

IN THE HIGH COURT OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

MISC. CIVIL APPLICATION NO.22 OF 2023

LENA MKAMITI MFALILA APPLICANT

VERSUS

UPENDO MFALILA 1ST RESPONDENT

CHELU MFALILA 2ND RESPONDENT

LAMECK MFALILA 3RD RESPONDENT

RULING

Date of last order: 07.08.2023

Date of Ruling: 11.08.2023

OMARI, J.

The Applicant brought an Application under section 95 of the Civil Procedure Code, Cap 33 RE 2019 and section 63(b) of the Law of Marriage Act, Cap 29 RE 2019 and any other enabling law. The Applicant beseeched this court to make an order and approve the return of the 3rd Respondent from the 1st and 2nd Respondent hand to that of the Applicant who is the 3rd Respondent's wife and any other relief that this court may deem just and fit to grant. However, the Application was objected by the 2nd Respondent on three points; that is the court has not been properly moved, the Application is bad in law for



being supported by a defective Affidavit which bears a defective verification clause and that the Application is untenable for being frivolous, vexatious and an abuse of the court process, and that the Application has been brought against a wrong (non-existing) party. It is on the basis of the above points that the 2nd Respondent sought for this Application to be dismissed with costs.

The preliminary objection was disposed by way of written submissions, the 2nd Respondent was represented by Innocent Mwelelwa Learned advocate and the Applicant had the services of Victor Kessy assisted by Dorothy Ndazi both are also learned advocates. The 1st and 3rd Respondents have been conspicuously absent throughout the conduct of this matter.

Submitting in support of the points of the preliminary objection counsel for the 2nd Respondent first prayed to abandon the first point of the objection then went on to submit the rest of the points. Counsel began with the current first point that the Application is bad in law for being supported by a defective Affidavit which bears a defective verification clause. He submitted further that the Applicant's Affidavit does not indicate the source of information in several paragraphs, that is not based on the Applicant's own knowledge. These paragraphs, according to the 2nd Respondent's counsel are paragraph 7, 8,11,12,13,14 and 16. According to the 2nd Respondent's counsel the

information that is contained in the identified paragraphs is not all in the Applicant's personal knowledge and in the verification clause of her Affidavit she stated that all the information is true to the best of her knowledge. To buttress this point of objection the 2nd Respondent's counsel made reference to the case of **Salima Vuai Fom v. Registrar Co-Op Societies and three others** [1995] TLR 75 where the Court of Appeal held that courts should only act on Affidavits where the sources of information are specified. Moreover, the 2nd Respondent's counsel cited the case of **Anatol Peter Rwebangira v. Principal Secretary Ministry of Defence and National Service and Hon. Attorney General**, Civil Application No. 548/04 of 2018 (unreported) where the Court of Appeal reproached the usage of blanket or general verification clauses in Affidavits without specifying which information the deponent has personal knowledge or belief of.

In defence, counsel for the Applicant replied on the point of objection regarding the Applicant's Affidavit being supported by a defective Affidavit which bears a defective verification. The Applicant's counsel argued that all the information contained in the identified paragraphs are within the knowledge of the Applicant as stated in the verification clause. Counsel sought to distinguish the **Salima Vuai Fom v. Registrar Co-Op Societies and three others** (supra) in the sense that in the cited case there was no verification clause while in the present



Application the deponent has knowledge of all facts stating that all paragraphs are true to the best of her knowledge. The Applicant's counsel went on to submit that since the general rule of practice and procedure is that an Affidavit as a substitute for oral evidence should only contain statements of facts and circumstances to which the witness deposes either of own personal knowledge or information which he believes to be true which is different from the present Application where the deponent deposed all facts which are within her knowledge. Counsel ended with a prayer that this point be dismissed with costs.

