

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA DISTRICT REGISTRY**

AT ARUSHA

MISC. CIVIL APPLICATION No. 173 OF 2022

(C/F Land Case No. 66 of 2022)

**THE REGISTERED TRUSTEE OF EVANGELICAL LUTHERAN
CHURCH OF TANZANIA.....APPLICANT**

VERSUS

UCHUMI COMMERCIAL BANK LIMITED.....1ST RESPONDENT

SUKE BRAND GROUP COMPANY LIMITED.....2ND RESPONDENT

LUTHERAN INVESTMENT COMPANY LIMITED.....3RD RESPONDENT

REGIZ COMPANY LTD.....4TH RESPONDENT

RULING

Date of last order 31/01/2023

Date of ruling 15/02/2023

BADE, J.

The applicant filed this Application under Order XXXVII Rule 1(a) of the Civil Procedure Code, Cap 33 [R: E 2019] and any other enabling provisions of the law. They have made an application which contains both ex parte and inter parte prayers to be considered by this court, *thus*, they prayed that the court grant a temporary injunction restraining the Respondents, their agents, servants, assigns or whomsoever acting through them, from evicting the



applicant or his tenants from the disputed property which is a landed property situated on plot No. 26 with CT no. 055021/11 Block I, low density residential area alongside old Moshi / Arusha road pending the hearing and determination of the application inter partes.

And then *Inter partes*, the applicant had prayed for the substantive order and other reliefs as the Court may deem just to grant:

This application traces its way from the land case No. 66 of 2022, which is pending before the High Court of Tanzania – Arusha District Registry. For obvious reasons, the applicant, thought it prudent to apply for temporary injunction pending the determination of the main case. As it happens, the Court ordered service on all parties for expediency, and upon appearance, parties were keen to argue the application without much ado.

Upon being prompted, the learned Counsel for the Respondent was quick to raise a concern on the appropriateness of the accompanied affidavit supporting the chamber application, and he thus raised a preliminary objection in limine litis maintaining that, "The Applicant's affidavit is defective in the sense that the Applicant has verified the matters of his personal beliefs and those of his personal knowledge

without any distinction. He further stated that it is against the law including numerous decisions of the Court, hence its consequence should be to struck out the application. He cited the case of **Easter Mwanjesa vs DSW (Deusche Stifting Weltbervoeelkerung Labour Revision 310 of 2019** at page 7, the High Court held that, the deponent had to distinguish which matters are of knowledge, and which ones are beliefs. The Respondent's counsel also cited the case of **Anatoly Peter Rwebangira vs Principal Secretary Ministry of Defense and Another**, Civil Appeal No. 548/4 of 2018 in which the Court of Appeal held that two issues have to be considered under verification clause which is blanket, one,that is against the rule governing the modus of verification clause in an affidavit; and two, without the specification, neither the Court nor the respondents can safely gauge as to which of the deponed facts are based on the applicant's own knowledge and what are based on his beliefs;in such confusion the verification is improper and renders the affidavit to be defective.

The Applicant's Counsel Mr. Muhalila, submitted in rebuttal; maintaining that the verification clause is correct. He argued that the affidavit has 15

paragraphs and the person who has verified has introduced himself as principal of the applicant and one of the registered trustees, that shows that all facts deposed is according to his knowledge, no information is outside his own knowledge. The learned Counsel further argued that the respondent's counsel is talking on the belief, which is simply the art of writing and the word is of no significance hence the cases he has cited are distinguishable. He argued that in Anatoly Peter Rwebagira's case at page 4 the person who verified failed to specify which paragraph were of his own knowledge and which ones are beliefs while the affidavit supporting the application, all the facts in the affidavit are based on his own knowledge hence there was no need of specifying.

