

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISCELLANEOUS CIVIL CAUSE NO. 3 OF 2022

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS
OF CERTIORARI AND MANDAMUS AGAINST THE DECISION OF THE
DISTRICT COUNCIL OF MOMBA DATED 17TH JANUARY 2022**

AND

IN THE MATTER OF THE VILLAGE LAND ACT, CAP 114

AND

**IN THE MATTER OF THE LAW REFORM (FATAL ACCIDENTS AND
MISCELLANEOUS PROVISIONS) ACT CAP 310 R. E 2019**

BETWEEN

**HANNA JUMA SIMPASSA (Administratrix of the Estate of the late Eliachim
Jackson Simpassa) 1st APPLICANT**

**EMMANUEL SIMPASSA (Administratrix of the Estate of the late Eliachim
Jackson Simpassa) 2nd APPLICANT**

VERSUS

DISTRICT EXECUTIVE DIRECTOR OF MOMBA 1ST RESPONDENT

MOMBA DISTRICT COUNCIL 2ND RESPONDENT

THE VILLAGE COUNCIL OF MOMBA 3RD RESPONDENT

THE HON. ATTORNEY GENERAL..... 4TH RESPONDENT

RULING

Date of last order: 10/06/2022

Date of ruling: 12/07/2022

NGUNYALE, J.

The applicants filed the present application seeking leave of the Court to apply for an order of certiorari and mandamus in order to move the Court to quash the decisions of the 1st and 2nd respondents' revoking the



customary right of occupancy of the late ELIACHIM JACKSON SIMPASSA with registration No. 13MBZ/972 issued by the respondents in 2006. Before the application was heard on merit the respondents raised a preliminary objection on the points of law to the effect that; -

- (a) The affidavit of the 1st applicant in support of the application is fatally defective for containing hearsay statement.*
- (b) That the application is incompetent for non-compliance with Rule 5 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedures and Fees) Rules, 2004.*
- (c) That the statement by the 1st applicant is incurably defective for contravening the provision of Rule 5 (2) (a) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedures and Fees) Rules, 2014.*

Basing on the strictly rule in court practice, a preliminary objection was to be disposed first. By consent the parties disposed the preliminary objection by written submission, they complied timely to the scheduling orders of filing their respective submissions.

The respondents under the service of Mr. Joseph E. Tibaijuka learned State Attorney dropped the second point of objection and they argued the first and second grounds of objection separately. The learned State Attorney submitted that the affidavit of the 1st respondent specifically paragraph 10.0, 11. 0 and 12. 0 violated principles governing affidavits because they contain opinions and hearsay evidence from the legal Counsel one Gloria Simpassa. He stated that it is also imperative to note

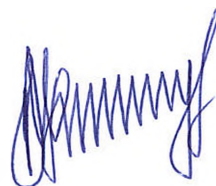
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that, despite the deponent's reliance on the statement given by their learned Counsel, there is no affidavit of the said counsel to support the application.

Mr. Tibaijuka went on submitting that the rules governing application for leave to file judicial review that is The Law Reform (Fatal Accidents and Miscellaneous Provision) (Judicial Review Procedure and Fees) Rules 2014 is silent on the content of the affidavit in support of the application. However, Rule 17 of the said rules allows applicability of the practice and procedure of the High Court in case of *lacuna* in the Rules. Therefore, as a matter of law and practice before the High Court, affidavits are regulated by Order XIX Rule 3 (1) and (2) of the Civil Procedure Code Cap 33 R. E 2019 which provides;

"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 beliefs may be admitted: provided that, the grounds thereof are stated."

It is trite law that matters of hearsay and opinion are not accepted in evidence and that an affidavit being a substitute of oral evidence is bound not to include opinion and hearsay statements as per Order XIX Rule 3 (2) of the Civil Procedure Code. This position was articulated in the case of **Uganda versus Commissioner of Prisons, *Ex parte* Matovu** [1966] 1 EA 514 where it was held; -



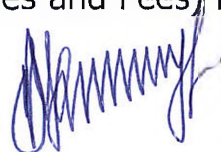
"as a general rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of own personal knowledge or from information which he believes to be true"

The respondents pointed out that paragraph 10.0 and 12.0 of the affidavit contains hearsay statements and present the personal opinion of Gloria Simpassa. The facts are not based on the personal knowledge of the deponent therein therefore she cannot personally verify them. Such paragraphs which contain hearsay and opinion legally should be expunged from the affidavit. In the case of **Sabena Technics Dar Limited versus Michael J. Luwuzu**, Civil Application No. 451/18 of 2020 Court of Appeal of Tanzania at DSM (Unreported) at page 11 the Court said; -

"... an affidavit which mentions another person is hearsay unless that other person swears as well, likewise in Benedict Kimwaga case it was observed that an affidavit mentioned another person's, that other person must swear an affidavit, otherwise it will be hearsay ..."

