IN THE HIGH COURT OF TANZANIA

THE CORRUPTION AND ECONOMIC CRIMES DIVISION

SUB REGISTRY AT MBEYA

MISC. ECONOMIC CAUSE NO. 7 OF 2017

(Arising from Economic Case Number 12 of 2017 pending at the Resident Magistrate's Court of Mbeya at Mbeya)

1. **ATHANAS SEBASTIAN KAPUNGA**
2. **ELIZABETH WAHYADE MUNUO**
3. **SAMWEL LAZARO NHIGA**
4. **JAMES QWARIDA JIROJIK**
5. **TUMAINI EXAUD MSIGWA**
6. **EMILY MAGANGA LYOTELA**
7. **JUMA RASHID IDD**
8. **MUSA ZUNGIZA ZUNGIZA**

VERSUS

REPUBLIC

RULING

Date of Last Order: 09/10/2017

Date of Ruling: 11/10/2017

W.B. KOROSSO, J:

Athanas S. Kapunga, Elizabeth W. Munuo, Samwel L. Nhiga, James Q. Jirojik, Tumaini E. Msigwa, Emily M. Lyotela, Juma R. Iddi and Mussa Z. Zungiza have filed an application under certificate of urgency via chamber

summons supported by an affidavit sworn by Baraka H. Mbwilo learned advocate engaged by the applicants. The application is pursuant to section 29(4)(d) and 36(1) of the Economic and Organized Crime Control Act Cap 200 RE 2002 (hereinafter referred to as the "Act" or "EOCCA"). Reliefs sought include first, that this Court be pleased to grant bail to the applicants on conditions it may deem fit pending final determination of Economic Crimes Case No. 12 of 2017 pending at the Resident Magistrate's Court of Mbeya at Mbeya, and second, for any other orders or reliefs the Court may deem fit and just to grant.

Court records reveal that upon service of the application, the Respondent Republic duly filed a counter affidavit together with a notice of preliminary objection. The counter affidavit in effect noted the contents of some paragraphs and disputed paragraphs related to the powers of this Court to entertain the application. The respondents conceded that bail is granted subject to dictates of law and put the applicants to strict proof on the averments that the applicants will suffer irreparable loss both economically and health wised if bail is not granted to them.

At the date fixed for hearing of the application the applicants enjoyed the services of Mr. James Kyando, Mr. Boniface Mwabukusi and Mr. Baraka Mbwilo learned advocates and the Respondent Republic was represented by Mr. Cassilus Mwamkandi and Mr. Baraka Mgaya learned State Attorneys.

Before venturing into hearing the merits of the application, the parties were heard on the preliminary objection raised, that is, the contention that the application is incompetent and not properly before this Court. It is pertinent to highlight that the application was filed in the High Court of Tanzania, Corruption and Economic Crime Division, Subregistry of Mbeya. The learned State Attorney informed the Court that the preliminary objection raised has two limbs. The first being a matter of jurisdiction, that is, challenging the jurisdiction of this Court, that is, the Corruption and Economic Crimes Division of the High Court to hear and determine this application especially the provision advanced to move the Court to hear and determine the matter being Section 29(4)(d) of the Act. The second point of objection is that the affidavit supporting the application is defective for being sworn by the applicants counsel on behalf of the applicants and thus rendering the application incompetent. The Court allowed the second limb of the objection to be heard after determining an objection against hearing of this objection, this can be discerned from the Ruling on this found in the proceedings on record regarding this issue.

We premise our deliberation by determining on whether the raised points of objections warrant consideration of this Court, before addressing the points of objection raised. The applicants counsels submitted that the points of objection raised are not purely points of law falling within the ambit of the principles governing preliminary objections outlined in ***Mukisa Biscuits Manufacturing Company LTD v West End Distributors LTD*** (1969) EA 696. In the said case, it was stated that an objection has to be

purely on points of law. The applicants contend that the objection raised requires consideration other facts and evidence outside the paramaters of the pleadings before the Court. The Respondent Republic argued that the objections raised were points of law and therefore properly raised and requiring the Court's determination.

