

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 539 OF 2022

(Arising from Land Case No. 230 of 2022)

SAMSON MWITA MAISA 1ST APPLICANT

SOPHIA ISAYA 2ND APPLICANT

VERSUS

MKOMBOZI COMMERCIAL BANK PLC 1ST RESPONDENT

MOPEH COMPANY LIMITED 2ND RESPONDENT

Date of last order: 08/06/2023

Date of ruling: 06/07/2023

RULING

I. ARUFANI, J

In this application, the applicants are seeking for an order for restraining the second respondent from selling an immovable property situated at Gezaulole Area within Kigamboni Municipality in Dar es Salaam Region, being plot No. 626, Block 24 with Certificate of Title No. 142457 pending hearing and determination of the main suit pending in this suit. After the respondents being served the first respondent filed in the court a notice of preliminary objection containing the points of law which read as follows: -

1. *To the extent that the deponent to the affidavit in support of the application sworn on 1st September, 2022 is neither the applicant nor the deponent took part in the transactions giving rise to this application and to the extent that the deponent has sworn and deposed to the affidavit in support of the application and verified as from personal knowledge factual matters in the affidavit, the application is incompetent for being supported by an incurably 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)*
2. *The affidavit in support of the application is incurably defective for containing a defective 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 2002)."*

The preliminary objection was set to be heard by way of written submissions, whereby, the applicant was represented by Ms. Jacqueline Jackson Dominick Rwakabwa, learned advocate and the first respondent was represented by Mr. Malick Khatib Hamza, learned advocate. Hearing proceeded ex parte against the second respondent as she was duly served but failed to appear in the court.

Arguing in support of the first point of preliminary objection, the counsel for the first respondent referred the court to Order XIX Rule 3

(1) of the Civil Procedure Code Cap 33 R.E 2019 (hereinafter, the CPC) that provides matters for which affidavits shall be confined to, which are facts as 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. To cement his argument, he cited the case of **Uganda V. Commissioner of Prisons Ex Parte Matovu [1966] E.A 514 at 520.**

She submitted that, the affidavit subject of this preliminary objection was sworn by one, Jaqueline Jackson Dominick Rwakabwa, who is not one of the applicants in the present application. She avers at paragraph 3, 4, 7, 9, 10 and 11 and in the verification clause in the affidavit that she is conversant with the facts she deposed in the affidavit.

The counsel for the 1st respondent submitted further that, the counsel for the applicant has sworn and deposed to the affidavit in support of the application and verified as from personal knowledge all the factual matters in the affidavit at paragraphs 1, 4, 10, 11 and 12 irrespective of the fact that she has, at no point in time been in conduct of the facts leading to this application.

He argued that, the stated averment by the deponent in the affidavit in support of the application is incurably defective for containing

hearsay, legal arguments and conclusions contrary to the provision of Order XIX Rule 3 (1) of the CPC. He stated that, it is general rule of practice and procedure that an affidavit is a substitute for oral evidence and therefore should contain statements of facts to which the witness deposes either of his own personal knowledge or information believed to be true.

He referred to the case of **Silima Vuai Fom V. Registrar of Co – Operative Societies and 3 Others**, (1995) T.L.R 75 where it was stated that *“The principle is that, where an affidavit is made on an information, it should not be acted upon by any court unless the sources of the information are specified.* She further cited the case of **Standard Goods Incorporation Ltd V. Harakhchand Nathu & CO.** (1950) 17 E.A.C.A 99 and the case of **Bombay Flour Mill V. Hunibhai M. Patel** (1962 E.A 803, where the similar holding was made.

She submitted further that, where an affidavit is deemed argumentative and containing hearsay and conclusions, it becomes incurably defective and cannot support an application and once there is no affidavit, an application cannot stand and it becomes incompetent. She cited the case of **Juma S. Busiyah V. The Zonal Manager, (South) Tanzania Post Corporation**, Civil Application No. 8 of 2004 CAT at Mbeya (Unreported) in his submission to cement his argument.

The counsel for the applicants referred to paragraph 1 of the affidavit and stated that, the affidavit in support of the application is sworn by **Jacqueline Jackson Dominic Rwakabwa**, the counsel for the applicants. He argued the said advocate verifies that the facts in paragraphs 4, 10 and 11 are from her own knowledge, where as the rest of the facts are from the information from the applicants. He stated the facts set in paragraph 4, 10 and 11 of the affidavit cannot be facts within the knowledge of an engaged advocate. They are facts that ought to be in the knowledge of the applicants themselves.

She cited in her submission the case of **Lalago Cotton Ginnery and Oil Mills Company Ltd V. Loans Advances Realization Trust (LART)**, Civil Application No. 80 of 2002 (Unreported) quoted by the Court of Appeal in the Case of **Tanzania Breweries Limited vs Herman Bildad Minja**, Civil Application No. 11/18 of 2019 at page 13-14 where it was stated that: -

"In Lalago Cotton Ginnery and Oil Mills Company Ltd vs Loans and Advances Realization Trust (LART), Civil Application No.80 of 2002 the court said. " An advocate can swear 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 these proceedings.”

From the principle of the law established in the above cited case, the counsel for the first respondent stated that, an advocate can swear and file an affidavit in proceedings in which he appears for his client but on matters which are within his personal knowledge only. He based on the above submission and the cited authorities to pray the court to find the application is incompetent and strike out the same in its entirety with costs.

