THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
MISC. LAND APPLICATION NO. 05 OF 2022

(Originating from Land Application No. 227 of 2019, District Land and Housing Tribunal for Mbeya at Mbeya)

CATHERINE AYUBU KIJINGO (Suing as administratix

of the estate of Charles Waya).....APPLICANT

VERSUS

MSAFIRI MLOWES.....1ST RESPONDENT
EZEKIEL MGOGO.....2ND RESPONDENT
CHESCO CHOGA.....3RD RESPONDENT
DOTO MAJI YA PWANI.....4TH RESPONDENT

RULING

Date: 17th July & 17th August, 2022

KARAYEMAHA, J

This ruling is in respect of an application, preferred by way of a Chamber Summons, filed by the applicant, substantively praying for extension of time within which to lodge an appeal against the decision of the District Land Housing Tribunal (DLHT) for Mbeya at Mbeya in Land Application No. 227 of 2019. The application is supported by an affidavit sworn by Catherine Ayubu Kijingo, the Applicant, setting out grounds on which the prayer for extension of time is based.

This application comes as a second attempt, following an order of the Court, striking out the previous application (Misc. Land Application No. 103 of 2020) on 29/11/2021 (Ngunyale, J.) in view of failure by the applicant to comply with the court's order to produce letters of administration containing three names.

On the delay in taking action within the time prescription, she avers in her sworn deposition, that she stepped in her late husband's shoes who, on being aggrieved by the DLHT's decision desired to appeal but was prevented by a failure by the DLHT to supply him with a certified copy of ruling delivered on 19/6/2020 and applied to be supplied through a letter. She contends further that certified copy of ruling was certified on 10/09/2020 and received it on 17/09/2020 but was already time barred. On 10/11/2020 filed an application for extension of time but was struck out for being incompetent on 29/11/2021. She was of the view that failure to file the application on time was not due to her husband's negligence but a delay to be supplied with the copy of ruling which was beyond his control. Another reason for failing to file the instant application was, in view of her deposition, delay to amend the letter of administration of estate by the Primary Court and

a technical delay due to prosecuting another application which was struck out.

The respondent resisted the application. Through a counter-affidavit by the respondents themselves, they were quite categorical that the applicant slept over her right and no explanation is offered to warrant grant of her application.

On 09/06/2022 when the matter came for hearing, the counsel for the parties prayed to have the matter argued by way of written submissions, a prayer which was acceded to by the Court. A schedule for filing the submissions was complied with by the parties. The applicant was represented by Mr. Emily Ernest Mwamboneke, learned counsel whereas the respondents were represented by Mr. Emmanuel Clarence, learned Counsel.

As the parties submitted in respect of the substantive aspects of the application, Mr. Clarence, the respondents' counsel, raised an issue which touches on the competency of the application. The learned counsel contended that the affidavit in support of the application is based on hearsay information because the applicant was not a part to Land Application No. 227 of 2019 and Misc. Land Application No. 103 of 2020. He was, therefore, of the view that the applicant ought to disclose

the source of information as per the requirement under Order XIX Rule 3 (1) of the Civil Procedure Code (Cap. 33 R.E. 2019) (hereinafter the CPC). Mr. Clarence submitted further that the applicant was to confine her affidavit to the facts of her personal knowledge. The learned Counsel doubted the applicant's depositions under paragraphs 3, 4, 5, 6 and 7 with regard to Land Application No. 227 of 2019 and Misc. Land Application No. 103 of 2020 which were prosecuted by the late Charles Waya as the applicant. The respondents' counsel was convinced that the verification betrayed the applicant because they were not within the applicant's knowledge.

In his rejoinder, Mr. Mwamboneke termed the point of law raised as a technic to obstruct the court from administering justice by calling it to be tied up with unnecessary technicalities flowing from the respondents' counsel's opinion. He said that the mode the learned counsel raised the point of preliminary objection was unacceptable because he did not raise it while filing the counter affidavit hence bound by his pleadings. The applicant's learned counsel rejoined further that the objection raised does not qualify to be one because it needs evidence to prove that the applicant has knowledge envisaged in the case of **Mukisa Biscuit Manufacturing Company vs. West End**

Distributors Limited 1969 EA, **COTTWO (T) Ottu Union and another vs. Hon. Idd Simba Minister of Industries and Trade and others** [2002] TLR 88.

Given the potential decisive nature of the raised point of preliminary objection, it behooves me to first deal with it, knowing that tenability or otherwise of it decides the question of whether or not the affidavit is defective. The question now is whether the applicant's affidavit is defective, if so, what are the consequences of such abnormality.

Before going into the gist of the preliminary objection, let me first determine whether or not it is a point of law warranting this court to proceed accordingly. A general rule, as rightly argued by Mr. Mwamboneke, is that a raised point of preliminary objection must be on a point of law which if argued as such will tend to dispose of the suit without any need to call for evidence to prove that fact. See the case of **Kelvin Rajabu Ungele and 3 others vs. Republic** Misc. Economic Cause No. 3 of 2018 (HC-Mtwara) and **Karata Ernest and others vs. Attorney General,** Civil Revision No. 10 of 2010 (both unreported). Equally, in the famous case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] EA 696, cited by Mr.

Mwamboneke, His Lordship Law, J. (as he then was) stated at page 700:

> *"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arise by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit..."*

The fact gleaned there from is that a preliminary objection should be based on pleadings and attachments before the court and should not depend on any other evidence.

Marrying the cerebrated principle with the current matter, the raised preliminary objection is that the affidavit is incurably defective for containing hearsay information. While Mr. Clarence seems to harbour the feelings that the defect is apparent on the affidavit, Mr. Mwamboneke is contented that evidence is required to prove these allegations. On my part a keen discussion and proper consideration of the affidavit in relation to this point, may definitely lead to the finality of this matter. A defective affidavit crumbles the application because it is by itself the evidence. It is plain from the affidavit that the applicant is referring to what Charles Waya did before she stepped into his shoes as an administratix. Nevertheless, the verification indicates that what is

stated in the 1st to 8th paragraphs are true according to her own knowledge. We do not need evidence to prove the fact that from paragraphs 3 to 7 of the affidavit the applicant was explaining what the late Charles Waya was doing. In view thereof, I am fully satisfied that the preliminary objection is a point of law and therefore, I can proceed to determine it accordingly.

Before that, I wish to restate the principles guiding affidavits which have been emphasized in various decisions of this Court and Court of Appeal and statutory law.

The law on what the affidavit should contain is well settled. Order XIX Rule 3(1) of the CPC says it all 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 supplied]*

In **Uganda vs. Commissioner of Prisons, Exparte Matovu** [1966] 1EA514, the court had similar position and stated that:

> *"As a 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 either of ***his own knowledge or from information which he believes to be true.***"

Generally, the affidavit must contain those matters to which the deponent would have deposed orally as a witness in court in the case. The rule enshrined under Order XIX Rule 3(1) ensures that the rule of evidence that hearsay evidence is generally not admissible is not circumvented by parties by using affidavits whose contents are not within the deponent's knowledge to prove. The only exception to this rule is in the evidence of interlocutory applications. In such applications as rightly observed by Mr. Clarence, matters of belief are allowed.

In the matter at hand, the impugned paragraphs are paragraphs 3, 4, 5, 6, and 7 of the applicant's affidavit which, for easy reference, I take the liberty to reproduce hereunder:

"*3. That, the late Charles Waya was the Applicant in application No. 227 of 2019 filed in the DLHT for Mbeya, being aggrieved from the decision he filed a letter requesting copies of ruling and order.*

4. That, the ruling to that effect was delivered on 19/6/2020 and copies of the said ruling in favour of the respondents was certified on 10/09/2020 and were availed to the late Charles Waya on 17/09/2020.