It is a well established principle that preliminary objections should be on points of law. The case of ***Mukisa Biscuits Manufacturing Company LTD v West End Distributors LTD*** (1969) EA 696 addresses on what a Preliminary objection is. At page 700 Law, J.A (as he then was) observed as follows:-

> *"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration".*

At page 701 Sir Charles Newbold P. had this to say:-

> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion".*

This principle has been restated by various cases of the Court of Appeal and the High Court and without question is the position of the law. That a preliminary objection has to be on points of law and derived from the pleadings before the Court and capable of disposing the matter. That being the case, the question before the Court therefore is whether the current preliminary objection passes this test.

The first objection raised relates to the jurisdiction of this Court to entertain the bail application and the second point is the competency of the affidavit supporting the application. There is no question that where an issue of jurisdiction is raised it is a point of law and has to be determined before addressing other issues. Jurisdictional matters being the crux of any proceedings, going to the mandate of the Court to determine the matter before it. Having considered everything before us we find that on this first point of objection, it is without doubt a point of law since it can in effect lead to disposal of the application and deriving from the pleadings and appendages thereto. Competency of the second point of objection we will consider and determine later when we address the second point in detail.

Starting with the first limb of the objection that is the jurisdiction of this Court to hear and determine the application before it. The Respondent Republic contend that the application was filed in a wrong registry, having been filed under section 29(4)(d) and 36(1) of the Act. That while it is true that the relevant section for bail applications is Section 29(4) of the Act consisting of subsections (a)(c) and (d) directing on where bail applications

should lie. Section 29(4)(a) relates to applications for bail between arrest and committal of the accused where the value of the property in the charges is less than ten million shillings and a District Court may proceed with hearing. Section 29(4)(b) provides for bail applications hearing after committal but before the trial commences and the jurisdiction lies in the High Court. Section 29(4)(c) relates to bail application hearing after the trial commences and jurisdiction vested on this Court. That section 29(4)(d) applies where the value of the property in the charges facing the applicants/accuseds is beyond ten million shillings and it is at any stage before commencement of trial and that the jurisdiction is vested in the High Court.

The respondents submitted further that the value of property in offences for which the applicants are charged with is over ten million shillings and the trial has not commenced before any court, therefore the relevant provision is section 29(4)(d) of the Act. That also according to that section it is the High Court General Registry with Jurisdiction and not the High Court Division of Corruption and Economic Crimes as can be seen from the application before the Court. To cement this argument, Misc. Economic Crime Cause No. 1 of 2016, ***Jeremiah Kerege and Ally Damji Raza vs. Republic*** was cited, the argument being that the holding in that case was based on wrong interpretation of the law. In that case Hon. Mkuye Judge (as she then was) applied purposive interpretation and held that after the amendments of 2016 which defined the Court, then the Court with

jurisdiction to hear bail applications under the said provisions is the Corruption and Economic Crimes Division of the High Court.

The respondents further contend that the amendments introduced by Act No. 3 of 2016 did not remove the jurisdiction of the High Court - General registry to hear bail applications where the amount is ten million or above. That this can be discerned from the fact that when the Parliament was amending section 29(4)(d). It left the said provision intact without any amendment and that this was deliberate. Because if they wanted to remove the jurisdiction of the High Court general registry it would have done so like it did by redefining it as the Corruption and Economic Crimes Division of the High Court instead of leaving the word "High Court" in the other provisions which they amended. The Respondents also prayed for distinguishing the holding in ***Jeremiah Kerege case (supra)*** by Hon. Judge Mkuye (as she then was) arguing that the said decision was based on wrong interpretation of the law. That the holding in that case was grounded on the Court improperly invoking purposive interpretation. The respondents further submitted that their contention that purposive interpretation was wrongly applied is grounded on the holding in ***Joseph Warioba vs Stephen Warioba*** (1977) TLR 278 and ***Goodluck Kyando vs R*** (TLR) 377, where the Court Appeal stated that purposive interpretation may be invoked when the provisions of the statute lead to absurdity and or there is a lacunae and not otherwise.

