IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 313 OF 2015

(Arising from Commercial Case No. 131 of 2015)

UAP INSURANCE TANZANIA LIMITED ..... APPLICANT

VERSUS

NOBLE MOTORS LIMITED ..... RESPONDENT

30th May & 30th June, 2016

RULING

MWAMBEGELE, J.:

The respondent has filed a preliminary objection against this application for leave to defend a summary suit. The preliminary objection is couched thus:

> "The affidavit supporting the Application is fatally defective for offending the mandatory provisions of law and specifically Rule 74 (2) (c) of the High Court (Commercial Division) Procedure Rules, 2012 GN No. 250 of 2012 and the law in general."

The preliminary objection (hereinafter "the PO") was argued before me on 30.05.2016 during which Mr. Nduruma Majembe, learned counsel for the respondents argued for the PO and Mr. Peter Swai, learned counsel for the applicant resisted it.

Both learned counsel were brief in their submissions. It was Mr. Majembe, learned counsel who ignited the oral hearing by stating that the affidavit offends the mandatory provisions of rule 74 (2) (c) of the High Court (Commercial Division) Procedure Rules, 2012 - GN No. 250 of 2012 (henceforth "the Rules") because it has a jurat of attestation which has only a signature and impressed stamp but missing other necessary ingredients. He stated that this is contrary to the rule cited above, for, it lacks the full name, address and qualification of a person before whom the affidavit was sworn. The learned counsel reminded the court that the rubber stamp is not part of the jurat. He referred the court to the cases of ***Felix Mkosamali Vs Jamal A. Tamim***, Civil Application No. 4 of 2012, ***Sharifa Ahmed Kaidi Vs Magreth Masao*** Civil Application No. 6 of 2011; both unreported decisions of the Court of Appeal. With that defect in the affidavit, Mr. Majembe, learned counsel, prayed that the application be dismissed with costs.

On the other hand, Mr. Swai, learned counsel for the applicant, rebutted that rule 74 of the Rules gives power to the Deputy Registrar of this court to reject an affidavit which contravenes Order IX of the CPC and section 8 of the Notaries Public and Commissioners for Oaths Act, Cap. 12 of the Revised Edition, 2002. He argued that those powers given to the Registrar are discretionary and are to be exercised subject to rule 74 (2) of the Rules because it uses the word "may". He continued to argue that section 8 of Cap. 12 provides what is supposed to be contained in the Jurat; these are the "who", "where" and "when" the oath has been taken. These were complied with and that is the reason why the Registrar did not reject the affidavit, he argued. He stressed that an affidavit cannot be defective just because the name of the officer attesting was not included in the jurat. He relied on ***Samwel Kimaro Vs Hidaya Didas***, Civil Application No. 20 of 2012 (CAT

unreported), also an unreported decision of the Court of Appeal, for this proposition. He also relied on that case ***Samwel Kimaro*** (at page 9 of the Ruling), to pray that in case the court finds that the defect is fatal, it (the Court) is asked to allow the applicant to make an amendment thereof.

In a short rejoinder, Mr. Majembe stated that the ***Sharifa Ahmed Kaidi*** was decided after ***Samwel Kimaro*** and discussed it at page 4 onwards. He added that a defective affidavit continues to be defective even after admission by the Registrar. The learned counsel relied on an unreported decision of the Court of Appeal of ***Kagera Sugar and Vuai*** (which he undertook to supply but has never walked the talk to date), for the stance that defects in the jurat are incurable defects which cannot be amended. The only solution, argued the learned counsel, is to have the application re-filed after the court strikes it out.

The basic question which this ruling must answer is whether the non-inclusion of the full name, address and qualification of the attesting officer in the jurat of attestation is an incurable defect. For easy reference, the provisions of rule 74 (2) (c) under which the PO is pegged reads:

> "Notwithstanding the provision of sub rule (1), the affidavit or counter affidavit shall not be deemed defective unless;-
>
> a) N/A;
>
> (b) N/A

(c) it does not contain the full name, address and qualification of the person before whom it was sworn or affirmed; or

(d) N/A"

This provision, save for the requirement of the full name of the attesting officer, is a recitation of section 8 of the Notaries Public and Commissioners for Oaths Act, Cap. 12 of the Revised Edition, 2002. For easy reference, let me reproduce this provision hereunder:

> "Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat of attestation **at what place and on what date the oath or affidavit is taken or made**".
> [Emphasis added].

