

THE UNITED REPUBLIC OF TANZANIA
(JUDICIARY)

THE HIGH COURT
(MUSOMA SUB REGISTRY)

AT MUSOMA

CIVIL REVISION No. 2 OF 2022

*(Arising from the Resident Magistrates' Court of Musoma at
Musoma in Misc. Civil Application No. 6 of 2021)*

MAPESA SAID MATAMBO

MARIJANI SAID MATAMBO

..... **APPLICANTS**

Versus

ROSE ALLY NYABANGE **RESPONDENT**

RULING

01.08.2023 & 02.08.2023

Mtulya, J.:

The provision of Order VI Rule 15 (3) of the **Civil Procedure Code [Cap. 33 R.E. 2019]** (the Code) was enacted in the following words: *the verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.* According to this court, in the precedent of **DPP v. Aidan Tangasi Mgonela & Two Others**, Misc. Criminal Application No. 81 of 2010, the enactment was coached in mandatory terms and it is not discretionary. To the court, where there are several deponents, each should abide with the enactment.

This court in the indicated decision had resolved that if verification clause is not dated and the place at which it was signed is not shown, the deponent's affidavit breaches the provision of Order VI Rule 15 (3) of the Code.

In the present revision, **Mr. Mapesa Said Matambo** (the first applicant) and **Mr. Marijani Said Matambo** (the second respondent) have drafted and filed joint affidavit in this court without citing the date and place at which the verification was signed. Noting the fault, **Mr. Evance Njau**, learned counsel for **Ms. Rose ally Nyabange** (the respondent), raised a point of objection resisting the competence of the revision. In his opinion, the affidavit in support of the chamber summons is incurably defective for want of proper verification clause.

When Mr. Njau was called to explain his point of protest, he briefly submitted that the applicants have not placed date and place where the verification clause was signed hence renders all paragraphs in the joint affidavit a nullity. In his opinion, a nullity affidavit in support of chamber summons results to incompetent application. In support of the submission Mr. Njau cited the authority in **DPP v. Aidan Tangasi Mgonela & Two Others** (supra) and prayed the present application be struck out for want of the law in Order VI Rule 15 (3) of the Code.

Replying the submission, **Mr. Daud Mahemba**, learned counsel for the applicants, had resisted the submission arguing that the indicated Order VI Rule 15 (3) of the Code does not regulate verification clause, but pleadings. Regarding the cited precedent in **DPP v. Aidan Tangasi Mgonela & Two Others** (supra), Mr. Mahemba stated that the case was resolved in *per incuriam* hence this court is not bound to follow its own decision which was mistakenly resolved.

According to Mr. Mahemba, date and place of verification is placed in affidavits by Commissioners for Oaths under section 8 of the **Notaries Public and Commissioner for Oaths Act [Cap. 12 R.E. 2019]** (the Notaries Public Act). In his opinion, the Commissioner for Oaths in the present application had printed the date and place of verification as 5th May 2022 and Mwanza respectively. Finally, Mr. Mahemba prayed this court to consider enactment of section 3A (1) & (2) of the Code on overriding objective when it finds that the raised point of objection has merit. In his opinion, the current trend of the law is in favor of the substantive justice.

Rejoining the submission, Mr. Njau submitted that affidavits are part of pleadings and regulated under Order VI of the Code whereas section 8 of the Notaries Public Act regulates jurat of

attestation. In his opinion, there is huge distinction between verification clause which is reserved for deponents and jurat of attestation provision which is reserved for attesting officers or learned commissioners for oaths. Mr. Njau submitted further that Order VI Rule 15 of the Code has already received precedent of this court in **DPP v. Aidan Tangasi Mgonela & Two Others** (supra) and Mr. Mahemba failed to produce any other precedent to the contrary. Finally, Mr. Njau stated that section 3A (1) & (2) of the Code cannot be invited in an incompetent application.

I have perused the present record and found that the applicants in their verification clause have not indicated the date and place in which it was signed. The precedent of this court in **DPP v. Aidan Tangasi Mgonela & Two Others** (supra) had already resolved that the enactment was coached in mandatory terms. However, Mr. Mahemba thinks that the mandatory nature of the provision does not relate to verification clauses in affidavits but pleadings, and in any case place and date in verification clause is the territory of commissioners for oaths. The law in section 8 of the Notaries Public Act provides that:

*Every notary public and commissioner for oaths
before whom any oath or affidavit is taken or made
under this Act shall insert his name and state truly in*

*the **jurat of attestation** at what place and on what date the oath or affidavit is taken or made.*

(Emphasis supplied).

The indicated enactment places duty to any notary public and commissioner for oaths to state a place and date in the jurat of attestation. The provision is silent on deponents. On the other hand, the law enacted in Order VI Rule 15 (3) of the Code provides that:

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

(Emphasis supplied).