The respondents also averred that the fact that the section was left as it is by the legislature without any amendments does not lead to any absurdity and there is no lacunae which can be discerned in the said provision. Arguing that the section is clear from plain interpretation, but that on the other hand, if the holding in ***Jeremiah Kerege's case*** was to be considered, and consequently removing the Jurisdiction from the High Court general registry and giving it to the Division of the High Court, Corruption and Economic Crimes this may lead to absurdity. The respondents based their argument on their understanding that there are few specific judges who have been provided with instruments to hear Corruption and Economic cases under the auspices of the Corruption and Economic Crimes Division of the High Court. That this being the case it will mean that accused persons may fail to get timely justice due to absence of the Hon. Judges with requisite instruments at the vicinity/registry where an application for bail has been filed and consequently denying people their rights established in the Constitution of the United Republic of Tanzania.

The respondents prayed for the Court to be persuaded by the holding in the case of ***Josephat Joseph Mushi and 8 others vs. Republic***, Misc. Economic Case No. 1 of 2017 (HCT Mbeya) where Hon. Dr. Levira Judge, at pg 12 was of the view that Section 29(4)(d) is very clear and conclusive and does not give rise to any absurdity and ordered that a similar application be heard in the normal High Court Registry. The respondents reiterated their prayer that therefore that, the current application before the Court, be heard in the general High Court registry and not in the

Corruption and Economic Crimes- Division of the High Court- Mbeya sub-registry as it is.

The applicants counsels rival submissions were that the Corruption and Economic Crimes- Division of the High Court was the one with jurisdiction to hear and determine the application on hand, arguing that the fact that section 29(4)(d) was not amended by Act No. 3 of 2016 does not in itself render that the Corruption and Economic Crimes Division of the High Court has no jurisdiction to hear and grant bail in application such as the one on hand.

The counsels contended that before the enactment of Act No. 3 of 2016 which amended the Act, the Act stated that the jurisdiction to hear such applications is vested in the High Court. The High Court when hearing matters within the context of the Act then was to constitute as the Economic Crimes Court. That section 3 of the Act was repealed by Act No. 3 of 2016 via section 8 and replacing it with section 3(1) (2) and (3). That regarding jurisdiction section 3(1) addresses this and there is a word "Proceeding" which word by virtue of Black's Law Dictionary 8th Edn pg 1241 means a particular dispute or matter arising in a pending case. From this the applicants counsel submitted that the present case being a proceeding, and the Court having pecuniary jurisdiction under section 3(3) of the Act as amended is the Court as defined in the Act as amended then it has jurisdiction to hear this application. That this being the case and the applicants facing charges of value of more than 4.5 billion it clearly falls

under the Corruption and Economic Crimes Division of the High Court- that is the Court hearing this matter.

The applicants counsel further contended that the issue of jurisdiction should also bear in mind the reasons, rationale for establishing this Court, and that this can be discerned by perusing through the relevant Bill which led to enactment of Act No. 3 of 2016, where at pg 21 part 3 it states the purpose being to deal with economic and corruption cases. From this the counsels averred that the present matter before the Court without doubt falls within this ambit hence their assertion that this Court has jurisdiction to hear the present application. The counsels for the applicants contention is grounded by the holdings in the Hon. High Court Judges in ***Kelvin Rajab Ungele and 3 Others vs Republic,*** Consolidated Misc. Economic Crimes Applications No.1 and 2 and ***Jeremiah Kerege*** case (supra) regarding the matter.

With regard to the issue of whether there is absurdity or lacunae in the disputed provision, the applicants counsels submitted that there is a lacunae seen after the amendments brought by Act No. 3 of 2016. That is by not touching in any way so ever upon amendment of section 29(4)(d), and thus resulting in leaving a gap which requires that the High Court as to resort to purposive interpretation. That if the Parliament when enacting the law - the amendment act - intended to deny this Court power to entertain such bail applications while it had given mandate to this Court to hear corruption and economic cases above one billion, then a mere decision of

the Court cannot oust this Court's jurisdiction. This was stated relying on the holding in the case of *Mtenga vs. University of Dar es Salaam* (1971) HCD 247. The applicants also submitted that the argument that there are a limited number of special judges with instruments to hear the applications and consequently can lead to cause delay in advancing justice, which may bring absurdity to the applicable provision, is mere speculation since there being no evidence brought before the Court to substantiate the said assertion and therefore should not be considered by the Court.

