

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 8 OF 2021

IN THE MATTER OF COMPANIES ACT, NO 12 OF 2002

AND

**IN MATTER OF WINDING UP OF BASHASHA MERCHANDISE
DEALERS LIMITED**

BETWEEN

EQUITY BANK TANANIA LIMITED.....PETITIONER

AND

BASHASHA MERCHANDISE DEALERS LIMITED.....RESPONDENT

RULING

Date of last order: 20/02/2024

Date of ruling: 15/03/2024

AGATHO, J.:

This ruling was prompted by the Petitioner's Preliminary Objections (POs) raised against the respondent's counter affidavit deposed by Mr. Obadia Kajungu, advocate. The POs were four, namely:

- (1) That the affidavit in opposition (by Obadia Kajungu) is incurably defective for want of attestation clause.
- (2) That the respondent's affidavit is incurably defective for containing defective verification clause

- (3) That the respondent's affidavit is incurably defective for being sworn by the person who is not well conversed with the facts of the matter.
- (4) That the respondent's affidavit in opposition is incurably defective for being undated.

In terms of legal representation, Mr. Emmanuel Saghan appeared for the Petitioner, while Mr. Dickson Venance Mtogesewa and Obadia Kajungu, represented the respondent. The hearing of the POs was conducted orally on 20th February 2024.

Mr. Saghan began his submission in chief by stating that there are four POs. He begged to jointly submit on the 2nd and 3rd POs, and argued the remaining POs separately.

He submitted that their POs are against the affidavit in opposition that was presented in this court on 10/03/2021 and was sworn by Mr. Obadia Kajungu. It was the submission of Mr. Saghan that the impugned affidavit lacks jurat attestation. In his view, that means it has not been notarized by any commissioner for oaths. It also has a defective verification clause, and it is not dated.

In seeking to impress the court Mr. Saghan and while trying to find a definition of an affidavit, he referred to the case of **DPP v Dodoli Kaputi and Another**, Criminal Application No. 11 of 2008 CAT. In that case at page 2 the

term affidavit is defined by extraction from the Black's Law Dictionary. On page 3 of that case the essentials of the affidavit have been stated to include:

- (i) The statement or declaration of facts
- (ii) A verification clause
- (iii) A jurat,
- (iv) Signature

Mr Saghan submitted that they have tested the above ingredients provided against Obadia Kajungu's affidavit and found that it lacks all the ingredients. Hence making it incurably defective and not amenable in any way.

On the first point of the PO, which states that the affidavit in opposition (by Kajungu) is incurably defective for want of attestation clause, Mr. Saghan submitted that attestation clause or jurat is the heart of an affidavit. And without it the affidavit lacks legs to stand on because that is the sole intention of the affidavit, the sworn statement. To buttress his submission, he cited Section 8 of the Notary Public and Commissioner for oaths Act [Cap 12 R.E. 2019] requiring the Commissioner for oaths or notary public to administer oaths, and that commissioner shall put his name, signature, place, and that date where such oath has been taken or made.

He then referred back to the case of **Dodoli Kapufi's case** (supra) on page 4, which states that an absence of the jurat or omission to show the date

and place where the oath was administered, or affirmation taken or the name of the authority renders the affidavit incurably defective.

The petitioner's counsel reiterated that they have examined Mr. Kajungu's affidavit on page 2 and there is nowhere where the commissioner for oaths has administered such oath. This means that there is no affidavit at all. It cannot be relied upon. He humbly prayed that it be struck out.

Thereafter, Mr. Saghan turned to the 2nd and the 3rd POs which he submitted jointly. The second PO reads that the respondent's affidavit is incurably defective for containing defective verification clause and the 3rd PO is that the respondent's affidavit is incurably defective for being sworn by the person who is not well conversed with the facts of the matter. The learned counsel submitted that they have carefully examined the verification clause of the affidavit of Mr. Obadia Kajungu and noted that it has not been dated and it contains information that are not in the knowledge of the deponent. Saghan submitted that they have compared the verification clause to be like the lungs of the affidavit. It should be precise and contain information that is known to the deponent. The counsel was of the view that Obadia Kajungu is an advocate for the respondent and thus he has no information or no capacity to verify information that is within the knowledge of internal management of the respondent's company. He went on suggesting that the information that is contained in paras 2, 3, 4 and 5 of the affidavit in opposition can only be verified by the directors or the top management of the respondent company such as

the CEO or CFO. He opined that if Mr. Kajungu was given information by such people he should have indicated that in the verification clause source of such information and who gave such information. To cement his argument he referred to the case of **Lisa E. Peter v AL. Hushoom Investment Civil Application No. 147 of 2016 CAT** at page 8, the CAT stated while citing the Indian case of **A.K.K. Nambia v Union of India (1970) 35 CR 121** it was held that:

"...The important of verification is to test the genuineness and authenticity of allegation and also to make the deponent responsible for allegation..."

