IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC CIVIL CAUSE NO. 2 OF 2016

ABAS ZUBERI MTEMVU .....PETITIONER

VERSUS

THE RETURNING OFFICER

FOR TEMEKE CONSTITUTENCY .....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

ABDALLAH ALLI MTOLEA .....3RD RESPONDENT

I. MAIGE, J

RULING

Whether the affidavit of Mr. AFIDU JAHUSSEIN LUAMBANO ("PW-4") should be received as evidence in lieu of oral testimony, is subjected to a number of objections based on points of law. In the first place, the affidavit has been criticized for violating the rule against departure from pleadings set out in order VI rule 7 of Civil Procedure Code. More so, it has been resisted for being argumentative and for comprising hearsay testimonies. Besides, the affidavit has been challenged for the reason of there being different descriptions of the names of **PW-4**. The oral submissions in support of the grounds of objection were made by Mr. Mabruik learned senior state attorney and Mr. Tibanyendera, learned advocate (together "the defense counsel"). The submissions in opposition were made by

Messrs Mkoba and Mbamba, learned advocates (together "the counsel for the petitioner").

It was submitted, in support of the first ground of objection, that, the affidavit in so far as it holds factual depositions not pleaded in the petition, is violative of the provision of order VI rule 7 of the CPC which bars departure from pleadings. **The defense counsel** in their submissions placed heavy reliance on the authorities in LAWRENCE SURUMBU TARA VS. THE ATTORNEY GENERAL AND TWO OTHERS, CIVIL APPEAL NO. 56 OF 2012, CAT, ARUSHA (UNREPORTED), PHILIP ANANIA MASASI VS. THE RETURNING OFFICER, NJOMBE NORTH CONSTITUENCY AND TWO OTHERS, CIVIL APPEAL NO. 56 OF 2012, HC, SONGEA (UNREPORTED), in which the provision of order VI rule 7 of the CPC was interpreted to mean that it operates as to bar adduction of evidence which is inconsistent to or otherwise departs from pleadings.

The specific paragraphs of the affidavit which are attacked for departing from pleadings are paragraphs 14, 16, 17, 18, 19 and 20. It was submitted that paragraph 14 departs from pleadings to the extent that it mentions the names of polling stations which do not feature out in paragraph 12 of the petition. The objection, it seems to me, is based on an incorrect presupposition that the factual statement in paragraph 14 of the affidavit is linked with paragraph 12 of the petition. In my reading, the deposition in paragraph 14 of the affidavit is connected to unofficial addition of votes at the offices of **PW-4** which is pleaded in paragraph 14 of the petition. This position was made clear in my ruling dated 21st June 2016.

The contents of paragraph 14 of the affidavit was also criticized for departing from paragraph 14 of the petition on account of variance in terms of the number of polling stations whose forms number 21B were not in possession of **PW-4**. With respect, I cannot agree with this contention

because it has been made clear in the respective paragraph that the names of the polling stations therein mentioned are those which **PW-4** would recall. Nowhere in the affidavit has it been stated that the polling stations referred in the respective paragraph are inclusive of all the polling stations whose forms 21B were not in the possession of **PW-4**. In my opinion therefore paragraph 14 of the affidavit does not depart from pleadings.

I will now pass to paragraph 16 of the affidavit. The deposition therein relates to the list of polling stations **PW-4** claims to have been given by the Returning officer. **The defense counsel** have submitted that the factual deposition therein is a case of its own because it does not feature out in the petition. With deep respect, I do not think that this is one of the material facts which the petitioner was mandated to plead in his petition. The dispute at hand being whether the results in all polling stations were added in the final results declared by the first Respondent, the question which documents will be used and where did the petitioner get them is a question of evidence since the document referred therein is not a document under order VII rule 14 (1) of the CPC. It suffices, in my opinion, if the document is listed in the list of documents to be relied upon in terms of order VII rule 14 (2) of the CPC read together with order XIII thereof. This is what has been done in the instant case.

I have noted however that the table in paragraph 16 of the affidavit consists of the contents of the list of the polling stations which is yet to be received in evidence. Conversely, the law as stated in section 61 of the Evidence Act does not allow proof of contents of a document by oral evidence before the documentary evidence is admitted in evidence. In here, the evidence involved is brought by way of affidavit. Nevertheless, under rule 21A of GN 447/2010, the evidence in affidavit, if admitted, is used in lieu of oral evidence. Upon admission, it would seem to me, such

evidence acquires the same status as an oral evidence adduced in the course of examination in chief. For those reasons, I would have, but for further reasons to be assigned hereinafter, rejected the evidence in the table for being premature.

In the normal practice, production of document is made during oral testimony in chief. The effects of the documents is introduced by oral evidence subsequent upon admission of the document into evidence. This procedure is not possible in the election proceedings because before a witness qualifies to give evidence, he or she must not only deliver an affidavit to the Registrar but the affidavit has to be admitted to form part of the records. With this therefore, it is obvious that production of document will be preceded by adduction of the evidence in chief by way of an affidavit. The law, the way I see it, is not clear on whether subsequent to admission of an affidavit, the witness will be allowed to give further oral testimony to explain the contents of the documents. What is clear is that the witness can be allowed to produce documents. For those reasons therefore, I find it not safe to determine the validity of the inclusion of the contents of the list of polling stations in the affidavit before establishing whether or not the document will be tendered into evidence. Therefore, the validity of the contents of paragraph 16 of the affidavit in relation to section 61 of the Evidence Act may be determined in my final decision.

