

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

MISC.LAND APPLICATION NO.57 OF 2022

BETWEEN

OMARY NDOLIMA AND 120 OTHERS APPLICANTS

VESRSUS

KILOSA DISTRICT COUNCIL 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

Date of last order: 07/12/2022

Date of Ruling: 15/12/2022

MALATA, J

It is well settled principle of law that, affidavit being a substitute to oral evidence must be sworn by a person accustomed with the facts deponed otherwise, the same will be hearsay calling for another person to swear. This principle is articulated in various court decisions including but not limited to the case of ***Uganda Versus Commissioner of Prisons, Ex-parte Matovu [1966] EA 514 at 520***, where the court stated that:

"As a rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only contain elements of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true. Such an affidavit must not contain an extraneous matter by way of objection or prayer or legal arguments or conclusion."

Similar position is administered in Tanzania in which, where an affidavit in support of a chamber summons mentions another person, that other person has to swear an affidavit to eliminate the standing hearsay evidence in the sworn or affirmed affidavit. This legal position is amassed from numerous decisions of our superior court and this court. In the case of **Juma Busiga Versus Zonal Manager TPC (Mbeya), Civil Application No 8 of 2004** (unreported) the Court of Appeal held that;

*"As the general rule of practice and procedure, an affidavit for use in, court, being a substitute for oral evidence, should only contain statements of facts and circumstances to which the **witness deposes to his own knowledge** or such an affidavit should not contain extraneous matter by way of objection or prayer or legal argument or conclusion."*

In **Sabena Technics Dar Limited Versus Michael J. Luwunzu**, Civil Application No. 451/18 Of 2020, in **Benedict Kimwaga v. Principal Secretary Ministry of Health**, Civil Application No. 31 of 2000 and in **NBC Ltd Versus Superdoll Trailer Manufacturing Company Ltd**, Civil

Application No. 13 of 2002 (both unreported), where our superior court categorically settled as legal principle in Tanzania that:

"An affidavit which mentions another person is hearsay unless that other person swears as well".

Also, in the ***Franconia Investments Ltd Versus Tib Development Bank Ltd***, Civil Application Case No. 270/01 of 2020 the court stated that

"In the same vein, I think, an advocate cannot purport to depose on a client's financial position but that such a deposition should be made by the client himself by affidavit."

Standing with our *stare decisis* in Tanzania, swearing affidavit in support to application, in particular, by advocates is limited as he can only do so to the extent of facts within his personal knowledge and not on assumptions or otherwise. Such facts, certainly may arise from the advocate's conduct of the matter, then he can swear to that extent as he personally knows what happened.

The rest of the facts fall within the province of the parties to case. Allowing advocates to swear affidavits without limitation is making them party to pleadings or evidence even to the facts he had no personal knowledge about.

Further, an advocate becomes a witness to facts to which he is a stranger, thus narrating hearsay which is legally inadmissible in our instance. Pleading facts whether in pleadings or affidavit is province of a party to case, save for the facts the advocate had personal conduct of which he can volunteer to state. Generally, pleading facts in pleading or affidavit is a sphere of the

parties to the case save for what I have narrated herein above. The above position is resounded by various court decision some of the them are; in ***Tanzania Breweries Limited Versus Herman Bildad Minja***, Civil Application No.18 of 2019 (unreported), the court of appeal repeated its position in ***Lalago Cotton Ginnery and Oil Mills Company Ltd Versus. The Loans and Advances Realization Trust (LART)***, Civil Application No. 80 of 2002 by stressing 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."

This court has decided to highlight the above principles as it will be in use in the determination of the matter at hand.

Having pointed out principle applicable to the case at hand, I now briefly narrate what is the case all about and the parties submissions for and against.

The applicants who are, one hundred and twenty-one (121) filed mareva injunction pending expiry of ninety (90) days notice of intention to sue the Government, the respondents herein, seeking restraint orders pending maturity of the ninety (90) days notice and final determination of the intended suit to be filed upon expiry of the said notice. Application is by way of chamber summons supported by affidavit sworn by the applicants' learned counsel one **James Clement Mwakalosi**.

The application was surmounted by counter affidavit and preliminary objection from the respondents to the effect that;

"The application is bad in law for being supported by an affidavit sworn by a stranger person other than the applicants."

On 7th December, 2022 the matter came for hearing and the parties appeared through their advocates. The Respondents enjoyed the legal service of Mr. Hemed Mkomwa and Mr. Daniel Makala learned State Attorneys from the Office of the Solicitor General and Applicants through Mr. James Clement Mwakalosi learned counsel. This court directed the parties to argue the preliminary objection first before reverting to the application itself. The preliminary objection was orally argued.

Amplifying what the preliminary objection is all about, the Mr. Makala submitted that, the affidavit in support of the chamber summons was sworn and verified by Mr. James Clement Mwakalosi learned counsel who is not party to this case. He submitted that, this is in contravention of **Order XIX Rule 3(1) of the civil Procedure Code, Cap.33 R.E.2019**. The Order provides that;

*"Affidavits shall be confined to such facts as **the 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. (Emphasis is mine)*

Mr. Makala submitted that as per the cited provision of law the person to swear an affidavit must be personally aware of the facts he is deposing to, otherwise the same will be legally not acceptable, thus contravening the above cited provision. He submitted that, in the verification clause, the deponent indicated that, what he stated in paragraphs;1,2,3,4 and 5 of the

affidavit are based on information supplied to him by the applicants. The affidavit, therefore, is in contravention of the above cited provision which requires affidavit to be sworn by person with personal knowledge of the facts. Finally, he referred this court to the case of **Lalago Cotton Ginnery and Oil Mills Company Ltd Versus the Loans and Advances Realization Trust (LART)**, Civil Application No. 80 of 2002 and quoted that;

"It is obvious therefore that an affidavit or counter affidavit which contains hearsay statement or argument instead of facts is incurably defective."

