IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO.102 OF 2021

MEXONS ENERGY LIMITED ..... PLAINTIFF

VERSUS

NMB BANK PLC ..... DEFENDANT

RULING

Date of Last Order: 09/04/2024
Date of Ruling:23/04/2024

GONZI, J.

On 9th April 2024, when the case was called for hearing of the Plaintiff's side, Mr. Michael Mahende learned advocate for the Plaintiff invited the second witness for the Plaintiff Mr. Rober David Malavanu to adopt his witness statement and tender in court five exhibits forming part of his evidence in chief. The witness was sworn in by the Court and thereafter he prayed to adopt his Witness Statement filed in Court on 21st September 2023 and sought to tender as exhibits, the five documents annexed to his Witness Statement. He also prayed to have his witness statement amended by changing the words "Exhibits" to read "Annextures". Further, he prayed to amend the word "Exhibit 1" wherever it appears in the Witness Statement to read "Annexture T.27". There was no objection to these prayers. The

Witness ultimately prayed that his witness statement earlier filed in court be received by the Court to constitute his evidence in chief. To this prayer, Mr. Seni Malimi learned advocate for the Defendant, raised an objection. He submitted that the Court should not receive the Witness Statement of the PW 2 because in its Jurat of attestation there is an omission to indicate the date when the witness appeared before the Commissioner for Oaths for swearing in before giving his evidence in chief. Submitting further on his raised objection, Mr. Seni Malimi argued that the copies of the Witness Statement filed in Court and served upon the Defendant, bear no date at the jurat of attestation showing when the witness allegedly appeared before the Commissioner for Oaths to take an oath before testifying. Mr. Malimi argued further that the Witness Statement of PW2 is defective and that the defect is a fundamental one because the witness statement is, in effect, unsworn by PW2. He submitted that the omission to indicate the date as to when the witness was sworn in before the Commissioner for Oaths renders the entire witness statement at hand not being made under oath. He argued that this omission violates Rule 50(1)(g) of the Commercial Court Rules 2012 as amended and re-numbered. Therefore, he submitted that the Witness Statement is not a valid witness statement. He referred the Court to the case

of **Catholic University of Health & Allied Science (cuhas) vs Epiphania Mkunde Athanase (Civil Appeal 257 of 2020) [2020] TZCA 1890 (11 December 2020)** where at page 10 thereof the Court of Appeal held that **where the law makes it mandatory for a person who is a competent witness to testify on oath, the omission to do so viatiates the proceedings because it prejudices the parties' case.** He argued that the witness statement constitutes examination in chief evidence and therefore, if not sworn, for not being properly attested before the Commissioner for Oaths as it is shown in the jurat of attestation of the Witness Statement of PW2, it renders the Witness Statement defective and this nullifies the entire document. He argued that it should not be received by the Court.

The learned counsel for Defendant also submitted that in the case of **Tanzania Railways Corporation & Attorney General vs Reuben Kyengu (Misc. Labor Application 4 of 2021) [2022] TZHC 12064 (16 August 2022),** the court insisted that **since the jurat of attestation is one of the crucial elements of an affidavit, disregarding the date when the affidavit was made and whether the deponent was personally known to the commissioner for oaths, is going contrary**

to section 10 of Oaths and Statutory Declarations Act and Section 8 of the Notary Public and Commissioners for Oaths Act...the defect cannot be cured through overriding objective. A defective jurat renders the whole affidavit defective and whose remedy is to strike it out. Mr. Malimi argued further that Under Rule 33 of the Commercial Court Rules, the Court can be moved orally to strike out a document which is improperly before the Court. He, therefore, argued that the court should not receive the witness statement by the 2nd Witness for the Plaintiff as it is not sworn before the Commissioner for Oaths.

Mr. Michael Mahende, Learned Advocate for the Plaintiff, responded that the learned counsel for the Defendant has not provided any legal provision supporting that such a small omission renders the entire Witness Statement unacceptable. He submitted that indeed the witness statement filed in court omitted, in its jurat of attestation, to show the date when the witness appeared before the commissioner for oaths to take the oath and write his witness statement but that such an irregularity is minor and curable. He argued that the witness statement is otherwise complete in every other respect and form except only for the omission to indicate the date in the

jurat of attestation when the witness was sworn in before the commissioner for oaths.