It was the view of the respondents that in absence of the affidavit of the applicants legal Counsel to support the contents of paragraph 10.0, 11.0 and 12.0 the contents of the same are hearsay.

About the third ground of the preliminary objection that the statement of the applicant is incurably defective for contravening the provision of Rule 5 (2), (a) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedures and Fees) Rules, 2014. The very



provision provides for mandatory requirement of the statement to provide name and description of the applicant. He submitted that in the statement of the applicant in this application, there is no any paragraph which provide name and description of the applicant. Hence, they do not know the capacity of the applicant if he sued in the capacity of the individual litigant, body corporate or represent other claimants.

The respondents cited the case of **The Registered Trustees of Democratic party versus The Registrar of Political Parties & AG**, Miscellaneous Cause No. 92 of 2017, High Court of Tanzania at DSM (unreported) at page 7, the Court did strike out the application, and one of the grounds was that, there is no proper name and description of the applicant as required under Rule 5 (2) (a) of GN No. 324 of 2014.

The applicants strongly contested the above position submitted by the respondents in support of the preliminary objections. On the first ground of objection the applicants through the service of Gloria Eliachim Simpasa leaned Advocate submitted that it is a settled law that where an affidavit is made on information it should not be acted upon unless the source of that information is disclosed. She referred the CAT decision in **Salima Vuai Fom versus Registrar of Cooperative Societies and 3 Others** [1995] TLR 75 Court of Appeal at Zanzibar where the Court held as follows; -


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*"(i) where an affidavit is made on information, it should not be acted upon by any court unless the source of information is specified: (ii) as nowhere in the affidavit, either as a whole or in any particular paragraph, is it stated that the facts deposed to or any of them, and if so which ones, are true to the deponent's knowledge, or **as advised by his advocate** or are true to his information and belief, the affidavit was defective and incompetent"*

He submitted that it is legally accepted the deponent to be advised by advocate facts which a lay person is incognizant of unless he is advised by his advocate. The advice to the client is a statutory duty imposed on the advocate by Regulation 16 of the Advocates (Professional Conduct and Etiquette) Regulations GN No. 118 of 2018. Legal opinion does not amount to material evidence. Regulation 64 of the Advocates (Professional Conduct and Etiquette) Regulations GN No. 118 of 2018, the regulation reads as follows: -

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

In the alternative the applicant conceded to the position submitted by the respondent that the effect of defective paragraphs of the affidavit is to be expunged. The applicants were of the view that if the content of paragraph 10.0, 11.0 and 12.0 of the first applicant affidavit will be found to be defective the remaining parts of the affidavit are still worth of being adjudicated upon by the Court. The Court should avoid being detained by matters of technicalities.

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On the third ground of preliminary objection that the statement of the applicant contravening **Rule 5 (2) (a) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Judicial Review Procedure and Fees) Rules, 2014** the applicant submitted that the rule provides that the application for leave shall be made *ex parte* in chamber and be accompanied by a statement providing for the name and description of the applicant. The applicants insisted that the respondents have misconstrued the provision and clearly have not read the statement of the 1st applicant which is collaborated by the 2nd applicant. The first applicant statement in the opening sentence she stated; -

"I HANNNA JUMA SIMPASSA, Adult, Christian and Resident of Mbeya Tanzania DO HEREBY TAKE OATH and STATE the following."

Under paragraph 1.0 of the affidavit, she states; -

"That I am one of the administrators of the estate of the late Eliachim Jackson Simpasa granted to me by the primary Court of Kawe on the 25th January 2021 in administration Cause No. M. I. T 2/MM 13 of 2021 and hence have full knowledge of facts here under pinning to this application"

The applicant submitted that she had clearly established her capacity to bring the present application as the applicant.

In the end the applicants submitted that they have complied with the substantial part of the Rules as alluded above and hence the preliminary



objection raised by the respondents be dismissed for lack of merit and proceed to determine the application with merits.

In rejoinder the respondents submitted that when the Court will expunge the paragraphs No. 10.0, 11.0 and 12.0 of the applicant's affidavit this application cannot stand at all. Those paragraphs contain the issue of illegality, breach of principles of natural justice especially a right to be heard, error of law which is essential grounds for the court to interfere with the decision of the public authorities and investigate on the proceedings and that is judicial review. He cited the case of **Sanai Murumbe and Another vs Muhere Chacha** [1990] TLR 54. The application for leave to file judicial review cannot stand as there was no illegality, breach of natural justice and error of law in the decision of the respondents. The respondents prayed the Court to struck out suit.

Having in mind the content of the affidavit and the rival submission of the parties it is for the Court to examine the contentious issues and rule upon as to whether the objection has merit or not.

