

TANZANIA / JUDGMENT

auland equipments t ltd vs elizabeth kokugonza kyakula 2023 tzhclandd 53 23 february 2023

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM MISC. LAND
APPLICATION NO. 762 OF 2022 (Arising from the decision of the District Land and Housing
Tribunal for Kinondoni in Land Application No.342 of 2017) AULAND EQUIPMENTS (T)
LTD..... APPLICANT VERSUS ELIZABETH KOKUGONZA
KYAKULA..... RESPONDENT

RULING

Date of last Order: 17.02.2023 Date of Ruling 23.02.2023 A.Z.MGEYEKWA, J I am called upon in this matter to decide whether this court should exercise its discretion under section 41 (2) of the Land Disputes Courts Act, Cap.216 [R.E 2019] to extend the time within the applicant to lodge an appeal against the decision of the District Land and Housing Tribunal for Kinondoni dated 21st September, 2022. The application is supported by an affidavit and supplementary affidavit deposed by Miao Sun, the applicant. The application 1 has encountered formidable opposition from the respondent and he demonstrated his resistance by filing a counter-affidavit deposed by Elizabeth Kokugonza Kyakula, the respondent. The application stumbled upon preliminary objections from the respondent. He has raised two points of preliminary objection:-

1. The affidavit in support of the Chamber Application is defective and bad in law for failure to swear or affirm contrary to Oaths and Affirmation Rules GN. No. 125 of 1967 read together with GN No. 132 of 1967.
2. That the affidavit in support of the Chamber Summon is defective and bad in law for containing hearsay evidence. When the matter was called for hearing on 7th February, 2023 the applicant enjoyed the legal service of Mr. Erick Simon, learned counsel and the respondent had the legal service of Mr. Mutongore, learned counsel. As the practice of the Court has it, I had to determine the preliminary objection first before going into the merits or demerits of the suit. The learned counsel for the respondent started his onslaught by submitting on the first objection. He claimed that the affidavit is defective for failure to swear or affirm contrary to Oaths and Affirmation Rules GN. 2 No. 125 of 1967 read together

with GN No. 132 of 1967. The learned counsel for the respondent contended that the affidavit is deponed by Miao Sun and the deponent begins by affirming without stating his religious belief whether he is a Christian or Moslem or pagans. He went on to submit that the deponent swears in the Jurat of attestation instead of affirming contrary to items 1, 2, 3, and 4 of the First Schedule to the Act. To support his submission he seek refuge in the cases of Venceslaus Mlasi Kimario v Akilimali Abdallah Kambangwa, Misc. Land Case No. 199 of 2021 and the Administratrix of the Estate of the late Mtumwa Selemani (Hawa Mtumwa Selemani) v the Registered Trustees of the Evangelist Assemblies of God (T) Kijitonyama Church, Misc Land Application No. 268 of 2016 (unreported). He insisted that the applicant has failed to comply with the cited position of the law, thus, he prayed this Court to sustain this point of law and strike out the application with costs. Submitting on the second objection, the learned for the respondent contended that the affidavit supported by the Chamber Summon is defective for containing hearsay evidence. He referred this Court to paragraphs 4 and 5 of the applicant's affidavit. Fortifying his argumentation Mr. Mutongore cited the case National Housing Corporation and Yono Auction Mart & Co Ltd v Anna Francis Maendaenda, Misc Land 3 Application No. 107 of 2018 (unreported). The learned counsel for the respondent went on to submit that hearsay evidence is inadmissible in court. He added that this Court and the Court of Appeal of Tanzania have stated repeatedly that an affidavit that mentions another person to that person should swear an affidavit. To buttress his contention he cited the case of Deograsia Ramadhani Mtego v Deodatus Rutangwerela, Misc. Civil Application No. 43 of 2022 (unreported) this Court cited with approval the case of Benedict Kimwaga v Principal Secretary Ministry of Health, Civil Application No, 31 of 2000 (unreported). The learned counsel for the respondent contended that since there is no affidavit supporting the application the same renders the application incompetent. On the strength of the above submission, beckoned this Court to strike the instant application with costs. In reply, the learned counsel for the applicant stated that the raised points of law are missing the criterion of being referred as preliminary objection. To support his submission he cited the cases of Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd [1969] EA696 and Ms. Safia Ahmed Okash (as Administratrix of the Estate of the late Ahmed Okash v Ms. Sikudhani Amiri 7 82 Others, Civil Appeal No. 138 of 2016 (unreported). It was his submission that this Court cannot deal with 4 this point without first establishing the facts contained in the jurat and the first statement in affidavit. He stated that the dependent in the beginning stated that he is an adult Chinese of Dar es Salaam do hereby make affirm and state as follows. He valiantly argued that the preliminary objection has been raised on assumption that religious beliefs are limited to Christian, Hindus, Muslim and Pagan. He added that the China nationals besides of other being Muslim, Christian some believes in Chinese religion ad they have their rituals. He went on to state that the counsel for the respondent had any doubt then he could have cross examined the applicant based on the provision of Order XIX Rule 1 of the Civil Procedure Code Cap.33 [R.E 2019]. Mr. Mutongore further contended that this objection lacks a quality of pure point of law as stated in the case of Mukisa Biscuit (supra). He forceful argued that the objection is attacking the facts contained in the affidavit which falls on the ambit of Order XIX Rule 1 of

the Civil Procedure Code, Cap.33 [R.E 2019]. Mr. Mutongore submitted that the Oaths and Affirmation Rules GN. No. 125 of 1967 read together with GN. No. 132 of 1967 are procedural and do not give any penal result on failure to comply with it. To bolster his submission he cited the case of Wencelaus Malasi Kimario v Akilimali Abdallah Kambangwa, Misc. Land Case Application No. 199 of 5 2021 (unreported). He stated that section 9 of the Oaths and Statutory Declaration of 1967 Cap. 34 [R.E 2019] is from the Act of Parliament hence in his view the Act of Parliament takes precedents over the subsidiary rules. Submitting on the second objection, Mr. Mutongore argued that the objection is misconceived because the statements did not require any other person to verify other than the deponent. He stated that the rules on verification are very clear that a deponent should state facts within his knowledge and if there are information the source was disclosed in the verification clause. To support his submission he referred this Court to Order XIX Rule 2 of the Civil Procedure Code Cap.33 [R.E 2019] and stated that the facts under paragraphs 4 and 5 of the affidavit are well stated. He argued that this objection cannot stand alone it needs evidence to be proved. Mr. Mutongore distinguished the cited cases of National Housing Corporation (supra) and Deogratias Ramadhani Mtego (supra) and stated that in the cited case the defect was on the verification clause while in the instant application the verification has no any problem and the respondent is only alleging on hearsay. The learned counsel for the applicant went on to argue that the in end result the consequence is not to strike out the affidavit but to disregard the said paragraphs since the same does not affect other paragraphs. He argued 6 that the Court has a duty to look at the effect of its orders since the end result striking out the application does not bar the applicant to file a fresh application. He stated that it is normal the court to order amendment of filing of a supplementary affidavit and disregard the technicalities. In conclusion, the counsel for the applicant urged this Court to overrule the preliminary objection and apply overriding principles to order the applicant to file an amended or supplementary affidavit. In his rejoinder, the learned counsel for the respondent reiterated his earlier submission. Having heard the contending submissions of the parties' counsels for and against the preliminary objection, it now behooves the Court to determine whether the preliminary objections are meritorious. The issue which I am called upon to resolve in this ruling is whether the concern raised by the respondent's counsel is valid. I have carefully summarized the submissions made by learned counsels for the applicant and respondent. Before I address the preliminary objections on merit, I find it necessary to consider the validity of the preliminary objection since the applicant's counsel has contended that the points of objection does not disclose the points of law. 7 In view of that, the applicant's counsel contended that the said objections does not disclose a point of law. Supporting his submission, he cited the case of Mukisa Biscuit (supra). To address Mr. Mutongore view, let me revert to what the Court in Mukisa Biscuit (supra), The Eastern African Court had this to say:- "A preliminary objection consists of point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit". Based on the above authority, I conclude, without much hesitation, that the objections falls squarely within the scope of a preliminary objection. It is in view thereof that, I find Mr. Mutongore's contention implausible and

