

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF SONGEA**

**AT SONGEA**

**MISCELENEOUS CIVIL APPLICATION NO.16 OF 2020**

**(Arising from Civil Appeal No. 06 of 2020)**

**FILBERTHA KAYOMBO..... APPLICANT**

**Versus**

**MAHAMUD DOST MOHAMED .....1<sup>ST</sup> RESPONDENT**

**MAJEMBE AUCTION MART LTD..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Date of Last Order: 01/06/2021.**

**Date of Judgment: 10/06/2021.**

**BEFORE: S.C. MOSHI, J.**

The applicant is seeking leave to appeal against the decision of this court in Civil Appeal No. 06 of 2020. The application is brought under section 5(1)(c) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 and the applicant is praying for the following orders: -

- 1. That this honourable court be pleased to grant the Applicant leave to appeal to the court of appeal against the judgement of this honourable court in civil appeal no. 6 of 2020.*
- 2. Costs be provided for.*

The application is supported by an affidavit deposed by Filbertha Kayombo (the applicant). The first respondent resisted the application and raised a preliminary objection that the affidavit supporting the chamber

summons is incurably defective since it does not state the place where the oath or affidavit is taken or made.

During hearing of the preliminary objection which was by way of written submissions, the applicant was represented by Mr. Edson Mbogoro learned advocate whereas the first respondent was represented by Mr. Melkion Mpangala.

Mr. Melkion Mpangala submitted among other things that, affidavits are governed by certain laws and rules and that these laws set requirements and conditions which are mandatory to be included in the affidavit. That one mandatory requirement is that, the affidavit should have a jurat and the jurat should state or show the place and date where the affidavit is taken. He cited section 8 of the Notaries Public and Commissioner for Oaths Act, Cap. 12 R.E 2019 which requires the affidavit to state in the jurat the place and date where the affidavit was taken or made.

He cited the case of **Director of Public Prosecution vs. Dododli Kapufi and Another, Criminal Application no. 11 of 2018**, Court of Appeal sitting at Dar es salaam (Unreported), which emphasized that the affidavit should have the jurat stating the date and place where the affidavit was taken or made. He argued that omission of the same renders the affidavit incurably defective.



He contended that, the affidavit sworn by Filbertha Kayombo the applicant is incurably defective since the jurat does not show the place where the affidavit was taken. He said that, this is a serious defect which goes to the root of the affidavit itself, and he proposed that the remedy is to strike it out.

He again pointed out that, he has also noted that the name of applicant is Filibertha Kayombo and the name which appears in the jurat is Filiberth Kayombo who is male while the applicant is female, this means that the affidavit is sworn by two different persons. He contended that the error is fatal and it makes the affidavit to be incurably defective and the remedy is to strike it out.

In reply, Mr. Mbogoro submitted that the preliminary objection is misconceived; hence not tenable. He said that the authority cited by the first respondent's advocate **DPP vs. Dodoli Kapufi and Another (supra)** is not in agreement with the respondent's counsel submission rather it supports the applicant's proposition that the jurat of attestation has all essential components namely, when, by whom and before whom.

He said that, section 8 of the notaries Public and Commissioners for oaths Act Cap. 12 R.E 2019 does not describe for any format or style of a jurat rather the said section provides for the contents of a jurat. He argued that looking at the jurat of affidavit in support of the application, all

ingredients of a jurat have been stated. The date has been indicated, the place where the oath was taken is shown to be at Songea and the person by whom the oath was taken has been shown. He admitted that, in typing the applicant's first name, the last letter was inadvertently omitted, this is just a slip of pen. He proposed that, it is one of such circumstances by which the principle of overriding objectives is intended to apply and cure. He argued that, the deponent of an affidavit is identified at the beginning of an affidavit as characterized by the words "I so do .....do hereby swear or affirm" etc and not at the end. He therefore said that, the error is negligible for the ends of justice.

He argued that the fourth and last ingredient of a jurat is that, the jurat must show or indicate before whom the oath was taken. He said that, this requirement has been met.

In rejoinder, Mr. Mpangala said that, looking at the jurat of the attestation of the affidavit of the applicant the word at Songea does not show the place where the affidavit was sworn rather it shows the place where the commissioner for oaths and the deponent knew each other after being introduced by Mary Madunga.

He finally said that, reading between the lines, the jurat of attestation of the applicant's affidavit does not show the exact place



*Sworn by the said Filiberth Kayombo who is  
personal known to me /introduced to me by Mary  
Maduga the latter being personally known to me at  
Songea in my presence this 15<sup>th</sup> day of December  
2020*

***BEFORE ME.***

*Name Lazaro Ernest Simba*

*Signature*

*Address Box 1287*

*Qualification Advocate*

Obviously the above jurat of attestation is not in consonancy with the requirements of section 8 of the Notary Public and Commissioner for Oaths Act Cap. 12 R. E 2019. I join hands with Mr. Melkion Mpangala that the date so provided does not show the place of attestation rather it shows the place where the commissioner for oath knew the deponent. Another error is regarding the name of the deponent. The deponent is Filibertha Kayombo however the jurat indicates that the affidavit is sworn by Filibeth Kayombo. In the case of **DB Shaprya and Co.Ltd vs. Bish International BV [2002] 1 EA**, it was held that affidavits are governed by certain rules and requirements which must be followed religiously. Failure to follow the rules and the requirement governing affidavits, will render the affidavit defective and the remedy is to strike it out.

Therefore, I agree with Mr. Melkiol Mpangala that the affidavit is defective. The immediate issue is whether the affidavit at issue can be rescued by resorting to the overriding objective. It is my view that, the affidavit cannot be salvaged by an overriding objective principle because the error is fatal, an affidavit being an oath cannot be amended. In the case of **Mondorosi Village Council and 2 others vs. Tanzania Breweries and 4 Others**, Civil Appeal No. 66 of 2017 (Unreported) the Court of Appeal has this to say concerning applicability of that principle:



*"Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case. This can be gleaned from the objects and reasons of introducing the principle under section 3 of the Appellate Jurisdiction Act Cap 4 R.E 2002 as amended by the Written Laws (Miscellaneous Amendments) No. 3 Act No. 8 of 2018, which enjoins the courts to do away with technicalities and instead, should determine cases justly. According to the Bill to the amending Act, it was said thus;*

*The proposed amendment are not designed to blindly disregard the rules of procedure that are couched in mandatory terms..."*

In the upshot, I find that the affidavit filed in support of the chamber summons is incurably defective as it does not conform to the requirements of section 8 of the Notaries Public and Commissioners for Oaths Act Cap. 12 R.E 2019; hence it cannot support the affidavit for that reason, there is no affidavit to support the chamber application. Consequently, the application is hereby struck out with costs.

It is so ordered

Right of Appeal Explained.

**S.C. MOSHI**  
**JUDGE**  
**10/6/2021**