Mr. Saghan submitted further submitted that looking at the affidavit of Mr. Kajungu it is difficult to tell the genuineness of the allegations/information. For sure it was from the third party who is not mentioned or even the source of such information is not mentioned. He argued that they are unsure of the correctness and genuineness of such information. He invited the court to strike the affidavit out.

On the last point of preliminary objection, the petitioner's counsel submitted that the affidavit in opposition being undated is incurably defective. He referred to page 2 of Mr. Kajungu's affidavit, where it is seen that it is not dated. Mr. Saghan admitted that though they do not have authority to support their allegation they are of the view that the affidavit filed in court must be dated to indicate the date when the same was taken or administered. On that

basis he humbly prayed that the affidavit in opposition be struck out with costs. He told the court that they specifically prayed for costs because the petitioner has incurred expenses in prosecuting matters involving this affidavit in opposition especially hearing of the POs.

In opposition to the POs stood Mr. Mtogeseewa for the respondent. He submitted in reply to submission by the petitioner's counsel. He argued that there is not affidavit in opposition in law that for lacking the jurat of attestation. He submitted that to Mr. Saghan that is the heart of the affidavit. Mtogeseewa agreed however on a different ground. He stressed that there is no opposing affidavit because in effect there was never in court's record an affidavit supporting and verifying the petition to be opposed. In the court's view this is just a clever way of saying we are objecting the affidavit verifying the petition. Such a tricky approach cannot be allowed. If they knew all that, why didn't they file their POs earlier. This is an afterthought that cannot be entertained for it aims to frustrate the POs at hand. Mr. Mtogeseewa should respond to submission in chief not fronting attacks against the petitioner's affidavit which is not the subject of the POs at hand.

Mr. Mtogeseewa continued to submit that when they appeared before this court on 12/02/2024 parties were afforded access to court's record and being officers of the court they learned that in a formal court record that an affidavit verifying the petition was filed. And they learned further even the said purported affidavit is not dated as well. The respondent's counsel submitted that in effect

the respondent's opposing affidavit was made illegally following the illegality of the presence of the affidavit verifying the petition for want of formal record that is the affidavit verifying the petition. Mtogesewa went on arguing that this point was raised because this is a court of justice and has a noble duty to be assured that it has before it lawful records notwithstanding what the parties are submitting. That is the position in the case of **Chama cha Waalimu v Attorney General, Civil Application No. 151 of 2008 CAT** on page 17, 18 and 19. The key principle in this decision is that a court of law while determining the parties claim and in this case **Chama cha Waalimu v Hon. Attorney General** case (supra) before granting the injunction to restrain mgomo wa waalimu, it ought or it had a duty prior to granting injunction to ascertain whether the application was legally before it not withstanding there was no objection.

And according to Mtogesewa upon revision before the CAT, this duty was discharged by the CAT itself by considering the legality of the records before it. And the CAT eventually it nullified all proceedings and decided itself to discharge the duty. Indeed, it discovered that the records were illegally before the High Court prior assurance legality or lawfulness before granting injunction order.

It was the view of Mtogesewa that the court should satisfy itself if there is an affidavit verifying the petition subject of this objection. He thus prayed that the court should discharge that duty as directed by the CAT. In effect it will discover that there was not a lawful opposing affidavit. The court is in

control of proceedings not advocates. On this the court is of the view that much as **Chama cha Waalimu's case** (supra) could be relevant, the court has to deal with POs raised first. Unfortunately for Mr. Mtogesewa, the court is now required to deal with the POs raised by the petitioner. In our view the respondent's counsel adopted his own style instead of reacting to the POs raised.

Mtogesewa argued further that in so far as there is not affidavit verifying the petition, the effect is in form of the opposing affidavit for not ever being sworn before the commissioner for oaths, and as held in **Dodoli Kapufi's case** (supra) He also admitted that actually, the jurat of attestation is the heart of the affidavit. The effect is that it being not the affidavit. For want of an affidavit in verifying the petition, there was a defect in form in the affidavit in opposition. It was in his view nullity.

