

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

**CRIMINAL APPLICATION NO. 23 OF 2014**

**THE DIRECTOR OF PUBLIC PROSECUTIONS .....-...APPLICANT**

**VERSUS**

**WILFRED MUGANYIZI LWAKATARE.....1<sup>ST</sup> RESPONDENT**

**LUDOVICK RWEZAURA JOSEPH ..... 2<sup>ND</sup> RESPONDENT**

**(Application for Extension of Time to file an Application for Revision  
from the Ruling of the High Court of Tanzania at Dar es Salaam)**

**(Kaduri, J.)**

**dated the 8<sup>th</sup> day of May, 2013**

**in**

**Misc. Criminal Application No. 14 of 2013**

**RULING**

14<sup>th</sup> September & 12 October 2016

**LILA, J.A.:**

The Director of Public Prosecution (henceforth the DPP), the applicant, is seeking extension of time within which to file an application for revision to the Court of Appeal against the decision of the High Court of Tanzania, at Dar es Salaam (Hon. Kaduri, J) dated 8<sup>th</sup> day of May, 2013 in Miscellaneous Criminal Application No. 14 of 2013. The application is brought by way of a notice of motion supported by an affidavit sworn by Faraja Agathon Nchimbi, learned Senior State Attorney. It is brought under Rules 10 and 48(1) of the Court of Appeal Rules, 2009 (herein to be referred to as the Rules).

The application is resisted by the respondent, Wilfred Muganyizi Lwakatare, through an affidavit in reply sworn by Peter Kibatata, learned advocate.

Besides filing an affidavit in reply Mr. Kibatata also filed a notice of points of preliminary objections in law which states:-

- 1. That, the application for extension of time is incurably defective for failure by the applicant to write, file and serve the 1<sup>st</sup> Respondent with written submissions within 60 days from the day of filing the application.*
- 2. That, the application for extension of time is incurably defective for non-citation of the law relating to period within which a revision is to be filed.*
- 3. That the application for extension of time is un-maintainable for the failure by the applicant to effect service of the same upon respondent within 14 days of the date of filing.*
- 4. That the affidavit in support of the application is fatally defective for reason that the verification by the deponent is fatally defective.*

*5. The affidavit in support of the application is fatally defective for the reason that the same does not show when the said affidavit was made.*

On the date of hearing the above points of objection, Mr. Peter Kibatala, learned advocate, appeared for the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent appeared in person, unrepresented and Mr. Tumaini Kweka, learned Principal State Attorney and Mr. Awamu Mbagwa, learned Senior State Attorney appeared representing the applicant.

In the course of hearing, Mr. Kibatala abandoned the 3<sup>rd</sup> point of objection and he argued the four remaining points of objection as listed.

Amplifying on the 1<sup>st</sup> point of objection, Mr. Kibatala contended that the applicant did not file written submissions in support of the application as required under Rule 106(7) of the Rules. He said though that Rule speaks of civil matter but its applicability extends to Criminal matters as was held by Hon. Luanda, J.A. in **DPP V. Elizabeth Michael Kimemeta @ Lulu** Miscellaneous Criminal Application No. 23 of 2012(unreported). Following such failure to file written submissions in support of the application Mr. Kibatala prayed this Court to dismiss the application under Rule 106 (9) of the Rules.

In respect of the second point of objection Mr. Kibatata stated that the applicant have not cited Rule 65 (4) of the Rules which shows the time within which the application for revision ought to be filed. It was his views that such Rule vests this Court with jurisdiction to do revision. He said failure to cite it renders the application fatally defective.

Regarding the fourth point of objection, Mr. Kibatata argued that the applicant have properly verified only paragraph 1 of the affidavit. He said the rest of the paragraphs are hearsay. He urged this Court to expunge them from the affidavit consequent upon which there will be no facts to support the application.

For the fifth point of objection Mr. Kibatata had it that the affidavit in support of the application is not dated to show when it was taken. He insisted that all the three components of the affidavit that is the body, verification and attestation must be dated.

Responding to Mr. Kibatata's arguments, Mr. Mbagwa, urged this court to dismiss all the points of preliminary objection as they are baseless.

Mr. Mbagwa stated that Rule 106 and its sub rules fall under Part V of the Rules which relates to civil matters only. He said rule 82 of the Rules is

very clear on that. He said the present application emanates from a Criminal matter. He also said Mr. Kibatata did not file a list of authorities as required under Rule 34(1) of the Rules and neither did he supply the Court with a copy of the cited case law decision.

Regarding failure by the applicant to cite Rule 65 (4) of the Rules, Mr. Mbagwa said this is an application for extension of time which is governed by Rule 10 of the Rules not an application for revision which is governed by Rule 65(4) of the Rules.