Luckily, in respect of lack of the name of the attesting officer in the jurat of attestation, I have had an opportunity to canvass on in some of my previous rulings. However, that was in respect of cases other than commercial cases to which the Rules are applicable. One such ruling is ***Ipyana Seme Vs Edson Mwasota***, Miscellaneous Land Cause No. 27 of 2011 (unreported) wherein I had discussed the two schools of thought on the point brought about by ***Mkosamali*** and ***Bulk Distributors*** on the one hand and ***Samwel Kimaro*** on the other and settled with ***Samwel Kimaro*** which was the latest case at that time. Following the majority decision in ***Samwel Kimaro***, I categorically stated at page 11 of the ruling:

> "... the law does not put as a mandatory requirement for the name of the attesting officer to appear in the jurat of attestation of an affidavit. Neither is it a rule founded upon practice. It is just a desirable practice because it has an added advantage of further authenticating the affidavit and thereby rendering the attesting officer more identifiable. An affidavit will therefore not be rendered defective on the mere fact that the name of the attesting officer is not stated in the jurat of attestation."

But at a later point, the Court of Appeal surfaced with yet another decision on the point in ***Sharifa Ahmed Kaidi*** (supra) departing from its earlier immediate position in ***Samwel Kimaro***. The *ratio decidendi* in ***Sharifa Ahmed Kaidi*** is that failure to show the name of the attesting officer is an incurable defect and makes an application incompetent.

As if the foregoing is not enough, in the recent past; on 03.02.2015 to be particular, the Court of Appeal, once again, came up with yet another position on the very point. This was in ***Arcopar (O.M.) S.A Vs Harbert Marwa and Family & 3 Others***, Civil Application No. 94 of 2013 (unreported). The ***Arcopar*** case discussed the two schools of thought on the point and the confusion in our midst as well as the way forward. Having addressed its mind at some length to the doctrine of precedent and *stare decisis*, the Court of Appeal came up with the following guideline:

> "... where the Court is faced with conflicting decisions of its own, the better practice is to

> follow the more recent of its conflicting decisions unless it can be shown that it should not be followed for any the reasons discussed above. It is for the above reasons that we have decided to follow the majority decisions in **KIMARO's case,** not out of disrespect for the author of the minority decision, but because as observed above, the latter follows the older of the two schools of thought. So, in our view **until such time as the full Bench would be convened to resolve the conflict, or the statute is amended, the position of the law on this point, should be that, the absence of an attesting officer's name in the jurat of an affidavit by itself, is not an incurable defect.**"
>
> [Emphasis supplied].

It is apparent that the ***Arcopar*** case reverted us to ***Samwel Kimaro***. But the problem is not settled yet as the ***Arcopar*** case seems to sound. The principle that was emphasized in ***Arcopar*** is that in case of conflicting previous decisions, the Court of Appeal, would follow the more recent of its conflicting decisions unless it can be shown that it should not be followed for any the reasons discussed in that ruling of the Court. Surprisingly, the Court of Appeal did not discuss ***Sharifa Ahmed Kaidi*** which was its more recent of its conflicting decisions on the point. Not even a mention of it was made. It would appear, perhaps, the panel in ***Arcopar*** was not aware of ***Sharifa Ahmed Kaidi***. But one wonders how could that be possible because one the members of the panel in ***Sharifa Ahmed Kaidi*** was also a member in

Arcopar. That is the reason why I said the ***Arcopar*** case has not cleared the confusion yet. Be that as it may, the principle in this jurisdiction (and many commonwealth jurisdictions) which has also surfaced in ***Arcopar*** is that this court will follow the decisions of the Court of Appeal regardless of their correctness. That principle was stated in ***Jumuiya ya Wafanyakazi Tanzania Vs Kiwanda cha Uchapishaji cha Taifa*** [1988] 146 in the following terms (I quote the second headnote thereof):

> "All courts and tribunals below the Court of Appeal are bound by decisions of the Court regardless of their correctness".

And ***Arcopar*** has reiterated:

> "We have to finish this note however, by cautioning that the above list of circumstances justifying a departure from the Court's own decisions is by no means exhaustive; and that generally those principles do not apply to subordinate courts of appeals; when they are faced with the decision(s) of this Court, **however erroneous they might appear to be**."