Respondent's counsel added in his submission that where there is a defect in form of the document such as the opposing affidavit, the proper remedy would not be to strike it out in this circumstance it would be to reject it. He was of the opinion that the affidavit of Mr. Kajungu ought to be rejected because of these circumstances. He referred to the case of **Sunlon General Building Contractors Ltd and Others v KCB Bank Tanzania Limited, Civil Appeal No. 253 of 2017 CAT** at page 22. It was Mr. Mtogese's prayer that the affidavit of Mr. Kajungu be rejected. And for purposes of enabling the respondent to access justice, she be allowed to refile an opposing affidavit

subject to court satisfaction that there is an affidavit verifying the petition. The court considers these as strange prayers coming from the respondent's counsel. They are meant to downplay the effect of the POs. Since the parties have already filed their pleadings and the petitioner has raised the POs the court is precluded from rejecting the impugned affidavit.

Counsel Mtogesewa also reacted to the counsel for the petitioner's submission on the claimed defect in the affidavit especially on the jurat of attestation. He submitted that the defects complained of are the same regarding the purported affidavit verifying the petition as per the principles in **Chama Cha Waalimu's case** (supra). He was further in agreement with the definition of affidavit in **Dodoli Kapufi's case** (supra) content of affidavit especially on the date of administering the oath. He then submitted that in event rejection is grantable, the petitioner will not suffer any hardship if the respondent is allowed to refile affidavit in opposition subject to court's assurance of the legality in court's record of the affidavit verifying the petition.

Mr. Mtogesewa in responding to allegation of defective verification clause, he submitted that given the request for rejection, looking at paragraph 2, 3, and 4 of the affidavit in opposition, the deponent has stated that he was in conduct of various cases of these parties. That is stated in paragraph 1, especially Civil Case No. 146 of 2020 which is coming for defence hearing. He opined that he cannot be challenged to be aware of the information. Moreover, it was his view that the petitioner's counsel has not cited any law forbidding an

advocate in conduct of the matter to swear an affidavit. It would ideally be directors or principal officers to swear the affidavits. Mtogesewa was of the view that the PO on verification clause is not attainable because it is the deponent who is verifying the truthfulness of the deposition. He submitted that it is unthinkable that the deponent conducting the matters lacks information on the matter. He then suggested that if there was any missing link it would have been subject to cross examination.

The counsel for the respondent stressed that there is no opposing affidavit. And reiterated his prayers that the court reject the said affidavit and that the respondent be allowed to refile an opposing affidavit subject to assurance of the legality that there is an affidavit verifying the petition in the case file/record.

In rejoinder, Mr. Saghan rejoined first by noting that the senior counsel for the respondent has admitted that there is no affidavit in opposition that has been filed. That is because the present one filed on 10/03/2021 is not affidavit.

Second, he submitted that they noted that the counsel for the responded has used much time challenging the affidavit verifying the petition. It was Mr. Saghan's rejoinder that with due respect to Mr. Mtogesewa the attacks on the affidavit verifying the petition were not the purpose of hearing. That is a PO in the notice of preliminary objection filed on 16/02/2024. He was therefore of the view that the court cannot venture into that PO as it not the time. However, he

was quick to submit that there is an affidavit verifying petition which is part of the winding up petition.

His third rejoinder point was that the counsel for the respondent has submitted that there is no affidavit on opposition because there is no main affidavit to oppose. Saghan clarified that an affidavit in opposition in winding up petition is not filed because there is main affidavit neither does it being filed in response to the affidavit verifying winding up petition. He went on clarifying that, an affidavit in opposition is provided in the law (it is a statutory document) under rule 106(1) of the Companies (Insolvency) Rules, G.N. 43 of 2005. He submitted that it means that an affidavit in opposition is a pleading filed in response to petition for winding up if at all the respondent wishes to oppose. It is filed not in opposition to an affidavit. The affidavit in opposition may be filed by even creditors. He pointed out that as we use Written Statement of Defence in opposition to the plaint what we use to oppose winding up petition is an affidavit in opposition. Thus, the argument that the respondent did not file affidavit in opposition because there was no main affidavit or affidavit verifying the petition does not hold water.

