

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

MISC. LAND APPLICATION NO. 386 OF 2023

(Arising from the Judgment of the High Court – Land Division at Dar es Salaam in Land Case No. 181 of 2009)

PRAXEDA BARNABAS

(Legal representative of HARRISON MANDALI)**1ST APPLICANT**

MEKEFASON MANDALI.....**2ND APPLICANT**

REHEMA R. KANGE.....**3RD APPLICANT**

MARIAM MAGERO.....**4TH APPLICANT**

EZRA J. MATOKE.....**5TH APPLICANT**

MARY KILIAN JOSEPH MCHAU

(Legal representative of KILIAN J. MCHAU).....**6TH APPLICANT**

ABDALLAH J. MVUNGI.....**7TH APPLICANT**

ELIRUHUMA MREMI.....**8TH APPLICANT**

RUKIA ATHUMANI.....**9TH APPLICANT**

MAJUTO RAJAB MBISA

(Administrator of the estate of ABUU M. BASAI)**10TH APPLICANT**

VERSUS

**THE REGISTERED TRUSTEES OF
THE ARCHDIOCESE OF DAR ES SALAAM****RESPONDENT**

R U L I N G

Date of last Order: 28/09 /2023

Date of Ruling: 14/11/2023

K. D. MHINA, J.

The Applicants, lodged this application by way of chamber summons, made under Section 11 (1) of the Appellate Jurisdiction Act [Cap. 141 R. E. 2019] ("the AJA")

The applicants are in pursuit of an extension of time within which to file a notice of appeal against the decision of the High Court (Land Division) in Land Case No. 181 of 2009, dated 22 July 2016.

The chamber summons is supported by the affidavit sworn by Mr. Samson Edward Mbamba, the counsel for the applicants, which expounds the grounds for the application.

After being served with the application, the respondent confronted the application with a notice of preliminary objection to the following effect;

(i) The application is incompetent for want of the applicants' supporting affidavits

AND IN ALTERNATIVE

(ii) The supporting affidavit is defective in form and substance for containing extraneous matters by way of either legal or

factual arguments or both opinions and conclusions under paragraphs 7, 8, 9, 10, 11, 12 and 13.

(iii) The verification clause is defective.

The application proceeded by way of written submissions. The applicants were represented by Mr. Samson Mbamba, learned counsel, while Mr. Michael Ngalo, also a learned counsel, represented the respondent.

In support of the preliminary objection, Mr. Ngalo submitted that Order 43 Rule 2 of the CPC requires an application to be supported by an affidavit. Though the law does not whose affidavit is to support the application, Mr. Ngalo's view was the supporting affidavit must be by the applicant for the simple reason that he/she is the one who is conversant or possesses the facts supporting the prayers.

He argued that in the instant application, the affidavit was filed by the applicant's advocate. The current jurisprudential reasoning on the status of advocates making and filing affidavits.

Therefore, he stated that the instant application is incompetent for want of applicants, joint affidavit or separate affidavits stating the facts and circumstances upon which the extension is sought. To bolster, his argument,

he cited **M/S Consortium of Les Genes (PTY) vs. Oberoi (PTY) Ltd**, Civil Application No. 53 of 2019 (HC-DSM), **Berno Didier Muhire vs. Rowland Patrick Sawaya**, Misc. Land Appeal No. 69 of 2022 (HC-Land Division), **Ramanlal Motibhai Patel vs. Subash Motbhai Patel and 31 others**, Civil Application No. Misc. Civil Application No. 18 of 2019 and **Omary Ndolima and 120 others vs. Kilosa District Council and another**, Misc. Land Application No. 57 of 2022 (HC-Morogoro).

In response to this ground of P.O., Mr. Mbamba submitted that the law as to when an advocate is allowed to swear an affidavit in support of or a counter affidavit was discussed by the Court of Appeal in **Lalago Cotton Ginnery and Oil Mills Co. Ltd v. The Loans and Advances Realization Trust (LART)**, Civil Application No. 80 of 2002 (unreported), where it was held that advocates could swear and file affidavit in proceedings in which he appears for his client but on matters which are in the advocate's personal knowledge only.

He further argued that in paragraph 2 of the affidavit, he indicated that he had instructions to swear the affidavit, representing and having represented the applicants from the inception of the proceedings preceding this application.

On this ground of P.O., Mr. Ngalo advocate filed the rejoinder, but I do not see the reason to narrate it here because it mainly contained what was submitted earlier in the submission in chief.

Having gone through the affidavit "attacked" and the submissions for and against this first ground of the P.O.,

On this, the entry point is the decision of the Court of Appeal of Tanzania in **D.B Shapriya v. Bish International BV** (2002) EA 47, where the term "affidavit" has been defined as;

"A written document containing material and relevant facts or statements relating to the matters in question or issue and sworn or affirmed and signed by the deponent before a person or officer duly authorized to administer any oath or affirmation or take any affidavit."

From the above definition, going straight to the issue in dispute, the point for consideration is whether a counsel could swear an affidavit on behalf of the client.

The above-stated scenario is not a new phenomenon in our jurisdiction. There is a plethora of authorities which already settled the issue.