The Counsel also added that, the Court of Appeal in the case of **Ramadhani Mikidadi vs Tanga Cement Co. Ltd, Civil Application 275/01 of 2019**, has introduced the principle that if there is defectiveness on the affidavit, with the leave of the court, the said verification can be amended relying on the Oxygen principle. The Counsel for the Applicant also cited the Court of Appeal case of **Jamal Mkumba and Another vs AG, Civil Application No. 240/01 of 2019** where at page 15, it was stated that when the verification is found to be defective, an order for its amendment

cannot prejudice the respondent. The Counsel maintained that if at all it shall be seen that the verification will have been defective, the applicant be accorded a chance to amend the clause so that the application can be heard *inter partes* and justice be done. He urges that it be noted that if the Court of Appeal decisions are not agreeing to each other, the most recent one should prevail. He firmly maintains that the High Court decision is distinguishable as its not binding and the position has changed.

The Counsel for the respondent rejoindered insisting that it is undisputable that the affidavit in question has 15 paragraphs, the dispute is on which paragraphs are of the applicant's knowledge and which ones are of his belief. The learned counsel urging that the word is on the art of writing is only wishful as the law and practice has always been to distinguish between matters of knowledge and those of beliefs. The thinking that because the deponent is a principal officer of the applicant would then know everything is not only unfounded, but an afterthought and wishful for if it had been so, the deponent would have stated so in the affidavit; adding the word 'belief' disqualifies the statement that all matters deponed are known by his personal knowledge.



He maintained that while the applicant's counsel tried to distinguish the case they offered in support of their contention, that the deponent in that case had failed to specify matters of his personal knowledge and those of his beliefs, that was not the reasoning or decision of the case by the Court, and that their contention is still that the case is valid with its stance.

The counsel countered further that the submission that the affidavit could be amended is funny, and really an afterthought. That can not remedy the affidavit as once a preliminary objection is raised one can not come up with another prayer because to the Court, he believes at that point the issue changes to whether the preliminary objection is valid.

He further urges that the case of **Ramadhani Mikidadi** (supra) would have served their sinking ship only if they came with the prayer to have the leave for the amendment of the affidavit, and would have had the time and opportunity to so do, but they opted not to. If the Court will allow the amendment of this affidavit, it will mean pre emptying the preliminary objection, which is against the law and practice of the land. Further, in the **Jamal Mkumba 's** case, the Court refused to grant the leave prayed after the preliminary objection was argued. This he concludes, cemented their position, and that the oxygen principle can not apply on these circumstances

because the overriding principle did not do away with the laws of procedure; but rather it came to simplify the proceedings of the Court. It is their contention that laws and procedure should be respected, and thus they reiterated their initial prayers that the application is incompetent, and that the same be struck out with costs.

This court's issue for determination following both parties' submissions is whether the applicant's affidavit supporting the application is defective, And if Yes, Can it be amended It is clear that the Preliminary objection raised is based on the fact that the verification clause in the affidavit is defective. For the sake of laying the foundation for this court's deliberation this court made reference to **Order XIX of the CPC, Notaries Public and Commissioner for Oaths, Act Cap. 12 and Oaths and Statutory Declarations Act, Cap. 34 R.E 2002 of the Civil Procedure Code, [Cap 33 R.E 2022]** which governs affidavits. Unfortunately, the order does not explain how the said verification should be done; but Rule 3 of the Order is clear that affidavits shall be confined to such facts as the deponent is able to prove of his own knowledge, and statement of his beliefs may only be admitted where the ground thereof is stated. The

position of the decided cases is also clear as has been in a number of decided cases. See Salma Vuai Fom and Lisa E. Peter (supra) etc.

