

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE CORRUPTION AND ECONOMIC CRIMES DIVISION

(DAR ES SALAAM REGISTRY)

AT DAR ES SALAAM

MISC. ECONOMIC CAUSE NO. 29 OF 2017

HARBINDER SINGH SETHI

VERSUS

REPUBLIC

Korosso, J.

The Ruling is for a Preliminary Objection raised by the Respondent Republic. The PO was filed with the respondents counter affidavit on an application filed by the applicant via chamber summons and supported by an affidavit deposed by Harbinder Singh Sethi the applicant. The application is pursuant to section 29(4)(d) and Section 36(1) and (5)(a) of the Economic and Organized Crimes Control Act, Cap 200 as amended by Section 10 of the Written Laws (Miscellaneous Amendments) Act, 2016 and Section 148(1) and (5)(e) of the Criminal Procedure Act, Cap 20 RE 2002; Section 2(1) and (3) of the Judicature and Application of Laws Act, Cap 358 RE 2002; Rule 6 of the Economic and Organized Crime Control (The Corruption and Economic Crimes Division) (Procedure) Rules, 2016 GN 267/2016 and any other enabling provision of the laws.

A Notice of Preliminary objection filed on the 12th of September 2017 and duly served to the applicants who acknowledged this in Court, raised two points of objection. The first objection was abandoned by the Respondent Republic vide a prayer to withdraw from Dr. Zainab Mango, Principal State Attorney on the 20th of September 2017 with no objection from the applicant's counsels. The Court consequently granted the prayer and the first point of objection was marked withdrawn. The second point of objection, that the affidavit in support of the application is incurably defective for containing extraneous matter, points of law and defective verification clause was argued by counsels for both parties and is what is before this Court for determination.

In amplification of the this point of objection the Principal State Attorney for the Respondent Republic stated that the affidavit supporting the application contravenes governing rules and practice on affidavits for containing extraneous factors that include arguments, conclusions, irrelevant matters and hearsay evidence. That they also contravened the provisions of sections 7 and 8 of the Evidence Act, Cap 6 RE 2002 that in effect state that evidence should contain relevant facts. That the fact that affidavits contain evidence than the provisions of section 7 and 8 of the Evidence Act applies to affidavits. The PSA also cited various cases to cement this point such as ***Rustamali Shivji Karim Merani vs Kamal Bhushan Joshi***, Civil Application No. 80 of 2009 and the case of ***Uganda Commissioner of Prisons, Ex Parte Matovu*** (1966) EA

514 popularly known as ***Exparte Matovu case*** and referred to in ***Merani's case***.

The Respondent Republic challenged various paragraphs of the affidavit supporting the application. The argument being that paragraphs 41 and 47 of the affidavit contain legal arguments that are also irrelevant to the matter in issue. That paragraph 5 of the affidavit also contains irrelevant legal arguments. The Respondents also had issues with paragraph 18, 19 and 20 stating that the contents therein are hearsay without any supporting documents since they discuss matters related to the health status, care and diagnosis of the applicant without any supporting documents. There was also a challenge that those referred to as to have provided information are not experts in the areas they gave advice and information, for instance the fact that learned counsel Makandeghe avers on the status of Muhimbili Hospital as it relates to the treatment of the applicant's afflictions and contained information from an anonymous medical personnel refraining from mentioning his name on information which is relied upon to provide status averred therein. A further challenge is made on Paragraphs 24 and 25 stating that they contain arguments and hearsay and information that lacks supportive evidence.

The Respondent Republic submitted further that Paragraph 26, 30 and 41 and 47 of the affidavit supporting the application are defective. For paragraph 26 it was argued that it contains arguments that invite the Court to find that the applicant will not

get medical attention while in remand and therefore it is a conclusion without substance. The verification clause was also challenged by virtue of the fact that paragraph 26 was not verified while paragraphs 19 and 21 have been verified as to be from the applicants knowledge whereas it was hearsay. It was the Respondent Republic prayer therefore for the application to be struck out for having a defective affidavit and therefore rendering the application incompetent before the Court.