Such as in **Arbogast c. Warioba vs. National Insurance Corporation (T) Ltd and another**, Civil Application No.24 of 2011, where the Court of Appeal already held that;

*"The Court did not, therefore, lay down a general rule that advocate cannot swear affidavits in the client's cases, but in my understanding, such affidavits should not contain hearsay. In **AUGUSTINE MREMA's** case, again the High Court said nothing about whether or not advocates could swear affidavits, but in a way supported the position in RAJPUT's case that, whether the deponent is an advocate or not, just like other evidence, subject to scrutiny".*

Again, in the cited case of **LaLago Cotton Ginneryand Oil Mills Company Ltd (Supra)**, the Court of Appeal stressed 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 these proceedings." And that "From the above, 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. These are the only limits which the advocate can make an affidavit in proceedings on behalf of his client."

Therefore, from the above, it is quite clear that an advocate could swear an affidavit for their client as there is no law that prohibits that act.

In connection with the above findings, having gone through the affidavit, it indicated clearly that he was not only authorized to swear the affidavit but also represented the applicants in previous matters in connection with the instant application.

Therefore, the first ground of P.O. lacks merit, and I dismiss it.

Regarding the grounds that the supporting affidavit is defective in form and substance for containing extraneous matters by way of either legal or factual arguments or both opinions and conclusions under paragraphs 7, 8, 9, 10, 11, 12 and 13, Mr. Ngalo submitted that in **Omary Ndolima (Supra)** it was held that affidavit should not contain extraneous matters by way of objection, prayer, legal argument or conclusion.

He narrated that at paragraphs 7 (i) -7(v) the applicants raised legal issues and arguments.

In paragraphs 8,9 and 10, the applicant raised both factual and legal arguments. While in paragraphs 11 and 12, the applicant raised legal arguments and conclusions.

Mr. Ngalo submitted that in paragraph 13, the applicant raised arguments, opinions and conclusions by raising that the decision sought to be appealed was tainted with irregularity, impropriety and irregularities.

As a way forward, Mr. Ngalo invited this Court to take recourse as per the cited case of **Arbogast c. Warioba**, by expunging the impugned paragraphs, and if the remaining paragraphs do not support the application, to struck out the application for being incompetent.

In response, Mr. Mbamba submitted that the application for an extension of time is based on illegalities, irregularities and impropriety of the Judgment in Land Case No. 181 of 2009. Therefore, the grounds for illegalities are not extraneous as they are in the record of the Court of Appeal in Application No. 482/17 of 2017.

Therefore, he argued that in all applications where the Court of Appeal

has granted an extension of time on points of irregularity, impropriety and irregularities, such points were raised, expressed, explained and expounded in the affidavit. To support his argument, he cited **Transport Equipment Ltd v. Devram P. Valambhia [1992] TLR 91.**

He concluded by submitting that in the application for an extension of time, points of illegalities of the decision intended to be challenged on appeal require the applicant to point out grounds of illegalities for the court to consider.

Having gone through the submissions by the parties, this issue should not detain me long.

In the cited case of **Valambhia** (Supra), illegality is sufficient ground to grant an extension of time.

Further, in **Lyamuya Construction Co. Ltd vs. Board of Registered Trustees of Young Women's Association of Tanzania**, Civil Application No. 147 of 2006 (Unreported), it was held that;

"The Court there emphasized that such point of law must be that of sufficient importance, and I would add that it must also be apparent on the face of the record, such as the question of

Jurisdiction, not one that would be discovered by a drawn argument or process."

The question is where the applicant is supposed to raise that ground of illegality.

The answer is in Order XLII Rule 2 of the CPC, which provides that;

"2. Every application to the Court made under this Code shall, unless otherwise provided, be made by a chamber summons supported by affidavit:

Provided that, the Court may, where it considers fit to do so, entertain an application made orally or, where all the parties to a suit consent to the order applied for being made, by a memorandum in writing signed by all the parties or their advocates, or in such other mode as may be appropriate having regard to all the circumstances under which the application is made".

Further to that, it is common ground that in law, the affidavit is a substitute for oral evidence.

From the discussion above, in my opinion, in cases of the application for an extension of time, the ground for the application, including points of

illegalities, is supposed to be in the affidavit. Failure, to do so amounts to non-pleading of such a ground.

In that view and from the above discussion, since the applicants pleaded illegality, then it was proper to point out those grounds of illegalities.

For that matter, the pleaded points of illegality are not extraneous matters. Therefore, the ground of P.O. lacks merits, and I dismiss the same.

Regarding the last ground of P.O., also should not detain me long. Mr. Ngalo briefly argued that the verification clause is defective for the reason that the affidavit contains paragraphs with legal arguments, opinions and conclusions.

On this, even without going to analyze the counter-argument by Mr. Mbamba, this ground must fail because it depended on the ground of P.O.

Therefore, dismiss the second ground of P.O.; this third ground is then automatically lacks legs to stand.

From the above discussion and in totality, the grounds of P.O., raised by Mr. Ngalo Advocate, lack merits, the grounds were both found to be unmeritorious.

In the upshot, I dismiss the P.O. raised and order the application to be heard on merits. Costs to be determined at the finality of the application.

It is so ordered.




K. D. MHINA
JUDGE
14/11/2023