

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA

MISCELLANEOUS LAND APPLICATION No 55 OF 2020

(Arising from Misc, Land Appeal No 49/2020 at the High Court of Tanzania, Musoma District Registry. Originating from Land Appeal No 176/2019 of District Land and Housing Tribunal for Mara at Musoma. Original Land Case No 17/2019 at Issenyi Ward Tribunal)

BWAHERI MASAUNAAPPLICANT

Versus

ULAMU WISAKA RESPONDENT

RULING

12th & 13th November, 2020

Kahyoza, J.

Ulamu Wisaka appealed successfully against the decision of the district land and housing tribunal (the DLHT) to this Court. She was adjudged owner of the disputed land. Aggrieved, **Bwaheri Masauna** intends to appeal the Court of Appeal. **Bwaheri Masauna** lodged the instant application under section 5(1)(c) of **Appellate Jurisdiction Act (AJA)** [Cap 141 R.E 2019] seeking this Court to certify that there is a point of law involved in the intended appeal.

Pursuant to the above cited law the applicant filed the application supported by an affidavit to this Court. Before this Court entertained, the application on merit. The respondent's advocate Mr. Waikama raised a preliminary objection that-

- 1) That, the applicant's affidavit in support of the application is incompetent defective for being undated.

Is the application fatally defective?

The learned advocate Mr Waikama for the respondent argued that the *jurat* and verification clause of the affidavit are not dated.

The respondent's advocate submitted further that the *jurat* does not indicate whether the commissioner for oaths knew the deponent or the deponent was introduced to him by the person he knew. He referred this Court to section 8 of the **Notary Public and Commissioners for oaths Act** [Cap. 12 R.E. 2019].

He averred that failure to date the *jurat* and the verification clause was fatal. To buttress his argument, he cited the case of **Anatory Peter Rwebangira V the Principle Secretary, Ministry of Defence and Attorney General**, Civil Application No 548/04 of 2018. He prayed the application to be struck out with cost.

The applicant, who appeared in person had nothing substantive to reply. He contended that he presented his application to the commissioner for oaths and that it was the commissioner for oaths who had a duty to date and indicate whether he knew the applicant or indicate the name of a person who introduced the applicant to him (the Commissioner for oaths).

In his rejoinder, to the respondent's advocate emphasised that ignorance of the law is not a defence. He prayed the application to be struck out with costs.

The affidavit's applicant shows the rubber stamp, name, and address of the commissioner of the oaths. It does not indicate the date when it was taken in the *jurat* or in the verification clause. Section 8 of

the **Notary Public and Commissioners for Oaths Act**, [Cap 12 R.E 2019] in addition to names, address and place of where the oaths was taken, requires the commissioner indicate the date on when the affidavit was made. It is mandatory to indicate the date. It stipulates that-

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

As the record of the Court bears testimony, the verification clause and the *jurat* of the applicant's affidavit were not dated. Failure to indicate the date when the affidavit was taken is a defect. In my opinion, that defect is curable. With due respect, I am not in agreement with Mr. Waikama learned advocate that the defect is fatal. The advocate cited the case of **Anatol Peter Rwebangira v the Principle Secretary, Ministry of Defence and National Service and the Attorney General** Civ. Application No. 548/04 of 2018, (CAT unreported). I went through the case, the same is distinguishable from the present case. In that case, the applicant's affidavit did not specify in the verification clause which facts were based on the applicant's own knowledge and which facts were based on the applicant's belief. The Court of Appeal found that the omission rendered the verification defective. It held-

"In this regard, we agree with the learned Senior State Attorney that, the verification clause of the applicant's affidavit is rendered defective which adversely impacts on the entire affidavit which is also rendered defective."

In the current case, the applicant did not indicate the date when the affidavit was taken in both the *jurat* and the verification clause. It is my considered opinion that the defect is not fatal, especially in the wake of the overriding principle.

The respondent's advocate advanced a second limb of objection that the Commissioner for oaths did not indicate in the *jurat* of attestation of the applicant's affidavit, whether he knew the deponent or the deponent was introduced to him by a person he knew. The Court of Appeal in **DPP. v Dodoli Kapufi and another** Cr. Appl no. 11 2008 pointed out three matters which the Commissioner for oath must indicate. It stated that-

*"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 Commissioners 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 MO MOTOR VESSELS**, Civil case No. 123 of 1996,(CAT 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);"*

The Court of Appeal, in the above quoted holding, did not indicate that the affidavit would be incurably defective, if, the commissioner for oaths failed to indicate that he knew the deponent or the deponent was introduced to him by the person he knew. I concur with respondent's advocate that the commissioner for oaths' failure to indicate that he knew the deponent or the deponent was introduced to him by the person he knew, was a defect but in the wake of overriding principle the same is curable. The defect does not go to the root of the matter.

One of the principles governing affidavits, provides that a defective affidavit can be amended. See **Salima Vnai Foun Vs. Registrar of Cooperative Society and Three others** [1995] TLR 75 where it was stated that-

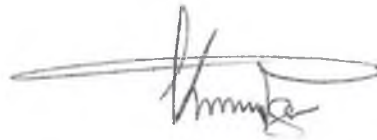
"Further, it now settled and for that I reason I differ with what the decision in , that a court has discretion to allow a deponent of an affidavit lacking a verification clause to amend the affidavit. It take, it that by using the "amend" this Court meant that the Courts can, if circumstances justify it, grant leave to the deponent to file an affidavit having a verification clause. I hold this view because I take (it) to be an undisputed proposition of law that something that is null and void is incapable of being amended. Being a discretion on power, the power to grant leave to a deponent to file an affidavit which has a verification clause must be exercised with justice and common sense."

There is yet another case of where the Court of Appeal took a position that an affidavit may be amended to rectify the defective verification. See **DDL International Ltd Vs. Tanzania Harbours Authority Tanzania Revenue Authority and Parastatal Sector Reform Commission** (Civ. Appl. No. 8/2001(unreported) CAT. It stated that *"the Court will in fit cases, exercise discretion to grant leave to amend the affidavit in the verifications clause"*.

Given the above position of the law, I find that the applicant's affidavit is defective and also that this a fit case to order the amendment of the affidavit.

Finally, I find the affidavit defective for want of the date on both the *jurat* of attestation and the verification clause also for the commissioner of oaths' failure to specify whether he knew the deponent or the deponent was introduced to him by a person he knew. The defectives are not fatal. They can be cured by amendment. I exercise my discretion to grant leave to amend the affidavit **to rectify the defects only**. The amended affidavit to be filed on or before 20/11/2020. Costs shall be in due course.

It is ordered accordingly.



J.R. Kahyoza

JUDGE

2/11/2020

Court: Ruling delivered in the presence applicant and the respondent and her advocate. B/C Catherine



J.R. Kahyoza

JUDGE

2/11/2020