5. *That, at the time he received the copy of ruling in application No. 227 of 2019 the time frame for appeal has (sic) already lapsed.*
6. *That, the applicant filed the application for extension of time on 10/11/2021 but the same was struck out for being incompetent on 29/11/2021 by Hon. Ngunyale, J.*
7. *That the failure to appeal on time was not due to his negligence but delay on being supplied with copy of ruling which was beyond his control, delay on amendment of letter of administration by primary court and technical delay as the applicant was prosecuting another application before high court which was struck out."*

The deponent verified that what is stated in these paragraphs are true according to her own knowledge. I seriously doubt. Questions that come to the fore at this juncture are **first,** how did she know the existence of Land Application N0. 227 of 2019, **second,** how did she know the date the ruling was delivered and when Charles Waya applied via a letter a copy of the ruling. The failure to know is exhibited by her failure to get the application letter requesting the copy of ruling and the date the letter was written. **Third,** how did she know that the applicant filed Misc. Land Application No. 103 of 2020 on 10/11/2021 and was struck out on 29/11/2021. This, notwithstanding, I took a judicial notice

and called the record of Misc. Land Application No. 103 of 2021 to satisfy myself on the date it was filed. The results are that it was filed on 21/09/2020. This indicates that the applicant is not well versed with the date it was filed and maybe she got insufficient information. It is undisputed that the applicant could not orally base her testimony on these facts without disclosing where she got the information. Else, her testimony would be hearsay and would not escape the impact of being expunged. Likewise in the present application, the applicant had to disclose the source of information. As rightly submitted by Mr. Clarence, the applicant was not a party to the above mentioned applications filed and prosecuted by the late Charles Waya, she could not gain an automatic knowledge of what took place by a mere fact that she was appointed adminitratix of his estate or being his wife. She was legally constrained to disclose the source of that knowledge/information.

The vexing question now is what is legal effect on the affidavit which contains hearsay evidence hence contravening the clear provisions of section Order XIX Rule 3 (1) of the CPC. It follows that the inevitable conclusion is as spelt out in the case **Phantom Modern Transport (1985) Limited v D. T. Dobie (Tanzania) Limited**, Civil References No. 15 of 2001 and 3 of 2005 (unreported) at page 6 which

quoted with approval the general rule of practice and procedure on affidavits stated in **Uganda vs. Commissioner of Prison ex parte Matovu** (supra) at page 520, thus:

> *"Where defects in an affidavit are inconsequential, those defective paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it. If, however, substantive parts of the affidavit are defective, it cannot be amended in the sense of striking off the offensive parts and substituting thereof correct averments in the same affidavit."*

My take of the above quoted verbum is that where the affidavit contains offensive paragraphs but the same are not substantive parts of the affidavit, they can be expunged or overlooked leaving the substantive parts intact. Since the law permits offensive paragraphs to be expunged from the affidavit, I, therefore, hold that paragraphs 3, 4, 5, 6 and 7 form the applicant's affidavit are expunged.

The settled principle is that after expunging the offensive paragraphs, an application can remain standing if the rest of the paragraphs have strong roots to hold the application. See; **Stanbic Bank Tanzania Limited vs. Kagera Sugar Limited,** Civil Application No. 57 of 2007; **Phantom Modern Transport (1985) Limited**

(supra) and **Peter Lucas vs. Pili Hussein and another,** Misc. Civil Application No. 33 of 3003 (all unreported).

I have closely examined the remaining paragraphs in the applicant's affidavit. A clear picture I get is that the gist of her application is contained under the expunged paragraphs. The remaining ones are not substantial to hold the application.

The applicant's learned counsel has pleaded this court not to be bound by unnecessary technicality. The learned counsel seems to invite this court to invoke the overriding objectives. This principle reminds this Court to avoid technicalities in dispensing justice but in my view cannot apply it the circumstances of this matter considering the gravity of the contravention which goes to the root of the matter. The Court of Appeal of Tanzania observed in the case of **Mondorosi Village Council & others vs. TBL & 4 others,** Civil Appeal No. 66 of 2017 (unreported) that:

> *"Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case. This can be gleaned from the objects and reasons of introducing the principle under section 3 of the Appellate Jurisdiction Act*

[CAP 141 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018, which enjoins the courts to do away with technicalities and instead, should determine cases justly."

In the upshot, after expunging paragraphs 3, 4, 5, 6 and 7 of the applicant's supporting affidavit which touch the root of the application, I find the application lacking legs to stand upon and the overriding objective cannot be safely invoked.

Accordingly, I uphold the respondent's objection and I strike out the application with costs.

It is so ordered.

DATED at **MBEYA** this **17th** day of **August, 2022**

J. M. Karayemaha
JUDGE