

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR-ES-SALAAM**

CIVIL APPLICATION NO. 240/01 OF 2019

(CORAM: LILA, J.A., KEREFU, J.A., And KAIRO, J.A.)

1. JAMAL S. MKUMBA
2. ABDALLAH ISSA NAMANGU }**APPLICANTS**

VERSUS

ATTORNEY GENERALRESPONDENT

**(Application for Restoration of hearing of the dismissed appeal by
the Court of Appeal at Dar es Salaam)**

(Mwarija, Mwangesi and Kwariko, JJA.)

dated the 17th day of June, 2019

in

Civil Appeal No. 22 of 2016

RULING OF THE COURT

24th September & 15th December, 2021

KAIRO, J.A.:

By way of Notice of Motion filed on 27th June, 2019, the applicants seek an order of the Court to restore Civil Appeal No. 22 of 2016 which was dismissed on 17th June, 2019 for the non-appearance of the applicants. The application is brought under Rule 112 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and is accompanied by an affidavit sworn by one January Raphael Kambamwene, the advocate of the applicants.

A brief factual background giving rise to this application is that the applicants were not amused by the ruling and order of the High Court of Tanzania, Dar es Salaam Registry in Civil Case No. 57 of 2015 delivered on 9th October, 2015. They thus decided to lodge Civil Appeal No. 22 of 2016 in this Court which was dismissed on 17th June, 2019 for non-appearance, hence this application. Together with an affidavit in reply opposing the application, the respondent on 30th August, 2019, lodged a Notice of Preliminary Objection (the PO) in terms of Rule 107 (1) comprised of two limbs as follows: -

- 1. That, the application is incompetent and bad in law for being supported by an incurably defective affidavit having a defective verification clause.*
- 2. That, the application is incompetent and bad in law for being supported by an incurably defective affidavit containing legal arguments and conclusion.*

At the hearing, the applicants were represented by Mr. January Raphael Kambamwene, learned counsel whereas the respondent had the services of Messrs. Erigh Rumisha and Mussa Mpogole, both learned State Attorneys.

In his submission in support of the first limb of the PO, Mr. Rumisha stated that the application is incompetent for being

accompanied by a defective verification clause. In elaboration, Mr. Rumisha stated that verification clause is a very crucial part of the affidavit as it assists the Court to be aware of the statement of the facts which the deponent is able to prove, and if it contains some other information, the source from where the deponent derived the said other information. He argued that the verification clause under scrutiny is defective for failure to disclose specifically which paragraphs are based on the deponent's own knowledge and which ones are based on the deponent's belief. Mr. Rumisha gave an example of paragraphs 4, 5, and 6 arguing that the same cannot be said to be based on the deponent's own knowledge as the source was supposed to be specifically disclosed in the verification clause, but it was not. To bolster his argument, he referred us to the case of **Anatol Peter Rwebangira v. The Principal Secretary, Ministry of Defence and National Service and the Hon. Attorney General**, Civil Application No. 548/04 of 2018 (unreported). Mr. Rumisha further elaborated that, looking at paragraphs 4, 5 and 6 of the said affidavit, it is very clear that the said averments are not based on the deponent's own knowledge, but obtained from his clients, therefore, the source of the said information was supposed to be specifically disclosed rather than giving a general verification clause as the deponent did which legally is not acceptable.

He invited the Court to find the verification clause defective, so is the affidavit and consequently the application is rendered incompetent for being accompanied by the defective affidavit which cannot be acted upon by the Court. Thus, the Court should struck out of the application, with costs.

Submitting on the 2nd limb of the preliminary objection, Mr. Rumisha submitted that, affidavit being a sworn evidence is supposed to contain only statements of facts which are of deponent's own knowledge or information which the deponent believes to be true and not arguments or conclusion. He cited the case of **Uganda v. Commissioner of Prisons Exparte Matovu** [1966] EA 514 to support his arguments. He went on to submit that paragraph 7 of the affidavit at issue is argumentative and contain conclusion. On that point, Mr. Rumisha submitted that, Mr. Kambamwene's argument that the case involves the livelihood of about 360 persons he alleged not to have been paid the promised compensation for their houses after paving way to Kilwa Road expansion, is argumentative. It was his further assertion that another argument that this appeal is the hope for redress of the said 360 persons is not a fact, but a conclusion. Mr. Rumisha stated that one would want to know whereabouts of the said 360 law abiding citizens and

the houses stated therein, how does Kilwa Road relate to the said citizens etc. He also added that despite being argumentative, the said paragraph also contains conclusion, thus ought to be expunged.

Mr. Rumisha went on to state that, after expunging the said paragraphs and the verification clause, the affidavit remains with no verification clause, thus rendered it defective and the application therefore incompetent for being supported by the defective affidavit. Finally, Mr. Rumisha prayed the Court to strike out the application with costs.

In his brief reply, Mr. Kambamwene who is also a deponent of the challenged affidavit, refuted Mr. Rumisha's arguments by submitting that there is nothing wrong with the said paragraphs in the affidavit. He elaborated that, though he was in the Court premises, he had a false knowledge that the case was not yet called. That, the statement in paragraph 4 of the affidavit to the effect that the case was not yet called confirms that he had the false knowledge and not that the client informed him so. Mr. Kambamwene referred us to paragraph 5 of the affidavit and stated that he witnessed the order in the course of being written to dismiss his case when he entered inside the Court room. Thus, he insisted that he was present himself inside the Court room

when the case was dismissed and not that he was so informed. He concluded that paragraphs 4, 5, and 6 are not there due to information but his own personal knowledge.

With regards to paragraph 7 of the affidavit, Mr. Kambamwene insisted that it contains facts which he can prove. Besides, the said citizens knew that they can realize their rights through this application. He however conceded that there could be some mistake in the verification clause with regards to words "... *and belief...*" as there is no information in the affidavit which is based on belief, as such, the words were not supposed to be there and he implored the Court to disregard them. He argued further that other assertions in the affidavit are based on the deponent's knowledge. Mr. Kambamwene concluded by praying the Court to dismiss the POs raised for lack of merit with costs.

In his rejoinder, Mr. Rumisha repeated what he submitted in chief and reiterated his prayer to have this application struck out with costs.

In determining the points of objection raised, we shall start with the 2nd limb to the effect that, the application is incompetent and bad in law for being supported by a defective affidavit which contains legal arguments and conclusion.

The legal position is now settled that an affidavit which is to be used as evidence before the court should not contain extraneous matters but facts only. The general rule of practice and procedure on affidavits was stated in **Uganda v. Commissioner of Prison Exparte Matovu** (supra) 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) as follows: -

"As a general rule of practice and procedure on affidavit for use in Court being a substitute for oral evidence, it should only contain statement to which the witness disposes either of his own knowledge or such an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion."

The position was followed in **DP Shapriya & Co. Ltd v. Bish International, Civil Application No. 53 of 2002** (unreported).

Mr. Rumisha has contended that paragraph 7 of the applicant's affidavit contains arguments and conclusion, the contention which was vehemently refuted by Mr. Kambamwene who insisted that the attacked paragraph contains facts which he can prove and not as was stated by Mr. Rumisha. For ease of reference, we find it apposite to reproduce paragraph 7 of the affidavit as follows: -

"7. That this case has touched the livelihood of some 360 law abiding citizens who have lost houses and other properties, to give way to Kilwa Road Expansion project, and have not been paid the promised compensation. This appeal is their hope for redress."

The quoted paragraph in our view attracts arguments as to whether or not the alleged 360 citizens have lost their properties as deposed, whether or not they were entitled to the compensation and whether they have not been paid up yet. Further to that the statement *"this appeal is their hope for redress..."* is a conclusion. We are therefore in agreement with Mr. Rumisha's argument on this aspect.

