THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

THE DISTRICT REGISTRY OF MBEYA,

AT MBEYA

MISC. LAND APPLICATION NO. 65 OF 2018.

(Arising from Land Application No. 9 of 2014, in the District Land and Housing Tribunal for Kyela District, at Kyela).

NELSON MWANKENJA.....APPLICANT

VERSUS

MBAULA DAVID.....RESPONDENT

RULING

04/06/ & 28/08/2020.

UTAMWA, J:

This is a ruling on a preliminary objection (PO) raised by the respondent's counsel, Mr. Ignas Ngumbi, against the application at hand. The applicant, NELSON MWANKENJA, who appeared without any legal representation, did not concede to the PO.

In the application, the applicant is seeking for an extension of time to lodge an appeal against a judgment of the District Land and Housing Tribunal for Kyela District, at Kyela in Land Application No. 9 of 2014. The application is preferred under section 41 (2) of the Land Disputes Courts Act, Cap. 216, R. E 2002 as amended by Act No. 2 of 2016. It is supported by an affidavit of the applicant. The respondent objected the application through a counter affidavit. He also lodged a notice of the PO.

The PO was based on a single ground that, the *jurat* of attestation in the affidavit is incurably defective for being in violation of section 10 of the Oath and Statutory Declarations Act, Cap. 34 of R .E 2002. Parties argued the PO by way of written submissions.

Addressing the court in support of the PO, the learned counsel for the respondent maintained that, the affidavit supporting the application is incurably defective since its *jurat* of attestation does not show whether the commissioner for oaths (the commissioner) knew the deponent personally or the deponent was identified to him by someone else whom the commissioner knew personally. Section 10 of Cap. 34 however, provides in mandatory terms that, declarations, which also include affidavits, must be in the form prescribed in the schedule of the Act. The schedule directs specifically that, the commissioner must indicate in the declaration either to have known the deponent personally or that, the deponent was identified to him by a person known to him personally. Since the abnormality is fatal and renders the affidavit incurably defective, the application is rendered incompetent and liable to be struck out. He supported the contention by precedents of the Court of Appeal of Tanzania (the CAT) in **Jamal Msitiri**

@ Chaijaba v. Republic Criminal Application No. 1 of 2012, CAT, at Tanga (unreported) and **Simplisius Felix Kijuu Issaka v. The National Bank of Commerce Limited, Civil Application Appeal No. 24 of 2003, CAT, at Dar es Salaam** (unreported).

In his replying submissions, the applicant conceded to the defect highlighted above. He however, contended that, the same was curable. He thus, urged the court to permit him to amend the error by merely cancel the word "identified" from the *jurat* by a mere pen so that it can read that the commissioner knew the deponent personally. This is so because, the commissioner intended to state so, but did not do so mistakenly. He further contended that, since the arguments raised by the respondent's counsel cannot bring the matter to an end, they do not constitute a proper PO under the law as per the case of **Mukisa Biscuits Manufacturing Company Limited v. West End Distributors [1969] E. A. 701.** The applicant thus, urged this court to overrule the PO and proceed to the hearing of the application on merits since he was also a layman.

In his rejoinder submissions, the respondent's counsel reiterated the contents of his submissions in chief. He added that, the fact that the applicant is a layman does not constitute a proper excuse. He also contended that, the point raised by the respondent qualifies as PO in law and as per the **Mukisa case** (supra).

I have considered the record, the arguments by both sides and the law. Parties are in fact not in dispute that the defect complained of by the respondent's counsel in fact, exists. The parties are also at one on the stance of the law set under section 10 of Cap. 34 as highlighted by the

respondent's counsel. I hastily support this stance of the law for being genuine. The parties' friction is only centred on the consequences of the defect in the affidavit complained of by the respondent's counsel. While the respondent considers the same as fatal, the applicant maintains that, it is not. The issue is thus, reduced to what is the legal effect of the defect in the affidavit?

In the first place, I am of the settled opinion that, the concern raised by the respondent's counsel has all the properties of a PO set in the **Mukisa Case** (supra). It is for example, based on a point of law, it is also based on facts arising from the pleadings (affidavit) and may end the matter if upheld.

Furthermore, I am of the view that, the circumstances of this matter call for an answer in favour of the respondent for the reasons shown hereunder. It is however, incumbent that I reproduce the jurat of attestation at issue for ease of reference, it reads thus:

> "Sworn at Mbeya by the said NELSON MWANKENJA, who is identified to me by.....the later (*sic*) being personally known to me this 14th Day of September 2018."

