

**IN THE HIGH COURT OF UNITED REPUBLIC OF
TANZANIA
THE CORRUPTION AND ECONOMIC CRIMES DIVISION
AT MTWARA SUB-REGISTRY**

MISC. ECONOMIC CAUSE NO. 2 OF 2018

(Originating from Economic Crimes Case No. 2 of 2018 - District Court of Lindi at
Lindi)

**MATESO ALBANO KASIAN @MATESO CHUPI
VERSUS
THE REPUBLIC**

RULING

W.B.KOROSSO, J.

The application before the Court has been filed by Mateso Albano Kasian @Mateso Chupi pursuant to section 29(4)(d) and section 36(1) of the Economic and Organized Crime Control Act, Cap 200 RE 2002. The application is vide a chamber summons supported by an affidavit sworn by the applicant himself and prays for orders for the applicant to be brought before the Court for bail consideration; For the Court to grant bail to the applicant on conditions as it deems fit pending trial of Economic Case No. 2 of 2018; and any other orders the Court deems fit in the interest of justice.

Upon service of the application, the Respondent Republic filed a counter affidavit affirmed by Nunu Twalib Mangu, learned State Attorney and a Notice of Preliminary Objection and a Certificate by the DPP filed under section 36(2) of the EOCCA Cap 200 RE 2002 objecting to bail to applicant.

There being a notice of Preliminary objection as it is well known, the Court on the date fixed for hearing proceeded to first hear and consider the Preliminary objection raised before going to the merits of the application. This Ruling therefore relates to the said Preliminary Objection raised by the Respondent Republic. The notice of preliminary objection stated the ground to be "*That the affidavit in support of the application is incurably defective*". In amplifying the said objection, Mr. Ladislaus Komanya, learned Senior State Attorney who represented the Respondents submitted to the Court that a scrutiny of the applicants affidavit reveals that they oath and verification clause shows the person to depose and verify is an applicant instead of a deponent. The Respondent contended that this is contrary to the rules guiding affidavits in terms of Order XIX Rule 2 and 3 of the Civil Procedure Code, Cap 33 RE 2002 requires that the one to depose and oath and verify is the deponent and not the applicant. The learned Senior State Attorney also availed the Court with various Court decisions to cement his argument.

The respondents cited the case of *Samwel Kimaro vs. Hidaya Didas*, Civil Application No. 20 of 2012, where the CAT Judgment refers to a deponent who is the one to swear an affidavit and that this is repeated in the judgment. The Learned State Attorney acknowledged the fact that there is no specific format for an affidavit but stated that this does not mean one should depose an oath as an applicant instead of a deponent. It was therefore there prayer for the objection to be sustained and the application to be struck out for having an incurable defective affidavit.

For the applicant, represented by Mr. Daniel Buma, learned Advocate, they prayed the Court to find the objection devoid of merit and to be overruled. Arguing that the learned Senior State Attorney assertion was misconceived because the applicants affidavit was not scrutinized carefully. The learned counsel for the applicant submitted that the word deponent appears where it is supposed to be, after the oath deposition where the applicant swears. The applicant counsel conceded to the fact that the word deponent is absent in the verification instead there is the word applicant but sought the Court to find this error minor not going to the root of the affidavit or application. That the affidavit has complied with all the necessary rules and that as conceded by the learned Senior State Attorney there is no established format on how an affidavit should appear. That in any case the Oaths and Judicial Proceedings and Statutory Provisions Act, No. 59 of 1966 revised in 2002 section 9 states that;

"in any judicial proceedings an oath or affirmation has been administered and taken, such oath or affirmation shall be deemed to have been properly administered not withstanding any irregularity in administration".

Discussing the case cited by the respondents, the learned counsel contended that the said case directs what an affidavit should have and it outlines that it is the deponent who swears and this fact has been complied in the affidavit. They thus prayed for the objection to be overruled.

The learned Senior State Attorney rejoinder was to reiterate submissions in chief and to highlight the applicants counsel concession on the verification clause missing the word deponent.

We find that having no registered objection from the applicants on the competency of the preliminary objection raised, and having regard to the fact that if it is upheld, the said objection may finalize the matter before the Court, we find no need to proceed to question ourselves further on whether or not the objection raised is a point of law, since a challenge related to non compliance of rules related to affidavit, is clearly a point of law within the ambit of the holding in relevant case law.

We premise our consideration of the objection raised, by mapping out what we find to be a comprehensive definition of an affidavit. The Court of Appeal in the Case of *DPP vs Dodoli Kapufi and Patson Tusalile*, Criminal Appeal No. 11 of 2008, stated that: "*in law, an affidavit is: a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths*" Taking this from *Black's Law Dictionary, 7th Edition*, at page 58. or that:

"*it is a statement in the name of a person, called a deponent, by whom it is voluntarily signed or sworn to or affirmed. It must be confined to such statements as the deponent is able of his own knowledge to prove but in certain cases may contain statements of information and belief with grounds thereon*" adopted from *Taxmann's Law Dictionary, D.P Mittal*, at pg. 138.

We decided to start with this because we find what is contained in Order XIX Rule 2 and 3 of the CPC, Cap 33 RE 2002 is not exhaustive and it mainly addresses the contents of an affidavit and not how or the format specifically. The cited Court of Appeal went further to outline the essential ingredients of any valid affidavit, therefore, being

i. the statement or declaration of facts, etc, by the deponent

ii. a verification clause

iii. a jurat, and

iv. the signatures of the deponent and the person who in law is authorized either to administer the oath or to accept the affirmation.

Stating further that " *a verification clause simply shows the facts the deponent asserts to be true of his own knowledge and/or those based on information or beliefs.*

This position was amplified in the case of *Samwel Kimaro and Hidaya Didas* (supra).

Having presented the position of the law related to an affidavit and the ingredients, it is important to note that there are no prescribed rules or designed form format made under section 8 and 10 of the Oaths and Statutory Declaration Act, Cap 34 RE 2002 as required by section 5 of the same Act. We now move to reproduce the oath and verification clause of the affidavit being impugned.

"6. That, I make this affidavit in support of the prayers sought in the Chamber summons.

Dated at LINDI this 26th day of JANUARY 2018

Signed

APPLICANT

VERIFICATION

1, MATESO S/O ALBANO KASIANI @MATESO CHUPI, being the Applicant in this application DO HEREBY VERIFY that, all what is stated in paragraphs 1, 2, 3, 4, 5 and 6 is true to my own best knowledge.

Verified at LINDI this 26th day of JANUARY 2018

Signed

APPLICANT

SWORN at LINDI by the Said MATEO S/O ALBANO

KASIANI @MATEO CHUPI who is known to me/

identified by DANIEL BUMA NGASSA

and latter became known to me in my presence this 26th

day of JANUARY 2018

Signed

DEPONENT"

BEFORE ME:-

From what has been imported above from the affidavit supporting the application, it is clear that the Oath has the word DEPONENT as required but this is not the case for the verification clause which names the person verifying as the applicant. The issue is whether this being the case, a matter which has not been disputed by the applicants counsel renders the affidavit defective.

In the case of *Jamal Msitiri @ Chaijaba vs. the Republic*, Criminal Appeal No. 1 of 2012, the Court of Appeal at Tanga, held at pg 7,

"As regards the verification, it is a clause in the affidavit that shows the facts the deponent asserts to be true of his own knowledge and/or those based on information or beliefs. In other words, it shows the source of each of the facts deposed in the affidavit. It is legally accepted practice that the verification clause must be signed and dated separately by the deponent".

At page 9 it states further:

"Thirdly, what is provided in the impugned affidavit as a verification clause and signed by the applicant as deponent is materially deficient. That is so because it does not

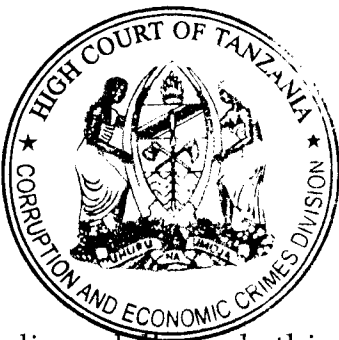
specifically authenticate the facts deposed in the affidavit as to whether they were true of the deponents own knowledge and or whether they were based on information received and believed to be true."


Though one cannot say that what is highlighted in the said judgment as missing in the *jurat* of attestation, verification and certification close applies in totality to the present application, but the fact that though there is a signature in the verification and also in the oath, the fact that in the oath, the one deposing is a deponent and in the verification it is an applicant, this provides doubts on whether the signatures are of the same person, that is from the one who deposes- the deponent. This is because the deponent in the verification is supposed to authenticate the facts deposed and sworn in the affidavit. In the absence of the word deponent in the verification clause it is impossible to state that the deponent signature is there within the ambit of section 8 of the Notaries Public and Commissioner for Oaths Act, Cap 12 RE 2002.

Having found that the deponents signature is absent in the verification clause contrary to the law, as held in *Dodoli Kapufi case* (supra) we find it renders the affidavit incurably defective. Another anomaly we find in the verification clause is the averment that paragraph 4 of the affidavit is true to the best of the applicants knowledge. It is a fact that the issue of the proper Court to entertain and consider the application without prejudice are legal matters and inadvertently must have come from the counsel for the applicant or directives from the learned Resident Magistrate in the originating case- if one refers to the contents of paragraph 3 of the affidavit. Therefore, we find that in the present affidavit, there is also failure to properly verify the source of information and thus again contravening section 8 of Cap 12.

For this reasons, I find that this being the situation, one cannot at this juncture, order for amendment which was in any case not in prayed for and there is also the fact that one cannot order an amendment on a verification clause- which is a process of authentication of facts deposed in the affidavit. Therefore, although I may sympathise with the applicant and the matter may be seen as inconsequential, I find the defect to be material and incurable in the present affidavit. I am also alive to the fact that Courts are implored by the Constitutional provisions to address substantive matters and to avoid being embedded in technicalities in the interest of justice. But it is also true that technicalities are there to ensure consistency in decision making.


Having found the affidavit to be defective, it also renders the application incompetent and it is therefore struck out. Ordered.




Winfrida B. Korosso
Judge
14th March 2018

Ruling delivered this day in chambers in the presence of Mr. Ladislaus Komanya, learned Senior State Attorney for the Respondent Republic, Mr. Daniel Duma, learned Advocate for the applicant. Also present is the applicant.




Winfrida B. Korosso
Judge
14th March 2018