The preliminary objection raised by the counsel for the respondent relies on the improper verification clause, the learned Counsel's averment is that the verification clause does not indicate which paragraphs are based on the applicant's own knowledge and which ones are based on his belief on the information from the other people. For ease of reference let us reproduce the contended verification clause:

*"I, **LOATA LAIZER MUNGANYA** being the principal officer of the applicant and one of the registered trustee duly authorized, hereby certify that what has been stated above in paragraph 1,2,3,4,5,6,7,8,9,10,11,12,13,14 and 15 are true to the best of my knowledge and beliefs"*

From the above reproduced verification clause, the last sentence shows clearly that the Applicant has verified even the information he has believed as given by other people. The preliminary objection raised is plainly the mainstay of what is reflected as the issue in the reproduced clause verifying

the deponed information on the affidavit. Because both counsel have been so expressive in demonstrating the offending issue for which I thank them both, it does not need much arsenal on my part to form an opinion. I subscribe to the Counsel for the Respondent's averment that the said verification clause is not at all clear on which information is of the deponent's own knowledge, and which ones are believed to be true through information received, and what is the source of this information as the law requires.

The Court of Appeal in the case of **Jamal S. Mkumba and Another vs Attorney General, Civil Appeal No. 22 of 2016** cited with approval the case of **Lisa E. Peter vs Al Hushoom Investment, Civil Application No. 147 of 2016** (unreported) which quoted an Indian case of **A.K.K Nambiar vs Union of India (1970) 35 CR 121** explaining the importance of verification clause in affidavits that;

"The reason for verification of affidavits is to enable the court to find out which facts can be said to be proved on the affidavit evidence or rival parties' allegations may be true to information received from persons or allegation may be based on records. The importance of verification is to test the genuiness and authenticity of allegation and also to make the deponent responsible for allegations. In essence

verification is required to enable the court to find out as to whether it will be safe to act on such affidavit evidence. In the absence of proper verification clause, affidavits cannot be admitted as evidence".

It is my finding that the Applicant's affidavit is defective and I doubt it that it can be saved by striking out the offending clause because the said clause carries all of the clauses of the entire affidavit. In the case of **Anatoly Peter Rwebangira vs Principal Secretary Ministry of Defense and Another, Civil Appeal No. 548/4 of 2018** the Court of Appeal had an opportunity of looking at a clause that is similar to the one we have.

Quoting with approval from the author C.K. TAKWANI on the fifth edition of his book titled CIVIL PROCEDURE, at page 21 it was stated that:

"Where an averment is not based on personal knowledge/ the source of information should be clearly disclosed."

The Court went on to restate the rule governing the modus of verification on the contents of the affidavit that can be acted upon and the consequences for non-compliance revisiting the famous case of the same Court in **SALIMA VUAI FOUU VS REGISTRAR OF COOPERATIVES** [1995] TLR 75. In that case, a chamber application which was filed in the High Court of Zanzibar was confronted with a preliminary objection which had two issues; one, it had no verification clause, and two it did not reveal the source of the

deponent's knowledge of some facts stated therein. On appeal the Court categorically stated during deliberation of the application:

*"1) Where an affidavit is made on information it should not be acted upon by any court unless the sources of information are specified.
2) As nowhere in the affidavit either as whole or in any particular paragraph it is 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 own information and belief, the affidavit was defective and incompetent, and was properly rejected by the Chief Justice. "*

The Court of Appeal then went on to state that

"In the light of the holding which we fully subscribe to, a deponent in the verification clause of an affidavit is required to specify the paragraph(s) he/she has verified to be true to his knowledge or belief or information whereby its source must be disclosed. It is thus settled law that, if the facts contained in the affidavit are based on knowledge, then it can be safely verified as such. However, the law does not allow a blanket or rather a general verification that the facts contained in the entire affidavit are based on what is true according to knowledge, belief and information without specifying the respective paragraphs. In the present application, according to the applicant's verification clause which we have earlier on reproduced, it is not possible to decipher the facts which are true based on the applicant's knowledge and those based on his belief."

This a position that I am bound with and to which this Court fully subscribes to. Now I shall turn to consider if the position that the Applicant Counsel has taken that the Court should apply the overriding objective principle in saving the affidavit as the Court of Appeal did in the Sanyou's case (supra). Truth of the matter is the defect on that particular case could be saved on the overriding objective principle as the defect was a mix up in numbering the paragraphs as opposed to a complete lack of distinction in the knowledge of the deponed facts. But more importantly, the Applicant in the case at hand had a chance before the raising of the preliminary objection to have requested to be allowed to amend the Affidavit but refused the offer and took his chance to argue the preliminary objection.