We have however noted Mr. Kambamwene's argument that paragraph 7 contains facts which he can prove, but we think that proving them or not would be after the advancement of arguments for and against the contentions by the parties. Thus, according to **Exparte Matovu** (supra) the paragraph contains extraneous matters which cannot be allowed to continue to be part of the Court's record. There is a plethora of authorities which categorically stipulates that affidavits should be confined to facts and must be free from extraneous matters. See for instance cases of **Lalago Cotton Ginnery & Oil Mills Company Limited v. The Loans and Advances Trust (LART)**, Civil

Application No. 8 of 2002, **Mustapha Raphael v. East African Gold Mines Ltd**, Civil Application No. 4 of 1998 and **Ignazzio Messina v. Willow Investment SPRL**, Civil Application No. 21 of 2001 (all unreported).

Regarding the consequence, we are in total agreement with Mr. Rumisha that the paragraph with extraneous matters ought to be expunged from the record. It is now settled that an offensive paragraph can be expunged or disregarded and the Court can continue to determine the application based on the remaining paragraphs if the expunged paragraph is inconsequential.

In **Chadha & Company Advocates v. Arunaben Chaggan Chhita Mistry & 2 Others**, Civil Application No. 25 of 2013 cited in the case of **Phantom Modern Transport (1985) Limited** (supra) the Court held:

"Where the offensive paragraphs are inconsequential, they can be expunged leaving the substantive parts of the affidavit remaining intact so that the court can proceed to act on it."

See also **Anna Makanga v. Grace Woiso**, Civil Reference No. 2 of 2006 (unreported). On account of what was held in **Chadha & Company Advocates** (supra) we hereby expunge paragraph 7 of the

affidavit from the record. We however hasten to add that the expunged paragraph is inconsequential and we shall therefore proceed to determine the application based on the rest of the paragraphs.

Reverting to the 1st limb of the PO, the respondent contends that the application is incompetent and bad in law for being supported by a defective verification clause. The issue for our determination is whether or not the verification under attack is defective and if yes, what is the consequence. For ease of reference, we have again found it pertinent to reproduce the said verification clause which appears as hereunder: -

VERIFICATION

"I January Raphael Kambamwene, the deponent herein, do hereby verify that what I have stated in paras 1, 2, 3, 4, 5, 6, 7 and 8 above is true to the best of my knowledge and belief based on my experience with the case and also my knowledge of the law...."

We shall start with what amounts to a verification clause.

The Court in **Director of Public Prosecution v. Dodoli Kapufi and Patson Tusalile**, Criminal Application No. 11 of 2008 (unreported) simply defined verification clause as that part of an affidavit which *"shows the facts the deponent asserts to be true of his own knowledge*

and those based on information or beliefs". A similar definition was also given in **Paul Makaranga v. Republic**, Criminal Application No. 3 of 2010 (unreported). As to the rationale of verifying an affidavit, the Court in **Lisa E. Peter v. Al- Hushoom Investment**, Civil Application No. 147 of 2016 (unreported) quoted with approval the Indian case of **A.K.K. Nambiar v. Union of India (1970) 35 CR 121** which explained the importance of a verification clause in affidavit 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 information received from persons or allegation may be based on records. The importance of verification is to test the genuineness and authenticity of allegation and also to make the deponent responsible for 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".

Basing on the above cited cases, verification clause is one of the essential ingredients of any valid affidavit which must show the facts the

deponent asserts to be true of his own knowledge and those based on information or beliefs.

On further instance on the importance of a verification clause, the Court in **Anatol Peter Rwebangira** (supra) quoted the book in *Civil Procedure by C.K. Takwani 5th Edition* where it was stated at page 21:-

"Where an averment is not based on personal knowledge, the source of information should be clearly disclosed."

