

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION
AT IRINGA SUB REGISTRY**

MISC. ECONOMIC CAUSE NO. 3 OF 2017
*(Originating from Njombe District Court in
Economic Case No. 20 of 2017)*

1. EMMANUEL LYABONGA } **APPLICANTS**
2. THOMAS MHUMBA }

VERSUS

THE REPUBLIC RESPONDENT

RULING

The applicants namely Emmanuel s/o Lyabonga, and Thomas Mhumba, first and second applicant respectively were arraigned before the District Court of Njombe charged with two counts.

In the first count they are charged with Unlawful Possession of Government Trophies c/s 86(2)(c) (ii) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 (d) of the first schedule, and Section 57(1) and 60(2) of the Economic and Organized Crime Control Act, [Cap. 200 R.E 2002].

It is alleged that on 10.8.2016 at Kitandililo Makambako area, Njombe District and Njombe Region they were found possessing six Elephant Tusks value at USD 45,000 equivalent to Tshs.

97,452,000 the property of the Government of the United Republic of Tanzania without permit or licence.

In the second count the applicants are charged with unlawful dealing with Government Trophies. That on the same date and place the applicants willfully and unlawfully dealt in Government Trophies in buying, selling and transporting 6 Elephant Tusks with the above named value without having a trophy dealer's licence.

The applicants have come to this Court applying for bail. The application is by chamber summons made under Section 29(4) (d) of Act No. 5 of 2009. The same is supported by two affidavits of the applicants.

After being served with the chamber summons and affidavits, the respondent/Republic filed counter affidavit. But also filed notice of preliminary objection on point of law in which he raised three grounds as follows:-

1. That the application is fatally defective for failure to cite properly the enabling provisions.
2. That, the application is fatally defective for the failure of the Commissioner for Oaths to specify whether he knew personally the applicants or they were introduced to him by someone else.
3. That, the application is fatally defective as the jurats all (sic) the applicants affidavits are in breach of Section 8 of the Notaries Public and Commissioner for Oaths Act, as the said affidavits are not dated.

At the hearing Mr. Mdegela learned Advocate appeared and said he was representing the 2nd applicant but later prayed to withdraw on the ground that he was not properly instructed. The

second applicant when given chance to say anything stated that he did not actually instruct Mr. Mdegela to represent him, but he just wanted him to be present as his brother-in-law in case he is granted bail then he could notify his relatives.

Both applicants opted to proceed with the hearing without being represented by an advocate.

For the purpose of convenience I ordered that the preliminary objection raised by the respondent will be heard along with the application by the applicants. Mr. Mwenyeheri Aristarick Learned State Attorney appeared for the respondent.

In support of the preliminary objection the Learned State Attorney submitted that the cited provision, S. 29(4)(d) is of the Economic and Organised Crime Control Act Cap. 200 RE 2002 Act No. 5 of 2009 is for Wildlife Conservation Act which has nothing to do with the present application. Mr. Mwenyeheri cited the decision of the Court of Appeal in the case of **Edward Bachwa & 3 Others VS The Attorney General & Another**, Civil Application No. 128 Of 2006 to show the effect of failure to cite proper enabling provision. He said the present application is incompetent for failure to cite proper enabling provision. On the second ground Mr. Mwenyeheri Learned State Attorney submitted that the Commissioner for Oaths did not indicate in the applicants affidavits whether the deponents were known to him before or were introduced to him by another person. That failure so to indicate rendered the affidavits defective and the application itself. He supported his argument by citing the case of **Emirates Airlines Vs Irfan M. Dinani & Tanzania Civil Aviation Authority** application No. 7 of 2009 of The Fair Competition Tribunal at Dar es Salaam. On the third point of

objection the Learned State Attorney argued that the affidavits filed by the applicants violated S. 8 of the Notary Public and Commissioner for Oaths as the same are not dated. To support his argument, he cited the case of **Samwel Kimaro Vs. Hidaya Didas**, Civil Application No. 20/2012 Court of Appeal of Tanzania in which the Court emphasized on place and date to be mentioned. But Mr. Mwenyeheri also said S. 8 of the Notary Public and Commissioner for Oaths was amended by Act No. 2/2016, S. 47 which added the name of the Commissioner for oaths to be mentioned.

