

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

MISC. CRIMINAL APPLICATION NO. 11 OF 2023

PAULO KAMILI.....APPLICANT

VERSUS

JOSEPH JACOB.....RESPONDENT

(Originating from the decision of Hanang' District Court in Criminal Appeal No. 27 of 2022)

RULING

4/8/2023 & 30/8/2023

BARTHY, J.

The above-named applicant moved this court with application preferred under Section 25(1) of the Magistrates' Court Act, 2002 [Revised Edition 2019], (so cited by the applicant), seeking for the following reliefs namely;

- i. That the honourable judge be pleased to grant the applicant for an order extending time for filing appeal out of time vide in the district court of Hanang' Criminal Appeal No. 27 of 2022 which was decided on 8/12/2022 in favour of the respondent.*



- ii. *Any other relief(s) that this honourable court may deem fit and just to grant.*

The respondent filed the counter affidavit to contest the application as well as notice of preliminary objection to the effect that;

- a. *That, this application is incompetent as a chamber summons has been procured under non-existent provision of law.*
- b. *That, the application is incompetent for contravening rule 10 of the Judicature and Application of Laws (Criminal Appeals and Revisions in proceedings Originating from Primary Courts) Rules 2021 G.N. 390 of 2021.*
- c. *That the jurat of attestation is defective.*
- d. *That, this application is incompetent for being supported by a defective affidavit.*
- e. *That, the affidavit contains either legal argumentative, opinion, prayers conclusions or extraneous matters.*

By parties' consensus the preliminary objections were disposed of

by written submissions. The applicant had the services of Mr. Kuwengwa Ndonjekwa learned advocate, while the respondent had the services of Erick Mbeya learned advocate.

In the submission in support of the preliminary objections, Mr. Mbeya abandoned the fourth and fifth preliminary objections. He therefore argued the rest of preliminary objections. However, I find that I will determine the third preliminary objection which may dispose of the application before me.

Submitting on the third preliminary objection, Mr. Mbeya contended that the application is defective for being supported by an affidavit whose jurat of attestation does not indicate whether the deponent is personally known or was introduced to the commissioner for oaths.

He went further to argue that, such omission violates the requirement of section 5 and 10 of Oaths and Statutory Declaration Act [CAP 34 R.E 2019] (to be referred to as the Act). He further stated, the jurat in the affidavit does not indicate as to whether the commissioner for oaths knew the deponent.

Mr. Mbeya cited several decisions to buttress his arguments such as **Waziri Bukuku v. Halima Kondo**, Misc. Land Application No. 911 of 2018

and Thomas John Paizon v. Khalid A. Nongwa, Misc. Land Application No 954 of 2017 (both unreported). He therefore invited the court to strike out the application.

On reply submission Mr. Njonjekwa contended that, the commissioner for oaths who administered the oath knew personally the deponent. He therefore argued there was no need to mention the name. He further submitted that, the jurat of attestation was in accordance to the law. He therefore invited the court to overrule preliminary objection.

On rejoinder Mr. Mbeya reiterated his arguments made in his submission in chief earlier on.

Having gone through the parties' rival submission and the pleadings in this application, with respect to the third preliminary objection the sole issue for my determination is whether the jurat of attestation is incurably defective.

Regarding the arguments of both sides in determination of this issue, Mr. Mbeya argued that the application is defective for being supported by an affidavit, whose jurat of attestation does not indicate whether the deponent is personally known or was introduced to the commissioner for oaths.



In the arguments of Mr. Ndonjekwa, he maintained that the jurat of attestation indicates that deponent is personally known to the commissioner for oaths, thus it complied with the law.

It is incumbent that I reproduce the jurat of attestation for ease of reference, it reads thus;

Sworn at Babati by the said
PAULO KAMILI, *who is known to me personally/*
Identified to me by
the letter known to me personally
in my presence this 10 day of April 2023

The provision of section 10 of the Oaths and Statutory Declaration Act [CAP 34 R.E 2019] requires affidavit to include declarations in the form prescribed in the Schedule of the Act. Whereas, the Schedule directs specifically that, the commissioner must indicate in the declaration either to have known the deponent personally or that the deponent was identified to him by a person known to him personally.

In the present matter, the jurat of attestation did not indicate whether the deponent is known personally or was introduced to the commissioner for oaths. In its present state the jurat in the applicant



affidavit is ambiguous and without a clear indication.

It is settled law that failure to indicate whether the deponent is personally known to the commissioner for oaths or was introduced by someone renders the affidavit defective.

This stance was stated in the case of **Amani Girls Home v. Issack C. Kamela**, Civil Application No. 18 Of 2014, Court of Appeal of Tanzania at Mwanza (unreported), it was held that;

"that an affidavit which does not show in the jurat whether the Commissioner for Oaths knew the applicant personally or through identification by a person known to the Commissioner for Oaths personally is incurably defective.

The above stance was stressed in the decisions of **Waziri Bukuku v. Halima Kondo** and **Thomas John Paizon v. Khalid A. Nongwa** (supra) where the court struck out the application for having jurat of attestation which did not indicate whether the deponent was known to the commissioner for oaths or was introduced by someone else.

Consequently, I find that the defect is on substantive nature and no



amendment should be allowed. This position was emphasized in the case of **Omary Ally Omary v. Idd Mohamed & Others**, Civil Revision No. 90 of 2003, Court of Appeal at Dar es salaam, where the court considered the affidavit as evidence on oath. The failure of the commissioner for oath to indicate how he identified the deponent was said to be the substantive defect that could not be cured by amendment.

In the upshot, the third preliminary objection is sustained for being meritorious and the application is accordingly struck out for being incompetent. Costs to follow events.

It is so ordered.

Dated at Babati this 30th August 2023.



G. N. BARTHY,

JUDGE

Delivered in the presence of the applicant and respondent in person, also Mr. Kuyengwa Ndonjekwa the learned advocate for the applicant.