The applicants counsel also submitted that the holding in ***Josephat Joseph Mushi and others case*** (supra) is distinguishable, apart from only having persuasive value. That the Court should depart from the decision the Hon. Judge because, the Hon. Judge did not look into the purpose of establishing this Court as propounded in section 3 of the Act. That if the Hon. Judge would have done so, she would have noted that the Court sitting as an Economic Court is no longer there. That section 6(a) of Act No. 3 of 2016 defines the Court to be Corruption and Economic Crimes Division of the High Court established under section 3 of EOCCA. That the words "High Court" mentioned under section 29(4)(d) of EOCCA are the same as those stipulated under Section 3 of the Act when read with section 6(a) of Act No. 3 of 2016. That the words "High Court" have been substituted by Corruption and Economic Crimes Division of the High Court and therefore it was their submission that the application before the Court is proper and can be heard and determined by this Court. That on pecuniary jurisdiction the charges facing the applicants having a value of

property of more than 4.5 billion well within the ambit of the pecuniary jurisdiction of this Court cements the point that it has jurisdiction to hear and determine this application.

We have had an opportunity to consider all the submissions presented by the counsels for both sides, also all the cited cases by the counsels on the first point of objection. We start by importing section 29(4) of the Act. It reads:

> (4) "*After the accused has been addressed as required by subsection (3) the magistrate shall, before ordering that he be held in remand prison where bail is not petitioned for or is not granted, explain to the accused person his right if he wishes, to petition for bail and for the purposes of this section the power to hear bail applications and grant bail-*
>
> *(a) between the arrest and the committal of the accused for trial by the Court, is hereby bested in the district court and the court of a resident magistrate if the value of any property involved in the offence charged is less than ten million shillings;*
>
> *(b) after committal of the accused for trial but before commencement of the trial before the court, is hereby vested in the High Court:*
>
> *(c) after the trial has commenced before the Court, is hereby vested in the Court;*
>
> *(d) in all cases where the value of any property involved in the offence charged is ten million shillings or more at any stage*

before commencement of the trial before the Court is hereby vested in the High Court.

It should be understood that at the time of enactment of this Act prior to the 2016 amendment, the Court was defined in section 3 which stated:

Section 3(1) *The jurisdiction to hear and determine cases involving economic offences under this Act is hereby vested in the High Court.*

Section 3(2) *The High Court when hearing charges against any person for the purposes of this Act shall be an Economic Crimes Court.*

It is without question, that at the time of enactment of the Act, the High Court was empowered to hear bail applications after committal of the accused for trial but before commencement of the trial, according to S.29(4)(b) and after trial has commenced in the Economic Crimes Court (as it was then), the Court (the Economic Crimes Court) is the one which was empowered to hear bail applications according to S. 29(4)(c). Where the value of property involved in the offence charged were more than ten million shillings or more at any stage before commencement of the trial before the Court sitting as an Economic Crimes Court was vested in the High Court as per section 29(4)(d) of the Act.

We find it important to bear in mind that the current subsection 4 of section 29 of the Act was inserted in the amendments contained in the

Economic and Organized Control (Amendment) Act, No. 12 of 1987 and at that time, the "Court" defined as the High Court sitting as an Economic Crimes Court was a High Court Judge sat with two lay members under Section 4(2). That under section 16(1) of the Act then, it read:-

> *"All questions to be decided by the Court, other than the question whether or not accused in guilty of any offence, shall be decided by agreement of the majority of the members. The reasons for any member differing from the views held by the majority of the members shall be stated by him in open court and be recorded by the Judge presiding over the proceedings, and shall form a part of the record of the Court in those proceedings".*

Meaning even on matters of bail it had to be a majority decision between the High Court Judge and the two lay members, it may be the reason why at that time, under section 29(4)(d) consideration and determination of bail, a purely legal matter was left to the High Court and not the "Court", which sat with lay members and it was found prudent to do at that time.

With the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 vide section 6, the definition of the term "Court" was substituted to mean the Corruption and Economic Crimes Division of the High Court established under section 3 of the Act. By virtue of section 8 of Act No. 3 of 2016, section 3 of the Act is repealed and reads:

Section 3(1) *There is established the Corruption and Economic Crimes Division of the High Court with the Registry and Sub registries as may be determined by the Chief Justice, in which proceedings concerning corruption and economic cases under this Act may be instituted.*

Section 3(2) *The Corruption and Economic Crimes Division of the High Court shall consist of a Jude or such number of Judges of the High Court as may bed determined by the Chief Justice.*

Section 3(3) The Court shall have jurisdiction to hear and determine cases involving

(a) corruption and economic offences specified in paragraphs 3 to 21 and paragraphs 27, 29 and 38 of the First Schedule whose valued is not less than one billion shillings, save for paragraph 14.

(b) .....

(c) ...

Section 4 of the Act which addressed the Constitution of the "Court" was repealed by Act No. 3 of 2016 and thus doing away with composition of the High Court sitting as an Economic Crimes Court which stated to be a Judge of High Court and two lay members.

Section 9 of Act No. 3 of 2016 alludes to the amendments of section 29 of the Act

(a) *in subsection (3) by deleting the words "High Court" sitting as the Economic Crimes Court" and substituting for them the words "Corruption and Economic Crimes Division of the High Court".*

(b) in subsection (7) and (8) by deleting the words "High Court" and substituting for them the words " Court" respectively.

It is clear that the establishment of the Corruption and Economic Crimes Division of the High Court vide Act No. 3 of 2016, was not to establish a separate Court from the High Court, since the Division is not outside the High Court established under Article 108(1) of the Constitution of the United Republic of Tanzania. Also remembering that the Civil and Criminal Jurisdictions of the High Court are derived under section 2(1) of the Judicature and Application of Laws Act, Cap 358 RE 2002. At the same time Article 108(2) empowers the High Court to hear matters that the law does not specifically provide for but as stated by Hon. Judge Twaib in ***Kelvin Rajabu Ungele and 3 others vs Republic*** (supra), the article recognizes the existence of other legislation that vest jurisdiction on other Courts and fora, legislations such as the Act.

Section 63 A of the Act confers powers on the Chief Justice to make rules for the better performance of the Court, a matter which was effected by the Chief Justice. The Economic and Organized Crime Control (The Corruption and Economic Crimes Division) (Procedure) Rules 2016 are now in place and gazetted in GN 267 of 2016. In the said Rules, the Court is defined to mean the Corruption and Economic Crimes Division of the High Court established under section 3 of the Act. Rule 6 states where an information or any other cause has been filed in the Division, it shall read... thus in effect showing there are various types of proceedings that can be undertaken at the Court.

There is no issue in doubt that the amendments contained in Act No. 3 of 2016 on the Act, did not touch on section 29(4)(d) as submitted by the learned State Attorneys for the respondents and conceded by the learned counsels for the applicants. This fact has been noted by learned Hon Judges in ***Jeremlah Kerenge (supra) Josephat Joseph (supra) and Kelvin Rajabu Ungele (supra)*** cited by the counsels in this case. But the question remains was the act of not amending subsection (d) of Section 29(4) of the Act made intentionally as argued by the Respondent Republic? Also does the jurisdiction of the Corruption and Economic Crimes Division of the High Court then begin only after committal proceedings? We find asking the said questions leads one to also ask was the intention of the legislature in leaving the provision as it is? For the respondents, the contents of section 29(4)(d) of the Act means this Court has no jurisdiction to entertain bail applications where the amount of property in the offence charged is above ten million in a matter before commencement of trial and that it is the High Court - general registry with that jurisdiction.

We take into consideration all the factors alluded to above by the applicants and respondent counsels, we are clear in our minds that to resolve this matter one has to be guided by rules and principles of statutory interpretation. We are guided on this and import the case cited in *Kelvin Rajabu Ungele* (supra) ***Prakash Kumar Prakash Bhutto vs. State of Gujarat*** (2005) *"... no part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in place. It is also trite that the statute*

or rules made thereunder should be read as a whole and one provisions should be construed with reference to the other provisions consistent with the object sought".