On the third point of objection Mr. Mbagwa argued that the verification is very proper as it shows sources of information which is legally acceptable. He said the averments are not therefore hearsay.

In respect of the fifth point of objection Mr. Mbagwa said it is not a legal requirement that the deponent should indicate the date when the affidavit was made before verification. He said even Mr. Kibatata did not cite any case law decision insisting that. He further said date is mandatory at the verification clause and attestation only.

Having duly considered the rival arguments by both sides I now proceed to determine the points of preliminary objection as presented.

At the very outset, I must say that the first point of objection is without merit. It is clear, as rightly argued by Mr. Mbagwa that Rule 106(4) of the Rules is under Part V of the Rules which govern conducts of civil matters. Rule 82 of the Rules in no uncertain terms restricts the application of the Rules under part V to Civil matters only. It provides:-

*"82. This Part shall apply only to appeals from the High Court or a tribunal, acting in original and appellate jurisdiction in **civil cases and to matters relating to them.**"*

The clear wording of the above Rule gives no allowance to any other interpretation. Even the case cited and supplied to the Court by Mr. Kibatata of **The DPP v. Elizabeth Michael Kimemeta @ Lulu** (supra) does not state or even give any impression that Rules under Part V do also apply in Criminal matters. All that I can say is that such case cited is irrelevant. I accordingly dismiss this point of objection.

In preliminary point of objection number two, Mr. Kibatata has raised issue that the applicant did not cite rule 65(4) of the Rules which talks of revision. It is my view that this point of objections is also a misconception on the part of Mr. Kibatata. In the instant application, as rightly argued by Mr. Mbagwa, the applicant is seeking extension of time within which to file

an application of revision. This is not an application for revision such that it would be mandatory to cite Rules 65 (4) of the Rules. All applications for extension of time are governed by and are brought under one Rule 10 of the Rules which mandates the Court to determine applications for extension of time. The condition precedent to the grant of such application is that the applicant must show good cause for the delay. Secondly, applicants are obliged to cite Rule 48(1) of the Rules which provides for the form of an application that the application to the Court shall be by way of a notice of motion supported by affidavit and shall cite the specific rule under which it is brought and state the grounds for the relief sought. In the instant application the applicant has filed a notice of motion, it is supported by an affidavit sworn by Mr. Faraja Agathon Nchimbi, has cited Rules 10 and 48(1) of the Rules and the grounds for the relief sought are well stated in the notice of motion. It is my firm view that the applicant's application complied with the Rules. It is accordingly proper. This point of objection lacks legs upon which to stand and it accordingly falls.

In point of objection number four, Mr. Kibatata is complaining that the verification is defective because only paragraph 1 is properly verified but the rest of the paragraphs are hearsay. In the first place, Mr. Kibatata did not

amplify this point sufficient enough to enable the court grasp the substance of his objection. However, for certainty, I hereunder quote the verification clause as contained in the affidavit by Mr. Faraja Agathon Nchimbi :-

*"VERIFICATION*

*I FARAJA AGATHON NCHIMBI, Senior State Attorney, do hereby verify that all that has been stated in paragraphs 1 of the affidavit is true to the best of my knowledge and what have been averred in paragraphs 2,3,4,5,6,7,8,9,10,11 and 12 above is according to the information gathered from the police investigation file, High Court's Proceedings in Miscellaneous Criminal Application Number 14 of 2013 and the Court of Appeal Proceedings in Criminal Application Number 5 of 2013 which I verily believe to be true."*

I wish to point out that a valid affidavit has four essential ingredients as were outlined in this Court's decision in **Director of Public Prosecutions v. Dudoli Kapufi and Another**, Criminal Application No. 11 of 2008 (unreported)

These are:-



- (i) *the statement or declaration of facts, etc, by deponent,*
- (ii) *a verification clause,*
- (iii) *a jurat, and*
- (iv) *the signatures of the deponent and the person who in law is authorized either to administer the oath or to accept the affirmation.*

A verification clause is therefore a mandatory component of an affidavit (see **Waingarero Chorwa V. The Republic**, Mwanza Criminal Application No. 2 "A" of 2010 (unreported). It shows the facts the deponent asserts to be true to his own knowledge and those based on information or belief. The significance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for such allegations. In the case of **Silima Vuai Fom v. Registrar of Co-operative Societies and 3 others**, Civil Appeal No. 36 of 1994, (unreported) this Court stated.

