

AFFIDAVIT/VERIFICATION

IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: OMAR, J.A., RAMADHANI, J.A., And LUBUVA, J.A.)

CIVIL APPEAL NO. 36 OF 1994

BETWEEN

SILIMA VUAI FOUUM.....APPELLANT

AND

1. REGISTRAR OF CO-OPERATIVE SOCIETIES
2. ALI MAKAME ALI
3. KHAMIS MTWANA HASSAN
4. WADI MACHANO.....RESPONDENTS

(Appeal from the decision of the High Court of Zanzibar - Hon. Chief Justice Hamid M. Hamid Esq dated 9th June 1994 in the matter of a Chamber Application at Zanzibar)

(Hamid, C.J.)

dated the 2nd day of May, 1994

in

Civil Case No. 7 of 1990

JUDGMENT OF THE COURT

LUBUVA, J.A.:

Before the High Court of Zanzibar, the appellant filed a Chamber application seeking to move the court to order the first respondent, the Registrar of Co-operative Societies in Zanzibar, to make available to the appellant the record of the "MAENDELEO STORES" Co-operative Society. The appellant had been a member and the secretary of the said Co-operative Society whose registration number was 55 of 1980. The Chamber application, was supported by an affidavit which was sworn to by the appellant as the applicant.

In the course of hearing the Chamber application which was filed by Mr. Ajar Patel, learned counsel for the appellant, a preliminary objection was raised against the validity of the appellant's affidavit by Mr. Mbwezeleni, learned counsel

for the second, third and fourth respondents supported by Mr. Uhuru Hemed Khalfani learned state Attorney for the first respondent, the Registrar of Co-operative societies. Upholding the objection, the learned Chief Justice of Zanzibar held the appellant's affidavit as incompetent since it was without verification and did not reveal the source of the deponent's information and knowledge of some of the facts stated in the affidavit. Consequently, the Chamber application was dismissed.

Disatisfied with the order of the dismissal of the Chamber application, the appellant has lodged this appeal. The memorandum of appeal filed by Mr. A. Patel learned counsel for the appellant contains six grounds of appeal out of which we think one essential point emerges. That is, that the learned Chief Justice erred in holding that the affidavit attached to the Chamber application was defective in law for not disclosing the sources of the deponent's information and for want of verification clause. At the hearing of the appeal, Mr. Uhuru Hemed Khalfani learned state Attorney for the first respondent took a preliminary objection that the appeal was incompetent in that the requirement of Rule 90(1) of the Court of Appeal Rules, 1979 were not complied with. He had served the notice for the objection under Rule 100 of the Court's Rules. It was Mr. Uhuru's contention that though the copies of the memorandum of appeal were filed at the Court's Zanzibar sub-registry on 26.6.1994, the first respondent was served with the memorandum of appeal on 21.11.1994 which was not within the prescribed time under the Court's Rules. He urged the Court to dismiss the appeal. However, when it was brought to his attention by Mr. Patel, learned counsel, that the application of Rule 90(1) is subject

to Rule 79 being complied with by the respondent to serve the appellant with his (respondent) address after receiving the notice of appeal by the appellant, Mr. Uhuru learned State Attorney, withdrew the preliminary objection. The appeal was thus proceeded with on its merits.

For the appellant, Mr. Ajar Patel, learned counsel, submitted that the learned Chief Justice could not be faulted in his holding that the appellant's affidavit was incompetent as it lacked verification and did not disclose the source of the deponent's knowledge and information. However he strongly criticised the learned Chief Justice for not exercising the discretion to require the deponent to amend the affidavit so as to disclose the source of information. If we understood Mr. Patel correctly, he was of the view that in the interest of justice the learned Chief Justice should have exercised the discretion vested in him to order for the amendment of the affidavit. Furthermore, it was Mr. Patel's submission that as the respondents did not file a counter affidavit to challenge the appellant's affidavit, it was an admission on the part of the respondents of the truthfulness of what was stated in the appellant's affidavit. For this proposition Mr. Patel, learned counsel did not have any specific authority on the point but had vague recollection of this Court's decision in some case in the Mwanza Registry.