According to the record, the blank space in the second line of the *jurat* quoted above was struck through by a ball pen. Now, by reading the *jurat* between lines, the contention by the applicant that the commissioner had intended to indicate that he knew the deponent (applicant) personally is unbelievable. This is because, the commissioner did not indicate anywhere that he knew the applicant, let alone that he knew him personally. In fact, the above quoted passage shows that, the commissioner intended to show

that, the deponent had been identified to him by another person whom he referred as the "later," and it was that other person whom he (commissioner) knew personally. Nevertheless, the commissioner did not mention that said person in the blank space of the *jurat* where it had been intended to mention such other person.

Owing to the above interpretation of the paragraph parroted earlier, it is my conclusion that, the *jurat* is ambiguous as rightly stated by the learned counsel for the respondent. It does not state whether the commissioner knew the deponent personally and it does not even mention the person who identified the deponent to him. This was irrespective of the fact that, the *jurat* is suggestive that someone, known to the commissioner personally, had introduced the deponent to him. The *jurat* thus, offended the mandatory provisions of the section 10 of Cap. 34.

Indeed, according to the circumstances of the case, the abnormally stated above is fatal because, affidavits must be authentic before they are acted upon. The courts must be certain that it was in fact, the deponent mentioned in the *jurat*, and not any other person, who took the oath before the commissioner. This certainty is achievable only by the commissioner stating clearly that, he either knew the deponent personally or that, the deponent was introduced to him (commissioner) by a person known to him (commissioner) personally. This is the significance of section 10 of Cap. 34. The rationale of these provisions of law is that, affidavits are vital instruments since in law, they take place of oral evidence; see the decision by CAT in **Phantom Modern Transport (1985) Limited v. D.T Dobie (Tanzania) Limited, Civil Reference No. 15 of 2001 and 3 of**

2002, at Dar es Salaam (unreported). It follows thus that, courts of law should not act on affidavits sworn by persons whose identity was not certain to the commissioner administering the oath, otherwise there will be an eminent danger of being misled.

Certainly, the fact that the applicant is a layman does not constitute a sufficient excuse for floating the law set to safeguard fair trials in courts of law. Again, the prayer by the applicant to rectify the defect by a mere pen cannot be a proper remedy. This is because, according to the law cited above, it is the commissioner's duty to state whether he knew the appellant or he was introduced to him by another person known to him personally. It is not thus, the domain of the applicant himself, as the deponent of the affidavit at issue, to speak or endorse for the commissioner, that he (commissioner) knew him (applicant) personally. His prayer to rectify the error is thus, impractical.

In fact, the irregularity at issue cannot be saved by the doctrine of "overriding objective." This doctrine has been recently underlined in our law vide the Written Laws (Miscellaneous Amendments Act) (No. 3) Act, No. 8 of 2018 (Act No. 8 of 2018). The doctrine/principle essentially requires courts to deal with cases justly, speedily and to have regard to substantive justice; see section 6 of Act No. 8 of 2018 that amended the Civil Procedure Act, Cap. 33 R. E. 2019. The amendments added new sections 3A and 3B to the statute. The principle was also underscored by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported).

Nonetheless, the above mentioned principle of overriding objective cannot be applied blindly or mechanically to suppress other significant legal principles the purposes of which are also to promote justice and fair trials. This is the envisaging that was recently articulated by the CAT itself in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported). In that case, the CAT declined to apply the principle of Overriding Objective amid a breach of an important rule of procedure.

Indeed, in the said **Mondorosi case** (supra) the CAT categorically held that, the principle of "overriding objective" cannot be applied blindly against the mandatory provisions of procedural law which go to the very foundation of the case. In so deciding, the CAT followed its previous decision in **Njake Enterprises Limited v. Blue Rock Limited & Another, Civil Appeal No. 69 of 2017** (unreported). It thus, distinguished the **Yakobo Magoiga case** (supra) which had applied the Overriding Objective principle. I am therefore, settled in mind that, the principle must work in tandem, and not in friction, with such other legal principles like the one under discussion, which are vital for justice dispensation. I consequently, distinguish the said **Yakobo Magoiga Case** (supra) from the case at hand for the reasons shown above.

Owing to the above observations, I answer the issue posed above thus; the defect in the *jurat* of attestation is incurably fatal to the affidavit. I thus, declare the affidavit incurably defective. The application is also rendered incompetent for want of a legally proper affidavit to support it.

The only legal remedy for an incompetent matter is to strike it out. I accordingly strike out the application with costs since costs follow event. It is so ordered.

JHK. UTAMWA.
JUDGE
28/08/2020.

28/08/2020.
CORAM; Hon. JHK. Utamwa, J.
Applicant: present in person.
Respondent; present in person.
BC; Mr. Patric, RMA.

Court: ruling delivered in the presence of the parties, in court, this 28th August, 2020.

JHK. UTAMWA.
JUDGE
28/08/2020.