*"The principle is that **where an affidavit is made on an information, it should not be acted upon by the court unless the sources of the information are specified.***

*This was reiterated by the Court of Appeal for East Africa in the case of **Standard Goods Incorporation Ltd v.***

***Habakchand Nathu & Co** (1950) 17 E.A.C.A. 99. Again, in the case of **Bombay Flour Mill v. Hunibhai M. Patel** [1962] E.A. 803 it was held that as **the affidavit did not state the deponent's means of knowledge or his sources of information and belief, the affidavit was defective and incompetent**, the application based on the affidavit was dismissed.... "[Emphasis mine)*

Now applying the above principles in the present application it is apparent that the verification in the applicant's affidavit in support of the application is in line with the legal requirements set in the above cited decisions. Mr. Faraja Agathon Nchimbi, the deponent in the applicant's affidavit, categorically states that the contents of paragraph 1 are according to his own knowledge and **the rest are according to information he got and he mentions the sources to be police investigation file, Proceedings of both the High Court and Court of Appeal case files.** This, in my view, is a sufficient disclosure of the sources of information. The information cannot therefore be said to be hearsay. This point of objection is therefore baseless and is dismissed.

In the last point of objection, Mr. Kibatata is attacking the affidavit in support of the application for not indicating the date when the affidavit was made immediately before the verification.

No doubt Mr. Kibatata is referring to the first component of a valid affidavit indicated above. He is alleging that the applicant did not indicate the date immediately after the statements or declarations of facts.

The practice is that immediately after the statement of facts or declaration of facts, the deponent indicates thus;-

*"Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_*

\_\_\_\_\_

*Deponents"*

Actually it is not only the date showing when the affidavit was made is indicated but also the deponent's signature.

Admittedly and Mr. Mbagwa also conceded that the applicant's affidavit in support of the application does not show the date when it was made and the deponent did not sign. Mr. Mbagwa simply said it is not a legal requirement while Mr. Kibatata is of a different view. The issue, I must

concede taxed my brain a bit. My perusal of the various applications filed particularly those placed before me have made me realize that there are many other application with affidavits not indicating the date when they were made and even the deponent's signature just below the statements or declarations of facts by the deponents and before the verification clause. Prominent writers such as Sarkar, Code of Civil Procedure 11<sup>th</sup> Edition Pages 1501 -1510 and Mulla, the Code of Civil Procedure, 17<sup>th</sup> Editions pages 849 – 859 are silent on the need for the deponent to indicate the date when the affidavit was made and even the deponent's signature.

Even our statute books, the Civil Procedure, the Oaths and statutory Declarations Act, [Cap 34 R.E. 2002] and the Notaries Public and Commissioners for Oaths Act, [Cap 12 R.E. 2002] have no provision in that regard. Instead, section 8 of Cap 12 mandatorily requires the jurat to show the date and place where the oath was administered or the affirmation taken, the name of the authority and the signature of the deponent. Non-compliance with the above requirements renders the affidavit incurably defective. [See **D.P. Shapriya & Co. Ltd v. Bish International B.V.** [2002] E.A. 47 and **Zuberi Mussa v. Shinyanga Town Council (CAT)** Civil Application No. 100 of 2004 (unreported). Similarly, on the need to have

a proper verification, this Court, in **Silima Vuai Foum vs. Registrar of Cooperative Societies** (supra) stated; that defects in the verification renders an affidavit defective.

It is apparent therefore that our statutes, authors and Court's decisions have insisted on the need to have a proper verification and jurat of attestation to constitute a valid affidavit. The little weight attached to the need to indicate the date when the affidavit was taken and the deponent signature in my strong view, signify, the minor effect it has in case of its omission. This is, it is my view, because by signing immediately after verification, the deponent not only owns the contents of the affidavit but also confirms its genuineness, authenticity and his readiness to be held responsible for the statements and/or declarations he has made. For this reason, I hold that omission to indicate the date when the affidavit was made and the deponents signature immediately before verification is an irregularity which is not fatal. It can be corrected by ordering an amendment of the affidavit by inserting the date and signature of the deponent immediately after the statements or declaration by the deponent. I accordingly invoke this Courts powers under rule 4(2) (b) of the Rules and hereby order the applicant to file another affidavit without any change in

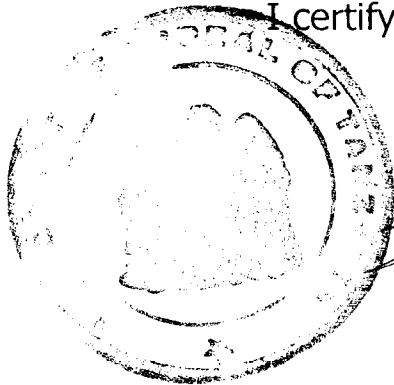
material content but inserting at the relevant part of the affidavit the date when the affidavit was made and a signature of the deponent. This should be done within seven days from the date of delivery of this ruling.


All said, save for the fifth point of objection which is partly upheld, the rest are dismissed. After effecting the amendment the application should proceed to be heard. I make no order as for costs.

**DATED at DAR ES SALAAM** this 4<sup>th</sup> day of October, 2016.

S.A. LILA  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.



  
E.Y. MKWIZU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**