

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: ORIYO, J.A, KAIJAGE, J.A. And MUSSA, J.A.)

AR. CIVIL APPLICATION NO. 4 OF 2008

M/S BULK DISTRIBUTORS LIMITEDAPPLICANT

VERSUS

HAPPYNESS WILLIAM MOLLEL..... RESPONDENT

**(Application for revision from the decision of the High Court of Tanzania
At Arusha**

(Bwana, J.)

**Dated the 16th day of November, 2007
in
Civil Case No. 3 of 2007**
.....

RULING OF THE COURT

10th & 18th June, 2013

KAIJAGE, J.A.:

This is an application under a Notice of Motion made under section 4(3) of the Appellate Jurisdiction Act, Cap 141 R.E 2002. It seeks to revise the proceedings before the High Court, Arusha Registry, in Civil Case No. 3 of 2007. The Notice of Motion is supported by an affidavit of Boniface Joseph, an advocate of the High Court.

Before us, the applicant had the services of Mr. Elvaison Maro, learned advocate, while Mr. John Materu, learned advocate, represented the respondent.

At the hearing of the application, Mr. Materu raised to argue preliminary points of objection notice of which was given and filed on 4/6/2013 pursuant to the provisions under rule 107 of the Court of Appeal Rules (the Rules). The preliminary objection was grounded on the following:-

1. That, the application for revision is incompetent pursuant to the provision of section 5 (2) (d) of the Appellate Jurisdiction Act, 1979 as amended by Written Laws (Miscellaneous Amendments) Act No. 25 of 2002 since the order/decision of the High Court dated the 12th day of February, 2008, did not conclude and/or finally determine the matter hence it is an interlocutory order;
2. That, the application for revision is incompetent for it seeks the revisional jurisdiction of the Court as an alternative to the appellate jurisdiction of the Court.
3. That, the affidavit supporting the Notice of Motion is fatally defective for being wrongly attested.

We accept that lucid arguments and submissions put forward on behalf of the parties as they relate to the first and second points of preliminary objection are not without substance and significance, but we have preferred to base our decision in this Ruling on the third point of objection.

Arguing in support of the third point of objection, Mr. Materu for the respondent impressed upon us that it is a requirement of law that a jurat of attestation should indicate the name and the signature of the attesting officer. Advancing his argument, he contended that the affidavit filed in support of the present application has a signature in the jurat, but lacks the name of the attesting officer. He contended that the omission of the attesting officer's name has rendered the affidavit filed in support of the present application incurably defective. Referring to the decision of this court in **FELEX FRANCIS MKOSAMALI vs. JAMAL A. TAMIM**; Civil Application No. 4 of 2012 (unreported) he stressed that an incurably defective affidavit is incapable of supporting the Notice of Motion. He thus prayed that the present application be struck out with costs.

Mr. Maro for the applicant conceded the said defect in the affidavit filed in support of the application. However, he submitted that the defect

amounts to an irregularity capable of being cured by way of amendment. Relying on the provisions of rule 4 (2) (a) of the Rules and Article 107 (2) (e) of the Constitution of the United Republic of Tanzania of 1977, he prayed that he be allowed to cure the irregularity by filing an amended affidavit incorporating the name of the attesting officer in the jurat.

It is now settled that an omission to show, in the jurat of attestation, when, where and the name or authority before whom the oath is administered renders the affidavit incurably defective.(See for instance; **FARES MUNEMA Vs. ASHA MUNEMA**; Civil Application No. 9 of 2003, **THE GOVERNMENT OF THE GREAT SOCIALIST PEOPLES LIBYAN ARAB JAMAHIRIYA AND ANOTHER Vs. MEIS INDUSTRIES LIMITED**; Civil Application No. 147 of 2010 (both unreported), **FELIX FRANCIS MKOSAMALI Vs. JAMAL A.TAMIM**, (supra) and **D. P. SHAPRIYA AND CO.LTD V's BISH INTERNATIONAL BV** [2002]' E.A 47.

In the present matter, there is no gain saying that the name of the attesting officer is not indicated in the jurat of attestation. As matters stands, a person or authority before whom the affidavit accompanying the application was sworn is unknown. The name before whom the affidavit

accompanying the application was sworn cannot be validly substituted by the name appearing in the advocate's rubber stamp. After all such rubber stamp is never part of the jurat of attestation (see; **ZUBERI MUSSA Vs. SHINYANGA TOWN COUNCIL**; Civil Application No. 100 of 2004 (unreported). Thus, on the strength of the authorities referred to herein above and as rightly submitted on behalf of the respondent, we are constrained to find that such an omission besetting the jurat of attestation has rendered the affidavit accompanying applicant's application incurably defective. We are also in agreement with Mr. Materu that an incurably defective affidavit cannot validly support the Notice of Motion. In the **SHAPRIYA** case (supra), this Court categorically ruled that non conformity with any regularity in the jurat of attestation is not a Sheer technicality and that such regularity cannot be waived at all by the parties.

Mr. Maro for the applicant while conceding the irregularity unearthed in the jurat, he prayed to be allowed to amend the affidavit in order to have it cured. With respect, we cannot accede to this prayer. The respondent having taken an objection to the competence of the present application, it will be wrong to entertain a prayer the effect of which would be to defeat the objection and, of course, rule 107 of the Rules which

permits objections would be negated.(See; **KANTIBHAI M. PATEL Vs. DAHYABHAI .F. MISTRY [2003] .T.L. R 437.**

That said, for reason explained, we hold that the incurably defective affidavit has rendered the present application incompetent. The application is accordingly hereby struck out with costs.

DATED at ARUSHA this 14th day of June, 2013.

K.K. ORIYO
JUSTICE OF APPEAL



S.S. KAIJAGE
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

MALEWO, M.A.
DEPUTY REGISTRAR
COURT OF APPEAL