There are various cases in Tanzania discussing principles of Interpretation of a statute, there is the case of ***Lausa Athumani Salum vs Attorney Genera***l, Civil Appeal No. 83 of 2010 where it held that when a Court is called upon to interpret a provision of a statute that provision must be read in its context. The context here means, the statute as a whole, the previous state of the law, other statutes in *pari materia*, the general scope of the statute and the mischief that it was intended to remed*y.* We find the context is also the need to make reference to the purpose and rationale of the relevant section taken within the context of the whole statute.

I have gone through the contents of section 29(4)(d) of the Act, and I am inclined to share the views held by Hon. Mkuye in Jeremiah Kerege's case and Hon Twaib in Kelvin Rajabu Ungele that the legislature in their omission to amend section 29(4)(d) of the Act, was an oversight, done inadvertedly. This is because when you take the matter in perspective, section 29(4)(d) of the Act as it is, will mean that before commencement of trial at the Corruption and Economic Crimes Division of the High Court, the general High Court registry has the jurisdiction to entertain bail any amount above ten million even if it is one billion and above. That after commencement of the trial at the Corruption and Economic Crimes Division of the High Court, it is only then that the said Division has jurisdiction to

determine bail applications notwithstanding the amount. This does not really augur well with the import of the amendments brought about by Act No. 3 of 2016 as they relate to section 3(3) of the Act. Where we find without doubt the intention was to establish the Corruption and Economic Crimes Division of the High Court and abolishing the Court, where the High Court set as an Economic Crimes Court. That the Corrupton and Economic Crimes Division of the High Court that hears and determines High Profile Corruption and Economic cases hence the one billion threshold for most of the offences and not putting a threshold for other offences such as those contrary to Wildlife Conservation Act or those specified paragraphs under Section 3(3)(b) of the Act and those instituted in Court under section 3(3)(c) of the Act.

There is also the fact that the amendments in No. 3 of 2016 provide for establishment of a separate registry expounded in the Corruption and Economic Crimes Rules in GN 267 of 2016 where subregistries are established in each Registry of the High Court across the country. This situation disputes the argument that allowing the Corruption and Economic Crimes Division of the High Court to entertain bail application under section 29(4)(d) may lead to delay in hearing and determination of the relevant proceedings since all High Court Registries have in place subregistries for the Court as defined in the Act. The establishment of subregistries in effect presupposes availability of High Court judges to hear and determine the said cases. The distribution factor is an administrative matter which should

not be a matter of concern nor be addressed as a legal issue raising concern.

It has been argued that purposive interpretation of statutory provisions should only be invoked were a provision is arbitrary or there is a lacunae. In ***Josephat Joseph Mushi case*** (supra) Hon. Dr. Levira Judge found no grounds to invoke purposive interpretation of section 29(4)(d) of the Act stating, that the plain meaning of the provision is clear and that it expounds that the powers of this Court to entertain bail application are only exercised after the commencement of trial and not before. The Hon. Judge undertook the position relying on the Court of Appeal case of ***Mwesige Geofrey and another***, and ***Caminetti vs USA, 242 US 470 (1917***) and found that there was no absurdity found in the provision to lead the Court to apply purposive interpretation in the provision.

With due respect to Hon. Dr. Levira Judge, I feel that had she considered the gist and rationale of the amendments to the Act, introduced by Act No. 3 of 2016, she would have found that the amendments to the Act were not intended to restrain the powers of the Corruption and Economic Crimes Division of the High Court from entertaining bail applications related to corruption and economic offences nor were they intended to leave only to the general High Court Registries powers to entertain such applications. We find it important as expounded by various cases some already alluded to that, a statute should be read in the context of other provisions in a statute. Therefore, it is pertinent for one to have a general context/purview

of the import of the amendments to the Act under Act No. 3 of 2016 when interpreting specific provisions. In doing this, it will lead one to ensure that section 29(4) of the Act is read together with section 3 (3) of the Act, as amended by Act No. 3 of 2016 when applying it.

In effect the absurdity to be cured is the fact that the omission to amend section 29(4)(d) may lead to bail applications related to accused persons charged with offences valued at even above one billion Tshs before commencement of trial before this Court, to be determined by the general registries of the High Court which have no powers to proceed with trials of those cases by virtue of Section 3(3).