Mr. Mahende submitted that, in the circumstances, there are two options the court can take. The first option is to allow the Witness himself to insert in the witness statement, the date he was sworn in by the Commissioner for Oaths, because the witness is present in court and has already taken an oath before the court. The second option, according to Mr. Mahende, learned advocate for the Plaintiff, is to grant the plaintiff leave to amend the witness statement, rectify the defect and refile it in court. He submitted that there are many authorities in support of what he had submitted. He cited the case of **Atanas Balabungwa Mondo (Administrator of the Estaes of the Late KOBALI MLONDO) vs Elinathan Kobali Mlondo @ KOBALI MLONDO & 2 others (Misc. Land Application No. 18 of 2023) [2023] TZHC 20711 (25 August 2023)** where this Court used the overriding objective to allow amendment of verification clause and jurat of attestation in the affidavit by inserting the dates which had been omitted. And the court (Hon.Magoiga,J.) stated that : **I find that in the circumstances of this application, the overriding objective principle is applicable, I accordingly apply it. The applicant is as such given chance to amend**

the anomaly only on dates and have them included as required by law. Also, he cited the case of **Bwaheru Masauna vs Ulamu Wisaka,** Misc. Land Application No.55 of 2020, HCT at Musoma, where this Court (Hon. Kahyoza, J.) allowed amendment in the affidavit including attestation clause in the affidavit and said: "**... given the above position of the law, I find the applicant's affidavit is defective and that this is a fit case to order amendment of the affidavit. Finally, I find the affidavit defective for want of date on both jurat and verification clause also for the Commissioner for Oaths failure to specify whether he knew the deponent or the deponent was introduced to him by a person he knew. The defectives are not fatal. They can be cured by amendment. I exercise my discretion to grant leave to amend the affidavit to rectify the defects only ...** ".

Mr. Mahende, learned advocate, also relied on the case of **Sanyo Service Station Versus BP(T) Ltd.** Civil Application No. 185 of 2018, Court of Appeal at Dar es Salaam (unreported) where there was no verification Clause in the Affidavit in support of the Application and yet the Court of Appeal of Tanzania held that **the defective rule of procedure has to be followed in the defective verification clause with some sense of justice.**

Relying on the cited decision, he prayed to be allowed to amend the affidavit's defect of omitting to indicate a date when the witness was sworn in by the Commissioner for Oaths. The learned counsel for the Plaintiff distinguished the case of CUHAS versus Epiphania Mkunde as the circumstances under it were different from the present case because in that case the witness never took an oath at all while in the present case the witness has complied with all requirements except that the date of his being sworn in is missing in the jurat of attestation of the witness statement. Again, Mr.Mahende, distinguished the case of **TRC** and **AG versus Reuben Kyengu** that the same was based on misuse of the overriding objective principle while the current case is not. He argued that, at any rate, the cited High Court case cannot prevail over the decision by the Court of appeal in Sanyo's case.

In rejoinder, Mr. Malimi, Learned Advocate, submitted that there is a law namely the Notary Public and Commissioners for Oaths Act that regulates on how the jurat of attestation should be. He submitted that that is the applicable law in the present circumstances. Lack of a date in the jurat of attestation renders the entire document defective. He argued further that although the other aspects of the Witness Statement are not defective, the

defect of omitting to indicate the date the witness took an oath before the commissioner for oaths puts a query as to whether the witness really appeared before the Commissioner for Oaths at all, and if he did, when did he appear? That is a fundamental defect that invalidates the witness statement, he submitted.

Mr. Malimi submitted that with regard to the options suggested by Mr. Mahende that the witness statement can be amended to rectify it by the witness inserting in it the date he was sworn in, is not possible. Mr. Malimi argued that the Court cannot turn itself into a Commissioner for Oaths in respect of the Witness Statement. Regarding the prayer to grant the Plaintiff leave to amend the witness statement and refile the same, he argued that the witness statement is not an affidavit which could be amended by filing a supplementary affidavit. He submitted that the Witness Statement is evidence in chief and as such one cannot amend his evidence in chief. He submitted that, at the present, it is the testimony of a witness which is at issue. Mr. Malimi argued that all the cases cited deal with defects in affidavits, but that the present case is a different one which has not been tested before. He reasoned that if the court allows amendment of witness statement, it will, in effect, be allowing amendment of evidence in chief. He argued that no option for any amendment of a witness' statement is available

in law and that is why the learned counsel for the Plaintiff has not cited any law to back up his prayer for amendment of a witness statement. He argued that if the witness statement is received, Rule 53 of the Commercial Court Rules will be violated.

Regarding the Sanyou Service Station Versus BP(T) Ltd case, the learned counsel submitted that it touched on verification of an affidavit while the issue in the present case touches on jurat of attestation of the witness statement which is evidence in chief, and hence a different matter. He submitted that an affidavit is used in an application whereas a witness statement is used as evidence in the main case. Equally, the learned counsel distinguished the Athanas Mondo's case as different principles are applicable to the case at hand. In the Athanas Mondo's case an amendment of chamber summons and affidavit was possible while in the case at hand, it is a case involving trial and, as such, the evidence in chief cannot be amended. He concluded by arguing that the Witness cannot amend his testimony. Therefore Mr. Malimi prayed that the Court be pleased to refuse to receive the Witness Statement of the second witness for Plaintiff's side and proceed to Strike it out.

Having heard the rival arguments advanced by the learned counsel representing both parties and after going through the authorities cited, I now proceed to determine the objection before me. In my Ruling I have asked myself as to what is being objected to at the moment? It is crystal clear that the witness (PW2) was not about to be tender in Court his Witness Statement. A witness who files his evidence in chief by way of witness statement, does not thereafter appear in court to tender the statement. Upon being filed in Court, the Witness Statement automatically forms part of the court record. He appears for cross examination, if any, by the opposite side and for tendering exhibits, if any, related to his evidence in chief. Before the cross examination starts, the witness in question may wish to tender exhibits forming part of his evidence in Court because admission of exhibits is a separate legal process. Exhibits forming part of the witness statement are not automatically admitted in court upon the filing of the witness statement. The exhibits have to be cleared for admission and there are rules of evidence which have to come into play in determination of admissibility of the exhibits in Court. However, the testimony in chief of the witness who files his witness statement is received by the court automatically on the date and at the time when the Witness Statement is filed in Court. That is why in terms of Rule 49(2) where a Witness Statement is filed out of time, or, in

terms of Rule 56(2) of the Commercial Court Rules, where a witness files his Witness Statement but fails to appear in Court for cross examination, the Court shall strike out his statement from the record. It is struck out of record because it was already received in Court and formed part of record when it was filed. The fact that the witness statement was already received in court upon being filed, is accentuated again by Rule 56(3) of the Commercial Court Rules where a witness files his witness statement in court but for exceptional reasons, fails to appear for cross examination, then lesser weight shall be attached to such statement. This means that even without the witness appearing in Court to adopt it, the Witness Statement is already in the Court record.

Therefore, as of now in the case at hand, the Evidence of the second Witness for the Plaintiff, presented in Court by way of Witness Statement is already part and parcel of the Court record from the date that the Witness Filed the Witness Statement in Court. The record shows that the Witness Statement by Robert David Malavanu, the second Witness for the Plaintiff, was made by Rober David Malavanu, a resident of Mafinga Iringa. It was made by him on 20th September 2023. That is the date the witness in question gave his evidence before the Commissioner for Oaths. The said evidence was written down and presented to Court on 21st September 2023

when the witness statement was filed in this court. The record shows that the witness statement of PW 2 is signed by the witness and is dated in the front page and at page 6; that is at the end of the testimony by the witness where it is "dated at Dar es salaam on 21st day of September 2023". Also, it is dated and signed by the witness in the verification clause where it is indicated that it is "verified at Dar es Salaam on 21st day of September 2023."

I therefore find that Rule 50(1)(g) of the Rules has not been violated.

The Witness Statement was filed in Court on 21st September 2023. Looking further at it, it becomes apparent that the slot for inserting the date in the jurat of attestation before the Commissioner for Oaths, the space is left blank. The Jurat of attestation of the Witness statement reads:

Solemnly Sworn and Delivered at Dar es Salaam }

by the said Rober David Malavanu who is known } SGD

to me personally/introduced to me by Michael } .....