In the first ground of objection the respondents complaint is that paragraph 10.0, 11.0 and 12.00 of the affidavit of the first applicant are defective for containing hearsay statements. For easy of reference, I wish to quote the very paragraphs; -

10.0 That I placed the abjure decision of the 1st respondent for review to my attorney Gloria Simpasa and has advised that the said decision is illegal, unreasonable and that it detracted considerably from procedural fairness of acquiring and revocation of lands in Tanzania.

11.0 That I was further advised by Attorney Gloria Simpasa that the decision of the 1st respondent was arrived at without giving me any opportunity to be heard before the said decision was rendered against me.

12.0 That I am further advised by Attorney Gloria Simpasa that in reaching the decision to revoke the certificate of customary right of occupancy the 1st respondent misconstrued the law and the provision of S. 8 of the Village Land Act No. 5 of 1999 and Regulation 76 of the Village Land Regulation of 2001.

The legal position is now settled that an affidavit which is to be used as evidence before the court should not contain extraneous matters but facts only. The general rule of practice and procedure on affidavits was stated in **Uganda v. Commissioner of Prison Exparte Matovu** [1966] E.A 574 and was restated in **Phantom Modern Transport (1985) Ltd v. DT Dobie (TZ) Ltd**, Civil References Nos. 15 of 2001 and 3 of 2002 (unreported) as follows;

'As a general rule of practice and procedure on affidavit for use in Court being a substitute for oral evidence, it should only contain statement to which the witness disposes either of his own knowledge or such an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion.'

Mr. Tibaijka submitted that paragraph 10.0, 11.0, and 12.0 of the affidavit contain hearsay without more while the applicant counsel replied that source of information is disclosed in the affidavit. In this application the



deponent has verified information which came from his advocate to which he believes to be true which is allowable by the law. With respect to Mr. Tibaijuka's submission it is not in every circumstance that whenever information in an affidavit is based on information of another person, that person should also depone to that effect. After making a careful perusal of the three paragraphs of the affidavit, the deponent has clearly disclosed in the verification clause which facts are true based on his knowledge and those based on his belief. Therefore, the objection is baseless.

In the second objection it was submitted that the applicant has omitted to include description in the affidavit while the applicant was of the view that the description has been shown in the introductory part of the affidavit. I have weighed rival arguments as against the law, rule 5(2)(a) of the Rules reads;

5(2) An application for leave under sub-rule (1) shall be made ex parte to a judge in chambers and be accompanied by-

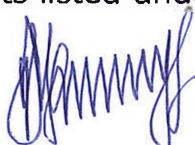
(a) a statement providing for the name and description of the applicant;

(b) the relief sought;

(c) the grounds on which the relief is sought; and

(d) affidavits verifying the facts relied on.

The law provides four documents to accompany the application. In this application the application is accompanied only by the affidavits of the applicants without any other documents listed under rule 5 (2) (a) of the



Rules. For clarity application for leave has to be substantially in 'FORM A' found at the first schedule to the Rules. After the orders sought in 'FORM A' provides as follows;

This application is brought at the instance of and is supported by the statement of the applicant and the affidavit(s) of

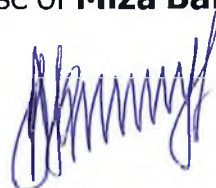
Reading the entire Rules it gives wider understanding as to what the statement is meant. For instance, rule 8(1)(a) of the Rules provides;

'8 (1) where a leave to apply for judicial review has been granted, the application shall be made:-

(a) by way of chamber summons supported by an affidavit and the statement in respect of which leave was granted.'

From my understanding leave is not granted on the averments found in the affidavit rather statement in which reliefs and ground upon which reliefs is sought will have to be enunciated. The purpose of the affidavit to the application for leave to file application for judicial review is to verify facts relied on.

In the instance matter the application filed by the applicants is accompanied only by the affidavits of the applicants which as I have demonstrated above have omitted to include the important document statement thereby rendering the application incompetent. I am persuaded by the judgment of this court in the case of **Miza Bakari Haji & 7 Others**



v the Clerk of the National Assembly & 9 Others, Misc. Civil Application No. 8 of 2018, HC at Dar es Salaam (Unreported) where Mwandambo, J as he then was, where he held that;

'... In the circumstances, since the application is not accompanied by a statement as required by Rule 5 (2)(a) of the Rules read together with form 'A' of the schedule to the Rules, I would agree with Mr. Ngole, learned Advocate that the omission is fatal rendering the application incompetent....'

In the end result, I find the second preliminary objection meritorious and do hereby strike out the application for being incompetent. Considering the circumstance of the matter I make no order as to costs.

DATED at MBEYA this 12th July, 2022




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D.P. Ngunyale
Judge