

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

MISC. LAND APPLICATION NO. 89 OF 2023

*(Originating from Judgment and Decree of the Court in Land Case No. 127 of 2008
by his Lordship Hon. Ndika, J dated 23rd January 2015)*

KELLEN ROSE RWAKATARE KUNTU

(As Legal Representative of the late

Rev. Dr. Getrude Lwakatare) **1ST APPLICANT**

HUMPHREY KAULILA KENNETH RWAKATARE

(As Legal Representative of the late

Rev. Dr. Getrude Lwakatare) **2ND APPLICANT**

TIBE KENNETH RWAKATARE

(As Legal Representative of the late

Rev. Dr. Getrude Lwakatare) **3RD APPLICANT**

MUTTA ROBERT RWAKATARE

(As Legal Representative of the late

Rev. Dr. Getrude Lwakatare) **4TH APPLICANT**

VERSUS

ZITHAY KABUGA RESPONDENT

Date of Last Order: 21.06.2023

Date of Ruling: 14.09.2023

RULING

I. ARUFANI, J

This ruling is in respect of the preliminary objection on a point of law that was raised by the counsel for the respondent as follows: -

"The application is incompetent for being supported by an incurably defective affidavit which is sworn by an advocate representing the applicant on matters which are outside his knowledge as per the Court of Appeal decision in Lalago Cotton

Ginnery and Oil Mills Company Limited vs. The Loans and Advances Realization Trust (LART), Civil Application No. 80 of 2002."

The preliminary objection was argued by way of written submissions. While Mr. Ngudungi, Advocate drew and filed in the court the submission on behalf of the respondent, Mr. Armando Swenya filed in the court the submission on behalf of the applicants.

In his submissions the counsel for the respondent pointed out that it is now settled legal principle that an advocate can only swear an affidavit on behalf of his client in matters to the advocate's personal knowledge. He said matters that can be sworn and those that cannot be sworn by an advocate were cleared in the case of **Lalago Cotton Ginnery and Oil Mills Company Limited V. The Loans and Advances Realization Trust (LART)**, Civil Application No. 80 of 2002, CAT at DSM (unreported).

He also cited the case of **Tanzania Breweries Limited V. Herman Bildad Minja**, Civil Application No. 11/18 of 2019, CAT at DSM (unreported) which cited the case of **Zitto Zuberi Kabwe (MP) V. Chama Cha Demokrasia na Maendeleo & Another**, Civil Case No. 270 of 2013, HC at DSM (unreported). He said the latter case of **Zitto Zuberi Kabwe** is in line with Regulation 61 of the Advocates (Professional Conduct and Etiquette) Regulations GN. No. 118 of 2018

(Hereinafter referred as the **Rules**) which prohibits advocates from giving evidence in matters which they are involved as advocates.

He said the affidavit supporting the application contains substantive evidence to establish rights of the applicants and the liabilities of the respondent in paragraphs 3, 4, 9 and 12 (ii). He said the issue of the previous advocate, Mr. Emmanuel Augustino turning hostile and demanding a hefty fee when conducting Probate and Administration Cause No. 32 of 2020 as reflected in paragraph 9 are challenges best known to the applicants but still the applicants themselves never swore an affidavit in respect of those facts thereby rendering what is stated by the advocate in the affidavit as hearsay.

He also argued that, even the verification clause support that the contents of the affidavit are partly true making the affidavit incurably defective. He prayed for the objection to be upheld and the application be struck out with costs for being supported by an incurable defective affidavit.

In his response the counsel for the applicants said that the objection raised is not maintainable for failure to follow the legal procedures and practice because the contravened law has not been cited as per the case of **Mathias Ndyuki & 15 Others V. Attorney General**, Civil Application No. 144 of 2015 CAT at DSM (unreported). He said since

there is no cited provision of the law then the objection raised is incompetent and should be overruled as the respondent has failed to move the court to consider the objection raised. He further said the objection does not qualify as a preliminary objection on a point of law according to the principles laid down in the case of **Mukisa Biscuits Co. Ltd V. West End Distributors Ltd** (1969) EA 696.

On the substantive submission, the counsel for the applicants stated that the objection raised is hooked on the verification clause of the affidavit in support of the application which derives its mandate from Order VI Rule 15 (2) of the Civil Procedure Code, CAP 33 R.E 2019 (the **CPC**). He said considering the said provision the affidavit has met all the mandatory requirements therein. He stated the case of **Tanzania Breweries Ltd** (supra) is distinguishable to the instant application because in that case the advocate deposed on behalf of his client who was a corporate body. He said it was necessary for the names of the principal officer of the company in that case to be known because the client was a corporate body (a legal person who had no mouth and voice).

He argued this is not the same in this case as the deponent has stated well the source of the information, he deposed especially in paragraphs 9, 10 and 12 (i-iv). He said even the position of the law in

the case of **Lalago Ginnery** (supra) is misconceived as the case aims at differentiating on matters which were internal to the client who is a corporate body and thus her representation must be by way of a third party (Principal Officer).

He said in the present application the affidavit has been sworn by the advocate who was duly authorised to sign pleadings by the applicants themselves who were parties to the case and the verification clause states that information was supplied to the advocate and there was no need to mention names. He said as far as Order VI Rule 15 (2) of the CPC is concerned the affidavit complied with this mandatory provision of the law.

He however, said if it should appear that there is a need for the verification to mention names of the applicants who supplied the information to the advocate then this should not render the application incompetent as the court has the discretion to order amendment of the affidavit. He relied on the case of **Jamal S. Nkumba & Another V. Attorney General**, Civil Application No. 240 of 2019 (CAT) (unreported) where the court ordered amendment of the affidavit so that the applicant could have inserted a proper verification clause according to the law. He concluded by praying to the court to dismiss the objection for want of merit.

Having gone through the rival submissions fronted to the court by the counsel for the parties the court has found the main issue to determine here is whether the preliminary objection raised by the respondent is meritorious. I would first clear the arguments raised by the counsel for the applicant that there ought to be a provision of the law cited to move the court to entertain the application.

With due respect to the counsel for the applicant, it is well known that case law is among the sources of law and the counsel for the respondent has specifically stated the objection is based on law and practice and cited the case of **Lalago Ginnery** (supra) which is landmark in this instance. That shows the argument raised by the counsel for the applicants has no merit as the raised preliminary objection is well supported by law. The court has also found the counsel for the respondent stated in his submission that the affidavit is defective for contravening Regulation 61 of the Rules, which in my view suffices to be the basis of the objection raised.

It is a position of the law as provided under Order XXXLIII Rule 2 of the CPC that an application must be supported by an affidavit and Order XIX of the CPC is the one governs affidavits. In these provisions there is nowhere stated a counsel for a party cannot swear an affidavit on behalf of his or her clients. However, it is clear from case law, amongst

them being **Lalago Cotton Ginnery** (supra) that there are circumstances that counsel cannot swear an affidavit because he either was not part to the proceedings or he is not properly authorized to swear the affidavit. In the said case the Court of Appeal stated that: -

"An Advocate can swear and file an affidavit in proceedings in which he appears for his client, but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during those proceedings."

The purpose of the restriction stated above is that, apart from swearing things not in the knowledge of the counsel for the party, it is to avoid the possibility of an advocate playing the dual role of an advocate and a witness in any given matter (see **M/S Consortium of Les Genes (Pty) & Oberoi (Pty) Limited V. Medical Store Department & Attorney General**, Misc. Civil Application No. 53 of 2019, HC at DSM (unreported)).

The complaint by the counsel for the respondent is that the affidavit was not sworn by the applicants themselves and this is confirmed by the verification which states that the information is partly on the knowledge of the deponent. Indeed, the affidavit is sworn by Mr. Armando Swenya who is advocate for the applicants and it is vividly clear that he was not the advocate who previously had conduct of the case (see paragraph 9 of the affidavit).

Further, there is no explanation as to why the applicants, even one of them on behalf of the others, could not swear the affidavit. Now, this being an application for extension of time and the main reason for the delay are challenges faced the applicants including misunderstandings between them and their previous Counsel Mr. Emmanuel Augustino who turned hostile and demanded a hefty fee, the best persons to swear an affidavit would have been the applicants themselves.

In that respect, Mr. Armando Swenya is incompetent to swear the affidavit and all the issues on information from the applicant are basically hearsay which renders the affidavit defective. In the case of **Adnan Kitwana Kondo & 3 Others V. National Housing Corporation**, Civil Application No. 208 of 2014 CAT at DSM (unreported), the affidavit of the advocate who had not represented the applicant at the High Court was declared incurably defective by the Court of Appeal because it was sworn by a person who is incompetent to swear matters stated therein.

When Hon. Makani, J (as she then was) was dealing with similar preliminary objection in the case of **Berno Didier Muhile** (As Legal Personal Representative of the Estate of the Late Karemera Boniface) **V. Rowland Patrick Sawaya**, Misc. Land Application No. 69 of 2022 HC Land Div. at DSM (unreported) she quoted a highly persuasive case from the Supreme Court of Kenya, **Raila Odinga & Others vs. William**

Ruto & Others, Presidential Election No. E0005 of 2022 (Consolidated with Presidential Election Petitions Nos. E001, E002, E003, E004, E007 and E008) where it was stated that: -

"...This Court cannot countenance this type of conduct on the part of Counsel who are officers of Court. Though it is elementary learning it bears repeating that affidavits filed in court must deal only with the fact which a deponent can prove of his own knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their clients in contentious matters, like this one before us, because they run the risk of unknowingly swearing to falsehood and may also be liable to cross examination to prove the matters deponed."

Hon. Makani, J went on saying in the case of **Berno Didier Muhile** (supra) that: -

"I am strongly persuaded in terms of the cited cases above that it is quite irregular for Counsel to swear affidavits on behalf of their clients in contentious matters because they run the possibility of unsuspectingly swearing to facts unknown or rather create their own facts which are likely to be false to make the story better. It should also be noted that with the swearing of an affidavit the Counsel may also be liable to cross examination to prove the matters deponed. In the present case as already established the affidavit is unreliable hence defective and, in that respect, there is no affidavit in support of the application contrary to Order XLIII Rule 2 of the CPC. This objection therefore has merit."

In a similar vein, I am persuaded that the affidavit sworn by the counsel for the applicants to support the application is defective on the basis of the cited cases above. Further, as correctly said by the counsel for the respondent, Rule 61 of the Rules forbids an advocate to give evidence in a matter that he is appearing. The said Rule states as follows:

"Subject to the court rules and practice an advocate shall not be allowed to give evidence in a matter in which the advocate is involved as advocate except in circumstances where it is permissible."

An affidavit sworn is evidence and as said in the case of **Berno Dider Muhile** (supra) above the deponent is subject to cross-examination. Therefore, the rationale behind this restriction is evident that an advocate who has sworn an affidavit cannot be cross-examined in a matter that he has conducted. For the reasons stated hereinabove, the court finds the objection raised by the counsel for the respondent has merit and it is hereby sustained. The application is thus struck out with costs for want of proper affidavit of supporting it. It is so ordered.

Dated at Dar es Salaam this 14th day of September, 2023.




I. Arufani
JUDGE
14/09/2023

Court:

Ruling delivered today 14th day of September, 2023 in the presence of Ms. Diana Mussa, learned advocate for the applicants and in the presence of Ms. Jackline Kulwa, learned advocate for the respondent. Right of appeal to the Court of Appeal is fully explained.



I. Arufani
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JUDGE
14/09/2023