

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND REVISION NO. 09 OF 2022

(Originating from the decision of the District Land and Housing Tribunal for Kinondoni District at Mwananyamala in Land Application No. 317 of 2018 and Execution No.542 of 2020)

MANASE RUBEN.....APPLICANT

VERSUS

BASTON ERIC MONGI.....1ST RESPONDENT

JAMES JUMA.....2ND RESPONDENT

R U L I N G

Date of last Order: 10 November 2022

Date of Ruling: 13 December 2022

K. D. MHINA, J.

On 1 April 2022, the applicant named Manase Ruben lodged the present application for revision against the respondents, Baston Eric Mongi and James Juma.

The orders being prayed are for this Court to;

- (i) Call for, inspect and revise proceedings, judgment, and decree in respect of Land Application No. 317 of 2018, which was before the District land Housing Tribunal for Kinondoni at Mwananyamala as the same is tainted with serious illegalities, error material to the merits of the case and involving justice.
- (ii) Call for, inspect and revise proceedings, ruling, and order in respect of Execution No. 542 of 2020, which was before the District land Housing Tribunal for Kinondoni at Mwananyamala as the same is tainted with serious illegalities, error material to the merits of the case and involving justice.
- (iii) The Applicant be reinstated to the landed property described as Plot No. 743 Block E, Sinza, registered with Certificate of Title No. 28561.
- (iv) Costs of the application.
- (v) Any other relief (s) the Court may deem fit and just to grant.

The application is supported by the affidavit disposed of by Manase Ruben, the applicant.

On the other hand, Mr. Frank N. Mwampamba, the counsel for the 1st respondent, swore the affidavit in reply, which was duly filed at the Court.

After being served with the affidavit in reply, the applicant confronted it with a notice of preliminary objection containing three grounds as follows;

- (i) That the first respondent's counter-affidavit is incurably defective for containing hearsay, legal arguments, opinion, and prayers
- (ii) That the verification clause of the first respondent's counter-affidavit is incurably defective.
- (iii) That the counter affidavit of the first respondent contains an incurably defective jurat of attestation.

The preliminary objection was argued by way of oral submissions. The applicant was represented by Mr. Mwan'genza Mapembe, a learned advocate, while the first respondent by Mr. Idd Mrema, also a learned advocate.

At the hearing, Mr. Mapembe started his submission by arguing the third limb of objection by citing the **DPP v. Dodoli Kapufi and another**, Criminal Application No. 11 of 2008 at page 3, where the Court of Appeal elaborated the essential elements of a valid affidavit that it also includes jurat of attestation.

Further, he submitted that section 8 of Cap 12 of the Laws defines the meaning of jurat of attestation while section 10 of the Oath and Statutory Declaration Act, Cap 34 provides that the oath must be in accordance with the schedule by indicating if the commissioner for oath knows the deponent personally or another person introduced him.

He stated that in the counter affidavit, the commissioner for oath did not disclose if he knew the deponent or if the deponent was identified by another person.

He concluded by submitting that failure to comply with section 8 of Cap 12, which is mandatory, is not a mere technicality. It renders the affidavit defective. To bolster his argument, he cited **D.B Shapriya v. Bish International BV** (2002) EA 47.

On the first limb of the preliminary objection, he submitted that the counter affidavit contains legal arguments, opinions, and hearsay contrary to the law. **Order 19 Rule 3 (1)** of the CPC and the case of **Uganda v. Ex Parte Matovu** (1996) E. A 514 provides for what should be contained in the affidavit.

To elaborate more, he argued that paragraphs 4, 5, 6, 8, 9, 12, 13, 15, 16, 18, 19, 22, and 23 contain legal arguments. While paragraphs 3,6, 8,10,11, 13,14, 15, 16, 17, 18, 19, 20, 21, and 22 contain hearsay. The reason is that Mr. Frank Mwampamba advocate deponed the counter affidavit, but the cited paragraphs indicated that the 1st respondent was the one who averred the statements.

Further, he submitted that paragraphs 15, 16,18, 19, 22, and 23 contain opinions.

Regarding the second limb of the objection, he submitted that the verification clause is incurable defective for containing hearsay. The 1st respondent exclusively owns the statements and not the deponent Frank Mwampamba. Therefore, it was improper for the deponent to verify the counter affidavit to the best of his knowledge.

In reply, Mr. Mrema submitted that the counter affidavit of the 1st respondent was prepared by Mr. Frank Mwampamba, advocate whom the 1st respondent duly authorized. At the time of preparation, Mr. Mwampamba knew the facts of the case because he had been dealing with that case for quite a long time.

Regarding the jurat of attestation, he submitted that the omission of not indicating whether the commissioner for oath knows the deponent is curable and cannot affect the facts in the affidavit.

He further submits that the spirit of the law is to determine cases on merits and not on technicalities; therefore, he prayed for the court to deal with the substance of the matter. If the Court finds the affidavit defective, the 1st respondent be allowed to amend the same. To substantiate his prayer, he cited **Colgate Palmolive Co. v. Chemi Cotex Industries Ltd**, Civil Case No. 70 of 2004 (unreported)

He concluded by distinguishing the cited cases of **Dodoli Kapufi** because, in the application at hand, the deponent knew the facts of the case while Ex parte Matovu provides the general rule.

In rejoinder, Mr. Mapembe submitted that the argument that Mr. Mwampamba knew the facts of the matter is misconceived because, in his argument, he stated that the content of the counter affidavit indicated that the one who was providing particulars of the case was the 1st respondent.

Regarding the jurat of attestation, he submitted that the counsel for the first respondent did not challenge this issue in his reply.

He concluded by submitting that a defective application ought to be struck out.

Having considered the chamber summons and its supporting affidavit, the affidavits in reply, and the oral submission made by the learned counsel for the parties, I find that the gist of the objection is that the counter affidavit is defective because of the;

- (iv) counter affidavit containing hearsay, legal arguments, opinion, and prayers
- (v) defective verification clause
- (vi) defective jurat of attestation.

In deliberating and determining the preliminary objection, I will adopt the way the counsel had submitted by starting with the third limb of objection.

The allegation was that the jurat of attestation was defective because the commissioner for oath did not disclose if he knew the deponent or the deponent was identified by another person, which was contrary to section 8 of the Notaries Public and Commissioner for Oaths Act, Cap 12 of the Laws and the principle stated in **D.B Shapriya v. Bish International BV** (Supra)

In this matter, the affidavit under scrutiny bears the signature of the attesting officer, the date and place where it was taken. Further, the commissioner for oath did not disclose if he knew the deponent or if the deponent was identified by another person.

Section 8 of Cap 12 reads as follows;

*"8. Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat of attestation at what **Place** and on **what** date the oath is taken or made".*

[Emphasis provided]

Upon scrutiny of the section, the affidavit must disclose where it is taken, when, and who is taking the oath. Those are the requirements of the cited provision of law.

Further, I have read **D.B Shapriya v. Bish International BV** (Supra), and the issue in contentious was the non-indication of the place where the affidavit was sworn.

From above, it follows that under section 8 of Cap 12, there is no requirement to insert whether the commissioner for oath knows the deponent or the deponent was introduced to him. Further, the cited case of **D.B Shapriya v. Bish International BV** (Supra) does not support the applicant's case.

Therefore, the third limb of objection lacks merit.

Coming to the first limb of preliminary objection, the counter affidavit contains legal arguments, opinions, and hearsay contrary to the law.

I revisit the alleged paragraphs and find that this should not detain me long. Upon scrutiny, as rightly submitted by Mr. Mapembe, in the counter affidavit, paragraphs 4, 5, 6, 8, 9, 12, 13, 15, 16, 18, 19, 22,

and 23 contain legal arguments. While paragraphs 3,6, 8,10,11, 13,14, 15, 16, 17, 18, 19, 20, 21, and 22 contain hearsay, paragraphs 15, 16,18, 19, 22, and 23 contain opinions.