In her reply, the counsel for the applicants pointed out that, the verification clause of the deponent affidavit in support of the application is not defective as it was specified by reference to the numbers of paragraphs of what information was according to deponent's knowledge and also deponent specified the information obtained from the applicants and believed to be true and not from deponent's own knowledge. She cited in her submission Order VI Rule 15(2) of the CPC and stated that, paragraph 2, 3, 5, 6, 7, 8 and 9 were information and documents supplied to her by the applicants and not from deponent's personal knowledge as argued. She submitted that, it is only paragraphs 1, 4, 10, 11 and 12 were verified to be from the deponent's own

knowledge.

She cited in her submission the definition of the term "personal knowledge" as given in the **Black's Law Dictionary (10th Edition) 2014**, to mean knowledge gained through first hand observation or experience as distinguished from a belief based on what someone else has said. She submitted that, paragraph 1, 4, 10, 11 and 12 as stated in the verification clause are information on the knowledge gained either by observation at first hand or experience by a deponent as defined on the definition of the personal Knowledge and do not contain hearsay, legal argument and conclusion, contrary to the law.

That, the 1st respondent did not indicate which paragraph were verified on personal knowledge and instead of that he generalized and failed to read carefully that the deponent illustrated some information were not from her personal knowledge but rather were supplied to her by the respondent, as provided under Order VI Rule 15(2) of the CPC. She concluded her submission by stating that, the preliminary objection lacks both legal and factual backing and therefore prayed the same to be dismissed with costs. In his rejoinder the counsel for the first respondent reiterated what he argued in his submission in chief.

I have carefully considered the rival submissions filed in the court by the counsel for the parties and find the issue for determination in this

matter is whether the preliminary objections raised by the counsel for the first respondent are meritorious. As the two preliminary objections are intertwining each other, I will determine them together. The court has found it is the 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 affidavit to be used in court.

The court has found there is nowhere in the cited provisions of the law 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 or she either was not part to the proceedings or he or she is not properly authorized to swear the affidavit. The Court of Appeal stated in the above cited case 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 the case of **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)).

That being the position of the law the court has gone through the affidavit sworn by the counsel for the applicants to support the application and find it is an affidavit sworn by the advocate for the applicants to support the matter which has been filed in the court for the first time and there has never been any other matter which the deponent appeared in court to represent the applicants. The court has found verification clause of the impugned affidavit shows the deponent verified the contents of paragraphs 1, 4, 10, 11 and 12 to be true to the best of her knowledge and the contents of paragraphs 2, 3, 5, 6, 7 and 9 to be true to the information and documents supplied to her by the applicants.

The court has found the paragraphs deposed on the knowledge of the deponent shows that, apart from paragraph 1 which is giving her identity, paragraphs 4, 10, 11 and 12 contains arguments and submissions which according to Order XIX Rule 3 (1) of the CPC are not allowed to be contained in an affidavit filed in court to prove a case. The

rest of the paragraphs are information obtained from the applicants and from the documents supplied to the deponent by the applicants which to the view of this court and as rightly argued by the counsel for the first respondent is hearsay which is prohibited by the provision of the law cited hereinabove.

When my learned sister 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 paragraph from highly persuasive case decided by the Supreme Court of Kenya in **Raila Odinga & Others V. 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 stated 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, and as rightly argued by the counsel for the first respondent I am persuaded that the affidavit sworn by the counsel for the applicants to support the application is defective for being deposed by an advocate who was not in law allowed to swear the same because of the position of the law stated in the above cited cases. The court has also found Rule 61 of the Advocates (Professional Conduct and Etiquette) Regulations GN. No. 118 of 2018 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.”

While being guided by the position of the law and the finding stated hereinabove the court has tried to consider the submission by the counsel for the applicants together with the definition of the term personal knowledge given in the **Black’s Law Dictionary** (supra) but failed to see anything material which can make the court to find the affidavit sworn by the counsel for the applicants to support the application at hand is properly sworn.

To the contrary the court has found as stated in the case of **Berno Dider Muhile** (supra) an affidavit is evidence and 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 objections raised by the counsel for the first respondent are meritorious and deserve to be sustained.

Having found the affidavit supporting the application is defective for being sworn by an advocate who legally was not allowed to swear an affidavit of that nature, the court has found the remedy available is for the stated affidavit to be declared it is defective. After declaring the stated affidavit defective it is as day follow the night that the chamber summons is becoming incompetent for lacking affidavit to support it.

Consequently, the preliminary objections raised by the counsel for the first respondent are hereby upheld and the applicant's application is accordingly struck out for being incompetent and the costs to follow the event. It is so ordered.

Dated at Dar es Salaam this 06th day of July, 2023



I. Arufani
I. Arufani
JUDGE
06/07/2023

Court:

Ruling delivered today 6th day of July, 2023 in the presence of Mr. Maliki Khatib Hamza, learned advocate holding brief for Ms. Jackline Jackson Dominick Rwakabwa learned advocate for the applicants and Mr. Maliki Khatib Hamza, learned advocate representing the first respondent. The second respondent is absent. Right of appeal to the Court of Appeal is fully explained.



I. Arufani
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JUDGE
06/07/2023