

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC LAND APPLICATION NO. 165 OF 2022

*(Arising from the Order of the Court dated 21st March 2022,
in Execution Application No.49 of 2020)*

MICHAEL CLEMENT JUMA APPLICANT

VERSUS

ABDALLAH MFAUME MDOGWA 1ST RESPONDENT

MAFAUME MDOGWA 2ND RESPONDENT

COMMISSIONER FOR LAND NECESSARY PARTY

THE HON. ATTORNEY GENERAL NECESSARY PARTY

Date of last Hearing: 25/08/2022

Date of Ruling: 06/10/2022

RULING

I. ARUFANI, J

When the present application came for hearing on 19th July, 2022 the court informed the counsel for the parties that it has discovered some defects in the affidavit supporting the application as some of the paragraphs of the affidavit are not verified and other paragraphs were verified on information which its source was not disclosed in the verification clause.

At the hearing the afore stated defects the applicant was represented by Mr. Nduruma Keya Majembe learned advocate who was assisted by Mr. Martin Sangira, learned advocate. On the other hand, the

first and second respondents were represented by Mr. Boaz Albany Msoffe, learned State Attorney holding brief for Mr. Victor Ntalula, learned advocate and Mr. Boaz Albany Msoffe represented the necessary parties.

Mr. Nduruma Keya Majembe told the court that, it is a requirement of the law that verification is done on paragraphs and sub paragraphs does not stand alone. He stated his affidavit shows all paragraphs were verified. He stated he believes the way the affidavit supporting the application is verified is meeting the requirement of the law and it can be used to dispense justice in the present application. He stated the defects found in the affidavit by the court do not prejudice any party or the court and submitted it can be used to dispense justice in the present application.

He referred the court to case of **Sanyou Service Station Ltd V. BP Tanzania Ltd**, Civil Application No. 185/17 of 2018 where the court applied the oxygen principle and stated that, although procedures are supposed to be followed but the court is supposed to be guided by sense of justice. He submitted that, if the court will find there is any defect on the application, the applicant be allowed to amend the affidavit supporting the affidavit and proceed to hear the application on merit.

In reply Mr. Boaz A. Msoffe told the court their reply has two limbs. He said the first limb is whether the affidavit is properly verified and second limb is whether the facts deposed in affidavit supporting the

application is true to the best of knowledge of the deponent. He stated in relation to the first limb that, each paragraph and subparagraph in an affidavit were supposed to be verified.

He submitted that, it is not true or correct to say verification of paragraphs of the affidavit is enough to cover subparagraphs which have their own facts. He submitted that the case of **Sanyou Service Station Ltd** cited by the counsel for the applicant is distinguishable from the present application because while in the present application the issue is non verification of subparagraphs contained in the affidavit supporting the application the issue in the said case was numbering of paragraphs of an affidavit wrongly.

He argued in relation to the second limb of his submission that, it is a requirement of the law as provided under Order XIX Rule 3 of the Civil Procedure Code that an affidavit should be sworn on the knowledge of the deponent and where is sworn on information received from the other source, the said source must be disclosed. He stated failure to disclose the source of the information renders the affidavit defective. He referred the court to the case of **Salma Vuai Foun V. Registrar of Cooperative Societies & Others**, [1995] TLR 75 where it was stated an affidavit made on information should not be acted upon unless the source of the information is disclosed.

He argued that, although the deponent of the affidavit supporting the application deposed all facts in the affidavit are on his own knowledge but what is deposed at paragraphs 2.3.1 and 4.2 are information obtained from the court's clerk and paragraph 5 is an information obtained from the applicant but the deponent stated all paragraphs are verified on his own knowledge. He stated it was not disclosed in the verification clause the stated facts were information obtained from the mentioned persons which is contrary to the law.

He submitted that, as the verification clause of the affidavit supporting the application is defective then it renders the application incurably defective as it lacks legs to stand on. He submitted further that under the stated circumstances the court cannot allow incompetent application to be amended. At the end he prayed the court struck out the application for being supported by a defective affidavit.

In rejoinder the counsel for the applicant told the court is conceding to the point of law stated by the counsel for the respondents as stated in the case of **Salma Vuai Fom**. He however stated that, as the said case was decided in 1995 and it cannot be applied in the case at hand as the law has changed following an introduction of oxygen principle into our laws. He referred the court to the case of **Sanyou Service Station Ltd**

where it was stated defect on verification clause is no longer fatal and cannot be a ground of striking out the application.

