

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE SUB REGISTRY OF KIGOMA)**

AT KIGOMA

MISC.LAND APPLICATION NO. 18 OF 2023

(Arising from Land Case No. 11 of 2022 before the High Court of Tanzania at
Kigoma)

ATANAS BALABUNGWA MONDO (Administrator of the Estates
of the Late Kobali Mlondo)..... **APPLICANT**

VERSUS

ELINATHAN KOBALI MLONDO @ KOBALI MLONDO.....**1ST RESPONDENT**

MNANILA VILLAGE COUNCIL.....**2ND RESPONDENT**

HON. ATTORNEY GENERAL.....**3RD RESPONDENT**

Date of last Order: 15/08/2023

Date of Judgement: 25/08/2023

RULING

MAGOIGA, J.

This ruling is in respect of preliminary objection on point of law that this application is hopeless and unmaintainable in law as the jurat of attestation of the affidavit in support thereof is defective for not stating when the affidavit was taken contrary to the provision of section 8 of the Notaries Public and Commission for Oaths Act [Cap 12 R.E 2019].

The applicant herein above sought extension of time within which to file an application for leave of appeal made under section 5(1)(a) and Section 11(1) of the Law of the Appellate Jurisdiction Act, [Cap 141 R.E. 2019] and any other enabling provisions of law.



Upon being served, the 2nd and 3rd defendants, filed counter affidavit resisting the grant of the reliefs sought and simultaneously raised preliminary objection against the competency of this application.

When this application was called on for hearing of the preliminary objections, the applicant appeared in person and unrepresented, the 1st respondent was as well present and unrepresented while the 2nd and 3rd defendants were enjoying the legal services of Messrs. Selestine Ngailo and Mr. Godfrey Mwachai, learned State Attorneys.

The applicant prayed this preliminary objection to be argued by way of written submission which prayer I granted.

I truly recommend them for their inputs on the matter. I will not be able to reproduce each and every argument taken, but it suffices to say their respective contributions are accorded the weight they deserve.

Mr. Anold Simeo argued on the preliminary objection by submitting that, it is a stipulation of the law under **section 8 of the Notaries Public and Commissioners for Oath Act [Cap 12 R.E 2019]** that it is an imperatively and mandatory requirement that the date when an oath or affidavit is taken has to be inserted in the jurat of attestation among others. He insisted on this point by saying that the word **shall** of which under section 53(2) of the Interpretation of Laws [Cap 1 R.E 2019] means something imperative.



He further pointed out that in the present application, the applicant has not adhered to such requirements of the law by omitting to state in the said jurat of attestation the date when the affidavit was taken or made hence, according to him, such omission renders the said affidavit defective as it contravenes the requirements of the said provision of the law and that, its remedy is to strike out the said application with costs.

In reply the applicant briefly argued that, the assertion by the 2nd and 3rd respondents that the instant application being defective and its remedy is to be struck out, is unfound and misconceived. According to the applicant, even if the court found so, the allegedly defect is not fatal to the extent of striking out the application but same can be cured by an amendment contrary to the assertion of the 2nd and 3rd respondents.

The applicant further argued that it is the position of the law in many precedents that whenever it is found that either the jurat of attestation or any other part of the oath or affidavit bears some defects, the same is curable by amendment. To buttress his position cited the case of **Bwaheru Masauna vs Ulamu Wisaka**, Misc. Land Application No.55 of 2020, HCT at Musoma, Hon. Kahyoza, J dealing with similar situation had this to say:



"... given the above position of the law, I find the applicant's affidavit is defective and that this is a fit case to order amendment of the affidavit.

Finally, I find the affidavit defective for want of date on both jurat and verification clause also for the Commissioner for Oaths failure to specify whether he knew the deponent or the deponent was introduced to him by a person he knew. The defectives are not fatal. They can be cured by amendment. I exercise my discretion to grant leave to amend the affidavit to rectify the defects only ..."

As regard to the provision of section 53(2) of the Interpretation Laws Act [Cap 1 R.E 2019], on the word **shall**, the applicant replied that, it is not always necessary that whenever the word "**shall**" is used in legal context means something imperative, instead, the same has to be construed depending on the circumstances of the case. According to the applicant, the date in jurat of attestation was not much necessary as the same was already clearly indicated in the verification clause. To support his argument, the applicant cited the case of **Eneriko Kalala vs Mohamed Mussa (Administrator of the estate of the late Ahmed Zahoro Ahmed)**, Civil Application No. 40 of 2021 CAT at Dar es salaam in which the Court cited with approval the case of **Leonard Magesa M/s Olan,**



Civil Application No. 117 of 2014 (unreported) where the court stated that it is not always whenever the word "shall" is used it connotes that it is mandatory, instead, the relevant section or rule must be read in context so as to extract the intent of the Legislature.

The applicant in strong term insisted that, the instant application is proper and has legs to stand before this court and that the alleged defects in the jurat of attestation is curable through amendment particularly in the light of the oxygen/overriding objective principle as enshrined in the Written Laws (Miscellaneous Amendment) Act No. 3 of 2018, and Article 107A (2)(e) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time.

It was the submission by the applicant that this court is empowered to promote substantive justice to expediate litigation of civil disputes. The defects complained by the 2nd and 3rd respondents cannot occasion injustice on the part of both parties if the court is pleased to continue to hearing and determine the merits of the instant application to its finality. On the above reasons, the applicant invited this court to find the preliminary objection raised by the 2nd and 3rd respondents baseless thus praying the court to be pleased to use its discretion to order amendment of the affidavit.

No rejoinder was filed by the 2nd and 3rd respondents.

This marked the end of hearing of the preliminary objection. The task of this court is now to determine the merits or otherwise of the preliminary objection.

Having carefully heard and followed the rivalling submissions on this point by the parties for and against the preliminary objection raised, I have noted that; **One**, it is not disputed that the affidavit does not state when it was taken contrary to the provision of section 8 of the Notaries Public and Commission for Oaths Act [Cap 12 R.E 2019].

However, what is in serious dispute between the learned State Attorneys for the 2nd and 3rd respondents and the applicant is whether the said defective affidavit's remedy is to strike it out or not.

While the counsels for the 2nd and 3rd respondents are of the strong view that by omitting to state in the jurat of attestation the date when the affidavit was taken or made such omission renders the said affidavit to be defective as it contravenes the mandatory requirements of the said provision of the law, thus, according to section 53(2) of the Interpretation of Laws [Cap 1 R.E 2019] which means something imperative, its remedy is to strike out the said application with costs. On the other hand, the applicant is of the strong view that the alleged defects in the jurat of attestation is curable through amendment particularly in the light of the oxygen/overriding objective principle.



For better and easy disposing of this point, let me start with the import of section 53(2) of the Interpretation of Laws [Cap 1 R.E 2019]. For easy of reference, it provides as follows:

"Section 53(2) Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."

Section 8 of the Notaries Public and Commission for Oaths Act [Cap 12 R.E 2019] which also states;

"Section 8 Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall insert his name and state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made."

Going by the literal wording of the above provisions is clear that it is imperatively and mandatorily requirement that the date when an oath or affidavit was taken to be inserted in the jurat of attestation. I have had sight of the chamber summons and its accompanied affidavit and I have also gone through the submissions presented by the parties, I have seen that truly, the applicant's affidavit lacks the date when it was taken or made. As it was correctly argued by the Counsel for the 2nd and 3rd



respondents, the said affidavit is in violation of the provision of section 8(*Supra*).

No doubt, courts in Tanzania will not apply blindly the overriding objective principle against mandatory provisions of procedural law which go to the foundation of cases just as was stated in the case of **Mondorosi village Council & 2 Others v Tanzania Breweries Limited & 4 Others**, Civil Appeal No. 66/2017 CAT (unreported). However, I am not persuaded by Mr. Simeo's argument because the complained anomaly does not prejudice the 2nd and 3rd respondents. I see that, the overriding objective principle has been accepted in fit cases like in **Yakobo Magoiga Gichere v Peninah Yusuph**, Civil Appeal No. 55 of 2017 CAT (unreported):

Upon our mature consideration, we think that this is a case where the Court should have due regard to the need to achieve substantive justice in line with Rule 2 of the Rules as it is our well considered view that the shortcomings, we have pointed out should not lead to the drastic action of invalidating the entire record of appeal. Thus, in the spirit of the overriding objective of the Court we, accordingly, grant leave to the appellant to lodge the omitted copies of written submissions under Rule 96 (6) within twenty-one (21) days from the date of this Ruling.



See also **Jovet Tanzania Ltd v Bavaria N. V.**, Civil Application No. 207 of 2018 CAT (unreported) and **Yusuph Nyabunya Nyatururya v Mega Speed Liner Ltd & Another**, Civil Appeal No. 85 of 2019 CAT (unreported)

In **Yusuph Nyatururya's** case (**supra**), the P.O. was that the appeal was incompetent for want of proper judgment and decree as well as for want of proper certificate of delay but the court held that:

"Ordinarily and under normal circumstances, with these irregularities the appeal would have been struck out. However, with the introduction of the principle of overriding objective which is geared towards expeditious and timely resolution of all matters, under section 3A of the Appellate Jurisdiction Act, Cap. 141 R.E. 202 (the AJA), as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 (Act, No. 8 of 2018), we are hesitant to do so. This is due to the fact that, in the case at hand, among others, it is obvious that, the pointed-out anomaly was not occasioned by the appellant. We are equally settled that, the respondents were not prejudiced by the said anomaly, as the judgment which was pronounced and



delivered is the same judgment composed and duly signed by the presiding judge. In this regard and in order to meet the ends of justice, we find this to be an opportune moment to invoke the overriding objective principle and allow the appellant to correct the identified anomaly by filing a supplementary record with the proper and duly signed judgment and decree of the High Court in accordance with the law...

I find that in the circumstances of this application, the overriding objective principle is applicable, I accordingly apply it. The applicant is as such given chance to amend the anomaly only on dates and have them included as required by law.

Mr Simeo's invitation to this court to uphold the preliminary objection on points of law and struck out Misc. Land Application No. 18 of 2023 does not find purchase with me. To the contrary, the preliminary objection on the legal point of objection is overruled. Costs shall abide the outcome of the application. It is so ordered.

Dated at Kigoma this 25th day of August, 2023.




S. M. MAGOIGA
JUDGE
25/08/2023