THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

MISC. LAND APPLICATION NO. 14 OF 2022

(From Land Appeal No. 2 of 2021, in the High Court of Tanzania, at Iringa).

1. ABBAS ANTHONY KILUMULE.....1ST APPLICANT

2. DEREMSI MSENA..... .....2ND APPLICANT

Versus;

FELOMENA PETER MAWATA@ TALIYAMALE..... RESPONDENT

RULING

29th August & 23 November, 2022.

UTAMWA, J.

The applicants herein, ABBAS ANTONY KILUMULE and DEREMSI MSENA (First and second applicant respectively), filed this application by way of Chamber Summons under sections 47(2) of the Land Disputes Courts Act, Cap. 216 RE. 2019 (The LADCA) and 5(1) (c) of the Appellate

Jurisdiction Act, Cap. 141 RE. 2019. The application was supported by an affidavit of Mr. Jonasi Burton Kajiba, the learned applicant's counsel. It wa seeking the following orders:

i. That, this Honourable Court may be pleased to grant leave to the applicant to appeal to the Court of Appeal of Tanzania (The CAT).
ii. Costs of this application to follow the event.
iii. Any other reliefs the court may deem fit and just to order.

The affidavit deponed that, the applicants were aggrieved by the judgement (Impugned judgment) of this court delivered by Hon. Mlyambina, J, on 15th March 2022 (In Land Appeal No. 2 of 2021). They filed a Notice of Appeal to the CAT. According to paragraph 5 of the affidavit, the applicants intend to move the CAT on the following issues: whether it was proper for this court to decide in favour of the respondent whereas the evidence tendered was hearsay, whether it was proper for this court to disregard the principle that a court should draw an adverse inference against a party who fails to call a material witness, whether it was proper for this court to hold that the respondent is the lawful owner of the suit property based only on the evidence of existence of graves and whether it was proper for this court to decide in favour of the respondent despite the fact that the respondent did not prove ownership on the balance of probability.

The respondent objected the application by way of counter affidavit sworn by one Mr. Marco Kisakali, the respondent's counsel. It was deponed

in the counter affidavit that, the affidavit does not show which applicant is represented by the advocate who deponed it. It is also stated in the counter affidavit that, the purported grounds of the intended appeal as outlined under paragraph 5 of the affidavit do not raise any issue of general importance or a novel point of law so as to justify the granting of the prayed leave to appeal.

At the hearing of the application, both parties were represented by their respective advocates mentioned above. The application was argued by way of written submissions.

In his written submissions in-chief, the applicant's counsel adopted the contents of his affidavit. He further submitted that, an appeal to the CAT is not automatic. A party has to firstly seek leave of this court as provided for under section 47(2) of the LADCA. This court is vested with discretionary powers to grant the prayed leave. He cited the case of **British Broadcasting Corporation v. Eric Sikujua Ng'maryo, Civil Application No. 138 of 2004** (unreported) to cement his contention. He also argued that, in the present application the main issue is whether the applicant has advanced clear points of law and grounds to warrant this court to grant the application. Paragraph 5 of the applicant's affidavit has met the conditions for this court to grant the leave as outlined in the **British Broadcasting case** (supra). This is so because, there is a substantial question of law and novel point of law worth the consideration by the CAT.

It was also the contention by the advocate for the applicant that, the points of law involved in the impugned judgment include the issue of whether it was proper for this court while evaluating the respondent's evidence to disregard the principle under section 62(1) of the Evidence Act, Cap. 6 RE. 2019. That principle guides that, hearsay is not admissible in law. Another point of law raised by the applicant is the principle developed in **Hemedi Saidi v. Mohamed Mbilu (1984) TLR 113.** He argued further that another point of law for determination by the CAT is whether a mere conclusion of graves in a disputed land is sufficient to prove ownership without collaboration. He also pointed out another issue for determination by the CAT to be whether it was proper for this court to decide in favour of the respondent despite the fact that she did not prove the case on the balance of probabilities.

The applicant's counsel thus, urged this court to determine the merits of the application only and consider whether the conditions to grant leave have been met as it was the position in **Bulyanhulu Gold Mine Limited and Others v. Petrolube (T) Limited and Isa Limited, Civil Application No. 364/16 of 2017** (unreported). He ultimately urged this court to allow his application with costs.

On his part, the advocate for the respondent advanced arguments through his replying written submissions as follows: in the first place, he challenged the affidavit supporting the application. He particularly faulted paragraphs 1, 2, 5 and the verification clause of the affidavit. He argued that, in the above paragraphs the applicants are put in the singular form.

