

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)

AT MWANZA

MISC.COMMERCIAL APPL. NO.16 OF 2019

(Arising from Misc. Commercial Cause No.05 of 2019)

CAPITAL DRILLING (T) LIMITED.....1st APPLICANT
CAPITAL DRILLING LIMITED.....2nd APPLICANT
DAVID REGAN PYNE.....3rd APPLICANT
JAMIE PHILLIP BOYTON.....4th APPLICANT
ADILI CORPORATE SERVICES
TANZANIA LTD.5th APPLICANT

VERSUS

SIRILI ILETI MUSHI.....RESPONDENT

RULING

Date of the Last Order: 06/07/2020

Date of the Ruling: 09/07/2020

NANGELA, J.:

Through a Chamber Summons made under Section 5 (1) (c) of the *Appellate Jurisdiction Act, Cap.141 [R.E.2002]* and Rule 45 (a) of the *Court of Appeals Rules 2009*, the five applicants herein filed this application seeking for the following orders, namely:

1. That, this honourable Court be pleased to grant the Applicants leave to appeal to the Court of Appeal against the whole of the decision of this honourable Court (*Magoiga, J*) dated October 2019.
2. That, Costs of this Application be borne by the Respondents.

The Application was supported by an affidavit of one Ernestilla John Bahati, an advocate of the Applicants, which was filed in this Court on 11th November 2019. The said affidavit set-forth grounds and reasons upon which the Application is premised.

On 06th December 2019, the Respondent filed his counter-affidavit. Besides, the Respondent filed a *Notice of Preliminary Objection* on the same date. In that *Notice of Preliminary Objection*, the Respondent raised one preliminary objection, to wit, that, *the affidavit supporting the application is incurably defective as it contravenes mandatory provisions of section 8 of the Notaries Public and Commissioner for Oaths Act, [Cap.12 R.E.2002].*

On the 03rd of July 2020, the Applicants filed their skeleton arguments against the *Notice of Preliminary Objection* in accordance with the requirements of Rule 64 of the *High Court (Commercial Division) Procedure Rules, GN.No.250 of 2012 (as amended by GN.107 of 2019)*. Earlier, on the 17th of February 2020, however, the Respondent had filed skeleton arguments in support of the preliminary objection as well as skeleton arguments in opposition to the application for leave.

On the 06th of July, 2020, when this Application was called on for its hearing, the appearance before the Court was as follows: Miss Ernestilla John Bahati, learned advocate, appeared for the Applicants, while Mr. Nobert Mlwale, also a learned counsel, appeared for the Respondent. Since the Respondent had filed a preliminary objection (PO), Miss Bahati prayed that the Court should proceed to the hearing and determination of the "PO".

Mr. Mlwale had a different view. He submitted that, the Court should hear both the "PO" and the application at the same time to expedite the process. Having looked at the application I decided that the parties should argue the "PO" first. Addressing the Court in support of the "PO", Mr. Mlwale adopted his skeleton arguments filed in this Court on the 17th February 2020 and prayed that they be taken to form part of his submission.

He informed the Court that, the "PO" was filed on the basis of what section 8 of the *Notaries Public and Commissioner for Oaths Act*, [Cap.12 R.E.2002] provides. In essence, his contention was that, the section was not complied with and, for that reason, the affidavit of Ms. Ernestilla Bahati was defective as it did not indicate the *date* and *place* at which the affidavit was taken.

Besides, Mr. Mlwale submitted that, since the affidavit which supports this Application is defective, the only available remedy is to strike it out, and, if that will be done, the entire application will, as well, become incompetent. To support his position, he referred this

Court to two decisions of the Court of Appeal: *DB Shaprya & Co. Ltd v Bish International BV*, [2002]IEA 47, CAT, DSM, and *Paulo Makaranga v The Republic*, Misc. Crim. Application No.3 of 2010, CAT, at Mwanza (unreported). In view of the above cases, he prayed that the application be struck out with costs.

Ms. Bahati made a brief submission requesting this Court to, first of all, adopt her skeleton arguments filed on 3rd July 2020. She went on to tell the Court that, as for her part, the affidavit filed in this Court was perfectly in order. She firmly stated that, its *jurat* of attestation was within the requirements of the law as it demonstrates where it was sworn and the date of that swearing, (i.e., it was sworn in Dar-Es-Salaam on the 11th November 2019). Ms. Bahati requested this Court to rely on the documents filed in this Court, as they clearly indicate that the *jurat* of attestation, was perfectly in compliance with section 8 of the *Notaries Public and Commissioner for Oaths Act*, [Cap.12 R.E.2002].

To support her views, she called to her aid and placed reliance on the decision of the Court of Appeal of Tanzania in the case of *Elifazi Nyatega & 3 Others v Caspian Mining Limited*, Civil Application No.44/08 of 2017 (unreported). In that case, the Court (Mwarija, JA) had the following to say:

I need not be detained much in determining this preliminary objection. After amendment *vide* Written Laws (Miscellaneous Amendments) No.2 of 2016, section 8 of the Act now reads as follows: "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."