P.Mahende the later being } Deponent

known to me personallty in my presence }

this.....day of September 2023. }

Before Me:

Name.: Juliana J.Mumburi

Adress: 111934 Dar es salaam

Signature: SGD

Qualifications: COMMISSIONER FOR OATHS

There is a Stamp of the said Commissioner for Oaths. The Witness Statement carries with it 5 annextures sought to be admitted as Exhibits.

Looking at the Witness Statement of Robert David Malavanu, the witness in question gave his evidence in chief on 21st September 2023 before a Commissioner for Oaths named Juliana Mumburi, who administered an oath and recorded the evidence in chief of the second witness for the Plaintiff. The evidence reached the Court on 21st September 2023 when it was filed in Court and started to form part of Court Record. When the Witness filed in Court his witness statement it constituted his evidence in chief in the same way like he could have appeared in Court on the date set for hearing and given evidence in chief orally. That is why failure by a party to file Witness Statement on the prescribed date amounts to failure by the party to present his witness to prosecute or defend his case when the same is set for hearing in Court. The Third Schedule to the Commercial Court Rules which prescribes the format and contents of a Witness Statement provide as follows:

5.1. **A witness statement is the equivalent of the oral evidence which that witness would, if called, give in evidence; it must include a statement by the intended witness that he believes the facts in it are true.**

Therefore, on 21st September 2023 when the Witness Statement of PW2 was filed in Court, in essence, the said witness had finished to give his evidence in chief orally before the Court save for the aspect of tendering and admission of the related exhibits, if any.

Mr. Malimi, learned advocate for the Defendant submitted that the defect of omitting to indicate the date when the witness took an oath before the commissioner for oaths, puts a query as to whether the witness really appeared before the Commissioner for Oaths at all, and if he did, when did he appear? Looking at the jurat of attestation reproduced above it is clear that the Witness Statement of Robert David Malavanu, was given under Oath in Dar es Salaam before Juliana Mumburi, Advocate and Commissioner for Oaths. The Commissioner for Oaths endorsed her name, signed and rubber-stamped the witness statement. When did the Witness take the Oath before the Commissioner for Oaths? No details are shown in the jurat of attestation

of the Witness Statement as to the date of taking the Oath. That space is left blank by the Commissioner for Oaths who had the duty of filling all the details therein. The Witness concluded giving his evidence by signing and dating the Witness Statement and duly verifying it. The witness also took an oath before the commissioner for oaths by signing as the deponent beside the jurat of attestation. It was the duty of the Commissioner for Oaths before whom the oath was being taken, to fill all the necessary details including the date in accordance with the law. The contents of the jurat of attestation are legally prescribed as being pronounced by the Commissioner for Oaths and the Commissioner for Oaths ought to have fulfilled her duty to fill the details as required by the law. But in the Witness Statement at hand, that particular portion was left blank. Was the administration of an oath, as shown in the jurat of attestation in the witness statement of PW2, complete in the absence of the date when the oath was taken by the witness while giving his evidence in chief in the presence of Juliana Mumburi, Commissioner for Oaths? This is a question of law. We have statutes regulating the making of Judicial Oaths in Tanzania.

In the discharge of their duties as Commissioners for Oaths, Advocates and other Commissioners for Oaths are regulated by laws. When looking at Section 10 of Oaths and Statutory Declarations Act Cap 34 of the Laws of

Tanzania and the Schedule thereto it is clear that the jurat of attestation for Oaths and Statutory Declarations is required to contain, among other things, the date on which the Oath/affirmation or statutory declaration is administered by the Commissioner for Oaths.

The Notaries Public and Commissioners For Oaths Act, Cap 12 of the Laws of Tanzania provides under section 8 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."**

The foregoing legal provisions make it a mandatory requirement for an oath or statutory declaration to be dated by the Commissioner for Oaths, amongst other requirements.

