IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MSOFFE, J,A., KIMARO, J.A., And JUMA, J.A.)

CIVIL APPLICATION NO. 20 OF 2012

SAMWEL KIMARO..... APPLICANT

VERSUS

HIDAYA DIDAS..... RESPONDENT

(Application from the decision of the High Court of Tanzania at Mwanza)

(Longway, J.)

dated the 5th day of August, 2008
in
Land Appeal No. 9 of 2006

RULING

5th August, & 11th October, 2013
MSOFFE, J.A.

I have read in draft the Ruling of my sister Kimaro, J.A. With respect, at first I was inclined to agree with her. On reflection however, I have decided not to.

This is an application by way of a notice of motion in which the applicant is seeking for an order that the notice of appeal lodged on 12/11/2008 against the decision of the High Court at Mwanza (Longway,

J.) dated 5/8/2008 in Land Appeal No. 9 of 2006 be struck out. The application is supported by the applicant's affidavit in line with the requirement under Rule 49(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is this affidavit which is the subject of a preliminary objection taken at the instance of Mr. Deya Paul Outa, learned advocate for the respondent.

The gist of the objection is that the affidavit is incurably defective because the name of the officer who administered the oath is not disclosed in the jurat. In support of the objection a number of authorities were cited. Among the authorities cited are this Court's recent decisions in **Felix Mkosamali v. Jamal A. Tamim,** Civil Application No. 4 of 2012 and **M/s Bulk Distributors Ltd v. Happyness William Mollel,** Civil Application No. 4 of 2008 (both unreported).

I have read **Mkosamali** and **M/s Bulk Distributors Ltd** (*supra*). In **Mkosamali** there was a signature of the attesting officer and a rubber stamp bearing the name of one M.K. Mtaki. This Court held that as per this Court's decision in **D.P. Shapriya and Co. Ltd v. Bish International BV** (2002) EA 47 a rubber stamp is not part of a jurat.

Therefore, although the affidavit had the attesting officer's signature it was defective for want of the name of the attesting officer. The affidavit in **Ms Bulk Distributors Ltd.** bore the signature of the attesting officer but it lacked the name of the said officer. Hence, the applications in **Mkosamali** and **M/s Bulk Distributors** were struck out for want of the name(s) of the attesting officer(s).

The affidavit under scrutiny in this application bears the signature of the attesting officer and a rubber stamp of the Resident Magistrate, Mwanza who is cited as **MAGISTRATE/COMMISSIONER FOR OATHS.** It is also evident therefrom that the oath was taken at **Mwanza** on **2/10/2012.** On the face of it therefore, it is my view that this is a valid affidavit in terms of Section 8 of the Notaries Public and Commissioner for Oaths Act (CAP 12 R.E. 2002) which reads:-

> *8. Every **notary public and commissioner for oaths** before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat of attestation at what **place** and on what **date** the oath or affidavit is taken or made.*
>
> (Emphasis supplied).

In my reading and understanding of section 8 it is important that an affidavit should disclose **who** is taking the oath, **where** it is taken and **when** it was taken. In this case, there is no serious dispute that the oath was taken by a **Magistrate** who is a **Commissioner for Oaths** at **Mwanza** on **2/10/2012.** Therefore, if I may repeat, for purposes of section 8 the affidavit in this case is valid because under the above provision there is no requirement of inserting the attesting officer's **name.**

It follows that having made the above conclusion or finding I could have easily ended up here by dismissing the preliminary objection. However, for purposes of further clarity on the subject, I propose to go further and state the law, as I understand it, governing affidavits.

The starting point will be the definition of an affidavit. In my understanding, an affidavit is nothing more than a statement made by a person under oath. **MULLA** on **THE CODE OF CIVIL PROCEDURE,** Seventeenth Edition, Volume 2, by B.M. Prasad, at page 849 provides as follows:-

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.

Then at pages 849 to 850 **MULLA** proceeds to say:-

The affidavit must be indorsed. It requires solemn affirmation or oath ***before the person authorized to administer the same.*** *At the bottom of the affidavit,* ***the signature of the deponent must appear or below that of the officer entitled to administer oath,*** *who must put his* ***signature*** *in token of both, that he administers the oath and then deponent signed in his presence,* ***and by his attestation he has subscribed to both aspects.***

(Emphasis supplied.)

In practice therefore, going by **MULLA** (*supra*), after preparing his affidavit a deponent will appear before a person authorized to administer

an oath. The oath is then administered. The deponent signs as evidence that he took the oath. The person authorized to administer the oath signs the affidavit as evidence that he administered the said oath on the date in question. This indeed is the JURAT which according to **Black's Law Dictionary** is *"the clause written at the foot of the affidavit stating **when, where** and before **whom** such affidavit was sworn".* (Emphasis supplied.)

A court relying on affidavit evidence needs to be satisfied that the facts contained in the said affidavit are given under oath. This is a requirement under section 4(1) of the Oaths and Statutory Declaration Act (Cap 34 R.E. 2002) to the effect that an oath shall be made by any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court. Section 10 of this Act prescribes the form of a statutory declaration. Of particular interest to this application is section 5 thereto which is to the effect that every oath or affirmation shall be made in the manner **and in the form** prescribed by rules made under section 8 of the Act. Section 8 mandates the Chief Justice "*to make rules prescribing forms of oaths and affirmations and the manner in which the same may be made.*"

Section 8 of the above Act should be read together with section 101(1) of the Civil Procedure Code (CAP 33 R.E. 2002) which gives powers to the Chief Justice to prescribe forms to be used under the Code. Sub-section (3) thereto provides that in the absence of such forms, the forms hitherto used in India under the Indian Civil Procedure Code, 1908, should be applied. To the best of my knowledge, so far the Chief Justice has not prescribed the form of an affidavit. If so, the Indian form should be used. But the Indian Code does not contain a prescribed form for affidavits. In view of this apparent *lacuna* in our law the same has to be filled with the practice and procedure that obtained in the High Court of Justice of England on the 22nd day of July, 1920 by virtue of Section 2(3) of the Judicature and Application of Laws Act (CAP 358 R.E. 2002). The form of jurat of attestation in England does not have a requirement for the **name** of an attesting officer. **Lord Atkin's Court Forms Vol. 3** (2nd Edition) at pages 324-325 is very clear on this, thus:-

> *7. Jurat. An affidavit must be signed by the deponent* ***and the jurat must be completed and signed by the person before whom it is sworn.*** *The deponent need not sign his name in the precise form in which the name is set out at the*

beginning of the affidavit. The jurat usually appears at the left hand side of the page, immediately below the last paragraph of the affidavit. The jurat usually appears at the left hand side of the page, immediately below the last paragraph of the affidavit. It should not be written on a fresh sheet on which no part of the body of the affidavit appears. The signature is written on the right hand side of the jurat. ***The signature of the person before whom the affidavit is sworn must be legible*** *or repeated below the signature in block letters or by rubber stamp.*

The words "before me" should always be included, although the court has allowed an affidavit not containing these words to be filed, on being satisfied that the affidavit had in fact been sworn before the person who signed the jurat...

(Emphasis supplied.)

From **Lord Atkin's Court Forms** (*supra*) we can discern the following points. **One**, it is not a necessary requirement that the name of the attesting officer should feature in an affidavit. **Two,** an affidavit should not only contain the attesting officer's signature but the same should be legible or repeated below the signature in block letters or by rubber stamp.

Three, it is not always the case that a rubber stamp is uncalled for or that it cannot be used in an affidavit. Rather, the rubber stamp may be used under the circumstances stated above by **Lord Atkin**. Therefore, there is no offence in having an affidavit that does not have the name of the attesting officer separate from that indicated in his official stamp. Thus, there is nothing unusual in using one's rubber stamp for indentifying himself. The important thing is that the rubber stamp should have his **full name, address** and **title**. In this sense, whether a name of the Commissioner for Oaths is written manually in long hand, printed in type or impressed with a rubber stamp is neither here nor there, so long as the Commissioner for Oaths is identifiable or ascertainable.

I may as well add here that without prejudice to **Lord Atkin's Court Forms** (*supra*), **Thomas Chitty** in **FORMS OF PRACTICAL PROCEEDINGS IN THE COURTS OF QUEEN'S BENCH, COMMON PLEAS, AND EXCHEQUER OF PLEAS** provides a useful sample of affidavits used in England. This is an example of forms which could be used in Tanzania, with modifications of course, to suit our own local environment. At page 207 thereof **Chitty** provides a sample of a jurat taken before a Commissioner for Oaths. It reads:-

*[If it be sworn before a commissioner authorized to take **affidavit** by the statute 29 Car. 2, c. 5]*
*"Sworn at—, in the county of —, the —, day of—, 1840, before me **C.C.,** a commissioner, & c.*
[Or, if the court be not mentioned at the top of the affidavit, 'a commissioner for taking affidavits in the court of—"]
(Emphasis supplied.)

I am aware that footnote (b) at page 207 in **Chitty** reads in part as follows:-

> (b) *This is called the jurat, and you must state in it the place where, and **name** of the person before whom, the affidavit is sworn;.....*
> (Emphasis supplied.)

As I shall endeavour to show hereunder, applying **Chitty** to the practice in Tanzania, it is still evident that the emphasis is that the jurat must show **when, where** and before **whom** such affidavit was sworn. The use of the words **CC** above, does not necessarily mean that it is the name of the attesting officer which has to be disclosed thereat. In my view, the words **CC** could as well mean the signature of the Commissioner for Oaths, or his rubber stamp, as the case may be, again so long as the attesting officer is plainly identifiable.

In **Mkosamali** the case of **D.P. Shapriya and Co. Ltd v. Bish International BV** (2002) EA 47 was cited. In **Shapriya** at pages 48 to 49 Ramadhani, J.A. (as he then was) sitting as a single Justice of this Court stated that:-

> *...the place at which an oath is taken has to be shown in the jurat. The requirement is mandatory: notary publics and commissioners for oaths "shall state truly in the jurat of attestation at what **place** and on what **date** the oath or affidavit is taken or made".*
>
> [Emphasis supplied.]

That is correct. So, in **Shapriya** this Court did not say that it is a necessary requirement to disclose the name of the attesting officer. As shown above, the emphasis in **Shapriya** is on **place** and **date** the oath or affidavit is taken or made.

Likewise, in **M/s Bulk Distributors Ltd,** the case of **Zuberi Mussa v Shinyanga Town Council**, Civil Application No. 100 of 2004 (unreported) was cited. In that case this Court, citing **Shapriya,** stated:-

> *...The Court was of a firm conclusion that the need to show in the jurat the **place** where the*

oath was taken was indispensable, and this cannot be substituted by the ***name of the place*** *in the advocate's rubber stamp. After all such rubber stamp is never part of the jurat of attestation.*

[Emphasis supplied.]

Yet again, that is correct in as much as the emphasis is on disclosing the **place** where the oath was taken – See also **Theobald Kainami v The General Manager, KCU** (1990) Ltd, Civil Application No. 3 of 2002 (unreported) that :-

Unfortunately for the applicant the courts in this country do not have the kind of leeway the courts in England have. The requirement in this country that the ***place*** *where the oath is made or affidavit taken has to be shown in the jurat of attestation is statutory and must be complied with.*

[Emphasis supplied.]

If I may disgress a bit here, unfortunately in **Mkosamali** and **Ms Bulk Distributors Ltd**, this Court did not pronounce itself on the reasons

justifying the inclusion of an attesting officer's name in the jurat. Therefore, I do not have the advantage and benefit of knowing the Court's reasoning on the point.

Reverting to **Shinyanga Town Council** (*supra*) my understanding is that this Court did not say that the rubber stamp (seal) of the attesting officer is unnecessary. All the Court said is that the seal containing the name and address of the advocate should not be used in place of the name of **place** in the jurat where the deponent was sworn or affirmed. There is logic in this reasoning because an advocate's movement and work places are not restricted to the location where he has his law practice. He can move with his seal anywhere in the country. At page 15 of the judgment in **Shinyanga Town Council** (*supra*) this Court affirmed this position thus:-

> *...we are unhesitatingly of the view that the principle laid down in these cases to the effect that the requirement in this country that the* ***place where*** *and the* ***date*** *when an oath or affidavit is taken or made must be shown in the jurat of attestation is a statutory one* ***which must be complied with*** *and not a dispensable technical requirement is now deeply rooted in our*

jurisprudence. Every affidavit, therefore, which does not conform with the statutory requirement under s.8 of the Act shall be treated as incurably defective until such time when the courts will be given a statutory leeway, as the courts in England, to hold otherwise.

[Emphasis supplied.]

Assuming, for the sake of argument, that the name of an attesting officer is a necessary requirement in the jurat of an affidavit, still the remedy in an ideal case is not to strike out the application supported by such affidavit. This is because section 9 of the Oaths and Statutory Declarations Act has the effect of curing any defects. Section 9 reads:-

9. *Where 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 or taken, notwithstanding any irregularity in the administration or the taking thereof,*** *or any substitution of an oath for an affirmation, or of an affirmation for an oath, or of one form of affirmation for another.*

[Emphasis supplied.]

It seems to me that section 9 was enacted in order to give integrity and sanctity to judicial proceedings. The rationale is that if a deponent presents an affidavit before a court of law, he will be subjected to the full rigors of the law of perjury irrespective of whether or not the oath is regular.

Further to section 9 (*supra*), in a fit case the conventional wisdom is that the court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive. The order may be either that the offending passage be removed or that the whole affidavit be taken off the file and destroyed, etc. The point of emphasis here, for our purposes, is that ideally in such a situation an application is not struck out for containing a defective affidavit. Rather, there is always room for an amendment in order to save the application. In this sense, assuming disclosing the name of an attesting was/is a necessary requirement, the above reasoning would apply.

I am fortified in the above view by this Court's decision in **Salma Vuai Foum v Registrar of Cooperative Societies and Three Others**

(1995) TLR 75 where at page 79 this Court decided, with approval, that the learned Chief Justice in the court below properly exercised his discretion in allowing the applicant to amend his affidavit. The same reasoning is found in **University of Dar es Salaam v Mwenge Gas and Luboil Ltd,** Civil Application No. 75 of 1999 (unreported) where Samatta, C.J. had this to say:-

> *It would appear that a court has discretion to allow a deponent of an affidavit lacking a verification clause to amend the affidavit. I take it that by using the word "amend" this Court meant that the Court can, if circumstances justify it, grant leave to a deponent to file an affidavit having a verification clause...*

Yet again, in **Phantom Modern Transport (1985) Ltd. Versus D.T. Dobie (Tanzania) Ltd.,** Civil Reference No. 15 of 2001 and 3 of 2005 (unreported) at page 10 the legal position was succinctly put thus:-

> *Where defects in an affidavit are inconsequential, those defective paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the 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. ***But where the Court is minded to allow the deponent to remedy the defects, it may allow him or her to file a fresh affidavit containing averments. What in effect it means is that a fresh affidavit is substituted for the defective one. To that extent one may possibly say that the original affidavit is being amended.***

(Emphasis supplied.)

The above authorities are of assistance in highlighting one major point. That it is not always the case that an application will be struck out because it is supported by a defective affidavit. In a fit case, there is always room for an amendment of the affidavit as the above authorities clearly show. Indeed, in my respectful view, an application, or an appeal for that matter, should not be struck out unless it is absolutely necessary to do so. Where possible, and if the law permits, an amendment should be the norm rather than the exception. In a sense, I am supported in this view by this Court's recent decision in **Godbless Jonathan Lema v Musa Hamisi Mkanga and Two Others**, Civil Appeal No. 47 of 2012

(unreported) where it was held that the omission of the words *"given under my hand and the seal of the court"* in a decree was inconsequential because it did not go to the root of the decree, and accordingly ordered an amendment to the said decree without striking out the appeal.

As intimated earlier, there is one important point which should be made here by way of emphasis. In the absence of forms made by the Chief Justice under section 8 of the Oaths and Statutory Declarations Act (*supra*) the practice in Tanzania has always been for an attesting officer to sign his name in the jurat or to impress his name with a rubber stamp containing his **full name, address** and **title.** To the best of my knowledge no reasons, let alone good and convincing ones, have been advanced todate by anyone to dispense with, or to justify a departure from, this will established practice which has remained undisturbed over the years. In my view, in the absence of concrete reasons to the above effect there is no basis for abandoning this practice. After all, the administration of our justice system should be certain, predictable, consistent and reliable.

In my considered opinion, this Ruling will not be complete without making one general statement in passing. In dispensing justice the courts are no doubt rendering or giving a very valuable service to the society at large and to the consumers of our justice system in particular. If so, the society/consumers must continue to have trust and faith in our system. These will be lost if cases are sometimes struck out on flimsy, cheap or too technical reasons. I think it is to the best interests of anyone that cases should reach a finality without being hindered in the process by preliminary objections which could be avoided or which do not ultimately determine the rights of the parties.

In conclusion, inserting the name of an attesting officer in the jurat may be desirable, and probably a good thing to do, since there is the added advantage of further authenticating the affidavit and thereby rendering the attesting officer more identifiable but it is not a requirement of the law or practice. Assuming it is a requirement, which I believe is not, where an application is supported by an affidavit without the name of the attesting officer in the jurat the said application should not be struck out. An applicant in the circumstances should always be given the opportunity to amend the affidavit.

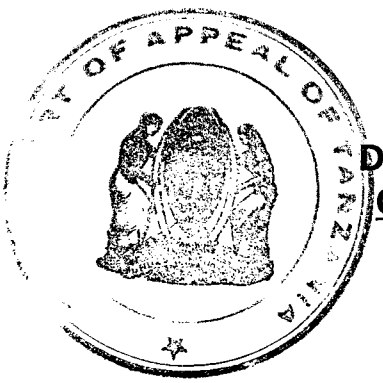
For the foregoing reasons, I hereby dismiss the preliminary objection. Since this decision is to a very large extent a result of my own research there will be no order as to costs.

Since my brother Juma, J.A. agrees the application will be heard in the next sessions of the Court at Mwanza.

DATED at DAR ES SALAAM this 11th day of October, 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

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



Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL