IN THE HIGH COURT OF TANZANIA

THE CORRUPTION AND ECONOMIC CRIMES DIVISION

(DAR ES SALAAM REGISTRY)

AT DAR ES SALAAM

MISC. ECONOMIC CAUSE NO. 17 OF 2017

(Originating from Economic Crime Case No. 19 of 2017 at the Resident Magistrates Court of Dar es Salaam at Kisutu)

KALRAY PATEL . . . . . 1ST APPLICANT
KAMA ASHAR . . . . . 2ND APPLICANT

VERSUS

REPUBLIC . . . . . RESPONDENT

Date of last order - 12/6/2017
Date of Ruling - 16/6/2017

RULING

W.B. Korosso, J.

Before the Court is an application for bail filed by the applicants supported by an affidavit sworn by Mr. Alex Mushumbusi, learned advocate for the applicants. In this matter the respondents upon being served with the application filed a notice of preliminary objection apart from the counter affidavit.

Therefore the Court first proceeded to hear the parties on the preliminary objection filed. Having heard the parties on the preliminary objection raised by the Respondent Republic, this Court on the 9th of June 2016

made a finding that two of the paragraphs in the affidavit supporting the application were defective but found that the defect found was not fatal since it did not go to the root of the matter and therefore held that the remedy was to expunge the two paragraphs found to be defective and expunged paragraphs 5 and 7 of the affidavit supporting the application.

On the 12th of June 2016, a date fixed to hear the application for bail on merit, the Respondent Republic presented to this Court a Notice of Appeal to the Court of Appeal of Tanzania pursuant to Rule 68(1) of the Tanzania Court of Appeal Rules 2009 which they had registered and prayed for the Court to order for stay of proceedings on the bail application.

In response, the applicants counsel represented by John Mapinduzi, Learned Advocate objected to the prayers for stay of proceedings stating that the notice of appeal against the ruling on the preliminary objection raised by the Respondent Republic does not preclude the bail application to be heard and submitted that the Court should proceed hearing of the bail application. The applicants counsel also argued that the notice of appeal by the Respondent Republic is an afterthought and being vexatious intended to deny bail to the applicants. The applicants counsel argued further that in the spirit of this Court, being disposal of matters before it expeditiously, the application should be heard on merit and the notice of appeal should not be considered.

The Respondent Republic Rejoinder by the State Attorney was to the effect that it was not the intention of the Director of Public Prosecution to abuse the process or deny bail to the applicants but that the notice of appeal filed was in exercise of their right to appeal on being aggrieved by

a decision of this Court. They reiterated their prayers for the Court to stay proceedings regarding bail application.

This Court takes note of the fact that there is a Notice of Appeal to the Court of Appeal of Tanzania, filed by the Director of Public Prosecutions and received and registered on the 12th of June 2017 duly understanding that that upon institution of a notice of appeal it a part has initiated the necessary process of an appeal. We import section 68 of the Court of Appeal Rules which reads:

> "68.-*(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in triplicate with the Registrar of the High Court at the place where the decision against which it is desired to appeal was given, within thirty days of the date of that decision, and the notice of appeal shall institute the appeal*".

The power to appeal to the Court of appeal by the Director of Public Prosecutions is under Section 6(2) of the Appellate Jurisdiction Act Cap 141 RE 2002 which reads:

> "6(2) *Where the Director of Public Prosecutions is dissatisfied with any acquittal, sentence or order made or passed by the High Court or by a subordinate court exercising extended powers he may appeal to the Court of Appeal against the acquittal, sentence or order, as the case may be, on any ground of appeal*".

This provision does not specify on the type of order and thus we take to mean that the DPP may appeal to the Court of Appeal if dissatisfied by any acquittal, sentence or order passed by the High Court. In any case any contention related to filing of the notice of the appeal and the appropriateness of filing an appeal against the ruling meted by this Court should be considered in the Court of Appeal and not in this Court.

At the same time, in determination of the issue on hand the Court especially the applicants counsel contention that where a notice of appeal against a ruling is filed it does not affect the proceedings regarding the substantive bail application, we find that it important to take cognizance of Section 10 of the Appellate Jurisdiction Act (supra) states: "*The High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may, if it thinks fit, pending the determination of an appeal from the High Court or the subordinate court concerned to the Court of Appeal–*

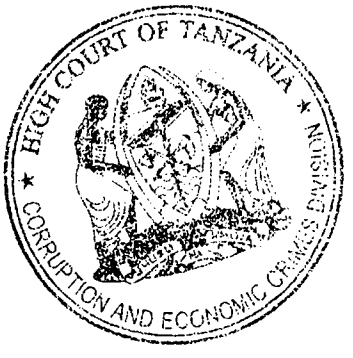
> *(a) admit the appellant to bail in the same circumstances in which the court would have given bail under section 368 of the Criminal Procedure Act; Cap 20*".