Therefore, the affidavit is defective in that sense. The question is, what is the remedy? I will answer this question later.

On the second limb of the objection, what is attacked is the verification clause which is faulted for being defective because it contains hearsay.

Having gone through the counter affidavit, I find that while in the paragraphs it is indicated that other information was obtained from another person, but in the verification clause, the deponent failed to indicate which facts his knowledge and which were based on his beliefs.

In **Jamal Mkumba and another Vs. The Attorney General**, Civil Application No. 240/01 of 2019 (TanZlii), the Court of Appeal explained the rationale and the importance of the verification clause as follows;

"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 the information received from persons or allegations may be based on record. The importance of verification is to test the genuineness and authenticity of allegation 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 evidence. In the absence of proper verification clause, affidavits cannot be admitted as evidence."

From that rationale of testing the genuineness and authenticity of allegations contained in the affidavits as indicated above and considering that facts in the affidavit are used as evidence in Courts.

Further, the Court of Appeal **Anatol Peter Rwebangira Vs. The Principal Secretary, Ministry of Defense and National Service & Another**, Civil Application No. 548/04 of 2018 (TanZlii), held that;

"....without the specification, neither the court nor the respondent can safely gauge as to which of the deponent facts are based on the applicant's own knowledge and what are based on his belief".

Therefore, flowing from above, it is quite clear that the deponent of the 1st respondent counter affidavit failed to specify and disclose what

among the 24 paragraphs contained in the affidavit are the facts based on his knowledge and what is based on his beliefs. That failure renders the counter affidavit defective.

As to the remedy for the defectiveness found in the 1st and 2nd limbs of preliminary objection, I begin by stating that each case has its own circumstances depending on the surroundings of the matter and the demand for substantive justice.

To start with the defective found in respect of the first limb of preliminary objection extraneous matters such as opinion, legal arguments, and hearsay, the demand for substantive justice "land" me to the decision of the Court of Appeal in **Phantom Modern Transport (1985) Ltd v. D.T Dobbie (T) Ltd**, Civil Reference No. 15 of 2001 and 3 of 2005 (unreported) where the Court held that;

"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 an affidavit are defective, it cannot be amended in the sense of striking off the offensive parts by substituting thereof correct averments in the same

affidavit. But where the Court is minded to allow the deponent to remedy the defects, it may allow him or her to file a fresh affidavit containing averments. What is effect it means that a fresh affidavit is substituted for the defective one. To that extent one may possibly say that the original affidavit is being amended."

Therefore, the defect in the 1st limb of objection is curable in the way it is directed in the cited case.

The defect found in respect of the 2nd limb of preliminary objection regarding the verification clause should not detain me much because the Court of Appeal of Tanzania has already set a precedent in numerous cases. In **Ramadhani Mikidadi Vs. Tanga Cement**,the Court held that;

"We are aware that a defective verification is amenable to amendment by the applicant upon being granted leave by the Court".

Again, in **Jamal Mkumba and another** (Supra), the Court held that;

"We think this is one of those cases which demands for substantive justice in its determination. But, we are satisfied that the respondent will not be prejudiced by an

order of amendment of the affidavit so as to accord a chance to the applicant to insert a proper verification clause according to the law and parties be heard on merits”.

In the circumstances, the 1st and 2nd limbs of preliminary objection succeed to the extent that the counter affidavit contains extraneous matters and the verification clause is defective but, on the way forward, instead of striking out the application as argued by Mr. Mapembe for the applicant, this Court orders the 1st respondent within seven (7) days from the date of this Ruling to file the amended, fresh counter and proper counter affidavit. No order as to costs.

It is so ordered.




K. D. MHINA

JUDGE

13/12/2022