

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 277/20 OF 2017

COMMISSIONER GENERAL (TRA).....APPLICANT

VERSUS

PAN AFRICAN ENERGY (T) LIMITEDRESPONDENT

**(Application for extension of time to apply for Review of the decision of
the Court of Appeal of Tanzania at Dar es Salaam)**

(Kimaro, J.A., Oriyo, J.A., and Mwarija, J.A.)

dated 9th day of May, 2016

in

Civil Appeal No. 146 of 2015

RULING

30th October, 2017 & 5th February, 2018

LILA, J.A.:

The Commissioner General of the Tanzania Revenue Authority, the applicant, by way of a Notice of Motion filed on 28/10/2017 under Rule 51(1) and (2) of the Tanzania Court of Appeal Rules, 2009, (the Rules) seeks for extension of time to apply for review of the decision of the Court (Kimaro, Oriyo, Mwarija, JJA) dated 09th May, 2016 in Civil Appeal No. 146 of 2015. The Notice of Motion is supported by an

affidavit affirmed by Juma Salim Beleko, a Principal Officer of the Applicant.

In response, apart from filing an affidavit in reply, PAN AFRICAN ENERGY (T) LTD, the respondent, filed a notice of preliminary objection in which two points of preliminary objection were raised.

These are:

1. *That the application is incompetent, for contravening Rule 48(2) of Court of Appeal Rules, 2009 (herein referred to as the Rules) together with form "A" provided in the First Schedule to the Rules and for being vague.*
2. *That the application is incompetent for being supported by an affidavit not attested according to the law.*

At the hearing of the notice of preliminary objection, Mr. Gabriel Malata, learned Principal State Attorney appeared for the applicant

and the respondent had the services of Mr. Gandiousus Ishengoma, learned advocate.

Apart from the above, a careful examination of the affidavit in support of the Notice of Motion by the Court revealed that there was no indication by the attesting officer, at the *jurat* of attestation, whether the deponent was known by the attesting officer personally or was identified to him by another person known to him. Counsel of the parties accordingly argued on the two points of objections raised as well as the legal point raised by the Court *suo motu*.

I will, for reasons to be disclosed latter, first deal with the legal point raised by the Court.

It was Mr. Ishengoma's arguments that the affidavit in support of a notice of motion must indicate either that the person taking oath or being affirmed is known to the attesting officer personally or was identified to him by a person known to him and that the name of such person must be written. He further said, the present affidavit is silent on that hence it is defective. He cited the case of **Anne Kilango Malecela** to bolster his argument. He, however, neither availed the

Court with the full citation of that decision nor served the Court with a copy of such Court's decision. He insisted that the defect is fatal.

On his part, Mr. Malata said attestation of affidavits is governed by Section 8 of the Oath's and Statutory Declarations Act, Cap. 34 R.E. 2002 (the Act) wherein three requirements to be complied to make an affidavit a valid one are provided to be:-

- (1) The jurat of attestation must mention the name of the person affirming or swearing to the affidavit.*
- (2) The affidavit must indicate the place and date at which the Oath took place, and*
- (3) It has to bear the name of the attesting officer (Commissioner for Oaths).*

He, in view of the above legal requirements, argued that the present affidavit fully complied with the Legal requirements in that it shows the name of the person affirming to be one Juma Salim Beleko, the place where affirmation took place to be Dar es Salaam and the

date to be 22nd June, 2017 and the attesting officer to be one Kause K. Izina.

Regarding failure to show whether the deponent was known personally to the attesting officer or was identified to him, he, in the first place, conceded that the affidavit in consideration is silent on that. He, however, argued that the affidavit he had in his file and that served to the respondent indicated that the word "*identified by*" was slashed hence showing that the deponent was known by the attesting officer personally. In respect of the affidavit in the Court's record which does not show that the word "identified by" was slashed, he was of the view that if the deponent was not known personally by the attesting officer and was identified by another person then the name of such person would have been indicated. He said there was no need to indicate the name of the person who identified the deponent to the attesting officer that is why the affidavit is silent. That requirement, according to him, applies only where the deponent is not known by the attesting officer personally. All in all he was of a firm that the affidavit was in total compliance with the law. Otherwise, he urged the Court to invoke the provisions of article 107A (2) (e) of

the Constitution of the United Republic of Tanzania (the Constitution) and allow the application be heard on merit.

Having heard the arguments by Counsel of both sides, it is apparent that it is a common ground that the affidavit in the Court's record in support of the Notice of motion is silent on whether the deponent was known to the attesting officer personally or was identified to him by another person. Without missing point it is worth restating here that the contents of the Court's record forms the basis of the Court's decision and not those possessed by the parties. It is, for that reason, crucial that parties take steps to make sure that the documents they file in courts fully comply with the law.

The above said, the central point for determination is whether the affidavit not indicating whether the deponent is known to the attesting officer or was identified to him by another person is fatally defective.