He stated he believes the case of **Sanyou Service Station Ltd** is not distinguishable from the present application because in the cited case there were paragraphs which were not verified at all as it is in the affidavit supporting the present application and the court allowed the affidavit to be amended. He prayed the court to rely on the afore cited case to desist to strike out the application as to do so will not give any benefit to the respondent or the court and instead of that it will cause multiplicity of the applications in the court.

After considering the rival submissions from the counsel for the parties in relation to the defect observed by the court in the affidavit supporting the application, the court has found the issue to determine here is whether the affidavit supporting the application is properly verified and if the answer is not in affirmative whether the applicant can be allowed to amend verification of the affidavit supporting the application.

The requirement to verify an affidavit properly was emphasized by the Court of Appeal in the case of **Lisa E. Peter V. Al-Hushoom Investment**, Civil Application No. 147 of 2016, CAT at DSM (unreported) where when the Court of Appeal was dealing with importance of proper verification of an affidavit it referred to the decision given by the Supreme

Court of India in the case of **A. K. K. Nambiar V. Union of India** (1970)

35CR 121 where it was held that: -

*"The reasons for verification of affidavits are to enable the Court to find out which facts can be said to be proved on the affidavit evidence of rival parties. Allegations may be true to information received from persons or allegation may be based on records. The importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for allegation. In essence, verification is required to enable the Court to find out as to whether it will be safe to act on such affidavit evidence. **In the absence of proper verification, affidavits cannot be admitted in evidence.**"*
[Emphasis added].

Basing on the position of the law stated in the above quoted case and after going through the affidavit supporting the application the court has found that, verification of the affidavit supporting the present application shows the counsel for the applicant verified paragraphs 1, 2, 3, 4, 5, 6 and 7 of the affidavit only and he didn't verify what is deposed in sub paragraphs 2.1, 2.2, 2.3, 2.3.1, 2.3.2, 2.4, 3.1, 3.2, 4.1, 4.2, 4.3, 6.1 and 6.2 contained in the affidavit supporting the application.

The court has found that, although Order XIX of the CPC which governs proof of a case by way of an affidavit does not state how verification of an affidavit is supposed to be made but by basing on the position of the law stated in the cases of **Salma Vuai Foun** and **Lisa E.**

Peter cited to the court by the counsel for the respondents it is the view of this court that, verification of an affidavit is supposed to be made by making reference to all numbered paragraphs and sub paragraphs deposed in an affidavit.

If verification of an affidavit supporting the application is required to be made by reference to the numbered paragraphs, then as rightly argued by the counsel for the respondents, where an affidavit contains paragraphs and subparagraphs all paragraphs and sub paragraphs contained in an affidavit are supposed to be verified. It is not correct to say verification can be done on paragraphs alone and leave sub paragraphs unverified and said an affidavit is properly verified.

The court has also found that, as rightly argued by the counsel for the respondents it is not only that the subparagraphs contained in the affidavit supporting application are not verified but also the affidavit contains information from other sources and the said information are not disclosed in the verification clause. The said information can be seeing at paragraphs 2.3.1, 2.3.2, 3.2 and 4.2 where it is deposed the deponent received the information contained in the mentioned subparagraphs from the Court Clerk and the facts contained in paragraph 5 of the supplementary affidavit is an information he obtained from the applicant.

The position of the law as provided under Order XIX Rule 3 of the CPC is very clear that an affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove and statement of his belief may only be admitted where the ground thereof is stated. The court has also found it was stated in the cases of **Phantom Modern Transport (1985) Ltd** Civil Application No. 141 of 2001, CAT at DSM (Unreported) and **DP Shapriya & Co. Ltd V. Bish International**, Civil Application No. 53 of 2002, CAT at DSM (unreported) that, an affidavit should contain statement to which the deponent deposes on his own knowledge.

While dealing with the similar issue in the case of **Anatol Peter Rwebangira V. The Principal Secretary, Ministry of Defence and National Service & Another**, Civil Application No. 548/04 of 2018 (unreported), the Court of Appeal quoted a passage from the Book titled **Civil Procedure** by C. K. Takwani where is stated that, where an averment is not based on personal knowledge, the source of information should clearly be disclosed.

