

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI SUB REGISTRY**

**AT MOSHI**

**MISC. LAND CASE APPLICATION NO. 38 OF 2023**

*(Arising from Land Appeal No. 21 of 2022 of the High Court at Moshi, Originating from Application No. 104 of 2019 of the District Land and Housing Tribunal for Moshi at Moshi)*

**PETER KULAYA KIRANGO (as a Legal Representative of Matey Kulaya) ..... APPELLANT**

**VERSUS**

**THOMAS ALOYCE KITAU ..... 1<sup>ST</sup> RESPONDENT**

**LUCIAN ALOYCE KITAU ..... 2<sup>ND</sup> RESPONDENT**

**LADISLAUS KITAU ..... 3<sup>RD</sup> RESPONDENT**

**LADISLAUS ALOYCE KITAU (As Legal Representative of Aloyce Shakale Kitau) ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

17/01/2024 & 16/02/2024

**SIMFUKWE, J.**

By way of chamber summons filed on 16<sup>th</sup> August, 2023, the applicant seeks an order of the court for extension of time to file an application for leave to Appeal to the Court of Appeal of Tanzania against the decision in Land Appeal No. 21 of 2022, which quashed and set aside the decision of

the trial tribunal. Aggrieved by the decision of the first appellate court the applicant lodged his first application on 24<sup>th</sup> May, 2023, that is Misc. Land Application No. 22 of 2023 which was struck out on 15<sup>th</sup> August 2023 for being incompetent. Now the applicant is seeking an extension of time to lodge another application for leave to Appeal to the Court of Appeal.

The application is brought under **section 11 (1) of the Appellate Jurisdiction Act, CAP 141 R.E 2019**, and **section 14 (1) of the Law of Limitation Act, CAP 89 R.E 2019**). It is accompanied by an affidavit sworn by one Joseph Peter, the advocate for the applicant.

Opposing the application, on 4<sup>th</sup> September 2023, the respondents lodged a notice of Preliminary objection (P.O) on one ground as follows:

- 1. That, the Application is incompetent for being based on fatally defective affidavit to wit, it is not verified by the applicant.*

At the hearing, the applicant was represented by Mr. Joseph Peter, learned counsel, whereas, the respondents had a service of Ms Lilian F. Mushi, learned counsel.

In the submission in chief, in support of their raised Preliminary Objection, Ms Lilian F. Mushi strongly submitted that, the application is fatally defective for being supported by fatally defective Affidavit which contains lies and it is not verified by the applicant. In support of her argument, Ms Lilian referred to the case of **DAMAS ASSEY AND ANOTHER vs. RAYMOND MGONDA PAULA AND 8 OTHERS**, Civil Application No. 32/17 of 2018, in which the Court of Appeal cited with approval its decision in **Ignazio Mesina v. Willow Investments SPRL**, Civil Application No. 21 of 2001 which held that:

*"An Affidavit which is tainted with untruths is no affidavit at all and cannot be relied upon to support an application. False evidence cannot be acted upon to resolve any issue."*

Ms Lilian stated that, the above position was also stated in the case of **RHODA HENRY (As Administratrix of the Estate of the late Henry Thobias) v. SAMWEL S. LYANDE & 9 OTHERS**, Misc. Land Application No. 86 of 2021, HCT, (unreported).

The learned counsel cited another case of **Lisa E. Peter v. Al Hushoom Investment, Civil application No. 147 of 2016**, CAT at Dar es Salaam

at page 8 where the Court cited with approval the case of **A. K. K Nambiar v. Union of India (1970) 35 CR 121**, where it was stated that:

*"..... The importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for the 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's evidence. In the absence of proper verification, affidavits cannot be admitted in evidence."*

The learned counsel submitted that, with the above position and bearing the fact that the applicant's affidavit clearly states that **"I JOSEPH PETER being the applicant herein verify that what is stated in paragraph 1, 2, to 13....."** is untruth and fatally affects the verification which inevitably the whole application must crumble. She submitted further that, the assertion is not true due to the fact that JOSEPH PETER in this application is not the applicant as per names of the applicant in the pleadings. That, worse enough, the said allegations by the deponent are not verified as true or not according to the deponent's knowledge.

Ms Lilian summarized their objection on two limbs:

**First,** she said that the affidavit states that, "I JOSEPH PETER being the applicant" which is apparently untruth and fatal to the affidavit.

**Secondly,** that the verification is by JOSEPH PETER verifying as the applicant while he is not. It was their point that, the affidavit implies to have been verified by the applicant while in fact the applicant has not verified it. That, the said affidavit is not verified as to whether the mentioned paragraphs are true or not according to the deponent's beliefs which is as well a fatal omission.

