

TANZANIA / JUDGMENT

kapongo mohamed kondo vs registered trustees of aict church tabora 2 others 2023 tzhc 18496 23 june 2023

COURT
TZHCDECIDED
23 June 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA THE SUB-REGISTRY OF
TABORA AT TABORA MISCELLANEOUS LAND APPLICATION NO. 11 OF 2022 KAPONGO
MOHAMED KONDO..... APPLICANT VERSUS REGISTERED
TRUSTEES OF AICT CHURCH TABORA -..... 1st RESPONDENT TABORA MUNICIPAL
COUNCIL..... 2nd RESPONDENT THE ATTORNEY
GENERAL..... 3rd RESPONDENT

RULING

Date: 19/4/2023 & 23/6/2023 BAHATI SALEMA. J.: The applicant herein, Kapongo Mohamed Kondo, filed the instant application under section 2(3) of the Judicature and Application of Laws Act, Cap.358 [R.E 2019] and section 95 of the Civil Procedure Code, Cap.33 [R.E 2019] praying for injunctive orders restraining the 1st respondent from developing the land located at Malabi Street, Ipuli Ward within Tabora Municipality pending hearing and determination of an application intended to be filed by the applicant. Before the application could come for hearing, the 1st respondent lodged a notice of preliminary objection (PO) on the ground that the 1st respondent; Registered Trustees of AICT Church Tabora; is not a body Corporate and is wrongly sued instead of the Registered Trustees of the African Inland Church Tanzania of P. O. Box 905 Mwanza. As it has been a renowned practice of this court, the hearing of the main application was halted pending the determination of the PO. The Court heard both parties, overruled the objection and granted leave to the applicant to amend the name of the 1st respondent on the pleadings i within 14 days. The court's decision was pursuant to the powers accorded to this Court by Order VI Rule 17 of the Civil Procedure Code, Cap.33[R.E 2019]. The applicant amended the application as ordered. However, once again, the 1st respondent filed the Notice of PO that; /. The applicant's amended affidavit supporting the application is incurably defective and contravenes the mandatory provisions of Section 8 of the Notaries Public and Commissioners for Oaths Act, Cap. 12[R.E 2019] as the purported amended affidavit was only sent and signed at Shinyanga before Mara Mwaselela - Advocate who never witnessed the signature of the alleged applicant in Tabora as alleged. ii. That on 16/9/2022 the applicant was only granted leave by the court to amend the name of the 1st respondent only on the pleadings, but has never sought and granted