unmeritorious, I do not go along with it. I choose to find that the objections is a pure point of law. Back to the wagon, in the instant preliminary objections, the controversy on which the objection is anchored is whether the applicant's objections are meritorious. The applicant's counsel has submitted in length that the applicant has properly sworn the affidavit the same suffice. To support his submission he cited section 9 of the Oaths and Statutory Declaration of 1967. 8 I have read the affidavit and noted that the applicant did not introduce his religion saying that he is a Chinese is a nationality not a religion in making an oath he affirmed and in the jurat of attestation the deponent swore before the Commissioner for Oaths. Therefore, in my considered view, the applicant oath is uncertain as to whether the applicant did swear or affirm considering the fact that the applicant's religion is unknown. Consequently, it is difficult for this Court to know the applicant's religion. Reading section 9 of the said Act it does not state that the same person can swear and affirm at the same time. Therefore, still the subsidiary rules is applicable in the matter hand since items 1, 2 and 3 of the Oaths and Affirmation Rules GN. No. 125 of 1967 read together with GN. No. 132 of 1967 provides for the procedure in taking an Oath, what has to be done by a person who takes an Oaths and affirmation. In the case of OTTU v AG & Others, Misc. Civil Application No. 15/97 at the HC at Dar es salaam the Court held that:- "The expression, 'affidavit' unfortunately despite its being a lawyers everyday tool, is not defined by any statute, I could lay my hands on. But the lexicon meaning of the expression 'affidavit' is that it is a sworn statement in writing, made especially under oath or affirmation before an authorized Magistrate or Officer." 9 It is worth noting that an affidavit is a substitute of oral evidence and it has to be confines of the law. There are a plethora of legal authorities in this respect. As it was decided in numerous decisions of the Court of Appeal of Tanzania in the case of Jamal S. Mkumba & Abdallah Issa Namangu v Attorney General, Civil Application No. 240/01 of 2019 cited with approval the case of Uganda v Commissioner of Prison Exparte Matovu (1966) EA 514 at page 520, 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) that:- "As a general rule of practice and procedure on affidavit for use in Court being a substitute for oral evidence..." Based on the above provision of law and authorities it is not clear the whether the applicant was supposed to affirm or swear hence the affidavit is defective. Again, I am in all fours with the learned counsel for the respondent that, the overriding objective principle cannot be applied blindly in disregard of the mandatory rules of procedure. In the case of Njake Enterprises Limited v. Blue Rock Limited & Another, Civil Appeal No. 69 of 2017 (unreported), the Court of Appeal of Tanzania was asked to invoke the overriding objective principle. In refusing to apply that principle, the Court is 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 of Appeal of Tanzania stated that:- "The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms...." See also The Registered Trustees of St. Anita's Greenland School & 6 Others vs Azania Bank Ltd, Civil Application No. 168/16 of 2020 which was delivered on 9th June, 2022. Lastly, the learned counsel for the applicant prayed

for the applicant to file supplementary affidavit so as to cure the ailment. It is my considered view that, like its name, 'supplementary affidavit', can only be filed to supplement a proper existing affidavit. In the instant application since there is no proper affidavit, therefore, there is nothing to be supplemented on his respect. Consequently, as it was decided in the cited authorities, the omission renders the application incompetent and thus it cannot be partly saved as urged by Mr. Mutongore. In the circumstances, the first objection raised by the counsel for the respondent succeeds. I will therefore detain myself in determining the li second objection. In the event, the incompetent application is hereby struck out with costs. Order accordingly. Ruling delivered on the 23rd February, 2023 in the presence of. Ms. Eda Rugakingira, counsel for the applicant and Mr. Mutongore, counsel for the respondent. A.Z.MGEYEKWA JUDGE 23.02.2023 12

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