It may not be irrelevant to underline the observations of the Court of Appeal in ***Sharifa Ahmed Kaidi*** which, as already alluded to above, immediately preceded ***Arcopar***. The court of Appeal observed.

> "After carefully considering the submissions of both counsel for the parties as well as traversing the decisions of this Court referred to above, we

wish to take note of the opinions made by the two Hon. Judges in the said case of ***Samwel Kimaro v. Hidaya Didas*** (supra). We highly respect their views which are founded on reconsideration of the scope of section 8 of the Act. However, we agree with Mr. Makange that the decisions in the cases of ***Felix Francis Mkosamali v. Jamal A. Tamim*** and ***M/S Bulk Distributors Ltd v. Happyness William Mollel*** (supra) in which the Court restated the requirement to indicate the name of the attesting officer on that portion of the jurat of attestation is good law. In our view, it is not enough for the attesting officer to just sign and impress a rubber stamp thereat. The rationale is that not all commissioners for oaths and notary public listed under section 10 (2) of the said Act have personal stamps. The list of commissioners under that provision include any persons employed by the Government of the United Republic and who, under the provisions of section 3 of the Advocates Act are entitled to practice as advocates of the High Court; any persons employed by the Tanzania Legal Corporation established by the Tanzania Legal Corporation (Establishment) Order, and who, under the provisions of section 3 of the Advocates Act, are entitled to practise as advocates of the High

> Court; the Registrars of the Court of Appeal, the Registrars of the High Court and every Deputy Registrar; magistrates and Administrative Officers in the service of the Government of the United Republic. In our firm view, the rubber stamp impressions of many of them without more will be meaningless. It is an unhealthy situation for affidavits signed by such commissioners without disclosing their names to be acted upon for, that way, there will be no easy way of braving or overcoming deceit or treachery. Such situation has attracted us to accept as a fact that the previous should be followed at least until when, perhaps, the said provision of law may have been reassessed."

Much as I thought ***Arcopar*** would have followed ***Sharifa Ahmed Kaidi*** which was its "more recent of its conflicting decisions" and much as I am bound by ***Arcopar***, the more recent of its conflicting decisions irrespective of whatever view I have against it, if it were a normal civil case (not a case to which the Rules are applicable), I would have found and held that the absence of an attesting officer's name in the jurat of an affidavit by itself, is not an incurable defect.

But the situation is different in a commercial case, like the present, to which the Rules are applicable. In cases in the Commercial Division of the High Court where the Rules are applicable, it is mandatory that, *inter alia*, the name of the attesting officer must appear in the jurat of attestation. This is

so because of the mandatory dictates of rule 74 (2) (c) of the Rules. Thus I find and hold, in the present case, the absence of an attesting officer's name in the jurat of the affidavit supporting the application is an incurable defect. It makes the application which it purports to support lacking the necessary support and thus incompetent.

The foregoing would have sufficed to dispose of this matter. However, for completeness, I wish to canvass other defects in the jurat complained of by Mr. Majembe, the respondent's counsel. The jurat of attestation also lacks the address of the attesting officer as well as the place where the affidavit was sworn. The provisions of rule 74 (2) (c) of the Rules as well as section 8 of the Notaries Public and Commissioners for Oaths Act (both quoted above) mandatorily require that the jurat of attestation should contain where (place) and when (date) the oath or affidavit is taken or made. This mandatory requirement has not been complied with in the present instance. As the requirement is mandatory, the affidavit becomes defective.

For the avoidance of doubt, I am aware that the affidavit under attack by Mr. Majembe, learned counsel, bears in the jurat a rubber stamp impression on which the name of the attesting officer before whom the affidavit was made, the place where the affidavit was made and sworn. However, as rightly pointed out by Mr. Majembe, learned counsel for the respondent, the rubber stamp is not part of the jurat. That this is the law has been stated in a string of decisions. These are ***Zuberi Mussa Vs Shinyanga Town Council***, Civil Application No. 100 of 2004 (unreported), ***Theobald Kainam Vs the General Manager, K.C.U. [1990] Ltd***, Civil Application No. 3 of 2002 (unreported), ***The Registered Trustees of Joy in the Harvest Vs Hamza Sungura***, Civil Application No. 3 of 2003 (unreported), ***Mohamed I.A.***

Abdulhussein Vs Pita Kempap Limited [2005] TLR 383 and ***DB Shapriya and Co Ltd v Bish International BV*** [2002] 1 EA 47, to mention but a few. In ***Abdulhussein***, for instance, this court (Shangwa, J.) held (I quote from the headnotes):