Ms. Bahati was quite emphatic, therefore, that, on the strength of the above case, this Court should find that, the requirements of section 8 of the *Notaries Public and Commissioner for Oaths Act*, [Cap. 12 R.E. 2002] as regards the *jurat* of attestation in the affidavit filed in this Court were complied with. In particular, she submitted that the *jurat* clearly states the name of the attesting officer and the place where the affidavit was attested. She thereafter prayed that the objection be dismissed with costs.

In the alternative, she requested this Court to rely on the *Overriding Objective Principle* as stipulated in the *Written Laws (Miscellaneous Amendment) No.3 (Act No.8 of 2018)* which amended section 3 of the *Civil Procedure Code*, [Cap.33 R.E.2002]. This principle requires Courts to deal with cases justly, expeditiously, proportionately and at an affordable resolution.

To reinforce her alternative submissions regarding the applicability of that principle, she referred this Court to the decision of the Court of Appeal in the case of *Yakobo Magoiga Gichere v Peninah Yusuph (Civil Appeal No.55 of 2017)* (unreported), where the Court held as follows:

With the advent of the principle of *Overriding Objective* brought by the *Written Laws (Miscellaneous Amendment)* (supra) which now requires the Court to deal with cases justly,

and to have regard to substantive justice; section 45 of the Land Disputes Court Act (which prohibits reversing decisions on account of errors which do not occasion failure of justice, should be given more prominence to cut back on over reliance on procedural technicalities".

On the basis of the *Oxygen Principle* (as it is sometimes referred to), Ms. Bahati urged this Court to proceed with the hearing of the application or else, should the Court find that the "PO" has merit, the Applicant should be granted leave to cure the alleged defect on the affidavit.

Mr. Mlwale's rejoinder submission was a brief one. In his rejoinder submission, he informed the Court that the document he was served has an affidavit with a *blank jurat* of attestation. He submitted, in the first place, that, unless the Court has a signed affidavit and the Applicant served him a different one, a fact which he labelled as being quite unprofessional, then, the affidavit was defective.

Secondly, as regards the applicability of the *overriding objective principle*, Mr. Mlwale was of the view that, such principle has no place in this Application. He argued that, under *Order XLIII rule 2* of the Civil Procedure Code, an application filed in this Court must be supported by an affidavit. He submitted, however, that, if that affidavit should be found to be defective, a defective affidavit is equal to no affidavit at all and, consequently, the Court has nothing to act upon.

Finally, Mr. Mlwale submitted that, the prayer that the Applicant be granted leave to cure any possible defects in the existing affidavit, is also misplaced since there will be nothing to cure. Moreover, he argued that, the prayer will be tantamount to pre-empting the "PO".

Mr. Mlwale argued further, that, the order to strike out the Application if granted, will not bar the Applicant from filing a proper Application. In view of that, Mr. Mlwale reiterated his submission in chief, and prayed that the Application be dismissed.

I took the liberty of looking at the Affidavit filed in this Court. In so doing, I found out that, as correctly submitted by Ms. Bahati, the *jurat* of attestation indicate the *name*, *place* and *date* as required by section 8 of the *Notaries Public and Commissioner for Oaths Act*, [Cap.12 R.E.2002].

However, when I looked at the copy of the affidavit served to the Respondent, I indeed found that its *jurat* of attestation was not displaying the *name* and *place* or *date* of its attestation. It was indeed blank. When I inquired from Ms. Bahati, she apologized stating that the Respondent was mistakenly served with an unsigned affidavit.

While it is indeed correct to argue that the affidavit filed in this Court is the one which should be relied on, I am in agreement with Mr. Mlwale that, serving the other party with a defective affidavit, different from the one filed in the Court, was acting unprofessionally. Had the correct affidavit been served on the

Respondent, there would not have been a preliminary objection as the one raised by the Respondent.

On the other hand, while the "PO" raised by Mr. Mlwale crumbled upon realizing that the affidavit filed in this Court had all features he said were missing, this Court, acting *suo motu*, asked the parties to address it on a different aspect in relation to the *jurat* of attestation. The issue raised by this Court *suo motu* was: *whether the jurat of attestation was in conformity with section 10 of the Oaths and Statutory Declaration Act, Cap 34 [RE 2002]*.

Responding to the issue raised *suo motu*, and having looked at section 10 of the *Oaths and Statutory Declaration Act, Cap 34 [RE 2002]*, Mr. Mlwale submitted that, the *jurat* of attestation, was not in conformity with that provision. He pointed out the defects to be a lack of clear indication regarding whether the deponent was introduced, or was personally known to the attesting officer. Ms. Bahati conceded to that submission. However, she submitted that, according to section 8 of the *Notaries Public and Commissioner for Oaths Act, [Cap.12 R.E.2002]*, what is mandatory in a *jurat* of attestation is to show the name, place of attestation and the date when the affidavit was sworn. She referred to this Court the case *Elifazi Nyatega & 3 Others v Caspian Mining Limited, Civil Application No.44/08 of 2017* (unreported), regarding what a *jurat* of attestation is all about.