More specifically, the Commercial Court Rules under the Third Schedule prescribe the format of a Witness Statement. The Witness Statement is required to be made under oath/affirmation to be administered by the Commissioner for Oaths. The language used in the Prescribed Form is the same like that used under section 8 of the Notaries Public and Commissioners For Oaths Act, Cap 12 of the Laws of Tanzania, that:

6. Jurat

> **"Every notary public and Commissioner for oaths before whom the witness statement is taken or made shall state truly in the jurat of attestation at what place and on what date the statement is taken or made."**

It is obvious that the wording of the Jurat of attestation in the witness statement is mutatis mutandis to the wording in section 8 of the Notaries Public And Commissioners For Oaths Act, Cap 12 of the Laws of Tanzania. It is therefore a mandatory requirement of the laws that the jurat of attestation of a Witness Statement should indicate the date when the statement was taken or made under oath or affirmation. In the witness statement of the second witness for the plaintiff, the date in the jurat of attestation was not filled in by the Commissioner for Oaths Ms. Juliana J. Mumburi who administered the oath to the witness who wrote witness statement under oath before her. I find this a neglect of duty on the part of the Commissioner for Oaths whose effects come to haunt the witness who had duly presented himself before the commissioner for oaths at a fee.

Now to the pertinent question. What are the effects of the Witness Statement not bearing the date in the jurat of attestation when the same was made?

Mr. Malimi, learned advocate has urged the Court not to grant leave to amend the Witness Statement nor allow the witness to effect amendment on the dock because that could amount to amending the evidence in chief. In my settled view, that argument is correct but only in so far as the main body of the Witness Statement is concerned. Looking at the Witness Statement of PW 2 in this case, the Witness wrote all his evidence and signed and dated the same. Then he verified the truth of that evidence and duly signed the verification. The substance of his evidence in chief ended with the witness signing and dating it before embarking into the verification process and swearing or affirming an oath in the Witness Statement. In my view the substantive portion of the evidence in chief in the witness statement cannot be amended by way of deletion or substitution of facts therein as it could compromise the credibility of the witness by giving different versions of evidence over the same subject matter. It could also make the trial endless or manipulated as witnesses could vary their witness statements to deviate from or align with the progress of the case. As regards verification clause or the jurat of attestation in the witness statement, the same does not constitute the substance of the evidence in chief of the witness. It can be amended in the same way like the verification clause or jurat of attestation of an affidavit can be amended. Counsel are not divided on the position that

jurat of attestation of an affidavit can be amended. They both cited a number of cases to that effect including the decision by the Court of Appeal of Tanzania in **Sanyo Service Station Versus BP(T) Ltd.** Civil Application No. 185 of 2018, Court of Appeal at Dar es Salaam (unreported), where there was no verification Clause in the Affidavit in support of the Application and yet the Court of Appeal of Tanzania held that **"the defective rule of procedure has to be followed in the defective verification clause with some sense of justice".**

Mr. Seni Malimi, learned counsel for the Defendant forcefully argued that all the cases cited by the counsel for both parties in this matter dealt with defects in affidavits while the present case is based on a defective jurat in a witness statement. He argued that this is a different case which has not been tested before. I have given this argument by Mr. Malimi its due weight as it shall become apparent very soon. But at the very outset I should state that I do not buy the argument because by way of analogy the same issue has been tested in the cases cited which dealt with defective jurats of attestation in affidavits. I have other reasons to arrive at that conclusion.

Firstly, the jurat of attestation relates to the manner of administering an oath/affirmation or statutory declaration and is not related to the content or

substance of the evidence contained in the witness statement. If the Jurat is defective and is not amended, at worst it should operate to make the evidence to which it relates, have the lower status of an unsworn evidence. Amendment of the Jurat of attestation is not amendment of the evidence. It is an amendment of the procedure or the manner of making the oath/affirmation or statutory declaration under which the evidence in chief was taken. Where there is an irregularity of the manner of taking the Oath/affirmation or statutory declaration, the law is loud and clear that such irregularity is not fatal. Section 9 of the Oaths and Statutory declarations Act stipulates that:

> **9. Where in any judicial proceedings an oath or affirmation has been administered and taken, such oath or affirmation shall be deemed to have been properly administered or taken, notwithstanding any irregularity in the administration or the taking thereof, or any substitution of an oath for an affirmation, or of an affirmation for an oath, or of one form of affirmation for another. (underlining supplied).**

Therefore, I hold the view that an irregularity in the manner of administering an oath or affirmation, like defective jurat of attestation in a witness statement, is curable.