I indeed agree with Mr. Malata that attestation of affidavits is governed by the Oaths and Statutory Declarations Act, Cap 12 R.E. 2002 (the Act). Section 8 of the Act makes it clear that a jurat should

show when, where and before what authority (whom) the affidavit was made. The authority, who is, usually a Notary Public and/or Commissioner for Oaths (See Section 10 of the Act) 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 The Court decision in the case of **Director of Public Prosecutions Vs Dodoii Kapufi and Another**, Criminal Application No. 11 of 2008 (unreported).*

Given the above requirements, the appearance of the person whom oath is administered or affirmation taken (the deponent) before the authority need not be overemphasized. To ensure that this is complied with, the *jurat* has a special format. This was made clear by the Court in the case of **Jamal Msitiri @ Chaijaba Vs The Republic**, Criminal Application No. 1 of 2012 (unreported) where it was stated that:

*"We would also wish to underscore that Section 10 of the Oaths and Statutory Declarations Act, Cap. 34 R.E. 2002 is relevant in attestation of an affidavit. It provides, in mandatory terms, the form that statutory declarations (**including affidavits**) must take. Such declarations must be in the form prescribed in the Schedule to Cap. 34 (supra). The aforesaid Schedule specifically directs that the Commissioner for Oaths must indicate in the declaration either to have known the deponent personally or the deponent before*

him must have been identified to him by a person known to him personally."

The issue that immediately calls for determination is whether an affidavit is part of Statutory Declarations.

To resolve this issue one needs to understand what an affidavit is.

The Legal Dictionary by S. L. Salwan and U. Narang, 22nd Edition, 2012 defines an affidavit as:

"A written statement made or taken under oath before an officer of the court or a notary public."

C.K. Takwani, in Civil Procedure, Fifth Edition page 27 defines an affidavit as:

"An affidavit is a declaration of facts, reduced to writing and affirmed or sworn before an officer having authority to administer oaths. It

should be drawn up in the first person and contain statements and not inferences."

Black's Law Dictionary, 7th Edition, at page 58 (See **Director of Public Prosecutions V. Dodoli Kapufi** (supra)) defines an affidavit thus:

"A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths."

Further, in Taxwann's Law Dictionary, D.P. Mittal, at page 138, an affidavit is defined thus:

"It is a statement in the name of a person, called a deponent, by whom it is voluntarily signed or sworn to or affirmed. It must be confined to such statement as the deponent is able of his own knowledge to prove but in certain cases may contain statements of information and belief with grounds therein."

It is a common understanding therefore that affidavits contain statements or declarations of facts in a written form affirmed or sworn before an officer having authority to administer oath or affirmation. In that respect, therefore, an affidavit must comply with the provisions of section 10 of the Act in that it must be in the form prescribed in the schedule to the Act which mandatorily requires the Commissioner for Oaths to indicate in the declaration (in the present case, the *jurat*) either to have known the deponent personally or the deponent before him have been identified to him by a person known to him personally. As section 10 of the Act is couched in mandatory terms, failure to comply with it is fatal.

For the above reasons I agree with Mr. Ishengoma that the affidavit in support of the notice of motion is fatally defective. There can never be a valid application where the notice of motion is not supported by a valid affidavit in terms of Rule 48(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) as amended by G.N. No. 362 of 22/9/2017. The purported application is for that reason incompetent.

Before concluding, I wish to address myself to the prayer by Mr. Malata that I should invoke the provisions of article 107A (2) (e) of the Constitution so as to allow the application be heard on merit and not be tied up with technicalities. I think this issue need not detain me much. It is now settled position of the law that Article 107A (2) (e) of the Constitution did not do away with or outlawed all the rules of procedure in the administration of justice. The Court, in the case of **Zuberi Mussa V. Shinyanga Town Council**, Civil Application No. 100 of 2004 (unreported) had this to say in respect of that Article:

*"...article 107A (2) (e) is so couched that in itself is both conclusive and exclusive of any opposite interpretation. **A purposive interpretation makes it plain that it should be taken as a guideline for Court action and not as iron clad rule which bars the courts from taking cognizance of salutary rules of procedure which when properly employed help to enhance the quality of justice delivered... One***

cannot be said to be acting wrongly or unreasonably when he is executing the dictates of law.” (Emphasis added).

In yet another case of **China Henan International Cooperation Group V. Salvand K.A. Rwegasira**, Civil Reference No. 22 of 2005 (unreported) the Court stressed:

"The role of rules of procedure in administration of justice is fundamental... that is, their function is to facilitate the administration of justice."

Given the above legal position and the fact that compliance with the provisions of section 10 of the Act is mandatory, failure to indicate in the *jurat* of attestation whether the deponent was personally known to the attesting officer or was introduced to him by a person known to him, is fatal. That renders the affidavit fatally defective. The affidavit is invalid.

The application is incompetent for want of a valid supporting affidavit. The above sufficiently disposes the application. I accordingly see no reason to consider the points of objections raised by Mr. Ishengoma.

For the foregoing reasons the application is accordingly struck out. Each party to bear its own costs.

DATED at **DAR ES SALAAM** this 31st day of January, 2018.

S. A. LILA
JUSTICE OF APPEAL

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


(E.F. FUSSI)
DEPUTY REGISTRAR
COURT OF APPEAL