

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(DAR ES SALAAM SUB REGISTRY)**  
**AT DAR ES SALAAM**  
**MISC. CIVIL APPLICATION NO. 315 OF 2022**

**SAMIHA ABDULKADIR OSMAN..... Applicant**

**VS**

**MOHAMED RAFI SAMMI.....Respondent**

**RULING**

**S. M. MAGHIMBI, J:**

Before this Court the applicant filed an application for leave to appeal to the Court of appeal against the decision of this court in Civil Appeal No. 4/2020. While filing counter affidavit to oppose the application, the Respondent, raised preliminary point of objection on point of law that:-

1. The affidavit supporting the chamber summons is incurably defective by containing a defective jurat of attestation contrary to Section 8 of the Notaries Public and Commissioner for Oaths Cap. [Cap. 12 R. E 2019].

The objection was disposed of by way of written submissions and the parties successfully complied to the order hence this ruling. The respondent's submission were drawn and filed by Mr. Sigbert Ngemera, learned Advocate, and the applicant's submissions were drawn and filed by Mr. Elay Nyamoga, learned advocate.

Submitting on the objection, Mr. Ngemera elaborated that under the provisions of Order XLIII Rule 2 of the Civil Procedure Code Cap. 33 R. E. 2019 ("the CPC"), any application before this Court must be filed by a

Chamber Summons. That the application before the Court suffers a defect for failure to disclose the place where it was made as the jurat of attestation is silent on this mandatory aspect. He went on submitting that it is clear from the affidavit sworn by Samiha Abdukadir Osman, supporting the chamber summons, that the same disclose no place as to where it was affirmed. His argument was that this is not a technicality but a mandatory requirement from the position of the law whereby the law puts an emphasis by using the word "shall" within the context of Notaries Public and Commissioner for Oaths Act [Cap. 12 R. E. 2019] ("the NPCOA") where it is provided that:

*"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".*

Mr. Ngemera then submitted that from the above position of the law, it is paramount to indicate the place where the affidavit was affirmed or taken and that non-compliance of the above provision the application must be struck out. He then cited the case of **Hadija Adam vs Godbless Tumbo, Civil Application No. 3 of 2010** and **The Government of the great Socialist People's Libyan Arab Jamahiriya and The Hon. Attorney General vs Meis Industries Limited** to support the argument. He then argued that this anomaly goes to the root of the document because an affidavit is evidence in itself.

He submitted that while aware of the overriding objective principle. However, he argued that the Courts are enjoined not to act blindly where the provisions of law clearly stipulate the procedures to be complied and

as such couched in mandatory terms like it is under section 8 (supra). Supporting his submission, he cited the case of **Mondorosi Village Council & 2 Others vs Tanzania Breweries Limited & 4 Others, Civil Appeal No. 66 of 2017** CAT at Arusha where it was held that;

*"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 foundation of the case".*

He also cited the case of **SGS Society General SA & Another vs VIP Engineering & Marketing Ltd & Another, Civil Appeal No. 124 of 2017** CAT at Dar es Salaam held that;

*"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".*

Concluding his submissions, Mr. Ngemera submitted that the affidavit supporting the current application is incurably defective and as such it cannot withstand the wrath of being struck out.

Replying to the objection, Mr. Nyamoga, Counsel for the applicant submitted that the NPCOA provides that: -

*"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 what date the oath or affidavit is taken or made".*

He then submitted that the applicant's affidavit contains all of the requirements or ingredients dictated by the provisions of section 8 of the law save for the place where the attestation took place. He was of the considered view that the fact that the applicant has stated that she is a resident of Dar es salaam and is based on the territorial jurisdiction of the high Court, should have been understood that the place of attestation was Dar es Salaam.

Moreover, Mr. Nyamoga submitted that, even when you look at the verification clause it portrays shreds of evidence that the applicant verified her affidavit at Dar es Salaam. He hence argued that this runs consonance with the place of jurat as there is no way for an applicant could have verified at Dar es Salaam and the jurat to take place different area. That the omission done is minor and a curable defective and the Court is invited to ignore and treat it as a slip of a pen.

However, Mr. Nyamongo claimed that failure to indicate a place where the attestation took place is no longer fatal as it is a curable defect by allowing the applicant to file an amended affidavit as it was held in the case of **Bwaheeri Masauma vs Ulamu Wisaka, Misc. Land Application No. 55 of 2022** where the Court stated:

*"As the record of the court bears testimony, the verification clause and the jurat of the applicant's affidavit were not dated. Failure to indicate the date when the affidavit was taken is a defect, in my opinion, that defect is curable. With due respect, I am not in agreement with Mr. Waikama learned advocate that the defect is fatal".*

He submitted further that the cases cited by the respondent specifically, the case **Hadija Adamu vs Godbless Tumbo**, (supra) and the case of **The Government of the Great Socialist People of Libyan Arab Jamahiriya & The Attorney General Vs Meis Industries Limited**, (supra), are of no help on this error considering the advert of the principle of overriding objectives brought by the written Laws (Miscellaneous Amendment) Act (No.3) which now requires the Courts to deal with cases justly and to have regard to substantive justice. It was therefore his argument that the respondent should not be allowed to take us back to 2011 and 2013 when those cases were decided in the absence of overriding objective principle which invites the Court not to be tied up by technicalities that may occasion delay cases in Court.

Mr. Nyamongo urged this Court to consider the omission of the place of attestation as an error not amounting to prejudice to any part or the Court itself. That if this Court will find that justice has been prejudiced, then order for the amendment of the said affidavit without costs to the parties considering that the applicant and respondent are fighting for the right of their child.

Having considered the parties' submissions and having gone through the records, it is apparent that both parties do not dispute that the place where the affidavit was affirmed was not disclosed in the affidavit in support of the application as the jurat of attestation is silent on this mandatory aspect. On his part, Mr. Nyamongo is moving the Court to apply the principles of overriding objective and treat the omission as a minor one or in the alternative order an amendment of the affidavit. On the hand, Mr. Ngemera moves the court to struck out the application for

the omission pointed makes the affidavit in support of the application fatally defective.

On my part, I am in one with Mr. Ngemera that omission of the jurat of attestation to indicate as to where the same was attested as required by section 8 of the NPCOA makes the affidavit in support of the application fatally defective. The law is clear by using the word "shall" which under the provisions of Section 53 (2) of the Interpretation of Laws Act [Cap. 1 R. E. 2019] makes it a mandatory requirement. Hence under the provisions of Section 8 of the NPCOA, it is a mandatory requirement to show place where the jurat was attested.

I have also noted that in both their submissions, the Counsel for the respondent and applicant addressed the Court on the overriding objectives principle. From the submissions, each party interpreted the said principle in their favour. On his part, Mr. Ngemera, stated that the overriding objective principle has no place in this case as the omission is fatal while Mr. Nyamonga urged the court to apply the overriding objective and order an amendment of the affidavit, treating the omission as minor. At this juncture, I make reference to the decision of the Court of Appeal in the case of **Mondorosi Village Council & Others vs Tanzania Breweries Ltd & Others (Civil Appeal 66 of 2017) [2018] TZCA 303 (13 December 2018)**. In this case, the Court of Appeal had the following to say concerning the applicability of the overriding objective 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 141 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 Page 12 of 14 cases justly. According to the Bill to the amending Act, it was said thus; The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms." (Emphasis added).*

The Court of appeal again set clarity to the use of the overriding objective principle in the case of **Martin D. Kumaliya & Others vs Iron & Steel Ltd (Civil Application 70 of 2018) [2019] TZCA 234 (27 February 2019)**, a case in which the procedural error committed by the Respondent was the same as that committed by the Appellant in the Mondorosi case (supra). On the Respondent's advocate's prayer to the Court to apply the oxygen principle to save this appeal, the Court of Appeal (Mugasha, J.A, Ndika, J.A and Kwariko, J.A) remarked:

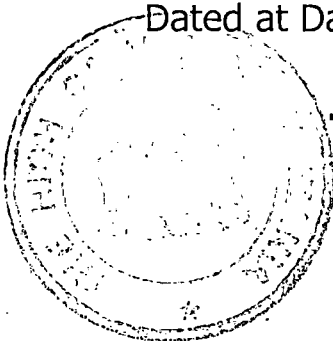
*"While this principle is a vehicle for attainment of substantive justice, it will not help a party to circumvent the mandatory*

*rules of the Court. We are loath to accept Mr. Seka's prayer because doing so would bless the Respondent's inaction and render superfluous the rules of the Court that the respondent thrashed so brazenly."*

On those two precedents which are binding in this court, it is my strong view in the current case, the principle of Overriding Objective cannot absorb the violation of the mandatory provision of Section 8 of NPCOA. The principle is not a broad-spectrum antidote for every procedural error even in situations where the omission is in violation of a mandatory principle of law making the matter fatally defective. That principle cannot, in fact, be applied mechanically to suppress or bulldoze other significant legal principles the purposes of which are also to promote fair administration of justice. It is my settled view that the irregularity discussed above, cannot be cured by resorting to the principle of Overriding Objective.

On those findings, it is conclusive that the affidavit in support of the Chamber Summons is fatally and incurably defective making the application before me incompetent. Consequently, the application is hereby struck out with costs.

Dated at Dar es Salaam this 28<sup>th</sup> day of June, 2023



  
.....  
**S. M. MAGHIMBI**  
**JUDGE**