In the verification clause under attack, Mr. Rumisha has argued that the deponent did not specifically disclose the source of information from which he derives for each paragraph in the affidavit at issue. He specifically pointed out at paragraphs 4, 5 and 6 of the affidavit asserting that the averments therein cannot be based on deponent's own knowledge as he stated in the verification clause. We wish to reproduce the attacked paragraphs as follows: -

"4. That, my clients aforesaid informed me that our case had not been called. That the case that was called was for other parties, not being us.

6. That following information from my clients that the appeal had not been called I honestly believed them as I was at the very court premises

ready for the hearing. I was not negligent at all."

[Emphasis supplied]

Looking at the bolded part of the excerpt above in paragraphs 4 and 6, the deponent suggests that he was informed of the assertions therein by his clients but he was also present inside the Court room when the order to dismiss his appeal was being written.

Though, Mr. Rumisha argued that the source of information of the above quoted paragraphs was not specifically disclosed, thus rendering the verification clause defective, but Mr. Kambamwene averred that he was as well in the Court room when the Court was writing the order to dismiss his case, as such, he had a personal knowledge of what transpired. His argument was not controverted and according to him, his presence in Court, entitled him to verify that all what he asserted in his affidavit were true to the best of his own knowledge, to which we also agree with.

We understand that Mr. Kambamwene has submitted that the words "*.....and belief...*" appearing in the verification clause were superfluous as no information in the affidavit is based on belief. Reading between lines, Mr. Kambamwene is suggesting that all of the assertions in the affidavit is based on his own knowledge. Be it as it may, we wish

to put it clear that we will address the issue of verification clause as it appears before us. Accommodating the plea to remove some words in the verification clause especially after the respondent has raised the objection concerning it will amount to pre-empting the PO raised to which we are not prepared to do. Besides, it is legally improper as Mr. Kambamwene was supposed to apply for the rectification of the affidavit before the PO was raised instead of using the backdoor to do that as he is now trying to do. We thus agree with Mr. Rumisha that the verification clause is defective. Basing on the above, what remained is the consequence.

Mr. Rumisha has invited this Court to struck out the application relying on the cited case of **Anatol Peter Rwebangira** (supra). We wish to state that, we have noted and appreciated the stance taken by the Court therein. We have also noted that the Court in other cases in likewise situation where the verification clauses were found to be defective, allowed the applicant to amend it. See: **DDL Invest International Limited vs. Tanzania Harbours Authority & Two others**, Civil Application No. 8 of 2001 (unreported) wherein the Court has also observed that whether or not to allow a party to amend an

affidavit with a defective verification is a matter in the discretion of the Court.

In another instance, the Court in **Sanyou Service Station LTD v. BP Tanzania LTD (Now PUMA ENERGY (T) LTD)**, Civil Application No. 185/17 of 2018 (unreported) though found that the defect in the verification clause was caused by wrong numbering of the paragraphs, invoked the overriding objective and allowed the applicant to amend the affidavit so as to cure the pointed-out defect in the verification clause.

We are inclined to agree with the position taken in **Sanyou's** case. Much as we appreciate the stance taken in **Anatol Rwebangira's** case, but it is the cherished legal principle that every case is to be decided on its own merits; that is, having regard to all the circumstances of each particular case. See: **Amos Kabota v. The Republic, Criminal Application No. 24/11 of 2017 (unreported)**. On account of the facts presented to us and for the interest of justice, we think this is one of those cases which demands for substantive justice in its determination. But further to that, 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 law and parties be heard on merit.

In the circumstances, the POs raised succeeds only to the extent explained above. The applicant is therefore given 30 days from the date of this ruling within which to file an amended affidavit with a proper verification clause. Costs to be in the cause.

It is so ordered.

DATED at DAR ES SALAAM this 10th day of December, 2021.

S. A. LILA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 15th day of December, 2021 in the presence of the appellant in person and Mr. Erigh Rumisha, learned State Attorney for the appellant is hereby certified as a true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL