

**IN THE HIGH COURT OF TANZANIA  
AT MWANZA**

**MISC.CIVIL APPLICATION NO.02 OF 2006**

***(Arising from Civil Appeal No.67 of 2004 Musoma D/Court, originated  
from Administration Cause No.49/2002 Musoma Urban Court)***

**ALHAJI RAJABU UKWAJU.....APPLICANT**

**Versus**

**BENJAMIN MAKUKA.....RESPONDENT**

**30/7/06 & 20/7/06**

**RULING**

**RWEYEMAMU, J:**

This matter arises from Musoma Urban Probate case 49/2002, where the present respondent **Benjamin Makuka** was appointed administrator of the estate of the deceased one Mectrida Mariam Athanas Ukwaju. The matter was subsequently subject of an unsuccessful appeal by **Alhaji Rajabu Ukwaju** the present applicant and another, in Musoma District Court civil appeal 67/2004, whose decision was delivered on 1/9/2005. Dissatisfied, the unsuccessful party filed an application to appeal that decision out of time for reasons contained in the applicant's affidavit.

The respondent filed a counter affidavit in response, raising two issues by way of Preliminary Objection (PO). The PO of the respondent seeks a dismissal of the application on grounds that:

- a. *"The application is incompetent for not showing the provisions of the law cited in this application, according to the Law of limitation Act, 10 of 1971.*

*b. The Affidavit (are) defective for not showing the name of the Magistrate or Commissioner for Oaths who signed the Affidavit dated 29<sup>th</sup> December 2005"*

That PO, resisted by the applicant is the subject matter of this ruling. He responds that the application is competent in terms of section 14(1) of the Limitation Act; and that the affidavit was "*duly signed by the appropriate magistrate---duly stamped---*, and was *therefore not defective.*" I proceed to deal with the first PO.

Although I am aware of the practice long observed by the court of parties citing specific legislative provisions relied on in their applications, my check under both the Limitation Act as well as the Civil Procedure Code, 1966, revealed no such provision. There could be binding authorities on the issue, but I am not aware of them. My search of the readily available (reported) decisions revealed nothing. I have to admit that the PO left me wondering; if such in fact is the legal requirement, where would that place the right of access to the courts of lay persons; (persons not legally trained) who may be indigent applicants? Be that as it may, I dismiss this part of the PO as being unfounded in law.

I have a different decision in respect of the second PO. Attestation of affidavits is governed by section 8 of the Notaries Public and Commissioner for Oaths Act, (CAP 12 R.E. 2002). It provides that:

*"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"*

The section does not specifically require the attestor to endorse his/her name. But, reading the Act in question in totality, and in light of the Court of Appeal's observation in **Ashura Abdulkadri v. The Director Tilapia Hotel**, MZA civil Appl. 2/2005 (Mwanza registry- unreported), it would appear endorsement by name is mandatory. Why? The TCA in the cited case at p. 3 observed that *'the thrust of the section is to authenticate the document in issue'*. The affidavit in question was attested by a magistrate, as permitted under 10 (2) (d) of that Act. The same Act section 3(2) provides for persons not entitled to practice as notaries public and commissioners for oaths. The list under 2(c) includes *"any person whose name is removed from----for professional misconduct, until the name is restored"* (Emphasis mine).

Now, if endorsement by name particularly when the person attesting is a magistrate is not necessary, and only a stamp of the court and signature are required, how would anyone authenticate the document as being signed by a practicing magistrate; given each court has more than one magistrate. Endorsement of the word 'Principal magistrate' as was the case in the present instance would not suffice to authenticate the document. In light of the above, I agree and sustain the respondent's second objection that failure to show the name of the magistrate who signed the affidavit made it defective.

I will however, in the interest of justice not dismiss the application as prayed. Instead, I permit the applicant under Order VI rule 17 of the CPC to amend the affidavit supporting the chamber application accordingly, and file an amended one within fourteen days from the date of delivery of this ruling. I make no order as to costs.

**Sgd: R. M. RWEYEMAMU**  
**JUDGE**  
**20/07/2006**

**Date:** 20/07/2006

**Coram:** Hon. R. M. Rweyemamu, J

**Applicant:** Alhaji Rajabu Ukwaju - Present

**Respondent:** Benjamin Makuka - Present

**B/Clerk:** J. Lwiza

**Court:** Ruling delivered this 20<sup>th</sup> day of July 2006 as per coram above.

**Sgd: R. M. RWEYEMAMU**  
**JUDGE**  
**20/07/2006**