I will now proceed with the contents of paragraph 17 of the affidavit which has been opposed for being extraneous the petition. The respective deposition, it seems to me, relates to a document listed in the list of document filed by the firsts and second respondents. As I observed in relation to paragraph 16 of the affidavit, the fact in issue being whether the declared elections results in question took into account all the polling stations for the constituency, the list of polling stations listed in the respondents' list of documents is relevant and is within the factual contentions in the petition and the replies thereto. Pertinent to observe as

it was for paragraph 16 of the affidavit is that, the list of polling stations whose contents is reflected in paragraph 17 of the affidavit is yet to be produced into evidence. It can therefore not form part of oral testimony unless the document is admitted into evidence. For the reasons I have given in relation to paragraph 16 therefore, the validity of the testimony in relation to section 61 of the Evidence Act may be dealt with in my final decision.

I will not consider the contents of paragraph 18, 19 and 20 of the affidavit. In the respective paragraphs, **PW-4** is making reference of wards which have more forms No. 21B and those with less. The respective paragraphs of the affidavit are silent on the source of the information stated therein. I have no doubt in my mind that the depositions in the respective paragraphs are not traceable from the petition. The substance of the claim in the petition as reflected in the framed issues and facts not in dispute are silent on there being some polling stations with less and more forms 21B. The counsel for the petitioner in their submissions did not refer me to any paragraph of the petition wherefrom the evidence in the respective paragraphs emanates. I will for those reasons therefore agree with **the defense counsel** that paragraphs 18,19 and 20 of the affidavit depart from pleadings. As a result therefore, the said paragraphs are hereby struck off.

The affidavit has also been questioned for being argumentative. The specific paragraphs of the affidavit which are criticized of being argumentative are paragraphs 16, 17, 18 and 19 of the affidavit. Since paragraphs 18 and 19 have already been expunged from the affidavit, I find it useless to deal with them. I will only deal with paragraphs 16 and 17 of the affidavit. On paragraphs 16 and 17, the argument of **the defense counsel** is that the same are argumentative because they contain tables with numbers. With respect, I cannot agree with them. Evidence, as I understand the law, may be actual or demonstrative. Demonstrative evidence arises in a situation for instance where models,

charts, photographs and motion pictures are used or demonstration made in a court room. In this matter, the tables are used to demonstrate the names of the polling stations and their respective numbers. There is therefore no arguments whatsoever in the respective paragraphs.

Paragraphs 11, 12 and 13 and 15 of the affidavit are criticized for comprising hearsay depositions. I do not read any hearsay evidence in paragraphs 11, 12 and 13. What the witness says in paragraph 11 and 12 of the affidavit is that he summoned into his offices all the election agents for his political party and thereafter supervised addition of votes. These facts, on the face of them, are based on what **PW-4** did. The statement in paragraph 13 of the affidavit is the continuation of the averment in paragraph 12 of the affidavit. It explains what result was obtained after the addition stated in paragraph 12 of the affidavit. It is based on what **PW-4** was involved in. In my opinion therefore, the depositions in paragraphs 11, 12 and 13 of the affidavit are not based on hearsay as claimed by **the defense counsel** or at all.

I will now consider the point in relation to paragraph 15 of the affidavit. The point of substance therein is that the petitioner told **PW-4** of his intention to appeal against the announced results. It was vigorously submitted that the factual deposition in the respective paragraph was hearsay in as much as it was based on what **PW-4** was told by the petitioner. In confutation, it was urged that the deposition in question was not hearsay because it was based on what **PW-4** heard from the petitioner.

It would appear to me that; the testimony in question emanates from conversation between **PW-4** and the petitioner. Depending on a particular purpose for which it is adduced, the statement may amount to hearsay or direct evidence. If the testimony seeks to establish the correctness of the contents of the information in question, it is hearsay, but if the intention is to establish the fact that the statement was made, it is a direct evidence. This is according to section 62 (1) (b) of the Evidence Act which is to the

effect that where the fact in issue is that which can be heard, evidence based on what the witness heard from a third party is direct evidence.

In SUBRAMANIAM V. PUBLIC PROSECUTOR (1956) 1. W.L.R. 965 referred by professor Stanley A. Schiff in his **EVIDENCE IN THE LITIGATION PROCESS**, THE CARSWELL COMPANY LIMITED, Toronto Canada, 1978 page 247, the Judicial Commitee of Privy Council had an opportunity to consider when a statement made to a witness by a third party amounts to hearsay and when not. It made the following observations;

> *Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is* ***to establish the truth of what is contained in the statement****. It is not hearsay and is admissible when it is proposed to establish by evidence, not the truth of the statement,* ***but the fact that it was made****. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or some other person in whose presence the statement was made.*

A similar point was made in an American case in MCAFEE VS. TRAVIS GAS CORPORATION (1941), 133 TEX. 153 S.W. 2d 442 (Texas) referred by professor Schiff *supra* in page 245, where the evidence by the appellant that he was told by a third party that the said third party was the employee of the respondent, was held to be admissible as a direct evidence to establish that the said statement was in fact made by the third party no matter whether it was correct or not.

From the authorities cited above, it is apparent that whether the statement made to a witness by a third party is hearsay or not, depends on a particular purpose for which the evidence is adduced. In this case, whether the petitioner intended to appeal against the announced results is not at issue because the petitioner has in fact already lodged the above petition. The issue, it would seem to me, is whether **PW-4** was, after the findings stated in paragraph 14 of the affidavit, told by the petitioner that he was intending to appeal. The testimony, in my judgment, is a direct evidence to establish that **PW-4** was told by the petitioner of his intention to appeal against the election results regardless of whether it was true or not. The reason being that it emanates from what **PW-4** heard from the petitioner. The contents of paragraph 15 of the affidavit therefore is not hearsay.

I will now consider the issue of descriptions of the name of **PW-4**. It is a fact that whereas in the opening clause of the affidavit **PW-4** identifies himself as **AFIDU JAHUSSEIN LUAMBANO**, in the verification clause and jurat of attestation his name is spelt as **AFIDU HUSSEIN LUAMBANO**. There is a missing of the word "Ja' in the latter part of the affidavit. In his introductory oral testimony, **PW-4** identified himself as **AFIDU JAHUSSEIN LUAMBANO**. Upon the affidavit being shown to him, he claimed to have been the one who deposed it. In their submissions, **the defense counsel** have invited me to hold that the defect is fatal. It renders the affidavit non-existent. I cannot agree with them.

The test involved in determining the effect of wrong description of names in court proceedings, according to the English authority in DAVIES VS ELSBY BROTHERS LTD, (1960) 3All ER at page 676, is whether a reasonable man reading the whole document having regard all the circumstances, would entertain no doubt that the person referred in the document was him but his name was wrongly described. If the answer is in the affirmative, the error is treated as a mere misnomer which cannot

affect the validity of the proceedings. In the respective judgment, in particular it was stated as follows:-

> *"The test must be : How would a reasonable person receiving the document take it? If, in all circumstances and looking at the document as a whole , he would say to himself: 'Of course it must mean me, but they have got my name wrong, then there is a case of mere misnomer. If, on the other hand, he would say: I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries, then it seems to me that one is getting beyond the realm of misnomer."*

In WHITTAM VS. WJ DANIEL $ CO LTD, 1961 3, All ER. 796, the Court of Appeal in England faced more or less similar issue where the word "limited" was omitted in the name of the appellant. Like in this matter, the counsel for the respondent argued that for the reason of omission to insert the word "limited" in the name of the appellant, the appellant was a non-existing person. It was the opinion of the counsel for the respondent that since the description was describing nothing, the action was against nobody. The court dismissed the submissions and held that the omission was a mere misnomer which could not affect the proceedings. At the end, the Court as per WERTS, J made the following pronouncement;-

> *In this case, I think there is a mere misnomer; and I do not know of any rule of law which compels us to hold that the mere omission of the word "limited" means that no person is sued at all, and that, until that is corrected, there is no defendant to the proceedings"*

In this matter, what is missing in the second name of **PW-4** is the word "Ja". The first and third names are spelt similarly in all parts of the affidavit. When **PW-4** was giving his oral introductory testimony, he told the Court that his names were **AFIDU JAHUSSEIN LUAMBANO**. He was shown the affidavit and confirmed that he was the one who deposed and signed it. In the premise, I do not think any reasonable man who receives

and read this affidavit would, under the circumstances, doubts about the fact that **AFIDU JAHUSSEIN LUAMBANO** and **AFIDU HUSSEIN LUAMBANO** was the same person. In my opinion therefore, the omission to insert the word "Ja" in the second name of **PW-4** is an insignificant misnomer which can easily be cured by inserting, by handwriting, a word "Ja" in the second name of **PW-4** appearing at the verification clause and jurat of attestation.

In the final results therefore, the preliminary objection shall fail save for the objection on the admissibility of paragraphs 18, 19 and 20 of the affidavit which have been expunged from the affidavit for offending the provision of order VI rule 7 of the CPC. The affidavit shall be admitted into evidence. However, before being admitted it has to be corrected, in hand writing, by inserting the omitted word "Ja" in the second name of **PW-4** wherever it is omitted.

It is so ordered.

THE HIGH COURT OF TANZANIA

I. MAIGE
JUDGE
29/06/2016

Ruling delivered in the presence of Mr. Malata and Miss. Maswi, learned state attorneys, representing the first two respondents, Messrs Kerario and Tabanyendera, learned advocates for the third respondent and Messrs Mkoba and Mbamba, learned advocates for the petitioner this 29th day of June , 2016.

THE HIGH COURT OF TANZANIA

I. MAIGE
JUDGE
29/06/2016