

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

MISC. CIVIL APPLICATION NO. 202 OF 2019

(Arising from Civil Case No. 79 of 2015 Ilala District Court)

MGAYA DANIEL STEPHANO.....APPLICANT

VERSUS

ACCESS BANK TANZANIA.....RESPONDENT

RULING

Date of last order: 30/3/2021

Date of Ruling: 20/05/2021

S.M. KULITA J;

This is a ruling on the Preliminary Objection on point of law raised by the Respondent's Counsel Mr. PATRICK S. KINYERERO, on the following points;

- i. That the application is incompetent as the jurat of attestation is incurably defective.
- ii. That the application is incompetent for contravening the mandatory requirement of section 44(1) of the Advocates' Act [Cap 341 RE 2002].

Accordingly, this court fixed the matter to be argued by way of written submissions. The scheduling orders for filing of

submissions in respect of the preliminary objection by both parties was also fixed, the parties henceforth submitted as hereunder;

In his submission in respect of the first ground the Respondent's Counsel, Mr. Kinyerero submitted that the jurat of attestation does not show whether the Commissioner for Oaths knew the applicant personally or through the identification by another person. He submitted that the Commissioner for Oaths was required to indicate if he is familiar with the person making oath before him as per the provisions of section 10 of the Oath (Judicial Proceeding) and Statutory Declaration Act [Cap 34 RE 2002]

Mr. Kinyerero went on to submit that the omission to indicate if the Commissioner knows the deponent renders the application fatally defective. He supported his argument by citing the case of Amani Girls Home Vs. Isaack C. Kamela, Civil Application No. 18 of 2018, CAT at Mwanza.

Expounding on the second ground of preliminary objection, citing section 44(1) of the Advocates Act Mr. Kinyerero submitted that the application contravenes the mandatory provisions of that section for want of the name of the person who drew the application.

In his concluding remarks Mr. Kinyerero prayed for this court to strike out the application.

Replying the 1st ground of the preliminary objection, relying on the issue of *overriding objective (oxygen principle)* the Applicant's Counsel, Mr. Daniel Lisanga submitted that according to the Written Laws (Miscellaneous Amendment) Act No. 3 of 2018 the courts of law have to promote substantive justice to expediate litigations of civil disputes. He further submitted that the defect complained of by the respondent cannot occasion injustice on the part of the Applicant. To back up his argument he cited the case of Yakobo Magoiga Gichere Vs. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza. Mr. Lisanga is of the opinion that the point of objection does not hold water rather a delay tactic of the court process.

Contesting the second ground of the preliminary objection that the application is incompetent for contravening the mandatory requirement of section 44(1) of the Advocate Act, Cap 341 Mr. Lisanga briefly submitted that section 44(1) has little to do with the application at hand and for that reasoning he is of the view that the respondent has failed to meet the aim of the preliminary objection of disposing the matter on merit. To cement his point, he cited the case of BOT vs. D.P. Valambhia, Civil Application No. 15/02, CAT at Dar es Salaam.

I start my analysis with the issue of jurat of attestation which lies on the 1st ground of the Preliminary Objection. Upon carefully going through the submissions of both parties in respect of that issue these are my findings; **Section 10 of the Oaths and Statutory Declaration Act [Cap 34 R.E. 2019]** states that each statutory declaration should be framed in accordance with the format/form that has been prescribed in that statute. The section provides;

"Where under any law for the time being in force any person is required or is entitled to make a statutory declaration, the declaration shall be in the form prescribed in the Schedule to this Act;

Provided that, where under any written law a form of statutory declaration is prescribed for use for the purposes of that law such form may be used for that purpose"

The above cited provision compelled me to go through the complained affidavit. I have observed that in the jurat of attestation the Commissioner for Oaths did not indicate whether he knows the deponent personally or has been identified to him by another person. It therefore contravenes the mandatory requirement of the provision of **section 10 of the Oaths and Statutory Declarations Act**. The same view was held in the case of **Thomas John Paizon Vs. Khalid A. Nongwa, Misc.**

Land Application No. 954 of 2017, H.C. Land Division at DSM where the court stated;

"Under Section 10 of the Oaths and Statutory Declarations Act Cap. 34 R.E. 2002 it is mandatory that the statutory declaration complies with the form prescribed in the schedule and it must be stated and specified in the jurat of attestation whether the deponent was known to the Commissioner for Oaths personally or whether he was identified to him by a person personally known to the Commissioner for Oaths".

In his reply submission the applicant's counsel Mr. Lisanga argued that the court should not rely on technicalities but substantive justice in reaching into just opinion. However, I am of the view that such argument does not hold water in the matter at hand for the reason that the court cannot act blind where the provisions of the law clearly stipulate the procedures to be complied with. In some of its cases the Court of Appeal has declared this position of law in respect of the extent in which the rule of overriding objective can be invoked, that it should not apply in blindly in disregard of the rules of procedure coached in mandatory terms.

Some of those cases include **MONDOROSI VILLAGE COUNCIL & 2 OTHERS V. TANZANIA BREWERIES**

LIMITED & 4 OTHERS, Civil Appeal No. 66 of 2017 CAT at Arusha (unreported) in which it was held;

"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"

In a case of **SGS SOCIETE GENERALE DE SURVEILANCE SA & ANOTHER V. VIP ENGINEERING & MARKETING LTD & ANOTHER, Civil Appeal No. 124 of 2017 CAT at DSM** (page 23) the court had this to say;

"The amendment by Act No. 8 of 2018 was not meant to enable parties to circumvent the mandatory rules of the court or to turn blind to the mandatory provisions of the procedural law which go to the foundation of the case."

The Court of Appeal had the same view in **MARTIN KUMALIJA & 17 OTHERS V. IRON & STEEL LTD, Civil Application No. 70/18 of 2018, CAT at DSM.**

Jurat of attestation is one of the crucial elements in the affidavit. It shows whether the deponent is personally known to the Commissioner for oaths or identified to him by somebody else who is known to the Commissioner. That should be considered as one of the key elements in the affidavit. Disregarding it, is contrary to the mandatory requirement of section 10 of the

Oaths and Statutory Declarations Act as read together with the Schedule to the said Act. There is no way such a grave defect in the jurat of attestation of the affidavit can be cured through overriding objective as the same goes to the root of the case.

Lack of proper identification in the jurat of attestation renders the whole affidavit incurably defective whose remedy is either to strike out the said defective affidavit or the whole matter in general depending on the circumstance of the case. According to the records this is the second application by the applicant on this same matter. The first one was Misc. Civil Application No. 721 of 2017 which was struck out by this court on 26/02/2019 for the reason that the pleadings was annexed with a defective decree. In this second application the affidavit has been found containing a defective jurat of attestation.

The Applicant's Counsel in the said Misc. Civil Application No. 721 of 2017 did not notice the error in the copy of Drawn Order that was supplied to him by the court. Actually, he had the duty to go through it to verify its authenticity before he takes it and attach the same as annexure for the application he had gone to file at High Court. The record in the said Misc. Civil Application No. 721 of 2017 shows that it is the presiding Judge who had noticed the said error and hence struck out the matter.

In that sense, instead of ordering the applicant to file the supplementary affidavit I find it proper for the whole matter to be struck out with costs so that the applicant can weight as to whether he can file another application (the 3rd one) which should be proper, otherwise he should waive the matter.

This first ground of preliminary objection is sufficient to dispose of the matter. I therefore sustain the preliminary objection and **strike out** the application with costs.



HK

S.M. KULITA

JUDGE

20/05/2021