In reply, the applicant counsels led by Mr. Lutema learned Advocate and included Mr. Mohamed Saleem Khan and Mr. Makandege Learned Advocates contended that the submissions by the Principal State Attorney when expanding the point of objection under consideration is misplaced and unfounded because it is wrongly premised and prematurely presented as if the application has been heard. The applicant's counsels conceded to the fact that a Preliminary objection should be based on pure points of law and contended that where the objection advances a need to ascertain the truthfulness or admissibility of a matter alleged to be hearsay, it is no longer a point of law but factual and therefore cannot constitute a preliminary objection as pronounced by law and practice. That what is objected to by the Respondent Republic is an opposition to points of facts and not a point of law and thus should be overruled by the Court. Arguing that the principles of what is a point of law are well established in **Mukisa Biscuits** case and that a preliminary objection must be on pure point of law derived from

the pleading and annexures and that this is not the case in the objection being considered.

The applicant counsels contended further that section 8 of the Evidence Act referred to by the Principal State Attorney on facts which are permissible that is the admissibility of *factum proban* and *factum pro bandum*. That in this situation the test to be applied is whether the said facts fall within the boundaries of section 8 of the Evidence Act. That to determine this one has to await the hearing of the application and not at this stage of hearing of preliminary objection. They conceded to the fact that an affidavit is not a plea or summons and cannot contain legal arguments. With regard to the challenged paragraphs of the affidavit, starting with paragraph 5, the applicant's counsels contended that this details the manner the applicant was arrested and therefore it contains mere statement of fact and not a legal argument nor is it hearsay as contended by the respondents since it is a statement of facts. The issue whether it is irrelevant or not is an issue for determination of the Court when considering and determining the bail application.

The applicant's counsel submissions with regard to paragraphs 18, 19 and 20 were that the said paragraphs did not contain hearsay evidence. Responding to the learned Principal State Attorneys submissions argued that what she stated that the applicants averments on the matter lacked proof was her own personal opinion, and that there is no law which states that each fact must be proved by a document. That it is upon the Court to

determine whether or not a fact has been proven with or without a document and that the challenge on the paragraph by the PSA goes to the merit of the case because it addresses the credibility of what is stated and that stage is yet to be reached and should await when the application is argued. With regard to the challenge on paragraph 22 that it contains arguments, the applicant's counsel submitted that the argument was again the Principal State Attorneys own opinion since what is stated therein is a mere statement that there is no other medical expert, and it is a statement and not an argument and whether the statement is true or not shall require proof which is a separate matter and not relevant at this stage. That the Principal State Attorney's arguments tried to limit the applicant's averments and that all what is contained in the affidavit is relevant and the forum to address relevance of the materials in the affidavit is at the hearing of the bail application where the Court will determine this. At the same time the applicants also invited the Court to recognize that even if one can argue there is hearsay evidence there are exception to the rule. On the statement regarding the competence of Muhimbili Hospital to treat the applicants' medical matter the applicants counsel contented that in any case what was stated by the applicant in the affidavit is similar to what was ordered by Hon. Shaidi RM, that the applicant to be taken for treatment at Muhimbili Hospital and therefore corroborating the challenge on the competence of Muhimbili Hospital.

Responding to the challenge on paragraphs 24, 25, 26, 30 and 41 and 47 of the applicants affidavit, the applicants counsel argued that the challenge on the statement that the applicant received information from his counsel, Advocate Makandegwe who is not a medical expert and also from a medical personnel not mentioned as per paragraphs 24 and 25 has no merit because even the PSA is not a medical expert and in any case the statements are not points of law but facts which go to the merit of the application.

The applicant's counsels also submitted an alternative prayer stating that even if the contested paragraphs by the respondents were to be held to be extraneous and argumentative, on the bases of available authorities such defects should not attract dismissal of the application as sought unless it adversely impacts on the entire affidavit, as held in ***Phantom Modern Transport case*** (1985) TLR and DT Dobie Case quoted with approval in Civil Application No. 263 of 2015 at pg. 9 where it held that "*the Court should apply the said test and if it find the defects in the affidavit inconsequential the Court should proceed to expunge the defective paragraphs*". It was thus prayed by the applicant's counsels therefore that in the present application even if the Court finds the paragraphs challenged are defective the Court to find them inconsequential and strike the same and order to proceed hearing of the application with the remaining paragraphs.

With regard to the contents of the verification clause whether it properly verifies the contents even where it is argued hearsay

evidence is included in some paragraphs, the applicant's counsels found this to be an irrelevant argument at this stage as contended earlier. They conceded to there being no reference to paragraph 26 in the verification clause, stating that this is an omission but that this fact of omission to verify or their being a defective verification is not fatal and is curable being a mere irregularity and that matters of verification are matters pertaining to civil procedure and not criminal as the current matter is. They prayed to be allowed to amend the verification clause and that the objection raised should thus be overruled.