Mr. Hemed State Attorney shared the view of Mr. Makala and added that, the cited provision allows another person to swear but grounds for so doing must be stated, which is not the case here. He thus prayed the application to be struck out.

In reply thereto, Mr. James Clement Mwakalosi learned counsel admitted to existence of the pointed out legal principles by the respondents and conceded that paragraphs; 1, 2, 3, 4, and 5 are offensive, therefore, asked the court to expunge the same from affidavit as it was directed in the case of **Lalago cited** herein above. He argued that, striking out such paragraphs leaves the affidavit intact and the court can still act on the remaining paragraphs, that is to say paragraphs; 6, 7, 8, 9 and 10 of the affidavit. Finally, prayed that in the interest of justice this preliminary objection be overruled and application be determined on merits.

Mr. Hemed learned State Attorney by way of rejoinder submitted that, since Mr. James Clement Mwakalosi learned counsel conceded and asked this

court to expunge the offensive paragraphs; 1, 2, 3, 4 and 5 of the affidavit then there is no affidavit in support of the application, he thus asked the court to struck out the application with cost.

After analysis of what the application is all about and submissions for and against, this court remains with a question, of ***whether the present application is competent before this court.***

It is this court's observation that, ***one***, the application is supported by affidavit sworn by Mr. James Clement Mwakalosi learned counsel for the applicant, ***two***, the applicants did not swear an affidavit in support of the application, ***three***, the affidavit sworn by Mr. James Clement Mwakalosi mention other persons (applicants) to be the source of information, ***four***, the supplier of information to Mr. James Clement Mwakalosi did not swear affidavits, ***five***, Mr. James Clement Mwakalosi information is hearsay, ***six***, the facts deponed by the Mr. James Clement Mwakalosi are not from his personal knowledge capable of being proved by himself, ***seven***, Mr. James Clement Mwakalosi's facts are not from conduct of this case before as such he is a stranger to all the facts he attempted to swear.

As previously stated, the legal principles tinted herein will now be at usage. Based on the principles in the afore cited cases of;

1. Uganda Versus Commissioner of Prisons, Ex-parte Matovu [1966] EA 514,
2. Juma Busiga Versus Zonal Manager TPC (Mbeya), Civil Application No 8 2004
3. Sabena Technics Dar Limited Versus Michael J. Luwunzu,
4. Benedict Kimwaga v. Principal Secretary Ministry of Health,

5. NBC Ltd Versus Superdoll Trailer Manufacturing Company Ltd,

6. Franconia Investments Ltd Versus Tib Development Bank Ltd

7. Lalago Cotton Ginnery and Oil Mills Company Ltd Versus The Loans

and Advances Realization Trust (LART)

8. Tanzania Breweries Limited Versus Herman Bildad Minja.

It is with no iota of doubt that, the Mr. James Clement Mwakalosi learned counsel for the applicants had no qualification to swear an affidavit in support of the present application for reasons that, **one**, the facts deposed are not from the learned counsel's personal knowledge as required by the **Order XIX Rule 3(1) of the Civil Procedure Code**, **two**, all the deposed facts are hearsay, thus inadmissible in law, **three**, the originators of information contained in the affidavit did not swear affidavit to abolish the hearsay information.

As to the proposal by Mr. James Clement Mwakalosi learned counsel that, this court be pleased to proceed with the matter based on other remaining paragraphs, I am of the settled view that, the same do not hold water that; **one**, paragraphs 6, 7 and 8 of the affidavit are on issuance of ninety (90) days notice and serving to the respondents, nothing more offered, **two**, paragraph 9 of the affidavit is on the issue of eviction. This fact is no way within Mr. James Clement Mwakalosi's personal knowledge but sourced from the applicants, if any, thus, hearsay and untenable in law, **three**, paragraph 10 of the affidavit raises issues of irreparable loss which is a none starter at this stage, as what is before me is the competence of the application. Issues of existence of irreparable loss fall within the merits of the application itself being one of the factors for consideration, thus prematurely raised.

Having so said, it is my settled view that, this application is supported by a defective affidavit sworn by person with no legal blessing to do so, thence cannot withstand in any way. As such, the application is incompetent for being supported by a defective affidavit. I accordingly hold so.

In obedience to our stare decisis and in consideration of defectiveness of the application before me as stated herein above, this court finds and rule that, justice and law are inseparable. One cannot achieve justice outside the legal parameters. This court cannot sacrifice law for the sake doing what is suggested by the learned counsel that, this court should look for justice not irregularities arising from non-compliance of procedural law. Justice is well pursued and secured by all people through no one's road called "Law". It goes without saying, therefore that, permitting people to seek justice in disregard to law for the sake of justice is to allow absurdity to stand on, thus creating predominant impression of unpredictability, uncertainty, inconsistency of courts decisions.

Further, doing otherwise, will prejudice justice and law itself. If one misses such road, then, he has to go back to the drawing table and follow the right way to pursue for his rights.

Consequently, this application is hereby struck out with cost for being incompetently preferred before this court.

It is so ordered

DATED at MOROGORO this 15th December, 2022




G.P. MALATA

JUDGE

15/12/2022