

TANZANIA / JUDGMENT

Bartazary Kilengwe v Manase Ngangaji Misc

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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT
KIGOMA MISCELLANEOUS CIVIL APPLICATION NO. 000020633 OF 2024 BARTAZAR
KILENGWE COMPLAINANT / APPELLANT / APPLICANT / PLAINTIFF VERSUS
MANASE NGANGAJI RESPONDENT / DEFENDANT

RULING

P. R. KAHYOZA, J, The Applicant, Bartazary Kilengwe is seeking for extension of time within which to file his appeal against the decision of the District Land and Housing Tribunal (DLHT) for Kigoma at Kigoma. The decision that the Applicant intends to challenge arises from the application for execution, that is, application No. 191 of 2019 that was delivered on 25th April, 2023. The application has been brought under section 41(2) of the Land Disputes Courts Act, Cap 216 [R. E.2019] and also under Section 14 of the Law of Limitation Act, [CAP 89 R.E 2019]. It is supported by the affidavit sworn by Mr. Michael Mwangati, counsel for the Applicant. On the other hand, the application is resisted by the Respondent through a counter affidavit sworn by Mr. Silvester Damas Sogomba, counsel for the Respondent. In addition, Mr. Sogomba also raised a preliminary objection to the following effect:

1. That the application has not complied with Rule 4(1) (a&b) of GN No.66 of 2022.
2. That the applicant's affidavit is incurably defective for failure to disclose source of information since it was sworn by the advocate who is not party to the suit. Addressing the first limb of the objection, Mr. Sogomba submitted that Rule 4(1) (a & b) of GN No.66/2022 is couched in mandatory words, that pleadings in English must have Swahili interpretation. He added that since there has been no compliance, the application is incompetent and it must be struck out. On the second limb, he submitted that the accompanying affidavit was incurably defective for failure to disclose source of information. He added that the affidavit was sworn by the advocate, who is not a party to the matter, but in the verification clause the learned counsel states that all the information deposed to was true to the best of his own knowledge. According to Mr. Sogomba, this was totally wrong. Page. 1 Mr. Sogomba also pointed out that under para six, eight and nine, the counsel avers and states facts as if he was the Applicant himself, but which is not the case. For these reasons, he urged the court t

have the application struck out with costs. In her response, Ms. Christina Mwiyanja, counsel for the Applicant dismissed all the points raised as being baseless. On the first limb she submitted that the point could not stand because even the Respondent's pleadings had no Swahili version. According to her the point raised was self defeating. She cited the case of *On Africa Construction Limited vs CATA Mining Company Ltd*, Civil Case No. 2/2023, HC of Tanzania at Musoma to support this contention. She further submitted that the rules relied upon by the learned counsel were not in his favour. It was her further submission that present matter, in terms of Rule 3 of the said Rules does not fall under the categories of those matters that require swahili version. She also supported her stance by citing the case of *Julius Kweba & Others vs The Registered Trustees of Seventh Day Adventist Church, & Another*, Land Appeal No. 76/2022, HC at Mwanza. On the second limb, the learned counsel submitted that an advocate can swear an affidavit on behalf of a party. She further added that a defective affidavit was not fatal, because such a defect is curable under the overriding objectives. For those reasons, she invited the court to overrule the objections raised with costs. In his rejoinder, Mr. Sogomba submitted that the cases cited were of this court, and as such they were not binding. He also added that the Rules cited speak of the person initiating the proceedings. Thus, the Applicant was duty bind to have a swahili version of the pleadings, and not the Respondent. On the second objection, Mr. Sogomba submitted that an affidavit is evidence, so if it is defective, the application cannot stand. I have carefully and dispassionately considered the rival submissions on the objections raised. I shall start by addressing myself on the issue of affidavit. I entirely agree with Ms. Christina Mwiyanja that an advocate can swear an affidavit on behalf of the party. I believe both counsel are not at issue on this aspect. I also agree with Ms. Mwiyanja that a defective affidavit, be it a verification clause or otherwise can be rectified to cure the anomaly. In *University of Dar es Salaam V. Mwenge Gas and Lub Oil Limited*, Civil Application No. 76 of 1999, the Court of Appeal when addressing the issue of amending an affidavit, had this to say: "Bearing in mind what was stated by this Court in *Salim Vuai Fom's* case (supra), it would appear that a Court has discretion to allow a deponent of an affidavit lacking a verification clause to amend the affidavit. I take it, that by using the word 'emend; this Court meant that the deponent can, if circumstances justify it, grant leave to the deponent to file an affidavit having a verification clause". But again, in *Sanyou Service Station Ltd vs Bp Tanzania Ltd (now Puma Energy T. Ltd)* (Civil Application No. 185 of 2018) [2019] TZCA 144 (22 May 2019) the Court of Appeal while addressing a somewhat similar situation had the following to say: Page. 2 "...it seems to me that what I have before me is a case of wrong numbering of the affidavit indicating the first paragraph as Number 6 instead of Number 1, then going about to verify the paragraphs whose numbers are wrong. Again, some of the paragraphs, Number 10 to 13, have not been verified. Does this justify striking out of the application? I ask myself. I think it does not. True, rules of procedure should be followed ... but not without some sense of reasoning and justice. Accordingly, for those reasons, I overrule the point of preliminary objection and order that the affidavit be amended so as to cure the defects as to numbering and insert a proper verification clause". The two positions above clearly show that defects in an affidavit are curable. However, my take is that there are circumstances under which affidavits cannot

be amended. This is in relation to situations where there is no amount of amendment that can resuscitate the affidavit in question. In the matter at hand, the concern of Mr. Sogomba is that the counsel for the Applicant has sworn the affidavit as if he was the Applicant himself, and also that the verification clause does not disclose the source of information. It is important to note that while the law empowers an advocate to swear an affidavit on behalf of the party, such a counsel does not become a party to the case. In the present application, the learned counsel has sworn the affidavit as if he was the applicant himself. This is reflected in paragraphs 6,8 and 10. The said paragraphs are reproduced for the sake of reference and so that they can paint the picture by themselves:

6. That my delay of filing appeal within prescribed time is due to the fact so much time was used in prosecuting application for reference which was wrongly filed.
7. That my failure to file appeal on time was not caused by my negligence but as the reasons set out on this affidavit that was beyond my control.
9. That, I will suffer irreparable financial loss if this application will not be granted unlike the Respondents. No doubt the above paragraphs reflects the worst situation in affidavits. Paragraph nine goes as far as depicting the counsel for the Applicant that he stands to suffer irreparable financial loss if the application is not granted. With these paragraphs forming part of the affidavit, and also taking into consideration that the verification clause does not disclose the source of information, it becomes clear and apparent that the affidavit is incurably defective such that no amount of amendment can bring it back to life. In Attorney General v Dickson Paulo Sanga (Civil Appeal No. 175 of 2020) [2020] TZCA 371 (5 August 2020) the Court of Appeal had this to say: "Since an affidavit is a substitute to oral evidence, it should only contain statements of facts based on deponent's actual knowledge or information received and it should not contain extraneous matters. Where an affidavit is made on information, it should not be acted upon by any court unless the sources of such information are specified." With this position, and given what I have elaborated above, I find the affidavit supporting the application incurably defective and thus rendering the entire application incompetent. Page. 3 For those reasons, I proceed to strike out the application with costs to the Respondent. It is so ordered. Dated at KIGOMA ZONE this 26th of November 2024. P. R. KAHYOZA, J JUDGE OF THE HIGH COURT Page. 4

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