Secondly, while affidavits and witness statements are used for different purposes in courts and for cases whose nature is different as Mr. Malimi well argued, still they are both just among the several methods of presenting in Court oral evidence in a written form. In other words, they are among the departures from or exceptions to the principle of orality that requires all evidence to be given orally by the witness before the trial court. The other exceptions include but are not limited to evidence given under commission to examine witnesses who cannot attend or cannot be made to attend the court under the provisions of Order XXVI of the Civil Procedure Code; as well as the remote proceedings rules used to run virtual courts. Perhaps the principle of orality can be best summed up by the following references:

Lazer, Susan (2021) The Principle of Orality: An Analysis of the Principles Governing the Prevalence of Direct Oral Testimony in the English Adversarial Trial System and the Impact of Reforms to Reduce its Status. Doctoral thesis, University of Huddersfield at pages 27 and 28 says as follows:

> **"Historically the giving of direct testimony orally developed through, and lay at the foundation of, the common law trial. This means that as a norm witness of fact (as distinct from those witnesses, such as experts, providing the court with an opinion) should personally attend to speak rather than have their**

evidence received in written format. The assumption that this technique offers a credible means of fact-finding is to a large extent accepted owing to its historical roots with a large and complex body of rules developed to bolster both credibility and reliability within this trial system....

A witness of fact is called to give an account of those matters in respect of which the witness claims direct personal knowledge (often referred to as an eye witness). Reliance in testing the eye-witness is placed on the opportunity to observe the demeanour of the witness and the assuredness with which answers are given to determine the extent to which the testimony carries weight in the fact-finding process. The persuasive quality of the evidence is thought to be demonstrated by that witness 'speaking up'. The unreliability inherent in a fact-finding exercise is based on the opportunity to observe the demeanour of a witness, rather than to evaluate evidence in a documentary form.....Clearly, a great deal of credence is placed on the principle of orality as the 'centerpiece of the adversarial system'. Much emphasis is placed on the value of hearing what a witness has to say based on that witness's own perception of events. To evaluate

what a witness has to say based on the witness's direct knowledge of events is seen as intrinsically superior to comparable evidence produced and evaluated in a documentary form such as a formal witness statement or affidavit. However, witness statements have now replaced direct oral testimony in many situations, this the result of questions being posed as to the suitability and necessity of live oral testimony."

In Australia, the Court once stressed on the critical significance of the principle of orality in **Butera v DPP** [1987] 164 C.L.R. 180 at 189 that:

"A witness who gives evidence orally demonstrates, for good or ill, more about his or her credibility than a witness whose evidence is given in documentary form. Oral evidence is public; written evidence may not be. Oral evidence gives to the trial the atmosphere which, though intangible, is often critical to the jury's estimate of the witnesses. By generally restricting the jury to consideration of testimonial evidence of its oral form, is thought that the jury's discussion of the case in the jury room will be more open, the exchange of views among jurors will more easily occur than if the evidence were given in writing or the jurors were each armed with a written transcript of the evidence.....The premise

of the traditional Anglo-American adversarial trial is that the testing of direct testimony from an eye witness should be conducted under prescribed conditions. While forums vary in style dependent on the nature of the proceedings, trials share a level of austerity and formality designed to place the witness in circumstances in which the heightened obligation to speak the truth is very much apparent. This is a process of testing the strength of the evidence, which is seen as of greater value in ascertaining the truth than to evaluate the same evidence contained in documentary format. This idea of a dread of manufactured evidence is acknowledged in the evolution of testing the witness in a live forum. As part of this process each side will adduce its evidence. Each witness undergoes a highly regulated form of questioning following the sequence examination-in-chief; crossexamination and re-examination."

In a book titled **The Law of Evidence,** 4th ed., Sweet & Maxwell 2010 at page 116 it was again underscored that:

"Receipt of live oral testimony, the principle of orality, is perceived as the most compelling means by which the reconstruction of past events has occurred in the traditional Anglo-American

adversarial trial system. While other forms of evidence are received, particularly within the system of the jury trial, hearing what eye witnesses have to say and assessing the testing of that recollection is key to evaluating a version of events which amounts to the closest approximation of the truth. It is clearly important in such a system that the evidence presented by the party wishing to reconstruct past events to support its contention on those matters in issue is as persuasive as possible."

Despite the intrinsic value of the principle of orality, with time there was a need to depart therefrom without losing its intrinsic value. As **Lazer, Susan (2021)** in her work. The Principle of Orality: An Analysis of the Principles Governing the Prevalence of Direct Oral Testimony in the English Adversarial Trial System and the Impact of Reforms to Reduce its Status, (supra pages 29,33, 35, 43 and 44) says:

"The time and cost of proceedings have resulted in numerous reforms over the last two decades. While those reforms stemmed principally from a desire to make access to justice in civil proceedings more affordable, and transparent in terms of procedures, a steady increase can be seen in reforms and practice rules relating to criminal procedure to the same ends. The principle of orality does not lend itself to

expedition or economy in that the playing out of witness testimony drawn through the procedural hurdles associated with the trial process, examination-in-chief, cross-examination and re-examination, require a great deal of court time and expense in engaging legal professionals. This elaborate process remains the cornerstone of the trial system despite undoubted human fallibility in the ability to provide an accurate recollection of events. Arguably, in many cases, a document-based system of enquiry would be preferable..... Despite the reforms, the principle of orality remains the starting point from which all other methods for the receipt of evidence are derived. Common to both criminal and civil cases is that the principle of orality is the starting point for all adversarial proceedings. All reforms and modifications can be traced back to the principle of orality. Its historical tradition and acceptance as the pre-eminent means of ascertaining the truth, insofar as that is possible to determine by any means, is unlikely to face radical reform. However, to achieve a fair trial significant modifications have been introduced. In civil matters, while the principle of orality has not been abandoned, it has been modified to a great extent."

The reforms to the principle of orality, inter alia, have resulted into the use of Witness Statement, which as I have said, is still intricately tied to its origin- the principle of orality and its contents and drafting are to a greater extent informed and circumscribed by the dictates of the principle of orality. The Court of Appeal of England in **Alex Lawrie Factors Ltd v Morgan, Morgan and Turner** (1999) EWCA 1758 observed that:

> **"The purpose of a witness statement was to allow the witness to put forward what they would have said in oral testimony, that it ought to appear in the document in their own words. The relevant evidence was the evidence the witness would actually say within the traditional version of the principle of orality...it was not for the lawyer to construct the evidence but for the witness to put forward those matters upon which they would readily be able to speak in cross-examination."**

Back to the case at hand, there is no doubt that the use of witness statements, like the case is for affidavits, is but an effort to modify the principle of orality in line with the quest to reduce time spent and expenses in the administration of justice but without completely forfeiting the benefits thereof in the fact finding exercise. Both affidavits and witness statements

as means of presenting oral evidence in a written form in Court, are made under oath/affirmation. The need for an oath/affirmation comes out of the fear of the court receiving fabricated evidence as it was accentuated by the authors Glover R and Murphy P, **Murphy on Evidence** 15th ed., OUP, (2017) pg. 10 that:

> **"The common law lived in constant fear of the perjury, fabrication and attempts to abuse or pervert the course of justice."**

Back to the case at hand, I emphasize that affidavits and witness statements are therefore twin brothers descending from, and chiefly influenced by, the principle of orality from which they unsuccessfully attempt to make the necessary departures. The rules governing the preparation of affidavits and witness statements and their presentation in Court are similar. Both have a requirement for a jurat of attestation and their jurat of attestation is prescribed in a similar style dictated by section 8 of the Notaries Public and Commissioners for Oaths Act. Both are confined to matters of facts which the witness is able to depone and both are written in the first person as if a witness is testifying orally in a Court of Law. There are many other resemblances. The contents of the Witness Statement in terms of Rule 50(1) of the Commercial Court Rules are that:

"50.-(1) A witness statement shall-

(a) be made on oath or affirmation;

(b) contain the name, address and occupation of the witness;

(c) so far as reasonably practicable, be in the intended witness own words;

(d) efficiently identify any documents to which the statement refers without repeating its contents unless this is necessary in order to identify the document;

(e) not include any matters of information or belief which are not admissible and where admissible, shall state the source of any matters of information or belief;

(f) neither contain lengthy quotation from documents or engage in legal or other arguments;

(g) be dated and signed or otherwise authenticated by the intended witness;

(h) include a statement by the intended witness that he believes the statements of fact in it to be true, and

(i) be in numbered paragraphs."

On the other hand, the contents of an affidavit for use in court are stipulated under Order XIX Rules 1 to 3 of the Civil Procedure Code that:

1. A court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable: Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

2(1) Upon application evidence may be given by affidavit but the Court may, at the instance of either party order the attendance for cross examination of the deponent;

(2) Such attendance shall be in court unless the deponent is exempted from personal appearance in court or the court otherwise directs.

3.-(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief

may be admitted: Provided that, the grounds thereof are stated.

(2) The costs of every affidavit which unnecessarily set forth matters of hearsay or argumentative matter or copies.

The law on affidavits as set out in the case of Uganda v. Commissioner of **Prisons, Ex parte Matovu** (1966) E.A.514 at page 520 was accepted by the Court of Appeal of Tanzania in the case of PHANTOM MODERN TRANSPORT (1985) LTD and D.T. DOBIE (TANZANIA) LTD and many other cases. In Uganda vs Commissioner of Prisons, Exparte Matovu case the rules on the making of affidavits were encapsulated that:

> **"..... 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 to which the witness deposes either of his own personal knowledge or from information he believes to be true. Such an affidavit must not contain an extraneous matter by way of objection or prayer or legal argument or conclusion"**

I had to revisit the law on the use of affidavits and witness statements to adduce oral evidence in a written form in a court of law and show their common origin and heritage from the principle of orality, to which they still

to a large extent abide to, with a bid to substantiate the interrelationship and resemblance between affidavits and witness statements and thereby neutralize the argument advanced before me that a defective jurat of attestation in a witness statement attracts a completely different treatment than that of a defective jurat of attestation in an affidavit. They are very similar and cognate documents. The point is that if the jurat of attestation of an affidavit for use in Court can be amended, I see no reason why a similarly worded jurat of attestation of the witness statement should not be capable of being amended. In that regard I didn't buy the argument by Mr. Seni Malimi, learned advocate for the Defendant that the present case on defective jurat of attestation in a witness statement is a different one which has not been tested before in the cases which dealt with a defective affidavit. I hold that a defective jurat of attestation of a witness statement can be amended as well.

Mr. Mahende, Learned Advocate, has prayed that if the court finds the omission to indicate the date in the jurat of attestation not a fatal irregularity, the witness who is under oath before the court may be allowed to insert the date in the jurat of attestation in his witness statement. That argument is not proper for two reasons. One, practically in the preparation of the witness statement or an affidavit, the jurat of attestation is not filled by the Witness

who gives the evidence in chief, rather by the Commissioner for Oaths before whom the oath or affirmation is taken. In effect, the omission to insert the date in the jurat of attestation was not the omission of the witness but of the Commissioner for Oaths who did not properly discharge her statutory duty. But the Witness and the party tendering that statement for use in Court were also duty bound to inspect the accuracy of their evidence before leaving the Commissioner for Oaths whose services they procured at a fee and before bringing the same for filing in Court. Secondly, the Court is not the one that administered the oath to the witness when he was giving his evidence in chief by way of witness statement. As such the Court does not know the correct date when the stated oath or affirmation was administered. It cannot insert a date when the Commissioner for Oaths administered the oath or affirmation to the witness in the absence of the court. The words by Murphy still reverberate in my mind that" "**the common law lived in constant fear of the perjury, fabrication and attempts to abuse or pervert the course of justice.**" The Court cannot be privy to likely fabrication of evidence. I therefore decline both options suggested by Mr. Mahende, Learned Advocate.

Finally, I order that the Plaintiff should effect amendment in the Jurat of attestation of the Witness statement of PW 2 Mr. Robert David Malavanu by

seeking the same Commissioner for Oaths before whom the evidence in chief of PW 2 was given and written in the form of a Witness Statement under oath, so that the said Commissioner for Oaths can insert in the jurat of attestation of the Witness Statement only the true date when the Oath or affirmation was administered by her to the witness. The amended Witness Statement containing the date in the jurat of attestation should be filed in Court within 7 days from the date of delivery of this Ruling. I make no order as to costs.

A. H. GONZI

JUDGE

23/04/2024

Ruling is delivered in Court this 23rd day of April 2024 in the presence of Conseta Boniface Learned Advocate, holding brief for Mr. Michael Mahende learned advocate for Plaintiff and Mr. Seni Songo Malimi Learned Advocate for the Defendant.

A. H. GONZI

JUDGE

23/04/2024