

IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA
CRIMINAL APPLICATION NO. 19 OF 2013
(CORAM: MBAROUK, J.A., MWARIJA, J.A. And LILA, J.A.)

DAVID MATIKU..... APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

**(Application for Review from the Judgment/Decision of the Court of
Appeal of Tanzania at Mwanza)**

(Msoffe, Kimaro, And Juma, JJJ.A.)

**dated the 6th day of August, 2013
in
Criminal Appeal No. 170 of 2012**

RULING OF THE COURT

28th February & 2nd March, 2017

LILA, J.A.:

This application has been preferred under Rule 66 (1) (a) and (e) of the Court of Appeal Rules, 2009 (the Rules). The applicant seeks to move the Court to review the judgment of the Court (Msoffe, J.A, Kimaro, J.A and Juma, J.A) dated 6th August 2013 in Criminal Appeal No. 170 of 2012. The application was filed on 30/9/2013. On 24/2/2017, the Republic/Respondent through Lameck Merumba, learned State Attorney,

filed a notice of preliminary objection containing two points of objection.

The points of objection are to the effect that:

- i. The application is bad in law for not being predicated on one or more of the grounds enumerated in paragraphs (a) or (b) or (c) or (d) or (e) of Rule 66 (1) of the Tanzania Court of Appeal Rules, 2009.*
- ii. The applicant's affidavit in support of the application for Review is substantially defective in the following aspects:-*
 - a) The affidavit is bad in law for containing unverified paragraphs.*
 - b) The affidavit is bad in law and incurably defective for containing defective jurat which lacks deponent's signature.*

At the hearing of the application, guided by the principle that an objection on points of law should be heard first (see **Thabit Ramadhani Maziku and Another v. Amina Khamis Tyela and Another**, Civil Appeal No. 98 of 2011 [unreported], we asked the parties to argue the points of objection first.

Mr. Merumba, learned State Attorney, who appeared for the Republic/Respondent was first to address the Court. He abandoned the

rest of the grounds of objection and argued only the second limb of the second point of objection which states:

(b) The affidavit is bad in law and incurably defective for containing defective jurat which lacks deponent's signature.

In support of the above point of objection, Mr. Merumba argued that the applicant's notice of motion is supported by the affidavit which lacks signature of the deponent who is the applicant. He contended that, the law is clear that if the deponent of the affidavit does not sign, the affidavit becomes defective. To bolster his argument, he referred us to page 3 of the Court's decision in **Director of Public Prosecutions vs. Dodoli Kapufi and Another**, Criminal Application No. 11 of 2008 (unreported), where the Court pointed out the four ingredients of a valid affidavit. He said one of such ingredients is the signature of the deponent. He further contended that, in that case, the Court held that absence of the deponent's signature rendered the affidavit defective. On the basis of his submission, the learned State Attorney urged the Court to strike out the application.

This being a legal issue, the applicant, a layman, who appeared in person and unrepresented, succumbed to the objection and prayed to withdraw the application so that he can, later, file a proper application.

On our part, we fully agree with the learned State Attorney that the applicant's affidavit in support of his application for review is defective.

We, however, before determining the merits of the objection, wish, at the very outset, to state that though the applicant can, under Rule 58 (1) of the Rules, at any time, informally apply to withdraw the application, it is now settled law that an incompetent application can not be withdrawn, instead, it ought to be struck out as it was stated by the Court in **Ghati Methusela vs. Matiko w/o Marwa Mariba**, MZA Civil Application No. 6 of 2006 (unreported) that;

*"It is now established law that **an incompetent proceeding, be it an appeal, application, etc is incapable of adjournment, for the Court can not adjourn or allow to withdraw what is incompetent before it. See Leons Ngaiai v. Hon. Justin Salakana & The Hon. Attorney General, which was a decision of the full Court.**"*
(Emphasis is ours).

On the basis of the above legal position the applicant's request is untenable.

Swearing of affidavits is governed by Notary Public and Commissioners for Oaths Act Cap. 12 R.E. 2002 (the Act). Section 8 of the Act provides:

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."

It is now settled that "*jurat*" refers to that part of the affidavit which shows when, where and before what authority the affidavit was made (see **DPP v. Dodoli Kapufi's case** (supra). In that case, the Court stated that the authority before whom the affidavit is taken, be it the Notary Public or Commissioner for Oaths, must make sure, among other things, that the deponent signed the affidavit. The Court went further to state:-

*"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.” (Emphasis is ours).

In another case of **John David Kaseka v. The Consolidated Corporation Ltd**, Civil Application No. 2 of 2012 (unreported), the Court was confronted with a similar situation that the applicant did not sign at the deponent’s part. The Court held that, the affidavit was incurably defective.

In the present application, it is a common ground that the applicant, the deponent, did not sign against the jurat. The omission, on the above authorities leads the affidavit in support of the notice of motion to be incurably defective as rightly argued by the learned State Attorney.

In a situation where the affidavit is found to be incurably defective the notice of motion misses legs on which to stand in terms of Rules 48 (1) and 49 (1) of the Rules which mandatorily requires every formal application to be made by way of a notice of motion supported by an affidavit. Since the applicant’s affidavit in support of the notice of motion is defective, the application is rendered incompetent. The same ought therefore to be struck out.

For the reasons stated above, the application is hereby struck out.

DATED at MWANZA this 2nd day of March, 2017.

M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

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


E. F. RUSSI
DEPUTY REGISTRAR
COURT OF APPEAL