Saghan submitted that throughout his submission he has not used the word opposing affidavit instead he used the word affidavit in opposition which is a statutory document. He continued to rejoining that since the respondent has prayed for an opportunity to file a fresh opposing affidavit after the petitioner has filed the main affidavit, that is unprocedural because everything

and time for filing documents has been provided for in the Insolvency Rules. In this case affidavit in opposition shall be filed in court 7 days before the date fixed for hearing. That has lapsed or passed way back in 2021. He said further even the winding up petition was published. Everything was done.

The petitioner's counsel also rejoined the cited the case of **Chama Cha Waalimu** (supra) pages 17 – 19. He argued that they have perused this decision, it talks about non-citation or wrong citation of enabling provision of the law. If there is non-citation or wrong citation of enabling provision of the law that is not the issue in the case at hand. The dispute before this court is defective affidavit in opposition.

Mr. Saghan resisted the counsel for respondent submission that because there is no affidavit in court then it be rejected. He submitted that the fate of defective affidavit is not rejection instead it is for it to be struck out as held in **Dodoli Kapufi** (supra) in pages 4-5 because such defect can never be waved by the parties. He rightly submitted that rejection of documents is upon filing not when it is contested at the stage like this one. As regarding the authority cited was **Sunlon's case (supra)** Saghan was of the opinion that the said case is irrelevant because, in that case what was being contested was written submission that exceed 10 pages before the High Court Commercial Division as per the rules of the court. The CAT held that the defect was not fatal, and the parties ought to have an opportunity to rectify it. In the present case is the

defective affidavit, the affidavit without jurat of attestation and defective verification. That is not a defect as to form, it is indeed a substantive defect.

Mr. Saghan contested the verification clause too where the counsel for the respondent submitted that the deponent is well equipped to verify the information on the matter because he has conducted various matters between the parties. He submitted that even if the deponent was aware or knew certain fact or information that was received or informed by someone else even those cases before coming to know the real dispute between the parties and hence, he ought to disclose that source of information. The petitioner's counsel submitted that in fact, the dispute in Civil Case No. 146 of 2020 is different from the one at hand. This was well stated by Phillip J in her ruling dated 14th July 2021 which is also in this case file. He concluded his rejoinder by praying that the affidavit in opposition be struck out with costs.

Before proceeding further, I wish to state that the court is enjoined to examine and determine the POs and not new points that have been brought through a back door by the respondent's counsel. Thus, I am not in a position to deal with the defects relating to an affidavit verifying the petition. This point was brought by Mr. Mtogese to confuse the court. Moreover, he cited **Chama cha Walimu's case** (supra) which in my view is irrelevant in the premise of the present case.

Having so stated and turning to the POs, I see no need to examine all four POs while the first one is sufficient to decide the contest. The first PO is

that the affidavit in opposition (by Obadia Kajungu) is incurably defective for want of attestation clause. This PO was conceded by Mr. Mtogesewa for the respondent.

I concur with Mr. Saghan that the impugned affidavit in opposition sworn by Mr. Obadia Kajungu and presented for filing in the court on 10/03/2021 lacks jurat of attestation. That implies that it has not been notarized by any commissioner for oaths. In **DPP v Dodoli Kapufi and Another, Criminal Application No. 11 of 2008 CAT** at page 2 cited the Black's Law Dictionary definition of the term affidavit. On page 3 of **Dodoli Kapufi's case** the essentials of the affidavit are: the statement or declaration of facts, a verification clause, a jurat, and signature.

Looking at Obadia Kajungu's affidavit one will find that it lacks all the above ingredients. Hence making it incurably defective and not amenable in any way. The court cannot act on a defective affidavit particularly if the defect is one that cannot be amended or takes the whole substratum of the affidavit. See the case of **Omari Ally v Idd Mohamed and Others, Civil Revision No. 90 of 2003, HCT at Dar es Salaam.**

The first point of the PO, which states that the affidavit in opposition (by Kajungu) is incurably defective for lacking jurat of attestation is sustained. The affidavit is struck out. The prayers for rejection of the said affidavit and leave to be granted to the respondent to refile the same is rejected for being untenable.


The court order as follows:

1. The first PO is sustained.
2. The affidavit in opposition is struck out for being incurably defective.
3. The petitioner shall have her costs.

Order accordingly.


DATED at DAR ES SALAAM this 15th Day of March 2024.




U. J. AGATHO
JUDGE
15/03/2024

Court: Ruling delivered today, this 15th March 2024 in the presence of Emmanuel Saghan, advocate for the petitioner, and Venance Mtogesewe, counsel for the respondent.




U. J. AGATHO
JUDGE
15/03/2024