In his rejoinder, the 2nd Respondents counsel reiterated what was in his submission in chief and submitted further that the information contained in the identified paragraphs that the Applicant is alleged to have knowledge of is not true. Counsel argued that the occasions that happened as stated in paragraph 7,8, 11,12, 13, 14 and 16 of the Applicant's Affidavit; the Applicant was not present and therefore she was supposed to state so in the verification clause from whom she received the information from. Therefore, the same offends the provisions of Order VI Rule 15 (1) and (2) of the CPC. The 2nd Respondent's counsel argued that if the offending paragraphs are expunged from the Applicant's Affidavit then the remaining paragraphs cannot support the Application on merit.

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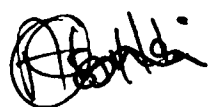
On the second limb of the preliminary objection that is the Application is untenable for being frivolous, vexatious and abuse of court process the 2nd Respondents counsel stated that the prayer sought by the Applicant is untenable in law. Counsel stated that the prayers in the chamber summons are in contrast with the Applicant's Affidavit which the former seeks the 3rd Respondent to be returned from the 1st and 2nd Respondent and the latter depones that the same 3rd Respondent is sick and in hospital. Furthermore, the 2nd counsel contends that since the said 3rd Respondent has not been declared incapacitated or impaired by any court then this Application is an abuse of court process. Counsel then cited the case of **Dhirajlal Walji Ladwa and 2 Others v. Jitesh Jayantilal Ladwa and Indian Ocean Hotel Limited**, Misc. Commercial Application No. 62 of 2020 where this court gave a definition of abuse of court process and that courts should prevent the use of courts for use as means of vexation and oppression in the process of litigation.

In defence of the second point of the objection the Applicant's counsel contended that what the Applicant has stated in paragraph 15,16 and 18 of her Affidavit that she is seeking to perform her matrimonial duties. He argued that the Applicant has not stated that the 3rd Respondent is mentally ill rather she stated that the 3rd Respondent was ill when he was removed from their matrimonial home thus, her prayer for him to be returned thus the Application



is made *bona fide* and not in abuse of court process. According to him the Application is not frivolous for it does not meet the test of a frivolous Application as per the case of **Nehemia Jacobo v. Murukulazo Village Council**, Misc. Land Case No. 48 of 2020. In rejoinder on this point the 2nd Respondent's counsel reiterated their submission in chief and went on ahead to challenge the Applicant's action of attaching annexures to their written submission.

On the last point of the preliminary objection that the Applicant lacks *locus standi* counsel submitted that the concept of *locus standi* has been defined by the Court of Appeal in the case of **Lujuna Shubi Ballonzi Senior v. Registered Trustees of Chama Cha Mapinduzi**, [1996] 203 where it stated that a person bringing a matter should be able to show that his right or interests have been breached or interfered with. In that regard the Respondent argued that the Applicant does not have *locus standi* based on three reasons. He explained that the LMA does not grant the right of a wife to make an application for the return of a husband, the second reason is that the Applicant did not show the injury she suffered by the 3rd Respondent being cared for by the 1st and 2nd Respondents who are his daughters. Lastly, the Applicant has not stated how her duties under the LMA have been interfered with and the 2nd Respondent is questioning the existence of the said marriage between the Applicant and 3rd Respondent; therefore, the Applicant has no *locus standi*.

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The Applicants counsel argued that the Applicant is the wife of the 3rd Respondent therefore the applicability of section 63 (b) of the LMA. Counsel submitted that the Applicant is a wife of the 3rd Respondent therefore should enjoy the rights and duties bestowed to married couples and no third party can call that into question since she has a marriage. In rejoinder, the 2nd Respondents counsel distinguished section 63 of the LMA from the matter at hand as the provision gives a wife the right to maintain her spouse for reason of mental or physical injury or ill health and does not prove marriage and she, the Applicant then lacks *locus standi*.

Having considered rival submission of the parties the issue for this court's determination is whether the Application is meritorious or falls short as stated in the three points of the preliminary objection raised by the Respondent. I am proposing to start with the first point or ground of objection in which the 2nd Respondent's counsel is contending that the Application is bad for being supported with an Affidavit that is defective for having a defective verification clause.


