

IN THE HIGH COURT OF TANZANIA

AT DODOMA

MISC. CRIMINAL APPLICATION. NO. 81/2010

**(Original Economic Criminal Case No. 1/2009 of Kondo
District Court at Kondo)**

D.P.P. APPLICANT

VERSUS

**1. AIDAN TANGASI MGONELA
2. NOAH KICHWA TAMBUKA
3. ABUBAKARY IDDI KINYUMA** } **..... RESPONDENTS**

RULING

15/8/2011 & 21/9/2011

KWARIKO, J.

The respondents herein were singularly and jointly and together charged before the District Court of Kondo with twelve (12) counts under the Economic and organized crime control Act, cap. 200 R.E. 2002 and the Penal Code Cap. 16 R.E. 2002. However, the record shows that when the case was called before the trial court for hearing on 4/2/2010 the complainant (Republic) did not appear hence the charge was dismissed and accused persons (respondents herein) were accordingly acquitted in terms of section 226 of the criminal procedure Act cap. 20 R.E 2002.

The republic was aggrieved by the trial court's order but they were late to file their appeal in this court. Therefore, this application was filed to be allowed to file notice of intention to appeal and petition of appeal out of time. The application is supported by the affidavit sworn by one EUNICE MMAR, the Regional Bureau Commander of the Prevention and Combating of Corruption Bureau, Dodoma.

Through the service of messis Njilumi and company Advocates, the respondents filed a counter affidavit opposing this application. Also a notice of preliminary objection upon the following points was filed:

1. That the application is supported by affidavit which is incurably defective on the ground that,
 - (a) The affidavit contains prayer
 - (b) The verification clause is not dated and does not show place of verification
 - (c) The affidavit purportedly sworn by the contains (sic) a defective jirat of Attestation.
2. That the accompanying affidavit is bad in law for failure to show the source of belief.

When the preliminary objection was called for hearing the Counsel for parties were granted on order to argue the same by way of written submissions which were accordingly filed.

It was submitted for the respondents in relation to the first point of objection that contrary to what the law says, the applicant's affidavit especially paragraphs 10 and 12 contains prayers and legal arguments. A number of authorities have been cited thus;

1. Order XIX Rule 3 (1) of the Civil Procedure Code Cap. 33 R.E. 2002 (The CPC).
2. UGANDA V COMMISSIONER OF PRISONS EX PARTE MATOVU [1966] E.A 514.
3. JUMUIYA YA WAFANYAKAZI VS SHINYANGA REGION COOPERATIVE UNION [1997] TLR 200;

Just to mention but a few where it was essentially submitted that the affidavit need not contain prayers and or legal arguments but such facts as the deponent is able of his own knowledge to prove.

Also it was submitted that the applicant's affidavit did not show the source of the applicant's belief as required in law and the case of **SALIMA VUAI FOMU V REGISTRAR OF CO-OPERATIVE SOCIETIES AND THREE OTHERS [1995] T.LR 75** has been cited to buttress the argument. And finally, it was boldly contended that the verification clause contravened the law under Order VI rule 15(3) of the CPC.

The foregoing irregularities, it was submitted, render the affidavit defective and thus incompetent before the court and since the irregularities are substantial it was prayed that the application be struck out with costs.

In reply to the foregoing submission it was submitted for the applicant essentially that the raised anomalies are legal technicalities and if taken against the applicant would mean to go against Article 107A (2) (e) of the Constitution of the United Republic of Tanzania which argue the courts to administer justice without undue regard to procedural technicalities. That, since the respondent only challenge the competency of the application but not its merits, its remedy is only to strike it out and not to dismiss it as the respondent's Counsel has prayed.

As for prayer for costs by the respondents the Counsel for the applicant submitted that the same is only applicable where an accused whose proceedings have been initiated by a private prosecutor is acquitted or discharged for him/her to be paid costs by the said prosecutor. Thus, the issue of costs is not applicable in the instant application. Therefore, the Counsel for the applicant prayed this preliminary objection to be dismissed in its entirety.

In the rejoinder thereof, the Counsel for the respondents contended that Article 107A of the Constitution of the United Republic of Tanzania may only be invoked by a layman and not by a legal trained mind and thus the applicant's Counsel has not shown sufficient reason why this Court would invoke this Article. As for the issue of costs it was submitted that it is the discretion of the court to order the same.

Consequent to the foregoing submissions the Court finds the issue to decide here to be whether the applicant's affidavit is defective and thus making the application incompetent before the Court. To answer the posed issue the Applicant's Counsel only

Invoked Article 107A of the United Republic of Tanzania Constitution and termed the point of objection as just procedural technicalities without showing if the irregularities are there and how they are only procedural technicalities. I am therefore inclined to agree with the Counsel for the respondents that the applicant's affidavit contains prayer under paragraph No. 12 which says:

"THAT, basing on the aforesaid premises, I believe that the granting of this application will be the only way of remedying the situation".