The applicants' affidavit is thus, incompetent as it does not state whether all the applicants are represented by the same advocate. He cited the decision by the CAT in the case of **Registered Trustees of St. Anita's Greenland Schools (T) and 6 others v. Azania Bank Limited, Civil Application No. 168/16 of 2020, CAT at Dar es Salaam** (unreported) to support his contention. He also submitted that, in that precedent, the CAT observed that failure by the applicants to file affidavit or affidavits to cover all of them is fatal to the application.

Alternatively, in reacting against the merits of the application, the respondent's counsel submitted that, the issue in the present application is whether the affidavit in support of the application establishes the points of law of public importance to be determined by the CAT as it was the position in the **British Broadcasting Case** (supra). The points of law contended by the applicant under paragraph 5 of the affidavit are merely points of fact and not of law. Such points only need the determination and evaluation of the evidence adduced before the trial District Land ad Housing Tribunal (The DLHT) from where the matter originated. The CAT therefore, being a second appellate court cannot focus on facts/evidence without genuine reasons.

It was also the contention by the respondent's counsel that, leave to appeal is not automatic. It is granted only where the applicant has established a novel point that needs determination by the CAT. The purpose for leave is to relieve the CAT of unmerited matters and to enable it give adequate attention to cases of true public importance. He cited the

cases of **Upendo Travelers Coach v. Almas Twaha Msuya, Misc. Civil Application No. 3 of 2021, High Court of Tanzania at Iringa** (unreported) and **Faustina Mkuvasa v. Pius Myinga, Misc. Land Application No. 4 of 2022, High Court of Tanzania at Iringa** (unreported) to cement his contention.

The respondent's counsel therefore, urged this court to dismiss the application with costs.

In deciding this matter, I opt to firstly consider the issue on the propriety of the affidavit raised by the respondent's counsel in his replying submissions. This is so because, the issue involves a pure point of law. It thus, has the status of a preliminary objection (PO) since it challenges the competency of the application. It is surprising that the applicants and their counsel did not bother not addressed themselves to the said issue by way of rejoinder submissions or by any other authorised mode.

Admittedly, the said legal issue challenging the competence of the application was raised a bit belatedly at the stage of replying submissions. Nonetheless, it deserves the attention of this court since in our law, a point of law, especially the one touching jurisdiction of court can be raised at any stage of proceedings. A point of law challenging the competence of a matter before a court essentially questions the jurisdiction of the court since courts of law are not entitled to entertain incompetent matters.

Again, courts of law of this land are bound to decide matters before them in accordance with the law and the Constitution of the Untied

Republic of Tanzania, 1977, Cap. 2 RE. 2002 (The Constitution); see the holdings by the CAT in the cases of **Tryphone Elias @ Ryphone Elias and another v. Majaliwa Daudi Mayaya, Civil Appeal No. 186 of 2017, CAT at Mwanza** (unreported) and **Joseph Wasonga Otieno v. Assumpter Nshunju Mshama, Civil Appeal No. 97 of 2016, CAT at Dar es Salaam** (Unreported). See further the old case of **John Magendo v. N. E. Govan (1973) LRT n. 60.** Furthermore, the law guides that, whenever a PO is raised against a matter, such PO must be firstly disposed before the substantive matter is considered on merits.

This court cannot therefore, close its eyes to the submissions raised by the respondent's counsel on the PO. The applicants and their counsel were also thus, supposed to react to such submissions. Nevertheless, they could not reply to the same though they had an opportunity to do so by way of rejoinder submissions. I thus, find that the applicant's deliberately opted not to react again the PO and they decided not to exercise their right to be heard. I will therefore, proceed to determine the issue on the PO by considering the submissions by respondents' counsel only.

The issue for determination at this stage is thus, *whether the application at hand is competent owing to the weaknesses in the affidavit pointed out by the respondent's counsel in his replying submissions.* Indeed, it is common knowledge that, in the present application, there are two applicants. The record also supports this fact. Nevertheless, the affidavit supporting the application shows that the advocate who deponed the affidavit was only representing one applicant. It does not indicate that he

represented both applicants as correctly contended by the respondent's counsel. This fact is conspicuously shown under the first and second paragraphs of the affidavit which read thus, and I reproduce them verbatim for a readymade reference:

> "1. That I am an advocate of High Court and Courts Subordinate thereto **duly instructed by the applicant to represent him in this matter** hence conversant with the facts I am about to depose hereunder.
>
> 2. That the **applicant** being aggrieved with the judgment of this court...," (Bold emphasis provided).

From the above quoted paragraphs of the affidavit, it is clear that the affidavit was deponed on behalf of only one applicant. However, it is not clearly shown as to which applicant between the two, was related to the affidavit. Again, under paragraph 3 of the affidavit it is indicated that, both applicants were aggrieved by the impugned judgment and filed the notice of appeal to the CAT. Moreover, the verification clause of the affidavit shows that the deponent-advocate represents only one applicant. It is therefore, doubtful as to whether the advocate swore the affidavit on behalf of both applicants.

Furthermore, the verification clause shows that, the leaned counsel deponed the affidavit on the basis of his own knowledge. He did not however, state in the body of the affidavit or anywhere that he had represented the applicants in the previous proceedings so that this court could believe that he had the requisite own knowledge to depone the affidavit. Otherwise, according to paragraph 1 of the affidavit quoted above, it is believable that the learned counsel deponed the affidavit on

the strength of the information from one of the applicants. Nonetheless, he did not indicate so in the verification clause and did not indicate the actual source of such information, i.e. the actual applicant who had informed him of the deponed facts.

Owing to the above reasons, I agree with the learned counsel for the respondent that, the affidavit at issue was not authentic enough to be relied upon by this court for its ambiguity. It is more so because, in law, an affidavit is vital document. It takes place of oral evidence; see the decisions by the CAT in **Phantom Modern Transport (1985) Limited v. D.T Dobie (Tanzania) Limited, Civil Reference No. 15 of 2001 and 3 of 2002, CAT at Dar es Salaam** (unreported) and **Juma S. Busiyah v. The Zonal Manager, (South) Tanzania Post Corporation, Civil Application No. 8 of 2004, CAT at Mbeya** (unreported). Affidavits supporting applications, like the one under consideration, must therefore, be not only clear, but also authentic.

In my further opinion, the irregularities in the affidavit pointed out above cannot be cured by the principle of overriding objective. This principle has been underscored in our written laws. It essentially requires courts to deal with cases justly, speedily and have regard to substantive justice as opposed to procedural technicalities. The principle was also underscored by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported) and many other decisions by the same court.

Nevertheless, it cannot be considered that the principle of overriding objective suppresses other important principles that were also intended to promote justice. The holding by the same CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported) supports this particular view. Indeed, this precedent is an authority that, the principle of overriding objective does not operate mechanically to save each and every blunder committed by parties to court proceedings or by courts of law themselves.

The reasons for my above finding that the error in the affidavit supporting the present application cannot be cured by the principle of overriding objective are as follows: in the first place, its effect is serious. This is because, it renders the affidavit ambiguous since it does not clearly show that the deponent was representing both applicants. In fact, even if it is presumed (without deciding) that the deponent-advocate was representing only one applicant, that presumption will not advance the applicant's case for an inch. This is because, according to the contents of the affidavit it is not clear on behalf of which applicant the affidavit was sworn. Furthermore, it is doubtful as shown earlier, as to how the deponent-advocate knew the facts deponed into the affidavit since the circumstances of the matter do not support the fact that he had the ability to depone the facts basing on his own knowledge as indicated in the verification clause. It is thus, unsafe for this court to rely upon such ambiguous and uncertain affidavit. Otherwise, injustice may be occasioned.

Owing to the above reasons, I agree with the submissions by the learned counsel for the respondent. I accordingly find that, the affidavit supporting the application at hand is incurably defective. I consequently expunged it from the record.

Having held that the affidavit was incurably defective, the application at hand remains unsupported. It is trite law that every application must be by way of chamber summons supported by an affidavit. An application which lacks a supporting affidavit is thus, rendered incompetent. I therefore, answer the issue posed above negatively that, *the application at hand is competent owing to the weaknesses in the affidavit pointed out by the respondent's counsel in his replying submissions.*

It is my concerted opinion that, the only legal remedy for an incompetent matter is to strike it out. Due to this finding, I find it needless to test the merits of the application for being incompetent. Courts of law not mandated to entertain incompetent matters as I observed earlier.

I therefore, make the following orders: I strike out the present application. If the applicants still wish to pursue their rights, they can do so by filing a proper application subject to time limitation. The applicants shall pay costs for this application to the respondent. This is because, the general rule is that, costs follow even unless there are good reasons to be recorded by the court justifying its departure from that general rule. This is the emphasis under section 30(1) and (2) of the Civil Procedure Code, Cap. 33 RE. 2019 and the decision by the CAT in the famous case of **Njoro Furniture Mart Ltd v. TANESCO [1995] TLR. 205**. In the present case

however, I find no good reason for departing from the general rule on costs, hence the order I have just made above. It is so ordered.

JHK UTAMWA

JUDGE

23/11/2022

23/11/2022.

CORAM; JHK. Utamwa, J.

For Applicants: Mr. Jonas Kajiba, advocate.

For Respondent: Mr. Kajiba holding briefs for Mr. Kisakali advocate.

BC; Gloria, M.

Court: Ruling delivered in the presence of Mr. Jonas Kajiba, advocate for both applicants, who also holds briefs for Mr. Marko Kisakali for the respondent, in court, this 23rd November, 2022.

JHK UTAMWA

JUDGE

23/11/2022.