Mr. Mwenyeheri submitted that as the applicants' affidavits are defective, they render the whole application incompetent and prayed that the same be struck out.

The applicants on their part they did not submit anything to challenge the objection raised. They admitted to have made that errors and the reason they gave is that they are layperson not conversant with the law. However they prayed to this Court to permit them to make amendment to their application, so that the same can be heard within a short time.

This prayer was not accepted by Mr. Mwenyeheri Learned State Attorney. He said as the applicants are conceding that their application is defective on the grounds they have raised, allowing them to make amendment is to circumvent their preliminary objection which they have already argued.

That being the position, there is no need to proceed with hearing of the application. The applicants have conceded that their application is incompetent before this Court. The question before me is whether or not to permit the applicants to amend their application. But as correctly submitted by the Learned State

Attorney this is not possible. Where a party has filed an application or an appeal, then the other party objected it on point of law which appears to obvious defective, the remedy is not to amend the impugned application. As doing so amount to circumventing the Preliminary objection already argued by the party objecting. In the case of **Bahadurali E. Shamzi and another Vs. The Treasury Registrar, Ministry of Finance Tanzania**, Civil Appeal No. 4 of 2003, Court of Appeal of Tanzania Dar es Salaam (unreported), after citing its other previous decisions the Court of Appeal held:-

“once the notice of preliminary objection was lodged, it was no longer open to the appellant to remedy the deficiency complained of by filing a supplementary notice of appeal.”

It is like in the present application, the respondent has noticed defects in the applicants chamber summons and in the applicants’ affidavits. Having noticed so he filed notice of preliminary objection on point law. The applicants have conceded to the defects which are obvious. Then they cannot be heard at this stage to apply to make amendments thereto. There is no dispute that S. 29(4)(d) does not fall under Act No. 5 of 2009. Act No. 5 of 2009 is the Wildlife conservation Act which has nothing to do with the present application. The proper citation is S. 29(4)(d) of the Economic and Organised Crime Control Act, the provision which confers jurisdiction to this Court to entertain the application. By citing S. 29(4)(d) of Act No. 5 of 2009 that is wrong citation of the enabling provision. This Court is therefore not properly moved to hear the matter as it was held in the case of **Edward Bachwa** (Supra). There

are lot of authorities on non or wrong citation of enabling provision which I need not to list them as the chain is un broken one.

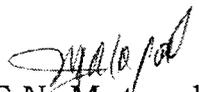
Again as the Learned State Attorney has submitted the Commissioner for Oaths did not indicate in the jurat of attestation of the affidavits of the applicants whether the deponents (applicants) were known to him before or were introduced to him by another person thus violated S. 10 of Oaths and Statutory Declarations Act, Cap. 34 RE 2002, and not S. 8 of the Notary Public and Commissioner for Oaths Act, mentioned by Mr. Mwenyeheri Learned State Attorney.

Defect in the jurat of attestation renders the affidavit defective as the same cannot be ignored or expunged, if expunged the remaining part can no longer be valid affidavit.

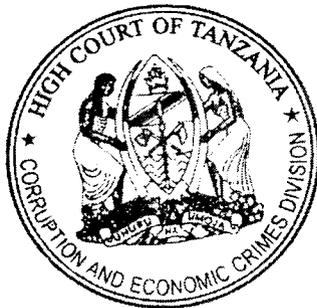
The above observed defects cannot be termed technicalities which can be cured by Article 107A(2)(e) of the Constitution of the United of Republic of Tanzania. The same go to the roots of the matter itself so they cannot be ignored.

However I do not agree with Mr. Mwenyeheri Learned State Attorney that the affidavits in question are not dated, the same are indicated dated 28 day of June, 2017 which appear after the certificate of the Prison Officer Incharge. As there was no prescribed format on how the affidavit should appear as held in the case of **Samwel Kimaro** (Supra). In my opinion that does not make the affidavits defective.

But as the first and second grounds are sound in law, they make the application incompetet. The preliminary objection on point of law is sustained. The application is hereby struck out.


F.N. Matogolo
Judge
10/08/2017

Ruling delivered today the 10th day of August, 2017 in the presence of applicants and in the presence of Mr. Mwenyeheri Learned State Attorney.




F.N. Matogolo
Judge
10/08/2017