In the premise, we hold that with the anomalies and in the interest of justice taking a purposive interpretation on the provision and looking at the legislative purpose underlying the context of the provision is the best and more appropriate approach to cure them. For the reasons expounded hereinabove, we thus find that the first point of objection is overruled and that this Court is vested with jurisdiction to hear and determine applications for bail applications before and after commencement of trial related to offences found in the Act with property of value of above ten million Tshillings under section 29(4)(d) of the Act.

On the second point of objection where the respondents challenged the competence of the affidavit, arguing that the counsel for the applicants was the one who had deposed the affidavit on behalf of the clients. The

applicants counsel had challenged whether this objection was a pure point of law arguing that no legal provision that has been infringed was presented by the learned State Attorneys. We find that an affidavit being an essential component of an application, that is one providing evidence to support it, challenging its competence does not require seeking further evidence and in itself if found to be sound is enough to depose of an application. Therefore we find it to be a point of law and will proceed to determine it.

When amplifying this point of contention, the learned State Attorney raised an issue of concern that Mr. Baraka Mbwilo learned Advocate for the applicants was the one who deposed the affidavit supporting the application contending that though they were aware there is no law against this, but advocates are limited in what they can swear and cited Civil Case No. 270 of 2013, ***Hon. Zitto Zuberi Kabwe vs Board of Trustees CHADEMA and another*** to cement their point of contention. That in the said case, the High Court judge holding was that it was not proper for an advocate to swear an affidavit for his clients and he can only do this on non contentious matters. Thus arguing that what was before the Court is contentious therefore it was not appropriate for the applicants advocate to swear an affidavit supporting the application. That this was also contrary to Rule 36 and 37 (5) of the Rules of Professional Conduct and Etiquettes for Advocates, they thus prayed to the find to find the affidavit incompetent and consequently struck out the application.

Mr. Mwabukusi learned Advocate for the Applicants prayed for the Court to dismiss the objection stating that the respondents had not revealed the

paragraphs which were controversial and left the Court to speculate on this and that it is not prohibited for an advocate to adduce evidence before the Court and the verification clause clearly outline what was best of his knowledge and facts he had been informed by the clients. Their prayer was for the Court to overrule the objection.

The case of ***DPP vs Dodoli Kapufi and another, Criminal Application No. 11 of 2008***, Court of Appeal provided a definition of what is an affidavit stating that it is ; "*a voluntary declaration of facts written down and sworn to by the declarant before an officer authorised to administer oaths*". The CAT, 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 a matter not disputed that as a matter of prudence and practice, an advocate should not swear/affirm an affidavit on behalf of his/her client if the latter is available, the case of ***Cordura Ltd Oysterbay Hotel and Jubilee Insurance Company of Tanzania Ltd***, Misc. Case No. 21 of 2002 (unreported) alludes to this position, the same of a Kenyan case, that of ***Kenya Horticulutral Expoters (1977) Ltd. - vs Pape***, (1986) KLR 707, where it stated that in the absence of an affidavit sworn by a party itself, it is doubtful whether an advocate could by his own affidavit prove all statements of information and belief. The said position is also amplified

in the case cited by the Respondents, a High Court case that is, ***Hon. Zitto Zuberi Kabwe vs. The Board of Trustees, CHADEMA and the General Secretary, CHADEMA***, Civil Case No. 270 of 2013.

The law in general does not prohibit an advocate to swear an affidavit on behalf of his client in a matter he is representing the client, but this should be only on matters of the counsels own knowledge. A Court of Appeal case, ***Lalago Cotton Ginnery and Oil Mills Company Ltd, vs. The Loans and Advances Realization Trust (LART***), Civil Application No. 80 of 2002 discussed the issue. Also Order XIX of the Civil Procedure Act, Cap 33 RE 2002 alludes to this fact that one can swear on facts known to him or informed as revealed in the verification clause.

