points of objection raised, I shall address the 2nd and 3rd limbs to the effect that, the application is incompetent and bad in law for being supported by a defective affidavit which contains a defective verification clause.

Before I get to the substance of the preliminary objection it is apposite that I should address the issue raised by the leered counsel for the applicant in his reply to the respondent's submission. In the instant application, the point of preliminary objection concerns the applicant's affidavit and verification clause.

Mr. Rutagiatina claims that the raised first objection is not a point of law. The nature and scope of a "preliminary issue" is cogently defined in the

statement of Law J.A., in the case of ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696***. The Eastern African Court had this to say:-

"A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit".

Similarly, the Court in the same case of **Mukisa** (supra) at 700 held that:-

"a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, a plea of limitation, or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration." [Emphasis added].

Considering the *ratio decidendi* in the above-cited authority, I conclude, without much hesitation, that both objections falls squarely within the scope of a preliminary objection.

Reverting to the 2nd and 3rd limbs of the preliminary objection, the respondent's counsel contends that the application is incompetent and

bad in law for being supported by a defective verification clause. The issue for my determination is whether or not the verification under attack is defective and if yes, what is the consequence. For ease of reference, we have again found it pertinent to reproduce the said verification clause which appears as hereunder: -

“ Save for the contents of paragraph 3 herein which partly comprise reasoning deriving from this court's decision whose source has been acknowledged and i verily believe in its authenticity to be true, what is contained in all the remaining paragraphs i.e 1, 2, and 4 above is true in accordance with my knowledge.”

I shall start with what amounts to a verification clause. The Court in **Director of Public Prosecution v Dodoli Kapufl & Patson Tusalile**, Criminal Application No. 11 of 2008 (unreported) defined the verification clause as:-

“ That part of an affidavit which "shows the facts the deponent asserts to be true of his own knowledge and those based on information or beliefs".

In the verification clause under attack, Mr. Malik has argued that the deponent did not specifically disclose the name of the person who verified the affidavit. Looking at the verification clause it is vivid that the deponed name is missing.

To this end, I take the position that the affidavit at hand is defective lack of deponed's name. The deponent was required to state his name to assert that what he is verifying is true and, that being so, the preliminary objection has merit, the same suffice to dispose of the application and, needless to have to belabor on the other points point of preliminary objection.

In the upshot, the application at hand is incompetent for being supported by a defective affidavit, accordingly, the same is struck out with leave to refile a proper application. No order costs.

Order accordingly.

Dated at Dar es Salaam this date 28th April 2023.




A.Z.MGEYEKWA

JUDGE

28.04.2023

Ruling delivered on 28th April 2023 in the presence of Mr. Christian Rutagatina, counsel for the applicant also holding brief for Mr. Malick, counsel for the respondent.




A.Z.MGEYEKWA

JUDGE

28.04.2023