In rejoinder the Principal State Attorney invited the Court to find that a point of law is not necessarily based on statutory laws only but that case law principles also give rise to points of law. That the challenged paragraphs apart from contravening the Evidence Act, section 7 and 8 they also contravene set case law principles. That their objection is not challenging the main application but the legality of the affidavit supporting the application. They also stated that though they do not object to the principles established by case law of expunging defective paragraphs if the Court so finds but their prayer for the application to be struck out is grounded on the defective verification clause and even an amendment of paragraph 26 will not cure the defect in the verification clause since among sources of information relied upon is an anonymous medical officer and this cannot be remedied.

Having considered the arguments and submissions from the counsels for the applicant and the Respondent Republic we find it important to first consider the competency of the preliminary objection raised. Being aware as submitted by the counsels for the applicant and conceded by the Principal State Attorney that a preliminary objection has to be one based on points of law.

The case of ***Mukisa Biscuits Manufacturing Company LTD v West End Distributors LTD*** (1969) EA 696 addresses on what a Preliminary objection is? At page 700 Law, J.A observed as follows: *“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration”*. At page 701 Sir Charles Newbold P. had this to say:- *“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion”*.

This principle has been restated by case law to be the position of the law on the meaning of a preliminary objection. Our question therefore is does the current preliminary objection pass this test? To determine it is pertinent to understand what is before the Court

presently for determination. The matter before the Court is a challenge on the competency of the affidavit supporting the application. The Respondent Republic submitted that the affidavit is defective for contravening section 7 and 8 of the Evidence Act and the holding in various cases especially what was expounded in the case of **Uganda Commissioner of Prisons, Ex Parte Matovu** (1966) EA 514 (reproduced in **Juma Busiga vs Zonal Manager TPC (Mbeya)**, Civil Application No. 8 of 2004 Court of Appeal) which stated:

"as a general rule of practice and procedure, an affidavit for use in Court, being a substitute for oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of his own knowledge or ... Such an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion".

The above holding and the law that is Order XIX of the Civil Procedure Code, Cap 33 RE 2002 clearly outlines the contents of an affidavit. Section 392 and 392A of the Criminal Procedure Act, Cap 20 RE 2002 as amended by Act No. 3 of 2011 does not define an affidavit but outlines before who they may be sworn but Courts have referred back to civil procedure in terms of defining an affidavit and its contents. It is a well established principal that an affidavit is a statement made by a person under oath as outlined by **Mulla** on Code of Civil Procedure, 17th Edition, Volume 2, by B.M. Prasad at page 849, where it reads: *"The essential ingredients of an*

affidavit are that the statement or declaration made by the deponent is relevant to the subject matter and in order to add sanctity to it, he swears or affirms the truth of the statement made in the presence of a person who in law is authorized either to administer oath or accept the affirmation".

A Court of Appeal decision which defines an affidavit. In ***DPP vs Dodoli Kapufi and another, Criminal Application No. 11 of 2008***, where it was held that an affidavit is "*a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths*". The Court of Appeal expounded on essential and mandatory ingredients for an affidavit. First, that the statement or declaration of facts etc, by the deponent. Second, verification clause; third, *a jurat*; and fourth, the signatures of the deponent and the person who in law is authorised either to administer the oath or to accept the affirmation.

When one looks at section 7 and 8 of the Evidence Act, we find in effect outlines that if one cannot find an avenue to introduce a given fact, this fact is not considered evidence and is not relevant and therefore not admissible. But at the same time it is clear that admissibility and evidential value of the facts or evidence introduced by parties must be determined through proper assessment and evaluation of such evidence which cannot be determined at this early stage. An actuality in issue is known as the "rule truth" of factum probandum and the applicable reality the evidenciary certainty or factum probans, thus clearly informing us

where immediate proof concerning a truth in issue is not accessible, it may be demonstrated by conditional confirmation and in such a case each spot of incidental proof might be an occurrence of an applicable reality, all this we find cannot be determine at this stage.

Despite this finding, having evaluated the points of objection raised challenging the competency of the affidavit, the contents which are legally defined under Order XIX Rule 3 of the Civil Procedure Code, Cap 33 RE 2002 and case law cited above **DPP vs Dodoli Kapufi** (supra), **Exparte Matovu** (supra) we find that there is no doubt that the point raised is a point of law. This is because it is legally based on contravention of establish procedures, and at the same time the objection is confined to the pleadings before the Court and does not rely on facts to be ascertained in the exercise of judicial discretion and may lead to the matter before the Court being disposed of. Therefore we find the objection is a point of law and we will therefore proceed to consider it.

