IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: OTHMAN, C.J., RUTAKANGWA, J.A., And MBAROUK, J.A.)

CRIMINAL APPLICATION NO. 11 OF 2008

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPLICANT

VERSUS

1. **DODOLI KAPUFI**
2. **PATSON TUSALILE** } **..... RESPONDENTS**

(Application for Review from the Decision

of the Court of Appeal of Tanzania

at Dar es salaam)

(Lubuva, J.A., Mbarouk, J.A., And Othman, J.A.)

Dated 14th day of July, 2008

In

Criminal Revision Nos. 1 & 2 of 2008

RULING OF THE COURT

30 March, & 6 May, 2011

RUTAKANGWA, J.A.:

We could not do better than preface this ruling, on a preliminary objection challenging the competence of this formal application for review of the Court's decision, with this simple but apparently pertinent question:

What is an affidavit? We shall, in providing our answer, restrict ourselves to the legal aspect of the question raised.

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": BLACK'S LAW DICTIONARY, 7th edition. at page 58;*
>
> *Or*
>
> *"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":* Taxmann's LAW DICTIONARY, D.P. MITTAL, at pg. 138.

The essential ingredients of any valid affidavit, therefore, have always been:-

(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.

The verification clause simply shows the facts the deponent asserts to be true of his own knowledge and /or those based on information or beliefs.

Of greater significance in the determination of this application, in our considered opinion, is the *"jurat".* The word *"jurat"* has its origin in the latin word *"jurare"* which meant *"to swear".* In its brevity a jurat is a certification added to an affidavit or deposition stating when, where and before what authority (whom) the affidavit was made. See, section 8 of the Notaries Public and Commissioner for Oaths Act, Cap 12 R.E. 2002. Such authority usually, a Notary Public and/or Commissioner for Oath, has to certify three matters, namely:-

(i) that the person **signing** the document did so in his presence,

(ii) that the **signer** appeared before him on the date and at the place indicated thereon, and

(iii) that he administered an oath or affirmation to the **signer,** who swore to or affirmed the contents of the document.

[See BLACK'S LAW DICTIONARY, *(supra)*].

Total absence of the jurat, or omission to show the date and place where the oath was administered or the affirmation taken, or the name of the authority and/or the signature of the deponent against the jurat, renders the affidavit incurably defective. There are a plethora of authorities to bear us out on this assertion. To mention but a few, see:-

(i) **WANANCHI MARINE PRUDUCTS LTD Vs. OWNERS MOTOR VESSELS**, Civil case No. 123 of 1996, High Court Dar es salaam (unreported);

(ii) **AZIZ BASHIR Vs. MS JULIANA JOHN RASTA & TWO OTHERS,** Misc. Civil Application No. 23 of 2003, High Court Arusha, (unreported);

(iii) **D.P. SHAPRIYA & CO. LTD Vs. BISH INTERNATIONAL B.V** [2002] E.A. 47, and

(iv) **ZUBERI MUSA V. SHINYANGA TOWN COUNCIL**, (CAT) CIVIL APPLICATION NO. 100 OF 2004 (unreported).

In the **SHAPRIYA** case (*supra*), this Court categorically ruled that the requirement to strictly comply with section 8 of Cap 12 is mandatory and not a shear technicality and that regularities in the form of a jurat cannot be waived at all by parties.

Against this firm legal background on the essence of an affidavit, we now feel secure enough to tackle and resolve one of the two crucial legal issues raised in this application challenging its competence.

In this application by Notice of Motion, the applicant seeks to move the Court to review its own decision dated 14th July, 2008 in consolidated Criminal Revision Nos. 1 and 2 of 2008. The notice of motion is, as by law required, supported by an affidavit sworn to by one Mr. Edgar Luoga. The orders sought in the application have been resisted by the respondent.

When the matter came up for hearing for the first time, Mr. Justinian Mushokorwa, learned advocate for the respondent, rose to argue some few points of preliminary objection. He had earlier on, under Rule 4(2) (a) of the Tanzania Court of Appeal Rules, 2009 (hereafter the Rules) after failing to meet the time limit set in Rule 107 (1), lodged a notice of preliminary objection. The said notice listed three points of law. However, at the hearing of the application, with the leave of the Court, he abandoned one of these three legal points. He was accordingly heard on two points only.

In the two points of objection, Mr. Mushokorwa was challenging the competence of the application because:-

(a) it is based on uncited enabling provisions of law and

(b) it is supported by a defective affidavit.

Admittedly, both are entertainable points of law, as Mr. Stanislaus Boniface, learned Principal State Attorney who represented the Applicant

conceded. Either of them, in our view, if sustained would suffice to conclusively dispose of the matter.

Submissions of both counsel for and against the two raised points of objection were concise and focused. Arguing in support of the second point of objection, Mr. Mushokorwa, in lucid style, impressed upon us that it is a requirement of the law that where a party opts to formally move the Court to grant certain orders, the application ought to be by notice of motion. It is an additional mandatory requirement of the law, he stressed, that in all such circumstances the notice of motion must be supported by an affidavit sworn to or affirmed by a known person. If there is no such affidavit or if the affidavit is found to be incurably defective, then the application should be held to be incompetent and should be struck out, he said. In all fairness to Mr. Boniface, we must point out at the outset that he was generally in agreement with Mr. Mushokorwa on this legal position, but he thought he had a formidable defence.

Advancing his argument, Mr. Mushokorwa made specific reference to the affidavit of Mr. Luoga in support of the notice of motion. He drew our attention to one glaring omission thereon. This was that it has no

signature of the deponent, that is Mr. Luoga, against the jurat to prove that it was indeed sworn to and signed by him at Dar es Salaam on 11th September, 2008, before a Commissioner for Oath as by law required. Relying on the case of **WANANCHI MARINE PRODUCTS LTD** (supra), he urged us to hold that this omission rendered the affidavit incurably defective and the application for review incompetent as a result. He accordingly pressed us to strike out the incompetent application.

Mr. Boniface did not take this challenge lightly, although he readily conceded the pointed out defect in the affidavit. With his characteristic candour, he argued that the admitted defect did not impact on the quality and/or validity of the affidavit of Mr. Luoga. He valiantly tried to impress upon us that this was a minor defect which could be conveniently wished away, to treat the affidavit as valid for the application to proceed to a hearing on merit. Were the Court to hold otherwise, he ingeniously submitted, the Court should take the defective affidavit as a mere letter of complaint and act on it to invoke its inherent jurisdiction to grant the orders sought. In a farther alternative argument, he implored us, if we were disposed to reject the affidavit for being incurably defective, to

entertain the application on the basis of a memorandum of review which is annexed to the notice of motion.

In a short rejoinder, Mr. Mushokorwa, who appeared not to be in want of arsenals, pointedly emphasized that the applicant chose to move the Court by making a formal application, which procedure entails its own prerequisites. The notice of motion, as a mandatory requirement of the law, must always be supported by an affidavit, he contended. If the affidavit is incurably defective then the entire notice of motion is incurably defective and must be rejected with all its annextures, he concluded.

Having dispassionately considered the rival submissions by both counsel, we have found ourselves in full agreement with Mr. Mushokorwa, on his unimpeachable contention that the applicant should be bound by his pleadings. The applicant, as rightly contended by Mr. Mushokorwa and admitted by Mr. Boniface, opted to move the Court to exercise its powers of review by lodging a formal application. It is established law that, a party contemplating to move the Court formally by a written application can only do so by lodging a notice of motion supported by an affidavit or affidavits. We are not aware of any alternative process or route towards

that end. Having so chosen to formally move the Court, the applicant was duty bound to ensure that he complied fully with all the legal requirements of the law. The Court cannot allow the applicant to blow hot and cold at the same time, as Mr. Boniface appeared to be inviting us to do. We are, after all, enjoined by the Constitution (see article 13) to accord equal treatment to all.

The law governing this point of objection as earlier expounded, is clear and leaves no room for exceptions or exemptions. Fortunately, there is no dispute here on the fact that the affidavit in support of the notice of motion is defective for want of the deponent's signature thereon. In our respectful opinion, this defect renders the so called affidavit of Mr. Edgar Luoga incurably defective, as correctly contended by Mr. Mushokorwa. This in turn renders the entire notice of motion incurably defective. We accordingly expunge it from the record. Once the notice of motion is expunged with all its annextures the application for review is left with no leg to stand on. The purported application becomes incompetent in law. It is only fit to be struck out as we hereby do.

Having struck out the incompetent application, we have found ourselves with no proceeding before us, which would form a basis of our discussion on the second point of preliminary objection. We are accordingly constrained from making any observations on it.

All said and done, we uphold the preliminary objection to the effect that the application for review is incompetent on account of want of a valid notice of motion.

As already indicated above, the same is struck out.

DATED at **DAR ES SALAAM** this 6th day of May, 2011.

M.C. OTHMAN
CHIEF JUSTICE

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

M.S.MBAROUK
JUSTICE OF APPEAL

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

J.S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL