

TANZANIA / JUDGMENT

CHARLES LWEMPISI V RICHARD JOSEPH RUGARABAMU ANOTHER

COURT
TANZLIIDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF MWANZA AT MWANZA MISC. CIVIL APPLICATION NO. 22246 OF 2024 (Arising from Civil Case No. 22248 of 2024) CHARLES KAHATANO LWEMPISI..... APPLICANT
VERSUS RICHARD JOSEPH KWEYAMBA RUGARABAMU..... FIRST RESPONDENT LWEMPISI GENERAL COMPANY LIMITED..... SECOND RESPONDENT

RULING

16/10/2024 & 25/10/2024 ROBERT, J:- This is a ruling on a preliminary objection raised by the respondents challenging the competency of the application for a temporary injunction filed by the applicant, Mr. Charles Kahatano Lwempisi. The applicant seeks an order to restrain the respondents, their agents, or any person acting under their instructions from supervising the collection of money from properties located at Plot No. 24/T and 25/T, Rwegasore Street within Mwanza Municipality, registered under Certificate of Title Nos. 6870 and 5695, pending the determination of the main suit (Civil Case No. 22248 of 2024). The dispute revolves around control and supervision of revenue collection from the disputed properties, with the respondents having been previously appointed by court order in RM Misc. Civil Cause No. 03/2021 to oversee these operations. Subsequent attempts by the applicant to challenge that order through review and appeal proved unsuccessful, with the review being dismissed in Misc. Application No. 16 of 2023 and leave to appeal denied in Misc. Land Application No. 38 of 2021. The applicant now seeks injunctive relief to prevent the respondents from continuing to supervise the collection of revenue from these properties pending the determination of Civil Case No. 22248 of 2024. The respondents raised three objections against the application, which are the subject of this ruling. The respondents submitted the following preliminary objections:

1. The affidavit by the applicant affirmed by Shabibu Badi Mruma is totally defective for containing hearsay information;
2. The affida vit by Shabibu Badi Mruma is hopelessly bad in law for containing defective verification clause for failure to show the source of information of the facts deposed thereto;

3. This Court is functus officio from entertaining prayer (a) at inter partes application based on the decision in RM Miscellaneous Civil Cause No. 03/2021 and Execution No. 47 of 2023. The respondents pray that the application be struck out with costs. During the hearing of the preliminary objection, the applicant was represented by Ms. Upendo Mulazi, learned counsel whereas the respondent was represented by Mr. Anthony Nasimire, learned counsel. Mr. Nasimire opened his submissions by addressing the third objection. He argued that this court lacks jurisdiction to entertain injunctive relief sought by the applicant because it is functus officio. He contended that the court had already determined the issue of supervision and collection of money from the subject properties in RM Misc. Civil Cause No. 3 of 2021. Specifically, he referred to the first paragraph on page 23 of the decision, which confirmed the appointment of the 2nd respondent as the supervisor of the properties. Counsel further argued that any attempt to challenge that order could only be made through a review or appeal. He emphasized that the applicant's review application was dismissed in RM Misc. Application No. 16 of 2023, and his application for leave to appeal was rejected in Misc. Land Application No. 38 of 2021. Therefore, counsel submitted that the 3 present application is a veiled attempt to circumvent final decisions of this court, which renders the application incompetent. On the 1st and 2nd Preliminary Objections, Mr. Nasimire submitted that the affidavit supporting the application is fatally defective. He argued that the affidavit contains hearsay information, as it was sworn by Mr. Shabibu Badi Mruma, an advocate, rather than the applicant himself, without indicating the source of the deposed facts. Counsel contended that an affidavit in interlocutory proceedings must contain facts within the personal knowledge of the deponent, as provided under Order XIX Rule 3(1) of the Civil Procedure Code. To support his position, he cited the cases of Said Risas v. Zacharia Mbarakani, Misc. Land Application No. 34 of 2020, and Salim Hamdun & Others v. Administrator General, Misc. Civil Application No. 267 of 2022, both reported in TANZLII, which emphasized that affidavits containing hearsay are unreliable and should be expunged from the record. Additionally, counsel submitted that the verification clause is defective because it fails to disclose the source of information. He insisted that the deponent's general assertion that all paragraphs are based on his "own knowledge and belief" without specifying the basis of such belief renders the affidavit incurably defective. Counsel prayed for the affidavit to be struck out, which would render the application incompetent. In response, Ms. Mulazi submitted that the doctrine of functus officio does not apply to this application. She argued that the present application seeks a temporary injunction to preserve the status quo pending the determination of the main suit, which is distinct from the matters determined in RM Misc. Civil Cause No. 3 of 2021. According to counsel, the main suit alleges contempt of the orders issued in the previous cases and involves new facts that were not addressed in the earlier proceedings. Counsel further submitted that the respondents' objection fails to meet the test of a valid preliminary objection as established in Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696, which requires that a preliminary objection must be based on a pure point of law. She contended that the respondents' objection would require evidence to establish whether the present application arises from the same cause of action as the previous cases, which disqualifies it