Looking at this provision, the Court finds that this provision does not apply in the circumstances pertaining in the present case since having reviewed section 368 of the Criminal Procedure Act, Cap 20 RE 2002 which is referred therein, it is clear that for the provision to apply, the Court must be convinced there is reasonable cause and the provision addresses suspension of sentences and admission of bail pending appeal which is not the case before the Court. This is also further compounded by the fact the law and case law empowers the Director of Public

Prosecution to appeal to the Court of Appeal against any order in criminal proceedings.

We also found it relevant to consider the position related to the jurisdiction of the High Court where a notice of appeal against a decision has been instituted such as the present case. In the case of ***National Insurance Corporation vs. Kweyambah Quaker*** (1999) TLR 150 were the Court of Appeal held that a Notice of Appeal to the Court of Appeal is addressed to the Court of Appeal and once it has been lodged any dealing with or in connection with it can only be transacted in the Court of Appeal. That a notice of appeal removes a case from the High Court to the Court of Appeal.

At the same time we have found no evidence that reveals that the filing of the notice of appeal by the DPP is buttressed by malice or vexatious with intention to deny the applicants the opportunity grant of bail. Therefore, having in mind the relevance of the notice of appeal filed by the DPP, this Court cannot continue with hearing of the bail application on hand, since the matter is no longer within the confinement of this Court. In the premises, we grant the prayers by the prosecution to stay bail application proceedings pending determination by the Court of Appeal of the appeal filed by the Director of Public Prosecutions. Ordered.



Winfrida B. Korosso
Judge
16th June 2017

IN THE HIGH COURT OF TANZANIA

THE CORRUPTION AND ECONOMIC CRIMES DIVISION

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

MISC. ECONOMIC CAUSE NO. 17 OF 2017

(Originating from Economic Crime Case No. 19 of 2017 at the Resident Magistrates Court of Dar es Salaam at Kisutu)

KALRAY PATEL ..... 1ST APPLICANT
KAMA ASHAR ..... 2ND APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

Date of last order - 8/6/2017
Date of Ruling - 9/6/2017

RULING

W.B. Korosso, J.:

The Ruling is upon consideration of the submissions by both parties on a Preliminary Objection raised by the Respondent Republic against an application filed by Kalray Patel and Kama Ashar supported by an affidavit deposed by Alex Mushumbusi, the applicants counsel. The application before the Court filed under a certificate of urgency is made under section 148(1)(2) of the Criminal Procedure Act, Cap 20 RE 2002, Section 29(4)(d) and 36(1)and 36 (5)(a)(b)(c) and (d), Section

36(6)(a)(b) and (c) and 38(7) of the Economic and Organized Crime Control Act, Cap 200 RE 2002 and seeks for the applicants to be heard on an application for bail.

The Respondent Republic preliminary objections is that the affidavit in support of the chamber application is incurably defective for having a defective verification clause. In amplifying this objection, Ms. Sumawe learned State Attorney who represented the Respondent Republic submitted that the verification clause of the supporting affidavit to the application is defective by reason that the deponent failed to reveal the source of information in some of the paragraphs by the general statement that all the paragraphs were true to the best of his knowledge. The Respondent contended that the contents of paragraph of paragraph 2, paragraph 3 and 5 were information from the Court and not from his own knowledge. That this is the case for paragraph 5, 6 and 7 which are information derived from information from the clients and that this was not acknowledged by the affidavit deponent.

Ms. Sumawe Learned State Attorney argued that failure to state the source of information on the affidavit in the verification clause is in contravention of Order XIX Rule 3 of the Civil Procedure Code, Cap 33 RE 2002 and thus rendered the affidavit defective. The Respondent Republic therefore contended that the remedy for a defective affidavit was for the application to be struck out by relying on the holding in the case of ***Augustino Lyatonga Mrema vs. AG (1996) TLR 274*** and ***Anna Ndimi Alex @ Kipaa vs Zahra Munisi and Khalid Adam Munisi,*** Commercial case No. 81 of 2008 (High Court Commercial Division Dar es Salaam).

The applicants rival submissions advanced by Mr. Mapinduzi and Mr. Mushumbusi Learned Counsels was to oppose the objection by the Respondent Republic stating that the deponent of the applicants supporting affidavit being the counsel was privy to the information presented in the affidavits and in effect the contents therein

became his knowledge and therefore there was no need for him to specify in the verification clause where he got the information in the challenged paragraphs especially paragraph 2, 3, 4 and 5 were the facts deponed were matters gathered from court files. The counsels argued that if the Court was to find that the deponent should have revealed the source of information for the contents of paragraph 4, 5 and 6 which is information known to their clients the remedy is not for the whole affidavit to be struck out but for the Court to order the said paragraphs to be expunged. That this is the position restated by case law although they failed to present to the Court any relevant case to substantiate this stance.

In addressing the issues on hand before the Court, we decided to first satisfy ourselves whether the application was competent and consider whether this Court is vested with the jurisdiction to entertain the matter. The Court finds that section 148(1)(2) and (3) of the Criminal Procedure Act, Cap 20 RE 2002 cited to move the Court is proper having regard to the fact that the applicants face charges contrary to the Penal Code, Cap 16 RE 2002 and the Electronic and Postal Communication Act, No. 3 of 2010 in counts no. 1, 2, 3, 4, 5 and 6. Section 29(4)(d) of the EOCCA is proper without doubt. Section 36(1) of EOCCA is also proper but the Court finds there was no need for Section 36(5)(a)(b)(c) and (d), Section 36(6)(a)(b) and (c) and 36(7) of the EOCCA since they discuss the conditions upon granting bail which is the discretion of the Court. In any case by virtue of the fact that proper sections were cited we find the Court is properly moved to hear the application.

It is 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".

There is a Court of Appeal decision which defined 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 authorised 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.

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.

The applicants counsel averred that the Court should take into consideration the provisions of Article 107 (A) (2) (e) of the Constitution of the United Republic of Tanzania advancing the duty of Courts to refrain from being too technical and in the process compromising dealing with substantive justice. We wish to first address this

issue. It should be noted that applicability or otherwise of that Article has been discussed in a number of cases by this Court and the Court of Appeal. In **Zuberi Musa v. Shinyanga Town Council**, Civil Application No. 100 of 2004 (unreported), the Court stated that:-

> *". . . Article 107A (2) (e) is so couched that in itself it is both conclusive and exclusive of any opposite interpretation. A purposive interpretation makes it plain that it should be taken as a guideline for court action and not as an iron clad rule which bars the courts from taking cognizance of salutary rules of procedure which when properly employed help to enhance the quality of justice. It recognizes the importance of such rules in the orderly and predictable administration of justice. The courts are enjoined by it to administer justice according to law only without being unduly constrained by rules of procedure and/or technical requirements. The word "unduly" here should only be taken to mean "more than is right or reasonable, excessively or wrongfully . . ."*

See also the case of **Ami (Tanzania) Limited v Ottu on behalf of P.L. Assenga and Others,** Civil Application No. 76 of 2002 (unreported) in which this Court observed:-

> *". . . Article 107 A (2) (e) of the Constitution does not in any way command that procedural rules should be done away with in order to advance substantial justice. Each case will be considered on its own peculiar facts and circumstances...."*

Taking into account the above laid guidance, we find that Article 107 A (2) (e) of the Constitution cannot apply in the circumstances of the present case on account that we can hardly gather any element of technicalities involved that upstages the substantive matter.

It is also important 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:

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. The challenge is whether the contents therein fulfils what is envisaged in a verification clause. 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. Suffice to say looking at the

challenged paragraph 2, 3 4 and 6 where the deponent of the affidavit verified that the facts stated therein are true to the best of his knowledge we find that this was enough since the facts stated as alluded by the applicants counsel are matters which came to the knowledge of the deponent by virtue of his role as the counsel for the applicants and as Court officers. For paragraph 5 and 7, we share the views by the learned State Attorney that though he gained the information from the backbone of being the counsel for the applicants in effect what is stated therein are matters not strictly speaking true to the best of the knowledge of the deponent. The deponent should have shown with clarity the source of the said information in the spirit of ensuring that the deponent takes responsibility on the fact stated. That being the case we find that still there is the fact that he gained the information in his role as the applicants counsel and use the information in that role.

Having said that, the pending issue is what are the consequences of having two paragraphs which somewhat failed to comply to the position stated above on the contents of a verification clause. We have gone through the cited cases by the Respondent Republic on the remedies upon an affidavit being found to have defective elements in the verification clause. Suffice to say, there are conflicting views of the courts with regard to effect of a defective verification clause. Some cases such as ***Massawe and Company vs. Jachibhai Patel and 18 Others Civil Case No. 39 of 1995*** (HC) DSM Registry which held that such a defect is incurable and in ***Hilal Hamed Rashid & 4 Others vs. The Permanent Secretary (Establishment) and Attorney General (HC), DSM Civil case No. 129 of 1998*** where the holding was that that such defects are curable dependent on particular circumstances of a case.

This court finds that the 2 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***