In expounding as to why the verification clause is important, the Court quoted with approval the case of **Director of Public Prosecutions vs Dodoli Kapufi & Patson Tusalile, Criminal Application No. 11 of 2008** (unreported) where it was stated that a verification clause is one of the essential ingredients of any valid affidavit and what amounts to a verification clause simply shows the facts the deponent asserts to be true of his own knowledge and/ or those based on information or beliefs. On the same case the Court of Appeal went further to quote from a law dictionary on determining the question as to what is an affidavit, where it relied on TAXMANN's LAW DICTIONARY, D.P MITTAL, whereby at page 138 an affidavit is defined to mean in law:

"... a statement in the name of a person called deponent; by whom it is voluntary signed or sworn to or affirmed. It must be confined to such statements as the deponent is able of his own knowledge to prove but in certain cases may contain statements of information and belief with grounds thereon."

While being urged to apply the overriding objective principle to save a defective affidavit that was supporting a notice of motion to the Court of Appeal in **The Registered Trustees of St. Anita's Greenland Schools & 8 Others vs Azania Bank, Civil Application No. 168/16 of 2020** (Unreported), the Court refused the invitation reasoning that the said overriding objective principle cannot be applied blindly in disregard of the mandatory rules of procedure. We are supported in this view by the Court's earlier decision in the case of **Njake Enterprises Limited v. Blue Rock Limited & Another, Civil Appeal No. 69 of 2017** (unreported). In that case, the Court was asked to invoke the overriding objective principle in the case of limitation period for filing an appeal. As it refuses to apply that principle under the circumstances of the case, the Court directed its mind to the objects and reasons of introducing the said principle in the Appellate Jurisdiction Act [CAP 141 R.E. 2019]. The Court referred to the relevant Bill which stated in principle thus:

"The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms..."



But then again, the Court of Appeal of Tanzania in the cases of **The University of Dar es Salaam vs Mwenge Gas and Lube Limited, Civil Application No 76 of 1999** (Unreported) where it was stated that: - "Bearing in mind what was stated by this court in **Salma Vuai Foum** case (supra), it would appear that a court has discretion to allow a deponent of an affidavit lacking verification clause to amend the affidavit. I take it, that by using the word 'amend', it is meant that the deponent can, if circumstances justify it, grant leave to the deponent to file an affidavit with a proper verification clause."

The position stated in the above cited case was followed in the case of **Sanyou Service Station Ltd** and in the case of **Jamal S. Mkumba & Another vs Attorney General, Civil Application No. 240/01 of 2019** were deponents of affidavits which were found had not disclosed the source of information contained in their affidavits and some paragraphs contained in their affidavits had not been verified were allowed to amended their affidavits for the purpose of enabling the parties to be heard on merit.

On the final analysis, I will allow the Applicant to amend its affidavit, so that we can proceed to hear the application for injunction on merit. But since the Applicant could have saved us all time and resources on arguing the preliminary objection and its determination when they could have taken the stance to pray to amend their affidavit on the first instance when it was

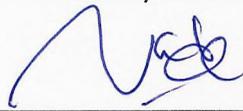


brought to their attention, they are condemned to costs. It is thus ordered as follows:

1. The applicants are allowed to amend the verification clause of the filed affidavit.
2. The said amended affidavit should be filed within 7 days or earlier from the date of this ruling.
3. The applicant are condemned to pay the costs of this preliminary objection.

Ordered accordingly.

DATED at **ARUSHA** on the 15th February 2023.



**A.Z. BADE
JUDGE.**

DELIVERED at **ARUSHA** on the **15th** day of **February 2023** before the counsel for the parties.



**A.Z. BADE
JUDGE**