This provision places the duty of citing date and place in which the verification was signed to the person who making it. The duty is upon the deponent to do so. In the present application, the applicants have declined to cite date and place where the verification was signed. That is the breach of the law in Order VI Rule 15 (3) of the Code. I am aware Mr. Mahemba had tried to distinguish pleadings cited under Order VI of the Code and the affidavit in the present application and that the precedent in **DPP v. Aidan Tangasi Mgonela & Two Others** (supra), which had linked affidavit and pleadings was resolved *per incuriam*.

The precedent in **DPP v. Aidan Tangasi Mgonela & Two Others** (supra) was decided on 21st September 2011, and remains undisturbed to date. This court cannot disturb it today, unless there are good reasons. In my opinion, I think, Mr. Mahemba has failed to produce good reasons to distinguish the cited precedent and any other precedents. In any case, the dispute regarding distinction between pleadings and affidavit was brought in this court on 15th February this year and was resolved on the same day in the precedent of **Victor Nestory Ndabagoye v. Sinda Geteba**, Civil Reference No. 8 of 2022. This court in the precedent had resolved, at page 4 of the Ruling, that: *affidavits and counter affidavits are part of pleadings and any person who do not comply with Order VI Rule 15 of the Code, his application shall be struck out for want of proper interpretation of the law.*

The thinking is supported by the Court of Appeal's precedent of **Jackson Sifael Mtares & Three Others v. The Director of Public Prosecutions**, Civil Appeal No. 180 of 2019, which at its page 16, the Court stated that affidavit and counter affidavits are indeed pleadings. This court will cherish the ideas produced in this court and Court of Appeal. It is important to abide with the move for want of certainty of the precedents resolved in this court and confidence building to justice stakeholders. I am therefore moved

to cherish the decisions and hold that the present application is incompetent for want of the law in Order VI Rule 15 (3) of the Code.

In the course of displaying uncertainty on his submission, Mr. Mahemba has invited section 3A (1) & (2) of the Code on overriding objective for easy access to this court to resolve the merit of the matter. However, the move was protested by Mr. Njau arguing that an incompetent application cannot produce any other passages. The question before this court is therefore: *whether an incompetent application can produce any other order than the struck-out order*. According to Mr. Njau, there is no application in this court to produce any other order than the struck-out order and the applicants have to follow the law, if they so wish, to prosecute their dispute. Mr. Mahemba on the other hand thinks that this is a court of justice and may produce any other order in favor of the merit of the matter. The reply on the subject is found in the Court of Appeal's precedent of **Ghati Methusela v. Matiko Marwa Mariba**, Civil Application No. 6 of 2006, where a full court of the Court of Appeal had resolved that an incompetent application or appeal cannot produce any other order.

The remedy for an incompetent appeal or application, according to this court and the Court of Appeal, is to strike it out

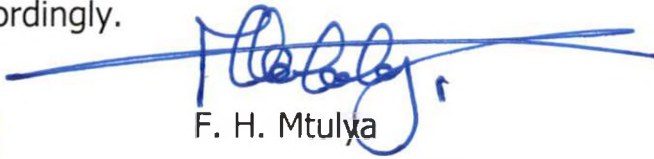
(see: **African Trophy Hunting Ltd v. Attorney General & Four Others** [1999] TLR 407; **Meet Singh Bhachu v. Gurmit Singh Bhachu**, Civil Application No. 144/02 of 2018; **Alli Chamani v. Karagwe District Council & Another**, Civil Appeal No. 148 of 2022; **Agineda Balisela v. Abila Benedictor**, Land Appeal No. 12 of 2022; **Rhobi William Waheri v. Marwa Kinoko**, Land Appeal No. 14 of 2023; and **Magesa Munyanga & Another v. Manyama Nyasika**, Land Revision No. 1 of 2023).

Having the law in Order VI Rule 15 (2) of the Code and indicated precedents of our superior court and this court, I cannot be detained on the contest. I am moved to hold that affidavits and counter affidavits are part of pleadings and any person who do not comply with the provision in Order VI Rule 15 (3) of the Code, his application will be struck out for want of the proper interpretation of the law, as I hereby do so. I do so without costs. Each party shall bear its costs. The reasoning of doing so is obvious that the dispute was not determined to its merit to enjoy the substance of the matter to its finality.

I am aware that during hearing of the point of law on the subject, a bunch of questions was raised by the contesting parties. However, I cannot cite and resolve them. It will be an academic

exercise, which I am not ready to indulge, as I have already held that the present revision is incompetent.

Ordered accordingly.



F. H. Mtulya

Judge

02.08.2023

This Ruling was delivered in Chambers under the Seal of this court in the presence of the first applicant, Mr. Mapesa Said Matambo and his learned counsel, **Mr. Daud Mahemba** and in the presence of **Mr. Evance Njau**, learned counsel for the respondent, Ms. Rose Ally Nyabange.



F. H. Mtulya

Judge

02.08.2023