The law says under Order XIX rule 3 (1) of the Civil Procedure Code thus;

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted".

And in the celebrated case in relation to the content of affidavits of **UGANDA V. COMMISSIONER OF PRISON EX PARTE MATOVU** (Supra) it was held thus;

"As a general rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only contain statement of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true. Such an affidavit must not contain an extraneous matter by way of objection or prayer or legal argument or conclusion".

However, the Court does not agree with the respondents' Counsel that paragraph 10 of the applicant's affidavit contains legal argument. For ease of reference para 10 is reproduced hereunder;

"THAT, up to the time when we were advised to seek redress to the High Court by way of appeal, the mandatory prescribed time under section 379 (1) of the Criminal Procedure Act, Cap. 20 of filing the notice and petition of appeal to the High Court had already lapsed".

The foregoing is not legal argument but a fact where the applicant is explaining her situation and the circumstance of the matter which necessitated this application. This fact is not at all arguable.

Also, the Counsel for the respondents submitted that the applicant's affidavit does not show the source of his belief as it is shown under paragraph 12. I have already indicated earlier that this paragraph contains prayer and I do not think the Counsel for the respondents was sure in his submission in regards to the sources of belief and what was decided in the case they cited of **SALIMA VUAI FOUM (Supra)**. The respondents' Counsel's explanation in relation to paragraph 12 of the applicant's affidavit clearly points to the content of verification clause as the law says under Order VI rule 15 (2) of the CPC which provides;

"The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verified upon information received and believed to be true".

If that is the case then the applicant's verification clause has state all the information in the affidavit was true to the deponent's best knowledge. This mean the deponent did not source any information from outside as also it is stated under Paragraph 1 of the affidavit that the deponent was the prosecutor of this case. Therefore, the cited case does not fit in the instant case.

However, the objection that the verification clause is not dated and does not show the place of verification has not been propounded in the submission for the respondents but I find the same with merits. It is true that the verification clause is not dated and the place at which it was signed is not shown. This is contrary to what the law provides under Order VI rule 15(3) of the CPC which says;

"The verification shall be signed by the person making it and shall state the date on which ad the place at which it was signed".

The above quoted requirement is coached in the mandatory term and thus it is not discretionary and each deponent should abide by the same. This goes to the already discussed point in relation to paragraph 12 which contains a prayer. The cited cases

show that if the affidavit has committed the said sins the same is defective and renders the application incompetent which should be struck out as rightly have been prayed by the Counsel for the respondents. The Counsel for the respondent has not prayed this application to be dismissed as contended by the applicant's Counsel. And the foregone irregularities are not just legal technicalities as it was argued by the Counsel for the applicant but they are procedural rules which are handmaids of justice and that is why they were enacted; it was or purpose of ensuring smooth administration of justice. The applicant's Counsel has taken refuge under Article 107A of our Constitution without propounding the alleged legal technicalities and without advising the court on this preliminary objection as raised by the respondents.

However, this court is of the opinion that had the applicant's affidavit contained irregularities in the pleading only as it has been shown under paragraph 12, the Court would have just expunged it from the affidavit and proceed with the application without distorting the subject matter; but since the affidavit's verification clause is also defective I find that this is fatal which renders the whole affidavit defective and thus making the application incompetent before the court.

The remedy to the incompetency of this application is to struck it out (See **UGANDA V COMMISSIONER OF PRISONS, EX PARTE MATOVU**, (Supra)). As for the issue of costs I agree with the applicant's Counsel's submission that costs are ordered payable in criminal matters by the High court if the proceedings have been instituted by a private prosecutor to a discharged or acquitted accused person (for easy of and full reference see

section 345 (1) (2) (3) and (4) of the Criminal Procedure Act Cap. 20 R.E. 2002). In our case the proceedings against the respondents were instituted by the Republic hence the issue of costs does not arise.

Before I rest my pen, I would like to agree with the respondents' Counsel that the issue of limitation period in relation to this application was raised by the 1st respondent in his personal capacity but since he was represented the court disregarded his pleading. Thus the submission by the applicant's Counsel in that respect was not called for.

Finally, find that this application is incompetent before the court and it is hereby struck out. Order accordingly.



(M.A. KWARIKO)

JUDGE

21/09/2011

COURT: Right of Appeal fully explained.



(M.A. KWARIKO)

JUDGE

21/09/2011