The position of the law stated hereinabove caused the court to come to the finding that, as the affidavit supporting the application contain subparagraphs which are not verified and other paragraphs are deposed on information which its source has not been disclosed then it is crystal

clear that the affidavit supporting the application of the applicant is defective as is contravening the position of the law stated hereinabove. Having arrived to the stated finding the question to determine here is what is the remedy for the stated defective affidavit.

The court has found that, while the counsel for the applicant argued the remedy is to allow the applicant to rectify the defects found in the affidavit by way of amending the affidavit, the counsel for the respondents argued the observed defect cannot be rectified by way of amending the affidavit and in lieu thereof what is required to be done is for the application to be struck out as it has no legs to stand on.

The court has found the long-established position of the law under the circumstances of the present application is that, where an affidavit is defective on its verification clause and the defect does not affect the substantive part of the affidavit the court can expunge or overlooked the offensive paragraphs and proceed to entertain the application by basing on the remaining part of the affidavit supporting the application. The stated position of the law can be seeing in the case of **Phantom Modern Transport [1985] Ltd V. D. T. Dobie (TZ) Ltd**, (supra) where it was stated inconsequential defects in an affidavit can be allowed to be amended. The Court of Appeal stated in the above cited case that: -

"...where defects in an affidavit are inconsequential those offensive paragraphs can be expunged or overlooked, leaving

the substantive parts intact so that the court can proceed to act on it. If, however, substantial parts of an affidavit are defective, it cannot be amended in the sense of striking off the offensive parts and substituting there for correct averments in the same affidavit but when the court is minded to allow the deponent to remedy the defects, it may allow him or her to file a fresh affidavit containing correct averments."

The position of the law stated in the above cited case is also being supported by decisions made by the Court of Appeal of Tanzania in the cases of **The University of Dar es Salaam V. Mwenge Gas and Lub-Oil Limited**, Civil Application No 76 of 1999 (Unreported) where it was stated that: -

*"Bearing in mind what was stated by this court in **Salm Vuai Fom's** case (supra), it would appear that a court has discretion to allow a deponent of an affidavit lacking verification clause to amend the affidavit. I take it, that by using the word 'amend', this court meant that the deponent can, if circumstances justify it, grant leave to the deponent to file an affidavit with a verification clause."*

The position stated in the above cited case was followed in the case of **Sanyou Service Station Ltd** cited by the counsel for the applicant in his submission and in the case of **Jamal S. Mkumba & Another V. Attorney General**, Civil Application No. 240/01 of 2019 where deponents of affidavits which were found had not disclosed the source of information contained in their affidavits and some paragraphs contained

in their affidavits had not been verified were allowed to amend their affidavits for the purpose of enabling the parties to be heard on merit.

The court has considered the argument by the counsel for the respondents that the case of **Sanyou Service Station Ltd** is not applicable and is distinguishable from the present application but failed to agree with his argument. The court has arrived to the stated finding after seeing that, as rightly argued by the counsel for the applicant there were some paragraphs which had not been verified at all in the affidavit filed in the cited case as it is in the present application and the court allowed the affidavit to be amended in the cited case. Therefore, the court has found the cited case is relevant and applicable to the present application.

While being guided by the position of the law stated hereinabove the court has found the argument by the counsel for the respondents that the defect found in the affidavit supporting the application cannot be amended rather is supposed to be struck out cannot be an appropriate remedy in the present application. The reason for coming to the above finding is because as rightly argued by the counsel for the applicant to struck out the application will not benefit any of the party in the application or the court but rather it will continue to delay dispensation of justice in the matter while the vision of the court is dispensation of justice timely.

Consequently, the court has found that, although it has been found the affidavit supporting the application is defective for having a defective verification clause but the applicant is granted leave to amend the affidavit supporting the application by filing in the court a fresh and properly verified affidavit to support the chamber summons so that the application can be heard and determined on merit. The properly verified affidavit to be filed in the court within seven (7) days from the date of this ruling. It is so ordered.

Dated at Dar es Salaam this 6th day of October, 2022



I. Arufani

JUDGE

06/10/2022

Court:

Ruling delivered today 06th day of October, 2022 in the presence of Mr. Nduruma Keya Majembe, advocate for the applicant and in the presence of Mr. Victor Ntalula, advocate for the first and second respondents and in the presence of Mr. Boaz Albany Msoffe, State Attorney for the necessary parties. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

JUDGE

06/10/2022