

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

MISC. LAND CASE APPLICATION NO.254 OF 2023

EFATHA FOUNDATION LIMITED.....APPLICANT

VERSUS

**DIPOSIT INSURANCE BOARD (Liquidator of Efatha Bank
Limited)1st RESPONDENT**

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Date of Last Order: 13.06.2023

Date of Ruling: 28.06.2023

T.N. MWENEGOHA, J

In the instant case, the applicant sought a leave of this Court to institute a suit against the 1st respondent for breach of a lease agreement. The Application was brought under **sections 9 and 97 of the Bankruptcy Act, Cap 25, R.E 2019** and **section 288 of the Companies Act, Cap 212, R.E 2019**. The same was accompanied by the Affidavit, sworn by the applicant's Advocate, Daniel Haule Ngudungi. It is this affidavit that sparked a preliminary objection from the respondents, through the representation of the learned State Attorneys, Francis Wisdom and Luciana Kikala.

Their objection was to the effect that, the affidavit in question is incurably defective for being sworn by an Advocate who is representing the applicant. When arguing in favor of the objection, they maintained that,

the rules are settled that, an Advocate can swear and file an affidavit in proceedings in which he appears for his client concerning matters which are in his personal knowledge. That is to say, he may swear an affidavit regarding a case to which he or she represented the said client, because he is taken to have personal knowledge of what transpired in the said proceedings. This rule was given in **Lalago Cotton Ginnery Oils Mills Company versus The Loans and Advances Realization Trust (LART), Civil Application No. 80 of 2002, Court of Appeal of Tanzania**, as cited in **Tanzania Breweries Limited versus Herman Bildad Minja, Civil Application No. 11/18 of 2019, Court of Appeal of Tanzania, at Dar Es Salaam(unreported)**. That, looking on the affidavit in support of the Application at hand, it is clear that the same contains substantive evidence establishing rights of the applicant and liabilities to the respondents, as seen in paragraph 3,5,7,8,9 and 10, of the affidavit in question. Hence, this Application should be struck out, upon sustaining the objection.

In reply, Advocate Ngudungi insisted that, the affidavit in question is not defective. That, the deponent has the knowledge of the facts stated therein. He got that information after scrutinizing the documents placed before him by the client. That, in fact, the deponent has stated that in his verification, that the knowledge was depicted from the available documents handed over to the advocate by the applicant. Therefore, the **Lalago Cotton Ginnery Oils Mills Company Vs The Loans and Advances Realization Trust (supra)** is distinguishable in this case.

In addressing the Preliminary Objection, I will highlight a general rule that, a lawyer cannot serve as an Advocate and witness in the same case. It is obvious that, serving in a combination of roles by an Advocate may

- prejudice the party's rights to the litigation. Same applies to the trier of the facts in issue, they may be confused or misled by a lawyer acting on both roles, as a witness and an Advocate at the same time. It is well settled that; an affidavit is a substitute of an oral testimony. Deponing facts in an affidavit is as good as testifying orally in a Court of law, see **Uganda vs Commissioner of Prisons, Ex-parte Matovu [1966] EA 514 at 520.**

This is the spirit behind the principles enshrined in the rules given in **Lalago Cotton Ginnery Oils Mills Company Vs The Loans and Advances Realization Trust (supra)**. The said rules, are exceptions to the general rule. They allow an Advocate to swear and file an affidavit, in proceedings in which he appears for his client, only on matters falling within his personal knowledge.

As argued by the learned State Attorney for the respondents, the facts stated in Mr. Ngudungi's affidavit, have established rights to the applicant and liabilities to the respondents. That shows that he is playing a double role in this case. He has to choose one as required in law, save for the exceptional circumstances, given in **Lalago Cotton Ginnery Oils Mills Company Vs The Loans and Advances Realization Trust (Supra)**.

For the afore given reasons, I find the objection to have merits and sustain it accordingly. The affidavit is incurably defective; hence it cannot support the Application.

Eventually, the Application is struck out. No order as to costs




T.N. Mwenegoha.
Judge
28/06/2023