She prayed that; the application be strike out with costs for being supported by a defective affidavit.

In his reply, on the outset, Advocate Joseph Peter who is also a deponent of the impugned affidavit started his submission by noting the recent amendment under the **Legal Sector Laws (Miscellaneous Amendment) Act, No. 11 of 2023**. That, section 47 of the amendment amends the **Land Disputes Courts Act [Cap 216 R.E 2019]** and section 10 of the amendment amends **section 5 of the Appellate Jurisdiction Act** to waive the requirement of leave. Mr. Joseph stated

that, the application of the provision is retrospective because the said law is procedural. He said that, the position was celebrated in the case of **Petro Robert Myavilwa vs. Zera Myavilwa, Civil Appeal No. 117/06 of 2022**, Court of Appeal of Tanzania at Mbeya, which held that:

*"The changes being procedural law which its applicability has retrospective effect, has a bearing to the application at hand in my view. As rightly submitted by Mr. Chapa, leave is no longer a requirement at the wake of the said amendment. As such, this application has been overtaken by events."*

Explaining the meaning of an affidavit as defined in the case of **DB Shaprya & Co Ltd Vs. Bish International BV**, Civil Application No. 53 of 2002 CAT (Unreported), Advocate Joseph contended inter alia that before the establishment of the **Oxygen Principle (Overriding Objective)**, in case an affidavit is defective, the application was rendered incompetent and defective. He prayed this court to disregard the cited cases of **Damas and Another v. Raymond Mgonda Paula** (supra) and **Peter v. Al Hushoom Investment** (supra) as they stick to the old position. He explained further that, post establishment of the Doctrine of

Overriding Objective (2018), the current position under the **Civil Procedure Code** (Cap 33 R.E 2019), the new section 3A, insist that, courts should not base on technicalities rather than on substance of the case. That, the Court of Appeal directs that, once there is a defective verification clause, the applicant should be given time to amend such affidavit. To buttress his argument, Mr. Peter Joseph referred the case of **Jamal S. Mkumba and Another Vs Attorney General**, Civil Application No. 240/01 of 2019, CAT, Tanzlii, in which the Court of Appeal allowed the applicant to rectify an error in the verification clause by ordering the applicant to file a new amended affidavit with proper verification clause.

Based on the above authorities, the learned counsel for the applicant was of the opinion that striking out this application is not a proper remedy. He said that, the proper remedy is to order amendment. Also, based on the changes brought by the amendment of the law, he prayed to withdraw the application because it has been overtaken by events with no order as to costs.

I appreciate the rival submissions of the learned counsels of both parties.

Without further ado, it is also worth to appreciate the issue of removal of leave to appeal as a requirement for appealing to the Court of Appeal of Tanzania as raised by Mr. Joseph learned counsel for the applicant. The learned counsel for the applicant referred this court to the **Legal Sector Laws (Miscellaneous Amendment) Act** (supra) and the case of **Petro Robert Myavilwa** (supra) in his endeavour to show that this matter has been overtaken by events. In the cited case of **Petro Robert Myavilwa**, at page 5 and 6, The Court of Appeal observed that:

*"I will start with the amendments brought by the amendments brought by the Legal Sector Laws (Miscellaneous Amendments) Act No. 11 of 2023, particularly section 10 which amended section 5 of the AJA effective 1st December, 2023. For ease of understanding, I will reproduce the amendment concerned as hereunder: -*

*"Section 10 The Principal Act is amended in section 5 (a) by deleting subsection (1) and substituting for it the following:*

*(1) In civil proceedings, except where any other written law provides otherwise, an appeal shall lie to the Court of Appeal against every order or decree including an ex-parte or*



*preliminary decree made by the High Court, in the exercise of its original, appellate or revisional jurisdiction.”*

***It is my interpretation, basing on the above exposition that, the changes have done away with leave requirement for one to appeal to Court against the decision of the High Court regardless of whether the impugned decision is an order, decree, an ex-parte decree or a preliminary decree **when exercising its original, appellate or revisional jurisdiction.** In other words, obtaining leave has ceased to be a requisite before one can appeal to Court effective the 1st December, 2023.***”Emphasis added

I entirely agree with the learned counsel for the applicant that this application has been overtaken by events based on the new amendment of the cited law and the above quoted decision of the Court of Appeal. The only option before me is to strike out this application. As it was held in the case of **Petro Robert** (supra), discussing the raised preliminary objection in the circumstances, will serve no purpose.

I therefore strike out this application for being overtaken by events with no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 16<sup>th</sup> day of February 2024.



X

S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

16/02/2024