IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MJASIRI, J.A., MWARIJA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 174 OF 2012

RIAKDIT BARNABAS ..... APPLICANT

VERSUS

BP TANZANIA LIMITED ..... RESPONDENT

(Application for Review of the Ruling and Order of the Court of Appeal of Tanzania at Dar es Salaam)

(Msoffe, Rutakangwa and Luanda, JJJ.A)

dated the 13thday of September, 2012

in

Civil Application No. 75 of 2012

RULING OF THE COURT

15th June & 3rd July, 2017

MWAMBEGELE, J. A.:

The applicant Riakdit Baranabas lodged the present application seeking to review the decision of this Court in Civil Application No. 75 of 2012. The respondent BP Tanzania Limited, through a law firm going by the name IMMMA

Advocates, has raised a preliminary objection against it. The preliminary objection, whose notice was lodged in Court on 25.06.2013, reads:

> *"The jurat in the affidavit of Riakdit Barnabas sworn on 9th November 2012 in support of the notice of motion is incurably defective for being wrongly attested".*

The preliminary objection (henceforth "the PO") was argued before us on 15.06.2017 during which both parties were represented. While Mr. Beatus Malima, learned counsel appeared for the applicant, Ms. Fatma Karume, also learned counsel, advocated for the respondent.

Both learned counsel were brief in their submissions. Ms. Karume submitted that the affidavit supporting the Notice of Motion is defective because the jurat lacks the name of the attesting officer. The learned counsel stated, however, that there were conflicting decisions by the Court regarding what should befall an affidavit with such an ailment. She cited **M/S Bulk Distributors v. Happynes William Mollel,** Civil Application No. 4 of 2008 on the one hand and

Samwel Kimaro v. Hidaya Didas, Civil Application No. 20 of 2012 on the other. While the former case articulated that lack of the name of the attesting officer in the jurat makes the affidavit incurably defective, the latter case held to the contrary. She was of the view that the position taken by the Court in **Samwel Kimaro**, depicted a lot of legal common sense.

Arguing against the PO, Mr. Malima was at one with Ms. Karume on the stance taken by the Court in **Samwel Kimaro**. He, however, submitted that the most recent case by the Court on the point is **Arcopar (O.M.) S.A v. Harbert Marwa and Family Investments Co. Ltd & 3 others**, Civil Application No. 94 of 2013 (unreported) in which, having discussed both cases cited by Counsel for the respondent, it was observed at p. 17 of the typed ruling that where there are conflicting decisions of the Court, it makes a lot legal common sense to follow the more recent one. He thus urged the Court to dismiss the PO with costs.

In a short rejoinder, Ms. Karume conceded that the position in **Samwel Kimaro** and **Arcopar** made a lot of legal common sense. On being asked by the Court why then she would not withdraw the PO, she replied that she wanted us to decide.

We wish to state at this juncture that the position on the subject of controversy in the present PO has currently been settled. The uncertainty was resolved by Parliament which amended the provisions of section 8 of the Notaries Public and Commissioners' for Oaths Act, Cap. 12 of the Revised Edition, 2002 (henceforth "Cap. 12"). Before the amendment, that section read:

> *"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."*

The above provision has now been amended. It was amended by section 47 of the Written Laws (Miscellaneous Amendment) (No. 2) Act, 2016 – Act No. 4 of 2016 (henceforth "Act No. 4 of 2016") which came into force on 08.07.2016; the date of its publication in the Government Gazette. Section 47 of Act No. 4 of 2016 enacted the following amendment to Cap. 12:

*"The principal Act is amended in section 8 by inserting the phrase "**insert his name and**" between the words "**shall**" and "**state**" appearing in that section."*

[Emphasis added].

By virtue of that amendment, section 8 Cap. 12 now reads:

*"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].

The position of the law today is that it is a mandatory requirement that the name of the attesting officer must appear in the jurat of attestation.

The position of the law before the above amendment, as already alluded to above, was uncertain. As correctly stated by Ms. Karume and supported by Mr. Malima, there were conflicting decisions of the Court on the point. There existed

two schools of thought championed by the cases of **Felix Mkosamali v. Jamal A. Tamim**, Civil Application No. 4 of 2012 (unreported), **M/S Bulk Distributors** (supra) and **Sharifa Ahmed Kaidi v. Magreth Masao**, Civil Application No. 6 of 2011 (also unreported) on the one hand and **Samwel Kimaro** and **Arcopar** (supra) on the other. While the first school advocated for the proposition that lack of the name of the attesting officer in the jurat makes the affidavit incurably defective, the second one was of the stance that the law did not put as a mandatory requirement for the name of the attesting officer to appear in the jurat and thus the ailment could not be fatal.

We could not hold our surprise at Ms. Karume's arguments against the PO she filed on behalf of the respondent. Under normal circumstances, the learned Counsel for the respondent ought to have argued in favour of the objection. Arguing against it, as it happened, and at the same time being hesitant to withdraw it and urging the Court to just decide on it, we respectfully think, the course of action opted by the learned counsel is inappropriate.

Having learnt that the PO she filed did not have her support, perhaps due to some change of positions in case law, we respectfully think, it was incumbent

upon the counsel for the respondent to withdrawal the PO and pave way for the matter to proceed to hearing on the merits. That would expedite quick disposal of the matter.

We think the paradigm shift made by counsel for the respondent might have been caused by case law decided after the filing of the PO. We say so because the notice of the PO was lodged in court on 25.06.2013 and the decision in **Samwel Kimaro** was pronounced on 11.10.2013. As the learned counsel for the respondent thought the case which was decided after she filed the PO changed her stance on the PO she earlier filed, the proper course to have been taken was, we respectfully think, to have it withdrawn. That was not done and we could not perceive why even after the Court had raised concern, the counsel of the respondent did not rethink over it. We are, under the circumstances, of the firm view that we cannot decide on a PO of this nature which the maker does not support.

In the premises, we find and hold that the preliminary objection stands unsupported and we hereby strike it out under rule 4 (2) (a) and (b) of the

Tanzania Court of Appeal Rules, 2009. Costs of the present preliminary objection shall abide the outcome of the main application which shall proceed to hearing on its merits on a date to be fixed by the Registrar.

Order accordingly.

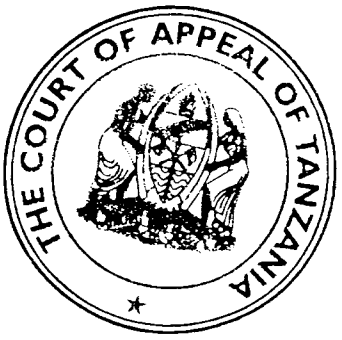
DATED at **DAR ES SALAAM** this 29th day of July, 2017.

S. MJASIRI
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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



E.P. Fussi
DEPUTY REGISTRAR
COURT OF APPEAL