

IN THE HIGH COURT OF TANZANIA

AT BUKOBA

HC: CRIMINAL APPLICATION NO. 3/2017

(Original Criminal Case No. 52/2015 in the District Court Bukoba)

1. BYARUGABA TRYPHONE
2. RWEYOMBIZA TRYPHONE } ----- **APPLICANTS**

VERSUS

THE REPUBLIC ----- **RESPONDENT**

Date: 31/5/2018

Coram: Hon. L.G. Kairo,J.

1st Applicant: Present in person

2nd Applicant: Present in person

Respondent: Ms. Veronica Moshi, S/A

B/C: Peace M.

Ms Veronica Moshi: Hon. Judge, the matter is for hearing of the P.O. we have raised. We are ready to proceed.

1st Applicant: We are also ready to proceed.

2nd Applicant: I am also ready to proceed.

Court: Hearing is to proceed as scheduled.

State Attorney: Hon. Judge, when we replied their affidavit, we raised two P.O. to the effect that the application is bad in law for having been

accompanied by a defective affidavit as the same was not properly verified. We so argue because the affidavit contain facts from 1st – 6th Paragraph. No place was left for verification but closer look, one would find or note that paragraph 6 is where they opted to put their verification wherein they stated that what has been stated in paragraph 1 -4 are true to the best of their knowledge and belief. But also further look at the affidavit, the applicants didn't say anything with regards to paragraph 5 which is also in their affidavit. Besides the law stipulate that the applicants are not to generalize when verifying. They were to state the number of the paragraphs categorically (ie. 1,2,3,4) and not (1-4) as they did. Further to that in paragraph 3 and 4 are hearsay but didn't indicate in the said verification or they didn't state who told them so, and to what extent do they believe on the veracity of the sad information.

I pray to refer to the case of **Augustine Lyatonga Mrema and others vrs AG. and others [1996] TLR 273** to support the said argument wherein the court observed that the affidavit which didn't abide to the requirement as per order XIX R (3) (1) of CPC Cap 33 that is if same is vague and doesn't show the source of information contained therein, the court in the said circumstances decided that such an affidavit should be struck out for want of competency. Having shown the flaws in the said verification clause we pray that the application be struck out as well.

With regards to the second P.O. wherein we argue that the application is bad in law for containing extraneous matters by way of hearsay, we submit that, according to paragraph 4 of their affidavit, they stated that they were told the notice of appeal wasn't filed as their advocate wasn't paid by their

relatives when the Applicants are in jail. We argue that, the legal requirement bars the affidavit to contain hearsay. Worse the Applicants didn't even show the source of the said information. Further we don't see the affidavit either of the advocate or relative so verifying. Besides the verification (paragraph 6) didn't state the source of the said information. We thus submit that, the omission of the above requirement make paragraph 4 to be hearsay contrary to the rules concerning affidavit. We thus insist that the said application be struck out for want of competent affidavit as the law stipulates.

1st Applicant: Hon. Judge, we submit that we are prisoners and further lay persons. When we want to appeal, it is the prison officers who normally assist us and even in this matter they are the ones assisted us. Thus if in the course of assisting it is found that there are defects, we pray the court to give necessary orders as a result.

2nd Applicant: Hon. Judge, we pray to be assisted as we don't know what to do as a way forward.

RULING

The application before me is for prayers by the Applicants to be allowed to file the notice of appeal and petition of appeal out of time. The application is supported by a common affidavit by the applicants. The Respondent when filing the counter affidavit raised two points of law;

(1) that the application is bad in law for having been accompanied by defective affidavit as it was not properly verified.

(2) that the application is bad in law for containing extraneous matter by way of hearsay.

The Applicants are self represented while the Respondent is being represented by Ms. Veronica Moshi the Learned State Attorney.

During the oral submission Ms. Moshi pointed out the shortcomings with regards to the attacked affidavit, in amplifying the P.O. raised. The Applicants when invited to make a reply told the court that they are prisoners and are laypersons. That they got the assistance of having their application drawn from the prison officers as such they don't know if the same were correct or not. However they pleaded with the court that if it will find that the said documents are with defects as pointed out, they pray the necessary orders that would assist them to pursue their right to appeal albeit out of time.

The court went through the attacked affidavit. It has observed that the affidavit has no verification clause. Though paragraph 6 purports to contain verification wherein the Applicants stated that what has been stated in paragraph 1 -4 are true but to say the least that doesn't amount to verification clause. Besides, even if the said paragraph 6 would have been coined in a "*verification clause style*" – but as correctly argued by the State Attorney the same was stated in a very general way without stating which paragraph is out of their belief which one was out of information received etc. Not only that paragraph 4 of the said affidavit talks on the information the Applicants received. Apart from being a hearsay which is against the legal requirement of the affidavit, that is only facts are to be contained

therein as per the case of **Uganda vrs Commissioner of Prisons Exparte Matovu [1966] EA 514**, but also Applicants didn't state the information was obtained from who.

All the above pointed out flaws or shortcomings has the effect of rendering the verification clause defective, as a result the whole affidavit is also defective.

The law is settled that once the affidavit to support the application becomes or is found to be defective, the whole application rendered so. The remedy available is to struck it out as I hereby do for want of competent affidavit. [Refer the case of **Leons Silayo Ngalai vrs Hon. Justine Alfred Salakana and AG: Civil Appeal No. 38/1996 CAT** (unreported)]. However the Applicants can still bring fresh application if they still so wish.

It is so ordered.



L.G. Kairo
Judge

31/5/2018