> "(i) Affidavit which does not state, in the jurat of attestation, the place where it was taken is defective;
> (ii) Stamp impression of attesting Notary Public and Commissioner for oath placed at the foot of the affidavit is not part of the jurat;
> (iii) An application which is supported by a defective affidavit lacks the necessary support and is incompetent"

And in ***Shapriya***, discussing the letter of section 8 of the Notaries Public and Commissioners for Oaths Act, the court of Appeal held:

> "The section categorically provides that the place at which an oath is taken has to be shown in the jurat. The requirement is mandatory: notary publics and commissioners for Oaths 'shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made'. The use of the word 'truly' in my considered opinion underscores the need to follow the letter of the provision. This provision is not a sheer technicality ..."

On the basis of the foregoing authorities, I am of the considered view that one cannot decipher a place and date where the affidavit was taken by looking at the rubber stamp impression of the officer before whom the affidavit was taken or made, for, a rubber stamp impression is not part of the jurat of attestation. In the present application, in addition to the signature of the attesting officer, it ought to have been shown in the jurat of attestation, *inter alia*, the address/place where the affidavit was taken. That defect, again, makes the affidavit incurably defective and makes the application lacking the necessary support.

I will not grant the prayer by Mr. Swai, learned counsel for the applicant to the effect that should I find the anomaly incurable, I should be pleased to allow the applicant to rectify the anomaly by an amendment. This is not legally acceptable, for it will be tantamount to preempting the preliminary objection raised by the respondent. It is the law in this jurisdiction that a preliminary objection should not be preempted. That this is the law has been stated times and again in a glut of cases in this jurisdiction. One such case is ***Mary John Mitchell Vs Sylvester Magembe Cheyo & ors***, Civil Application No. 161 of 2008 (unreported) in which the Court of Appeal reiterated its earlier position it stated in ***Method Kimomogoro Vs Board of Trustees of TANAPA***, Civil Application No. 1 of 2005 (unreported) wherein it stated:

> "This court has said in a number of times that it will not tolerate the practice of an advocate trying to preempt a preliminary objection either by raising another preliminary objection or trying to rectify the error complained of."

That was not the first case the Court of Appeal held that a preliminary objection should not be pre-empted. There are other cases. Such cases include ***Shahida Abdul Hassanali Kassam Vs Mahedi Mohamed Gulamali Kanji*** Application No. 42 of 1999 (Unreported), ***Almas Iddie Mwinyi Vs National Bank of Commerce & Another*** [2001] TLR 83, ***Alhaji Abdallah Talib Vs Eshakwe Ndoto Kiweni Mushi*** [1990] TLR 108, ***The Minister for Labour and Youth Development and Shirika la Usafiri DSM Vs Gaspa Swai & 67 Others*** [2003] TLR 239] and ***Frank Kibanga Vs ACCU Ltd***, Civil Appeal No. 24 of 2003 (unreported), to mention but a few.

In recapitulation, I wish to state as follows. The need to indicate in the jurat the full name, address and qualification of the attesting officer is a mandatory requirement in commercial cases in the Commercial Division of the High Court under the provisions of rule 74 (2) (c) of the Rules. The stance of the Court of Appeal that the absence of an attesting officer's name in the jurat of an affidavit by itself is not an incurable defect is only applicable to cases to which the Rules are not applicable.

I wish to state as a postmortem that there is a Bill being tabled in the ongoing Parliamentary Session proposing an amendment to section 8 of the Notaries Public and Commissioners' for Oaths Act. The Bill - The Written Laws (Miscellaneous Amendment) (No. 2) Bill, 2016 – proposes in section 47 thereof for the inclusion of the name of the attesting officer in the jurat of attestation. If the amendment sails through, inclusion of the name of the attesting officer in the jurat of attestation will be a mandatory requirement in all cases. This will clear all the predicaments that we have found ourselves in because of the conflicting decisions of the highest court of our land on the

point in normal cases; that is in cases other than cases in the Commercial Division of the High Court to which the Rules are applicable.

On the basis of what I stated earlier on, the PO by the respondent is with merit and therefore sustained. The present application is consequently struck out with costs to the respondent for being incompetent.

Order accordingly.

DATED at DAR ES SALAAM this 30th day of June, 2016.

J. C. M. MWAMBEGELE

JUDGE