IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

MISC. CIVIL APPLICATION NO. 34 OF 2018

(Originating from Civil Case No. 18 of 2014 of Bukoba RM's Court)

VALERIAN CHRISPIN MLAY----------APPLICANT

VERSUS

NATHAN ALEX----------RESPONDENT

RULING

20/11/2019 & 19/2/2020

KAIRO, J.

This ruling is the result of the Preliminary Point of Objection (PO) raised by the Respondent's Advocates when filing his counter affidavit as a reply to the Applicant's prayer for an extension of time to file an appeal out of time. The P.O. raised was to the effect that the application is incurably defective, incompetent and bad in law for being supported with a defective affidavit.

The Applicant is being represented by Advocate Lucy Nambuo of Comfort Attorneys and the Respondent is represented by Ms. Gissella Maruka Advocate of Haki Attorneys.

In her brief but focused oral submission, Advocate Maruka stated that the Advocate who administered oath to the deponent didn't sign but only wrote his name and affixed the stamp. She argued that the omission is against the requirement of Section 8 of the Notaries Public and Commissioners for Oath Act No. 12 RE: 2002. Thus the affidavit has been rendered incurably defective and hence incompetent before the law. She referred this court to the case *of Mabi Auctioneers (T) Ltd vrs NBC Holding corporation nee Consolidated Holding Corporation; Civil Application No. 176 of 2004 CAT (DSM) (unreported).* She concluded by praying the court to struck out the application.

In her riposte, Advocate Nambuo conceded to the pointed out omission but attributed it to a mere oversight to which she argued doesn't invalidate the application. She pleaded with the court to exercise its powers and act on the matter despite the anomaly.

She was further of the view that to order the return of the affidavit for it to be signed or to struck it out would cause unnecessary delay. Besides it would amount to punishing the client for the oversight of the signing Advocate. She added that upholding the P.O. will not solve the

is a vehicle for attainment of a substantive justice, it will not help a part to circumvent the mandatory rules of the court." She concluded by praying the court to struck out the application with cost as to entertain the applicant Advocate's prayer amounts to circumvent the mandatory rules of the court.

I have heard the submission from both parties. Both Advocates are at one that the commissioner for oath who administered the oath to the Applicant did not sign at the *jurat of attestation*. The issue for determination is whether the said omission violates Section 8 of the Notaries Public (supra) thus the application has been rendered defective.

For easy reference I wish to recapitulate Section 8 of the Notaries Public (supra):

> *"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. (Emphasis mine)"*

Looking at the said section, mandatory requirement of signing has not been portrayed. However in my understanding the word **'truly'** in the said provision means what has been stated therein in, and in this

context the affidavit is true or sincere- as such the only way of showing sincerity is by signing against what has been stated.

Advocate Nambuo has attributed the omission to an oversight or human error. I paused to ask whether the stated oversight doesn't go to the root of the affidavit and thus can be tolerated. In my view, the answer is in the negative. How can one authenticate the veracity of the said *jurat,* if the commissioner for oath has sworn in the deponent without signing, having in mind that the stamp can be affixed by an unqualified person. In the said circumstances, the omission is fatal and goes to the root of the affidavit itself rendering it defective.

The Applicant's Advocate has also prayed the court to apply the overriding objective principle and allow the matter to proceed. But with due respect, it is imperative to note that affidavits being documents containing material and relevant statements relating to the matters at issue are governed by certain rules and requirement which have to be followed and I hasten to add "followed strictly", as such the court is reluctant to assent to the prayer to proceed, because doing so would condone to the violation of the law.

On the prayer by the Applicant to allow the attacked affidavit be taken to the commissioner for oath for signature and be brought back to court, suffice to state that I join hands with Advocate Maruka's

argument that, there is no such a procedure. But further, even if such a procedure would have been available, the grant would have amounted to circumventing the P.O. raised, which again is unacceptable. I got fortification on this stance in the case of Case of **KANTIBHAI M. PATEL VS DAHYABHAI F. MISTRY: CIVIL APPEAL NO 58/1997 [2003] TLR 437** wherein the court observed that *once an objection is raised, it would be contrary to the law to entertain a prayer the effect of which would be to defeat the objection.*

In the upshot I find the P.O. sustainable. The application is therefore struck out with cost for want of competence.

It is so ordered.

L. G. Kairo

JUDGE

19/2/2020

Date: 19/2/2020

Coram: Hon. J. M. Minde, DR

Appellant: Present

Respondent: Absent

B/Clerk: Kithama

Ms. Nambuo (Adv) for the Applicant:

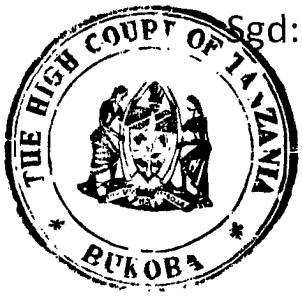
This matter was scheduled for ruling today we are ready to receive the ruling if it is ready.

Ms. Gisela Maruka (Adv) for the Respondent;

Also we are ready for ruling

Court:

This matter appeared today for ruling and it is delivered to the parties and their advocates.



Sgd: J. M. Minde, DR

19/2/2020