For the second, third and fourth respondents and on behalf of Mr. Uhuru Hemed Khalfani for the first respondent, Mr. Mbwezeleni made brief but pertinent submissions. First, Mr. Mbwezeleni contended that as a matter of law, the learned Chief Justice properly rejected the affidavit of the appellant which was incompetent due to lack of verification and the non-specification of the source of information by the

deponent. Mr. Mbwezeleni referred us to the case of MTALE v JANUARY KAPEMBWA (1976) TLR No. 7. Secondly, Mr. Mbwezeleni submitted that as the affidavit was incompetent, the appellant was not bound to react to it and that, that could be taken as an admission of truth in what was stated in the affidavit of the appellant. He urged the court to dismiss the appeal.

As rightly pointed out by Mr. Mbwezeleni, learned counsel for the appellants, we think the only issue for consideration in this appeal is the validity of the affidavit deposed by the appellant. From the record as well as the submission of both counsel, it is an undisputed fact that the appellant's affidavit which was an essential part of the appellant's application before the learned Chief Justice had neither the verification clause nor did it specify the source of the information deposed by the appellant. To our minds, the legal position regarding affidavits which are without verification or specification of source of information is crystal clear. From case law, numerous cases have been decided by this court and the court of Appeal for Eastern Africa on this point.

The principle is that where an affidavit is made on an information, it should not be acted upon by any court unless the sources of the information are specified. This was reiterated by the court of Appeal for Eastern Africa in the case of STANDARD GOODS INCORPORATION LTD v HARAKHCHAND NATHU & CO. (1950) 17 E.A.C.A 99. Again, in the case of BOMBAY FLOUR MILL v HUNIBHAI M. PATEL (1962) E.A. 803 it was held that as the affidavit did not state the deponent's means of knowledge or his source's of information and belief, the affidavit was defective and incompetent, the application based on the affidavit was dismissed. Likewise, in the case of MTALE v JANUARY KAPEMBWA (1976) TLR case No. 7 which was cited by

Mr. Mbwezeleni, the High Court of Tanzania correctly in our view, applied the above principle.

Applying this principle to the instant case, we have no hesitation in agreeing with Mr. Mbwezeleni learned counsel for the appellant that the affidavit in question being defective and incompetent was properly rejected by the learned Chief Justice of Zanzibar. As already indicated, affidavits and what matters which affidavits should be confined are governed by law. In that case, even if we were to accept Mr. Patel's submission that the respondents' failure to counter the appellant's affidavit amounted to acceptance of the truthfulness of what the appellant had stated in the affidavit, still we are with respect, unable to appreciate how that would validate such clear and unambiguous legal requirement in an affidavit. Furthermore, as Mr. Patel correctly conceded, it being a matter of discretion for the court to require the appellant (applicant) to amend the affidavit so as to specify the sources of information deposed to, we can hardly fault the learned Chief Justice for exercising the discretion in the way it was done. We cannot by any stretch of imagination say that the exercise of the discretion was done wrongly. On the whole, we are satisfied that in the appellant's affidavit it is nowhere stated, in respect of the affidavit as a whole or of any paragraph or allegation in it, that the facts deposed to, or any and if so which of them, are true to the deponent's knowledge, or as advised by his advocate, or are true to the best of his information and belief. For that reason, we are with respect, in agreement with Mr. Mbwezeleni, learned counsel for the appellant that the affidavit being defective and incompetent was properly rejected. We are thus of the settled view that the learned

Chief Justice was entitled to dismiss the application which was based on the strength of the affidavit.

Accordingly, we dismiss the appeal with costs.

DATED at ZANZIBAR this 28th day of November, 1994.

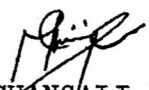
A.M.A. OMAR
JUSTICE OF APPEAL

A.S.L. RAMADHANI
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




(M. S. SHANGALI)
DEPUTY REGISTRAR