

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWARIJA, J.A., MUGASHA, J.A. And MKUYE, J.A.)

CIVIL APPLICATION NO. 548/04 OF 2018

ANATOL PETER RWEBANGIRA.....APPLICANT

VERSUS

- 1. THE PRINCIPAL SECRETARY, MINISTRY OF DEFENCE
AND NATIONAL SERVICE.....1ST RESPONDENT**
- 2. THE HON ATTORNEY GENERAL.....2ND RESPONDENT**

**(Application to strike out Notice of Appeal of an intended appeal against
the decision of the High Court of Tanzania, at Bukoba)**

(Matogolo, J.)

dated the 29th day of July, 2010

in

Civil Case No. 03 of 2010

RULING OF THE COURT

8th & 13th May, 2019

MUGASHA, J.A.:

The applicant seeks to move the Court to strike out the notice of appeal against the decision of the High Court because of the respondents' failure to take some essential steps to institute an appeal within the prescribed time. The application is by Notice of Motion brought under Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009

(the Rules) and it is accompanied by the affidavit sworn by **ANATOL PETER RWEBANGIRA**, the applicant.

The application is confronted by preliminary points of objection which we will address at a later stage after giving a brief factual background giving rise to the application as gathered from the documents accompanying the application.

The applicant was the plaintiff in Civil Case No. 3 of 2010 before the High Court of Tanzania, Bukoba Registry which was on 29th July, 2016 determined in his favour. Thereafter, he filed an application for the execution of the decree. However, on 22nd June, 2017 which was a period of more than a year after the pronouncement of the trial court's decision, the applicant was served with a notice of appeal to appeal to the Court by officer of the 2nd respondent. It is the contention of the applicant that, though the notice of appeal to the Court was served to him out of time, yet the respondent has not taken any essential steps to institute an appeal.

On 2nd May, 2019 the respondents filed the notice of preliminary objection which sought to impugn the application on two points, which are conveniently paraphrased as follows:

- (1) The application is bad in law and incurably defective for being supported by a defective affidavit which is neither dated nor signed.
- (2) The application is bad in law and incurably defective for being supported by a defective affidavit which bears a defective verification clause.

At the hearing of the preliminary objection, the applicant was represented by Mr. Joseph Bitakwate, learned counsel whereas the respondents had the services of Mr. Abubakar Mrisha learned Senior State Attorney assisted by Ms. Grace Lupondo, learned State Attorney.

When Mr. Mrisha rose to argue the preliminary points of objection, after a brief dialogue with the Court, on reflection, he abandoned the 1st ground of the preliminary objection which he had earlier on filed on behalf of the respondents. The learned counsel

pursued the 2nd point of objection challenging the present application to be incompetent on account of being accompanied by an affidavit which bears a defective verification clause. He pointed out that, the applicant has not revealed or rather specified the paragraphs of the affidavit which are based on his own knowledge and those which are based on his belief. In this regard, the learned counsel argued that on account of the defective verification clause, the application is not accompanied by a proper affidavit which can be acted upon by the Court as the application is rendered incompetent. He thus urged us to strike out the application with costs. To buttress his submission, the learned counsel referred us to the cases of **PAUL MAKARANGA VS THE REPUBLIC**, Criminal Appeal No. 3 of 2010, **DIRECTOR OF PUBLIC PROSECUTIONS VS DODOLI KAPUFI AND PATSON TUSALILE**, Criminal Application No. 11 of 2008 (both unreported) and **SALIMA VUAI FOUN VS REGISTRAR OF CO-OP SOCIETIES AND THREE OTHERS** TLR [1995].

In reply, Mr. Bitakwate opposed the preliminary objection. He submitted that, the application is properly before the Court because it is accompanied by the affidavit deposed by the applicant who has verified the facts therein to be true based on both knowledge and

belief. He thus argued that, since the verification clause is there, the present matter is distinguishable from the cases of **SALIMA VUAI** (supra) and **PAUL MAKARANGA** (supra) whereby in both cases the verification clause was lacking. He added that, in **SALIMA VUAI** (supra) the Court of dealt with the issue of undisclosed source of information contained in the respective affidavit which is not the case in the application at hand. When we prompted him to address the Court on the principle laid in the case of **DODOLI KAPUFI** (supra) which articulates on the essence of the verification clause specifying the paragraph or paragraphs which are based on knowledge, belief and those on information, he contended the same was not necessary. As such, he urged us to dismiss the preliminary objection with costs because the application is properly before the Court.

After a careful consideration of the submission of learned counsel, the point for determination is whether the applicant's affidavit is accompanied by a proper affidavit as required by Rule 48(1) of the Rules which categorically states:

"Subject to the provisions of sub-rule (3) and to any other rule allowing informal application,

every application to the Court shall be by notice of motion supported by affidavit. It shall cite the specific rule under which it is brought and state the ground for the relief sought."