We start with the challenges on paragraph 5, 18, 19, 20, 22, 24, 25, 26, 30 and 41 and 47 containing extraneous, irrelevant matters, legal arguments, conclusion and also hearsay statements. It is important that our consideration of the challenged paragraphs will not be based on the relevance of the averments to the application before the court which we find are matters to be determined where there is consideration of the main application, but we shall consider relevance relating to the competency of the application before the Court, that is considering whether the

affidavit averments fail the standard established in **Ex Parte Matovu's** case, hat an affidavit being a substitute for oral evidence should only contain statement of fact and circumstances which the witness deposes either of his own knowledge, of information from a known source and should not contain extraneous matters.

We went through all the highlighted paragraphs and considered the submissions of all the parties. With regard to paragraph 5 of the affidavit, having considered the averments therein we find that they contain a contention of facts on the applicants side of what transpired after the applicants arrest. We find that the issue of their relevance to the application should be considered during determination of the application and not at this juncture, therefore we find nothing wrong with the contents of this paragraph and find it to be proper. Regarding paragraph 18 of the affidavit, we find that though it appears to be a mere statement narrating information received from the applicants counsel and another party an anonymous medical personnel and the issue of whether the information is relevant or not should be determined at the time of determination of the application. There is a problem in this paragraphs that of not being specific on one of the person who is said to be the source of information. The statement as it is also contains conclusions and speculations not properly phrased to come out as facts. Therefore the paragraph is defective.

For paragraph 19, we find looking at its contents, it is a statement that is speculative and thus does not fall within the

boundaries of statement of facts expected in an affidavit as expounded by case law and therefore it is defective. For paragraph 20 we find that the contents from "*That I have been advised ... which I urgently require*" is a statement of what he has been informed and is acknowledged as such and as no problem, but from "*and even if there were such a source, the obtaining prison conditions in Tanzania would not allow the mounting, application and use of such specialized sophisticated medical equipment and expertise requisite for my urgent compulsory intensive specialized monthly medical attention and assessments*" is an opinion, conclusive and speculative and not within the boundaries of facts expected to be in an affidavit and therefore the speculative part is defective. Paragraphs 21 and 22, we find to be speculative and conclusive and therefore defective. The averments in paragraph 24 we find this to be a statement of what he has been informed, and its veracity or relevance should be determined during hearing of the application. Despite the contents of paragraph 25 and 26 containing averments of information from his counsel, there are averments which go beyond and lead to being speculative and arguments and conclusions which leads to my finding that the paragraphs are defective.

For paragraph 30, we find the contents are within the boundaries of a statement of what the applicant believes and commits himself to undertake and this position is the same for paragraph 41 framing we find to contain conclusions, arguments

and speculations out ambit of facts within the knowledge of the applicant or from information gathered expected in an affidavit and I therefore find it to be defective. Paragraph 47 contains arguments and not only facts as required therefore I find the paragraph to be defective.

From the above it is clear the next step is to consider consequences of the paragraphs or statements found to be defective, that is, Paragraphs; 18, 19, 21, 22, 25, 26 and 41 and 47 entirely and part of paragraph 20. This court finds that there are cases, ***Civil Reference No. 15 of 2001 and No. 3 of 2002, Phantom Modern Transport (1985) Limited vs D.T. Dobie (Tanzania) Limited***, CAT and ***Civil Application No. 9 of 2011, The Attorney General vs SAS Logistics Limited and Samwel Kimaro vs Hidaya Didas, Civil Application No 20 of 2012 (decided in October 2013)*** have developed the law of affidavit.

The role of this Court therefore will be to consider whether the two paragraphs, we have found with defect in the affidavit by reason of improper verification are inconsequential or substantive. The decisions of the Court of Appeal cited above advance that a court can expunge the paragraphs it finds defective and remain with the remaining paragraphs. ***Civil Reference No. 15 of 2001 and No. 3 of 2002, Phantom Modern Transport (1985) Limited vs D.T. Dobie (Tanzania) Limited***, CAT at Dar es Salaam where at pg. 10 the Court of Appeal held:

"It seems to us that where defects in an affidavit are inconsequential, those offensive paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it. If however, substantive parts of an affidavit are defective, it cannot be amended in the sense of striking off the offensive parts and substituting thereof correct averments in the same affidavit".

The counsels for the applicants prayed to the Court that if it finds the paragraphs in the affidavit challenged to be offensive then they should be expunged because they are inconsequential and not struck out the application. Having considered the paragraphs we found to be offensive, we find that having regard to the circumstances pertaining and the effect of the said paragraphs, we proceed to expunge paragraphs 18, 19, 21, 22, 25, 26, 41 and 47 entirely and part of paragraph 20.

Being guided by case law, especially in the ***Rustamali Shivji Karim Merani vs. Kamali Bhushan Joshi***, Civil Application No. 80 of 2009, CAT that what ***Phantom Modern Transport*** (Supra) and ***AG vs SAS Logistics Limited*** (supra) state is that after expunging of the offensive paragraphs of an affidavit, courts are enjoined to examine whether the remaining parts are insufficient to support the application, If the remaining parts are sufficient to support it, the application must also go, but a party may file a fresh affidavit. We find the said expunged paragraphs to be

inconsequential not affecting the genesis and ambit of the application before the Court.

We now move to the other arm of the objection with regard to the Respondent Republic argument of the verification clause being defective. It is important to understand that, verification is a virtual part in an affidavit as it discloses the source of information given by the deponent. That the law provides that the source of information might be knowledge or belief hence the one making the affidavit must state which information came from his own knowledge and which one from his belief. Having stated the above position, the concern remaining is whether the absence of a proper verification or where there is lack of clarity on the verification clause renders the whole affidavit defective. For the applicants, they find such an anomaly not fatal while for the Respondent Republic they implored the Court to find the defect crucial and incurable and therefore rendering the affidavit defective and consequently the application incompetent.

It is also pertinent to remind ourselves that the essence and rationale of a verification clause in an affidavit is to test the genuineness and authenticity of the facts the deponent has stated in the affidavit and also to make the deponent responsible for the facts stated. The case of ***Court of Appeal of Tanzania in Anna Makanga vs Grace Woiso Civil Reference No. 21 of 2006*** Court of Appeal at DSM (unreported) is relevant because it described verification as simply a final declaration made in the presence of an

authorized officer, such as a notary public, by which one swears to the truth of the statement in the document. Order VI Rule 15 of the Civil Procedure Code States is relevant and reads:

15.-(1) 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.

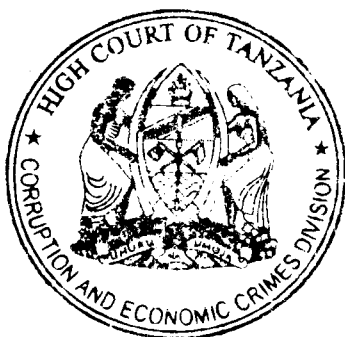
(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verified upon information received and believed to be true.

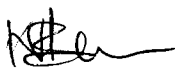
(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

In the present case, there is a Verification clause in the affidavit. It is without doubt mandatory to have a verification clause having regard to the fact that the word shall is used in Section 15 of CPC cited above. There is no question that paragraph 26 was not verified, this fact was conceded by the applicants counsel. The applicant who deposed the affidavit verified that what is deposed is true to the best of his knowledge for the relevant paragraphs and some paragraphs true according to advice given by lead counsel and an anonymous Amana Hospital Medical officer- a matter which contravenes the finding in ***Salima Vuai Foun vs Registrar of Cooperative Societies and 3 Others***, (1995)TLR 75, where the Court held; " *where an affidavit is made on information , it should*

not be acted upon by any court unless the sources of information are specified". This position has been restated in the case of **Convergence Wireless Networks (Mauritious) Limited and 3 Others vs. WIA Group Limited and 2 Others**, Civil Application No. 263 "B" of 2015, CAT Dar es Salaam, but bearing in mind the fact that paragraph 18 where the reference to the unspecified informant in the verification clause and the fact that paragraph 26 which was unverified have both been expunged and all the other clauses reveal verification of clauses were sources of information is specified we find that the objection becomes superfluous and remains for whole purposes an academic exercise.

Consequently the preliminary objection is partly upheld to the extent that Paragraphs 18, 19, 21, 22, 25, 26, 41 and 47 entirely and part of paragraph 20 that is words from "*and even if there were such a source, the obtaining prison conditions in Tanzania would not allow the mounting, application and use of such specialized sophisticated medical equipment and expertise requisite for my urgent compulsory intensive specialized monthly medical attention and assessments*" are expunged from the records of the application before the Court and let the application proceed on merit.




Winfrida B. Korosso
Judge
26th September 2017