In the present case, the challenged affidavit shows that Mr. Baraka H. Mbwilo solemnly swears and states. From the submissions it is true that the respondents did not highlight the paragraphs they found in contravention, but just made a general statement on the matter. It is obvious from the records that Mr. Mbwilo is not one of the applicants and by virtue of paragraphs 1and 2, it avers that he is an advocate of the High Court of United Republic of Tanzania engaged by the applicants. Paragraph 3 is a general statement alluding to the fact that the affidavit supports the prayers in the chamber summons and paragraph 4 alludes to the fact the arraignment and charges related to the 1st to 6th applicants and the case number. Paragraph 5 alludes to the joining of 7th and 8th applicants in the relevant case. Paragraph 6 cannot be said to be in the knowledge of the

deponent the same for paragraph 13, paragraph 14, paragraph 15, paragraph 16 and paragraph 18.

Having looked at the contents of the affidavit despite the fact that the verification clause alludes to the fact that the information was received from the applicants on matters he had no personal knowledge but there being no reason advanced by the applicants counsel for failure of the applicants to aver the same themselves being the ones conversant with the same. One cannot dispute the fact that the law on affidavit is that the affidavit should be confined to such facts as the deponent is able of his own knowledge to prove. Order XIX Rule 1 of the Civil Procedure Code provides for the need to specify with particularity the source of information clearly where facts deposed are not to the deponents knowledge. I have gone through the averments by the deponent and although one cannot say that the verification was very particularised, but the fact that all the averments not to the deponent knowledge were stated thus and acknowledged to believe to be true according to the information provided.

This court finds that there are 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 Limited and Samwel Kimaro vs Hidaya Didas, Civil Application No 20 of 2012 (decided in October 2013)*** have developed the law of affidavit. The role of this Court therefore will be to consider whether there are paragraphs it finds to

be defective. The decisions of the Court of Appeal cited above advance that a court can expunge the paragraphs it finds defective and remain with the remaining paragraphs. ***Civil Reference No. 15 of 2001 and No. 3 of 2002, Phantom Modern Transport (1985) Limited vs D.T. Dobie (Tanzania) Limited,*** CAT at Dar es Salaam where at pg. 10 the Court of Appeal held:

> "*It seems to us that where defects in an affidavit are inconsequential, those offensive paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that he court can proceed to act on it. If however, substantive parts of an affidavit are defective, it cannot be amended in the sense of striking off the offensive parts and substituting thereof correct averments in the same affidavit*".

Having carefully examined and considered the content of the affidavit supporting the application, I find the contents of paragraph 13, 15, 16 and 18 to be speculative and not facts despite the verification and thus contravening the principles enshrined in the case of ***Uganda Commissioner of Prisons, Ex Parte Matovu*** (1966) EA 514 (reproduced in ***Juma Busiga vs Zonal Manager TPC (Mbeya***), Civil Application No. 8 of 2004 Court of Appeal) which stated:

> "*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 and*

circumstances to which the witness deposes either of his own knowledge or ... Such an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion".

I therefore, for reasons stated above expunge paragraphs 13, 15, 16 and 18 from the affidavit. We are also guided by case law, in the ***Rustamall Shivji Karim Merani vs. Kamali Bhushan Joshi,*** Civil Application No. 80 of 2009, CAT, ***Phantom Modern Transport*** (Supra) and ***AG vs SAS Logistics Limited*** (supra) state is that after expunging of the offensive paragraphs of an affidavit, courts are enjoined to examine whether the remaining parts are insufficient to support the application, If the remaining parts are sufficient to support it, the application must also go, but a party may file a fresh affidavit. We find the said expunged paragraphs to be inconsequential not affecting the genesis and ambit of the application before the Court.

In the interest of justice we adopt what was stated in Jeremiah Kereges case (supra) last paragraph that the Government should take action to look at the anomalies in the Act related to bail applications to bring more certainty and clarity for charges with a value that exceeds ten million shillings.

Therefore, for reasons alluded to above let the bail application before this Court proceed on merit. It is Ordered.

Winfrida B. Korosso

JUDGE

11/10/ 2017

Ruling delivered in open Court this day in open Court in the presence of Mr. Boniface Mwabukusi, Mr. James Kyando and Mr. Baraka Mbwilo learned Advocates respectively for all the applicants and Mr. Baraka Mgaya Learned State Attorney for Respondent Republic. Also present were all applicants.

Winfrida B. Korosso

JUDGE

11/10/ 2017