For avoidance of doubt, the verification of the Applicant's Affidavit clearly states:

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'That, all what has been stated above in paragraph 1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18,19,20 and 21 inclusive are true to the best of my knowledge.'

The 2nd Respondent's counsel is contending that the information contained in para 7,8,11,12,13,14 and 16 of the Affidavit cannot be in the Applicants knowledge, thus, she should have stated the source of the said information. The Applicant's counsel on the other hand is contending that the said information is in her knowledge and unlike the case of **Salima Vuai Fom v. Registrar Co-Op Societies and three others** (supra) relied upon by the 2nd Respondent's counsel the Applicant verified the facts contained in the Affidavit stating she has knowledge of the information; thus, she has done no wrong.

The Court of Appeal in the case of Director **of Public Prosecution v. Dodoli Kapufi and Patson Tusalele**, Criminal Application No. 11 of 2008 (unreported) described a verification clause as that part of an Affidavit which shows that the facts deponed are true of the deponent's knowledge and those based on information or his beliefs. Moreover, in the latter case of **Lisa E. Peter v. Al- Hushoom Investment**, Civil Application No. 147 of 2016 (unreported) while quoting an Indian case **A.K.K. Nambiar v. Union of India** (1970) 35 CR 121 the Court of Appeal explained the essence of the verification of an Affidavit. This was stated as to enable the court to ascertain which facts can be proved by Affidavit or allegations are true information received from other



persons. It is to enable the court to test the authenticity and genuineness of the information and if it is proper for the court to act on such evidence. According to the stated authority if a verification is missing or not proper then the Affidavit cannot be admitted as evidence. Therefore, it goes without saying a verification is essential for an Affidavit to be termed to be valid.

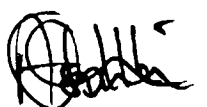
The 2nd Respondent's counsel referred to the case of **Anatol Peter Rwebangira v. Principal Secretary Ministry of Defence and National Service and Hon. Attorney General** (supra) wherein the Court of Appeal in explaining the need for source of information by a deponent quoted from C.K. Takwani's book on Civil Procedure as follows:

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

In the current Application the 2nd Respondent is objecting on the basis that the Applicant's Affidavit has information that cannot be in her knowledge and the verification clause does not disclose the source of information. The Applicant is contenting that all the information is based on her personal knowledge.

Order VI Rule 15 (1) of the CPC provides:

Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or



by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.

Furthermore, Order VI Rule 15 (2) of the CPC 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.

This means that where a person is seeking to rely on information that has been obtained from other sources then the same need to be disclosed. After scrutiny of the identified paragraphs of the Applicant's Affidavit I am inclined to agree with the 2nd Respondent's counsel that the Applicant's Affidavit in the identified paragraphs contains information that is unlikely to be her personal knowledge thus, should have had the source disclosed. Accordingly, as correctly pointed out by the 2nd Respondent's counsel for a verification clause to comply with the law, the deponent has to clearly state the facts which are from her knowledge, belief or understanding. In this present instance this was not done rendering the verification clause defective.

I am aware of the position postulated in the case of **DDL Invest International Limited vs. Tanzania Harbours Authority & Two others**, Civil Application No. 8 of 2001 (unreported) in which the Court of Appeal observed that an Affidavit with a defective verification can be amended and the decision to allow such amendment is a matter that is in a court's discretion. In



this particular case the Applicant has not ventured into that nor has she prayed for the same, I am therefore not going to delve into matters not pleaded or prayed for.

Having found the first point of the preliminary objection meritorious, discussion of the other two points will be moot as the Application has to be supported by an Affidavit and this one is not.

For the reasons I have endeavoured to explain herein above, I find the objections raised to have merit and they are sustained. The Application is hereby struck out. Due to the nature of the Application each party to bear its own costs.

It is so ordered.




A.A. OMARI

JUDGE

11/08/2023

Ruling delivered and dated 11th day of August, 2023.


A.A. OMARI

JUDGE

11/08/2023