In this regard, we have deemed it pertinent to reproduce the applicant's affidavit as follows:

"AFFIDAVIT

"I, Anatol Peter Rwebangira, an adult, Christian and a resident of Bwanjai area, Misenyi District, hereby make oath and state as follows:

- 1. **THAT** I am the applicant in this application and was the plaintiff in Civil Case No. 3 of 2010 before the High Court of Tanzania at Bukoba which was decided on the 29th July, 2016; thus conversant with the facts to be deposed herewith.*
- 2. **THAT** after the judgment of the High Court of Tanzania at Bukoba in Civil Case No. 3 of 2010 was delivered on the 29th July, 2016; the applicant sought and obtained a copy of the judgment and decree of the High Court.*
- 3. **THAT** the applicant also did on the 22nd May, 2017 file an application for execution of the decree of the High Court of Tanzania in Civil Case No. 3 of 2010.*

4. **THAT** on the 22nd June, 2017 the applicant was served with a Notice of Appeal by the Principal State Attorney, Attorney General Chambers, Kagera zone expressing the respondents' intention to appeal to the Court of Appeal of Tanzania. (A copy of the notice of appeal served on the applicant is "Annexure A" to form part of this affidavit).
5. **THAT** the Notice of Appeal filed to the Court of Appeal of Tanzania by the respondents was not served in time to the applicant.
6. **THAT** from the date the Notice of Appeal was filed to the Court of Appeal of Tanzania; no any essential step has been taken by the respondents to institute the appeal."

At the end of the affidavit the applicant verified the facts contained in the affidavit as follows:

"All what is stated in paragraphs 1,2,3,4,5, and 6 of the affidavit is true is true to the best of my knowledge and belief".

As a general rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only contain statements of facts and circumstances to which the witness deposes

either of own personal knowledge or from information which he believes to be true. See- **UGANDA VS COMMISSIONER OF PRISONS, EXAPARTE MATOVU** [1966] 1 EA 514.

In the case of **DIRECTOR OF PUBLIC PROSECUTIONS VS DODOLI KAPUFI AND PATSON TUSALILE**, (supra), in determining the question as to what is an affidavit, relied on a **TAXMANN'S LAW DICTIONARY, D.P MITTAL**, whereby at page 138 it defines an affidavit in law in the following terms:-

"...a statement in the name of a person, called deponent, by whom it is voluntary signed or sworn to or affirmed. It must be confined to such statements as the deponent is able of his own knowledge to prove but in certain cases may contain statements of information and belief with grounds thereon."

Relying on the said definition, in **DODOLI KAPUFI** (supra) the Court thus concluded that, a verification clause is one of the essential ingredients of any valid affidavit and what amounts to a verification

clause simply shows the facts the deponent asserts to be true of his own knowledge and/ or those based on information or beliefs. Similarly, **C.K.TAKWANI** in his book titled **CIVIL PROCEDURE** Fifth Edition at page 21 states that:

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

The rule governing the modus of verification on the contents of the affidavit that can be acted upon and the consequences for non-compliance were considered by the Court in the case of **SALIMA VUAI FOUM VS REGISTRAR OF COOPERATIVES** (supra). In that case, a chamber application which was filed in the High Court of Zanzibar was confronted with a preliminary objection because it had no verification clause and did not reveal the source of the deponent's knowledge of some facts stated therein. On appeal the Court categorically said:

"1. Where an affidavit is made on information, it should not be acted upon by any court unless the sources of information are specified."

*2. As nowhere in the affidavit, either as whole or in any particular paragraph, it is stated that the facts deposed to or any of them, **and if so which ones, are true to the deponent's knowledge, or as advised by his advocate, or are true to his information and belief, the affidavit was defective and incompetent,** and was properly rejected by the Chief Justice."*

[Emphasis supplied]

In the light of the bolded expression of the holding which we fully subscribe to, a deponent in the verification clause of an affidavit is required to specify the paragraph(s) he/she has verified to be true to his knowledge or belief or information whereby its source must be disclosed.

It is thus settled law that, if the facts contained in the affidavit are based on knowledge, then it can be safely verified as such. However, the law does not allow a blanket or rather a general

verification that the facts contained in the entire affidavit are based on what is true according to knowledge, belief and information without specifying the respective paragraphs. In the present application, according to the applicant's verification clause which we have earlier on reproduced, it is not possible to decipher the facts which are true based on the applicant's knowledge and those based on his belief. Therefore, with respect we find Mr. Bitakwate's argument not sound on the specification not being necessary merely because the facts in the applicant's affidavit are based on knowledge and belief. We say so because **one** that is against the rule governing the modus of verification clause in an affidavit; and **two**, without the specification, neither the Court nor the respondents can safely gauge as to which of the deponed facts are based on the applicant's own knowledge and what are based on his belief. In this regard, we agree with the learned Senior State Attorney that, the verification clause of the applicant's affidavit is rendered defective which adversely impacts on the entire affidavit which is also rendered defective.

In view of the aforesaid, since it is a requirement of the law that, a party contemplating to move the Court formally by a written

application can only do so by lodging a notice of motion supported by an affidavit or affidavits, on account of the defective verification clause in the applicant's affidavit, we have no proper affidavit to support the present motion.

Therefore, we agree with Mr. Mrisha that the application is incompetent and the Court is not properly moved. We uphold the preliminary point of objection raised and accordingly strike out the incompetent application with costs. It is so ordered.

DATED at **BUKOBA** this 10th day of May, 2019.




A. G. MWARIJA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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


S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL