

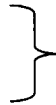
**IN THE HIGH COURT OF TANZANIA  
AT DAR ES SALAAM**

**MISCELLANOUS CIVIL APPEAL NO. 41 OF 2004**

**HASHIM JONGO AND 41 OTHERS.....APPLICATN**

**VERSUS**

**1. ATTORNEY GENERAL  
2. T.R.A**



**RESPONDENT**

**RULING**

**Mlay, J.**

This ruling is on a preliminary objection on points of law to an application for leave to apply for the orders of certiorari, Mandamus and Prohibition. The application, made under sections 2 (2) of the Judicature and Application of Laws Ordinance Cap 45.3 and sections 17 (2) and 17A of the Law Reform (fatal Accidents and Miscellaneous Provisions Ordinance) Act 55 of 1968 and section 95 of the Civil Procedure Code 1966, has been brought by six (6) Applicants (1) BONEPHACE SIGAGE (2) JOSEPHINE MRUTU (3) LIDYA RUTAHIBYA (4) ENOSH FELICIAN (5) DAURS BAKARI and (6) MARIAM YAHYA, representing 42 applicants including the said representatives. The application has been supported by the affidavit of the six

representatives and a statement drawn and filed by G.S Ukwong'a advocate.

The respondents who are the ATTORNEY GENERAL AND TANZANIA REVENUE AUTHORITY have filed a counter affidavit and also gave a Notice of a preliminary objection on points of law that:

- (i) The application is bad in law as it contravenes Order I rule 8 of the Civil Procedure Code, 1966.
- (ii) The affidavit filed by the applicants in support of their application is incurably, defective as it contravenes section 8 of the Notaries Public and Commissioners for Oaths Ordinance, Cap 12.

Both parties were ordered to file written submissions on the preliminary objection. The submissions filed on behalf of the Respondents started with the preliminary objection based on a defective affidavit. The first submission on this point is that an affidavit is governed by certain rules and requirements and that they have to be followed "religiously." Reliance was placed on the decision of the Court of Appeal (Ramadhani J.A) in Civil Application No. 53 of 2002, DB SHAPRIYA AND CO. Ltd BISH INTERNATIONAL BV (Unreported in which and affidavit was defined as follows:

*"An affidavit is a written document containing material and relevant facts or statements relating to the matters in question or issue and sworn or affirmed and signed by the deponent before a person or officer duly authorized to administer any Oath or an affirmation or take any affidavit" The learned State Attorney Submitted further that there requirements are provided for in several statutes and for this application, the provisions of section 8 of the Notaries Public and Commissioners for Oaths Ordinance, Cap 12 which provides as follows:*

*"Every Notary Public and Commissioner for Oaths before whom any oath or affidavit is taken or made under this Ordinance shall state truly in the jurat of attestation at what place on what state the oath or affidavit is taken or made"*

This State Attorney submissions went on to quote from the AB Shapriya's Case cited earlier on where Ramadhani J.A. Commenting on the above quoted provision stated:

*"The Section categorically provides that the place and date which the oath is taken has to be shown in the Jurat. The requirement is mandatory Notary Public and Commissioner for Oath shall state truly in the just of*

*attestate at what place or on what date the oath or affidavit is taken or made. The use of that word truly in my considered opinion under scores that need to follow the letter of the provision."*

The respondents submitted that the affidavit sworn by the six representative applicants contains a Jurat which does not discourse where the affidavit was taken. They further submitted that in the absence of the place where the affidavit was taken, it is a serious defence which goes to the root of the affidavit itself. They therefore prayed that the affidavit be struck out.

In reply the applicants submitted that it is "plainly clear that it is upon that Notary Public and Commissioner for Oaths, **Not the applicant**" to state the place and date. They contended that "the **Commissioner for Oaths** before whom the applicant's affidavit was attested **resides and practices his legal and official activities at Dar es Salaam. He did endorse the place where he carried out his attestation and date**" (emphasis mine). The applicants further submitted that, "the Notary Public and Commission for Oaths before whom the affidavit is made stamped on the Jurat. **The stamp contains among** other words the word Dar es salaam **which indicates that the attestation was made and done before them at Dar es salaam**" (emphasis mine).

In essence, the applicants argument is that it is not their duty to show in the Jurat that the affidavit was taken at Dar es salaam. That, in their view, is the duty of the Commissioner for Oaths. Secondly, they are arguing that by stamping on the affidavit with the stamp of the Commissioner for Oaths which contains the word Dar es Salaam, the Commissioner Oaths complied with the requirements of the Law.

In what appears to be a submission in the alternative, the respondents have referred to the Case of VIP ENGINEERING AND MARKETING LTD VS SAID SALIM BAKHRESSA LTD Civil Applicant No. 47 of 1996 in which Samatta J. stated:

*"While the importance of irrigation cannot be over emphasized, it must not be forgotten that there is a danger of Consumers of justice losing confidence in the court if judicial officers are obsessed more with strict compliance which procedural rules their the merits of the disputes before them are too strong into that error is to aid the judicatures grave diggers".*

They submitted that "**the omission**" of the place of attestation if any, as alleged by the respondent in itself **is not a fatal omission** as such since the affidavit is not being said to be void" (emphasis mine).

It is not seriously being disputed that in the affidavit sworn by the six representative applicants, it is not stated in the Jurat where the Oath was made or the date when the affidavit was sworn. The affidavit was drawn and filed by G.S. Ukwong'a advocate and sworn before P.C.K. MYOVELA as can be gathered from the stamp.

Clearly it is not dated when the affidavit was sworn before Myovela. The provisions of section 8 of the Notaries Public and Commissioners for Oaths Ordinance Cap 12 are very clear and they state:

*"Every Notary Public and Commissioner for Oaths before whom any Oath or affidavit is taken or made **shall state truly in the Jurat of attestation at what place and on what date the Oath or affidavit is taken or made**" (emphasis mine).*

The applicants are right to say that the duty is imposed on the Commissioner for Oaths and not on the deponents. However, the issue here is not one of apportioning blame for the shortcoming. The issue is the validity of the affidavit itself, where the mandatory provisions of the law have not been complied with. From the chain of authorities, it is now settled law that an affidavit which does not comply with that mandatory requirement of stating truly in the Jurat

either at what place or on what date that affidavit was made or both, is incurably defective and no court can act on it. See for example:

1. C/A CIVIL APPLICATION NO. 53 OF 2002 DB SHAPRIYA AND CO LTD VSBISH INTERNATIONAL BV.
2. C/A CIVIL APPLICATION NO. 3 OF 2002 THEOBARD KANAM AND THE GENERAL MAWAZOR K.C.U (1990) LTD.
3. MISC CIVIL APPLICATION NO. 1 OF 2006 JOMBA JOHN KOY (Applicant) VS CHRISTOPHER ONESENDEKA 1<sup>ST</sup> Respondent THE HON. ATTORNEY GENERAL 2<sup>ND</sup> Respondent High Court Arusha Registry (Unreported).

In the present application the Jurat does not contain both the place at which it was made and the date on which it was made. So, even assuming that the stamp of the Natories Public and Commissioner for Oaths containing that word "Dar es Salaam" is taken as the place where the affidavit was taken, still the date on which the affidavit was made is missing and this is fatal. On the issue of stamp, the authorities are clear that, the stamp does not cure the defect. The stamp with the word "Dar es Salaam" can be applied to an affidavit at Arusha and the affidavit filed in Dar es Salaam and vice versa. So the applicants' submission that the stamp on the affidavit is compliance with the law, has no leg to stand on.

In the alternative the applicants have argued that the defect is a mere procedural error which should not prevent this court from looking into the merits of the dispute, on the authority of the V.I.P Engineering case earlier cited. I have no doubt that the situation involved in the V.I.P Engineering Case is different from the present case. In that Case the defect was in the form of the Notice of Motion which was headed, "NOTICE OF MOTION." It is this irregularity which was held not to be fatal. In the present case, there has been a clear non compliance with that mandatory provisions of the law. An affidavit being evidence on oath, is not just a document and strict compliance with the law as to how an affidavit should be taken, cannot be regarded as a mere procedural error.

In the final analysis the 2<sup>nd</sup> preliminary objection is upheld. The affidavit being incurably defective it is stuck out. As the application remains without a supporting affidavit, the application is incompetent and it is accordingly stuck out.

The decision on the 2<sup>nd</sup> point is sufficient to dispose of this application. However, the respondents had raised another point of law in the preliminary objection. The objection is that the application contravenes Order I rule 8 of the Civil Procedure Code 1966.



In the written submissions the respondents have contended that in their affidavit the applicants never explained if they obtained leave of the court to represent the others. They submitted that all persons who intend to be so represented in court have to consent in writing, which has not been done in this case. They cited that case of K.J. MOTORS OTHERS CIVIL APPEAL NO. 74 OF 1999 (Text not made available) and LUJUNA SHUBI BALONZI SENIOR VS RESISTERED TRUSTEES OF CCM (1996) TLR 203 and quoted the decision at page 211 to the effect that:

*"The foundation of Order I Rule 8 CPC is to be found in the principle which transcends the personal or parochial nature of the combatants who are arrayed as parties to the suit. It affects the rights of the other persons not present before the court. Here a duty is cast on the court itself to follow meticulously the procedure prescribed by Order 1 Rule 8. In view of the far reaching consequences of a decree passed in what is described in law as a representative suit, it is necessary that the relevant provisions must be treated as peremptory and mandatory"*

The respondents and also referred to Misc. Civil Application No. 114 of 1994 between George Mponda and others Versus SALUM

IPANDE and 674 others where Samatta JK as he then was, is said to have stated:

*"A representative suit cannot be said to have been validly instituted unless and until the mandatory provision of Order 1 Rule 8 of CPC are complied with. Common interest litigation can be conducted only in accordance with the provisions of order 1 Rule 8 of the Code. Failure to comply with these mandatory provisions is fatal to any such suit or application"*

The respondents submitted that on the strength of the above authorities the applicants were appointed contrary to the mandatory requirements of Order 1 Rule 8. They further submitted that all the applicants ought to have filed affidavits in support of the application. The respondents prayed that this application be dismissed, with costs.

In reply the applicants submitted that the application before this court is not a suit within the meaning of Order 1 Rule 8 of the Civil Procedure Code 1908, being an application for leave to apply for prerogative orders, under Cap 453 of the laws and the FATAL ACCIDENTS and MISCELLANEOUS PROVISIONS, ACT, 1968.

The applicants contended that the 42 applicants in the present application are well known to the 2<sup>nd</sup> respondent who is the employer of the 42 applicants. They stated that it is the same Applicants whose proceedings started from the Conciliation Board up to the Minister for Labour under the provisions of the Security of Employment ACT, 1964. In essence, they submitted that in the present application, an application of this nature leave for a representative suit is not required and that the affidavit sworn and affirmed by the six applicants on behalf of their fellow 36 applicants, is sufficient.

Order 1 Rule 8 of the Civil Procedure Code 1966, provides as follows:

*"8(1) Where that are numerous persons having the same interests in one suit, one or more of such reason may, with the permission of the court, sue, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the court shall in such case give at the plaintiff's expense, Notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by Public advertisement, as the court in each case may directs.*

*(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply7 to the court to be made a party to such suit."*

In this application it is not in dispute that it has been brought by 6 applicants on behalf of 42 applicants. It is not further in dispute that the provisions of Order 1 Rule 8 above have not been complied with. The only issue is whether Order 1 Rule 8 applies to an application of this nature or only to a suit.

First, in the light of the decision on the second point on the defect of the supporting affidavit, this point is now only of academic interest since there can be no application in the absence of a valid affidavit. Secondly, it is not in dispute that the present proceeding is an application for leave to apply for prerogative orders. The question is whether it can be said to be a "suit". The word "suit" has not been defined in the Civil Procedure Code 1966. However, the Oxford Dictionary of Law Fifth Edition defines "suit" as follows:

*"A court claim. The term is commonly used for any court proceedings although originally it denoted a suit in equity as opposed to an action in law....."*

Applying the above definition of the word "suit" to the present proceedings, I have no doubt in any mind that the application being a "court proceeding", it is a "suit" for the purpose of Order 1 Rule 8. Since this court proceeding has *"numerous persons having the same interest in the same proceeding"* and since one or more of these

persons wish to represent the others, the permission of this court has to be obtained.

In short the provisions of Order 1 Rule 8 of the Civil Procedure Code, 1966, apply to an application of this nature. It is immaterial that the applicants are known to the respondent. The question is whether the permission to institute the proceedings on behalf of the others was obtained. Since permission to represent the other applicants in these proceeding was not sought and obtained, this application brought on behalf of 42 applicants is incompetent and liable to be struck out.

The first point in the preliminary objection is therefore also upheld.

In the final analysis both points of law raised in the preliminary objection are upheld. That being the position this application is incompetent and therefore improperly before this court and it is accordingly struck out, with costs.

  
J.I. Mlay

**JUDGE**

Delivered in the presence of Mr. DARUS BAKARI one of the six (6) applicants and in the absence of the respondents this 4<sup>th</sup> day of August, 2006. Right of Appeal is explained.

A handwritten signature in black ink, appearing to read "J.I. Mlay". The signature is written in a cursive style with a large initial "J" and "M".

J.I. Mlay

**JUDGE**

4/8/2006