leave to amend or substitute his affidavit as he did; Hi. That the applicant's affidavit and amended affidavit are false and faked for the purpose of injuring the 1st respondent. On the date of the hearing, the matter was ordered to be disposed of by way of written submissions which were duly adhered to by both parties. In support of the PO, Mr. Kamaliza Kamoga Kayaga, learned counsel, submitted that the first ground of objection was based on the contravention of the mandatory provisions of section 8 of the Notaries Public and Commissioners for Oaths Act, Cap. 12. That in jurat of attestation, it is alleged that the applicant was affirmed at Tabora on the 24/9/2022 before Ms. Maria Mwaselela - advocate having been introduced by his advocate Mr. Emmanuel Sululu. He submitted that in his counter affidavit in paragraph No.5, he stated that on 13/10/2022. He travelled to Shinyanga and went to see Maria Mwaselela - advocate in her office at Shinyanga and showed her the amended affidavit. She told him that on 24/9/2022 she was not in Tabora but was in Shinyanga and the amended affidavit was only sent to her office by the applicant's counsel who does not know the applicant. That the applicant never signed before her. This is contrary to the mandatory provisions of section 8 of the Notaries Public and Commissioners for Oaths Act, Cap. 12. This renders the application incompetent. He further submitted that the applicant has not filed any rejoinder to challenge those clear facts and it means he concedes to those facts. In the case of Evans s/o Bugale V Jimi s/o Modest, Misc. Land Application No. 3 of 2021 Kgm cited in Nyamunini s/o Ntatambigwa v Simon s/o Kikoti, Mis. Land Application No. 19/2021 HCT- Kigoma (unreported). As to the second ground of objection, the counsel submitted that on 16/9/2022 this court delivered the ruling and granted leave to the applicant in the following terms "... Leave is granted to the applicant to amend the name of the 1st Respondent on the pleadings within 14 days from today." He submitted that, in the order, there was no leave to amend the contents of the affidavit, as it appears now in the amended affidavit under para No.2, 5 and 6. In the absence of an order from the court allowing amendment of the affidavit, the amended affidavit has no legs to support the chamber summons. Thus, the application is incompetent and should be struck with costs. 3 Finally, he submitted that advocates, as officers of the court, should always strive to ensure that the reputation and dignity of the court are protected by avoiding faked documents as was advised in the case of Energy and Water Utilities Regulatory Authority V Jambo Petroleum Products Limited, Civil Revision No. 4 of 2022- HCT unreported. Responding, the applicant's counsel submitted that there is no affidavit sworn by the said Maria Mwaselela proving that she was not at Tabora when she attested the affidavit. He submitted that what is being submitted by the learned counsel for the 1st respondent is just a mere say which is not supported by any documentary evidence. The bus ticket attached to the counter affidavit is not final proof that the learned defence counsel went to Shinyanga to meet Ms. Maria Mwaselela. Such allegation was to be backed up by the affidavit sworn by the said Maria Mwaselela. As to the applicant not filing a rejoinder, it is clear that no law requires a counter affidavit to be re-joined. Since the matter has to proceed to a hearing the same can be countered in the hearing hence the case of Evansi s/o Bugale Vs Jimi s/o Modest cited by the 1st respondent which is just a persuasive decision that cannot bind this court. With regard to the second ground, the applicant's counsel stated that it is intended to waste precious time of the Court, the same has no base on the ground that it is not stated in the 1st respondent's written submissions what has been amended by the applicant in paragraphs 2, 5 and 6 of the affidavit and how the alleged amendment has resulted to non-

support of the chamber summons and how it has occasioned any failure of justice to the 1st respondent. That being the position in the case of Energy and Water Utilities Regulatory Authority V Jamba 4 Petroleum Products Limited {supra} cited by the learned counsel, its applicability is irrelevant to the application at hand. In rejoinder, the applicant was again faulted for not filing a rejoinder or reply to the counter affidavit; particularly, on what was asserted in paragraph No. 5 of the counter affidavit. The 1st respondent's counsel argued further that, it is elementary that in the absence of a reply or rejoinder to the counter affidavit, the applicant cannot challenge those facts by way of submissions from the bar. It means that those facts are true and admitted. Otherwise, it was upon the applicant to come up with an affidavit from Maria Mwaselela to dispute the assertion. As to the second ground, he reiterated that the court has not granted leave to the applicant to amend the contents of his affidavit, particularly paragraphs 2, 5, and 6 which are different from the previous affidavit of the applicant. In the absence of such leave, the purported amended affidavit is useless and cannot support the application. Having heard from both camps, the issue is whether the objections are meritorious. As to the first limb of the objection, I subscribe with the applicant's counsel that since there is such an allegation, I am of the considered view that the said Maria Mwaselela would have filed an affidavit sworn proving that she was not at Tabora when she attested the affidavit. As correctly stated that is just a mere say which is not supported by any documentary evidence. The bus ticket attached to the counter affidavit is not final proof that the learned defence counsel went to Shinyanga to meet Ms. Maria Mwaselela. Such allegation was to be backed up by the affidavit sworn by the said Maria Mwaselela. This ground fails. 5 Coming to the second limb of the objection, it is true that on 16/9/2022 the applicant; under Order VI Rule 17 of the Civil Procedure Code, Cap.33, was granted leave by the court to amend the name of the 1st respondent only on the pleadings. He never sought and was not granted leave to amend or substitute his previous affidavit. Therefore, I find a basis for that. Therefore since the 2nd limb of objection suffices to dispose of the objection, I find no reason to belabour much on the remaining objection. For the reason stated herein above, the preliminary objection raised by the 1st respondent is hereby sustained. I hereby struck out the application with costs. Order accordingly. A. BAHATI SALEMA JUDGE 23/6/2023 Court: Ruling delivered in presence of both parties. A. BAHATI SALEMA JUDGE 23/6/2023 Right of Appeal is hereby explained. A. BAHATI SALEMA JUDGE 23/6/2023 6

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