from being a valid preliminary objection. 5 On the 1st and 2nd Preliminary Objections, Ms. Mulazi contended that the affidavit sworn by Mr. Mruma is competent. She relied on Order XIX Rule 3(1) of the Civil Procedure Code, which allows any person with knowledge of the facts to swear an affidavit in interlocutory applications. She argued that an advocate may depose to facts within his knowledge or based on information provided to him by his client. Counsel cited the case of *Thomas Misalaba v. William Ngomole*, Misc. Land Application No. 144 of 2021, to support the position that affidavits in interlocutory applications may contain both facts known to the deponent and statements of belief, provided that the grounds for such belief are stated. Although counsel conceded that the verification clause could have been more precise, she submitted that the defect is curable by amendment. She relied on *Sanyou Service Station Ltd v. BP Tanzania Ltd*, Civil Application No. 185/17 of 2018, which affirmed the court's discretion to allow amendments to verification clauses. The court has carefully considered the parties' submissions and the authorities cited. The issues for determination are: 6

- (a) Whether the court is functus officio in respect of the relief sought.
- (b) Whether the affidavit is defective for containing hearsay information and a defective verification clause. Starting with whether the Court is functus officio, the doctrine of functus officio precludes a court from re-opening or reconsidering a matter that it has conclusively determined, except through a formal review or appeal process. In this case, the issue of revenue collection from the disputed properties was conclusively resolved in RM Misc. Civil Cause No. 03 of 2021 and the applicant's subsequent legal challenges were dismissed. Although the counsel for the applicant argues that the main suit is distinct from the previous proceedings cited by the respondents, the key question in connection to this application is which state of affairs constitutes the proper status quo to be preserved. The concept of status quo, as emphasized in *Atilio v. Mbowe* [1969] HCD 284, means the last uncontested state of affairs that existed before the dispute arose. This ensures that the subject matter of the case is preserved until the final determination on the merits. 7 In this case, the decision in RM Misc. Civil Cause No. 3 of 2021 is critical. That ruling legally empowered the respondents to supervise revenue collection from the properties at Rwegasore Street. As such, the supervision arrangement became part of the new legal status quo - meaning the state of affairs as established under that order. Reversing that arrangement through an injunction would not preserve the status quo but rather disrupt it. The applicant's argument that the prior status quo existed before the respondents' appointment cannot hold because it would undermine the effect of the prior court order. The court finds that the status quo to be preserved includes the respondents' supervision of revenue collection, as ordered in RM Misc. Civil Cause No. 3 of 2021. Issuing the temporary injunction sought by the applicant would effectively reverse or suspend the lawful execution of that order, which the court cannot do under the guise of preserving the status quo. Such a reversal could only be achieved through a proper review, appeal, or setting aside of the prior order - not through an interlocutory injunction. Therefore, this court cannot entertain this application, as doing so would contravene the principle of functus officio. 8 Coming to the last issue, whether the

affidavit is defective. The respondents argue that the affidavit affirmed by Mr. Shabibu Badi Mruma contains hearsay information and lacks a proper verification clause. The relevant law governing affidavits is Order XIX, Rule 3(1) of the Civil Procedure Code, which requires affidavits to contain only facts within the personal knowledge of the deponent, or where facts are based on belief, the grounds for such belief must be disclosed. Upon reviewing the affidavit, it is clear that the deponent, Mr. Mruma, failed to indicate the source of the information he relied upon. This failure renders the affidavit defective, as it makes it impossible for the Court to determine whether the deponent had personal knowledge of the facts or whether they were merely transmitted to him by another person. Failure to disclose the source of such information constitutes hearsay, which is inadmissible in an affidavit. Turning to the issue of the verification clause, it is well established that the verification must specify which facts are based on the deponent's personal knowledge and which are based on information obtained from others. The affidavit in this case does not clearly distinguish between these 9 categories. The failure to make this distinction is a fundamental defect, not a mere irregularity. The cases of Said Risas v. Zacharia Mbarakani (Misc. Land Application No. 34 of 2020) and Salim Hamdun v. Administrator General (Misc. Civil Application No. 267 of 2022) support the proposition that where an affidavit fails to disclose the source of information, it becomes unreliable and inadmissible. Without a valid affidavit, the application is rendered incompetent. In the present case, the failure to disclose the source of information is a material defect that cannot be cured without prejudicing the respondents. The applicant had the opportunity to ensure that the affidavit complied with the requirements of the law, and failure to do so cannot be overlooked. The absence of a valid affidavit renders the application incompetent. As held in Sanyou Service Station Ltd v. BP Tanzania Ltd (Civil Application No. 185/17 of 2018, CAT), a defective affidavit can be amended only under certain conditions. However, in this case, the defects are so fundamental that they vitiate the entire affidavit, leaving nothing to amend. io Based on the foregoing analysis, all three preliminary objections raised by the respondents are upheld. The affidavit is defective both for containing hearsay information and for having a defective verification clause. Moreover, the court is functus officio concerning the subject matter. Consequently, the application is hereby struck out with costs. It is so ordered. 11

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