However, she prayed, in the alternative, that, should this Court find it appropriate, it should apply the *overriding objective principle* and be more concerned with substantive rather than procedural justice. She argued that, the application at hand is an application for leave. If it will be struck out, the Applicant will be deprived of their constitutional right of being granted leave to Appeal to the Court of Appeal. She submitted further that, while she understands that the striking out does not bar a re-filing of the application in Court, there is as a well an issue of time limitation. She prayed, therefore, that, in the interest of justice, the application should be allowed to proceed on merit.

Mr. Mlwale requested for leave to respond to the submission by Ms Bahati. Upon being granted such leave, Mr. Mlwale submitted that, affidavits are not only governed by *Notaries Public and Commissioner for Oaths Act, [Cap.12 R.E.2002]*. He was of a firm view that, apart from section 8 of the *Notaries Public and Commissioner for Oaths Act, [Cap.12 R.E.2002]*, the *Section 10 of the Oaths and Statutory Declaration Act, Cap 34 [RE 2002]* do also apply to affidavits.

Mr. Mlwale referred to this Court the case of *DB Shaprya & Co. Ltd v Bish International BV, [2002]IEA 47, CAT, DSM*, and submitted that, in that case, the Court of Appeal insisted that, the *jurat* of attestation, should follow the procedures laid down by the law religiously. He stated, therefore, that, the Affidavit in support of

the Application was defective as it contravened *section 10 of the Oaths and Statutory Declaration Act, Cap 34 [RE 2002]*.

This Court has subjected the arguments of both learned counsel to scrutiny in light of the issue raised *suo motu*, and, I have given such submissions an anxious consideration. Certainly, as correctly submitted by Mr. Mlwale, in our jurisdiction the law governing affidavits is not only the *Notaries Public and Commissioner for Oaths Act, [Cap.12 R.E.2002]*. *The Oaths and Statutory Declaration Act, Cap 34 [RE 2002]* is also an applicable law and what it provides should not be brushed aside as if it were irrelevant.

In particular, sections 5 and 10 of the *Oaths and Statutory Declaration Act, Cap 34 [RE 2002]*, and which are relevant to our case, provides that:

"Section 5: Every oath or affirmation made under this Act shall be made in the manner and in the form prescribed by the rules made under section 8..."

Section 10: ...Where under any law for the time being in force any person is required 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 purpose of that law, such form may be used for that purpose...."

The schedule format prescribed in this Act state as follows:

"This declaration is made and subscribed by the A.B. which is known to me personally [or who has been identified to me by the latter being known to me personally] thisday of"

As it might be seen herein above, the schedule to the *Oaths and Statutory Declarations Act* [Cap. 34 R.E 2002] requires the Commissioner for Oaths, before whom an oath is taken, to state *whether he knows the deponent personally, or the deponent has been introduced to him by another person who knows him*. Besides, the name of the person who introduces the deponent must be stated in the *jurat* of attestation clause.

Looking at the affidavit filed in this Court, there is no clear indication whether the Commissioner for Oaths before whom the oath was taken, knew the deponent personally, or the deponent has been introduced to him by another person who knows him. Such an omission renders the affidavit defective.

The cases of *Mantrac (T) Ltd v Junior Construction Co. Ltd and Another*, Misc. Commercial Case No.70 of 2017 (Unreported); *Ramadhani Pazi & Wambura Malima v Tanzania Civil Aviation Authority*, Revision No.325 of 2013 (unreported) and *Peter Mziray Kuga v Anne Kilango Malecela & 2 Others*, Misc. Civil Appl.No.7 of 2006 (unreported), have altogether insisted on what a *jurat* of attestation must indicate.

In the case of *Peter Mziray Kuga v Anne Kilango Malecela & 2 Others*, (*supra*) Mwaikugile, J; (*as he then was*) held that:

"The identity of the deponent in the supporting affidavit must be stated truly in the *jurat* of attestation. Whether the Commissioner for Oath knows the deponent in person or has been identified to him by X, the latter being personally known

to the Commissioner for Oaths all that has to be stated in the *jurat* of attestation. That information of identification has to be clearly shown in the *jurat*."

As stated by the Court of Appeal in the case of *DB Shaprya & Co. Ltd v Bish International BV, [2002]IEA 47, CAT, DSM*, since affidavits are governed by certain rules and requirements, such rules and requirements must be followed religiously. Failure to follow the rules and the requirements governing affidavits, will render the affidavit defective and defective affidavit will be struck out. In my view, such affidavit cannot, in any way possible, be rescued by resorting to the overriding objective principle as Ms. Bahati would like this Court to do.

As correctly stated by Mr. Mlwale, the overriding objective principle has no place in this case. Perhaps the wisdom of the Court of Appeal in the case of *Mondorosi Village Council & 2Others v Tanzania Breweries & 4 Others, Civil Appeal No.66 of 2017* (unreported), needs to be observed.

In that particular case, the Court of Appeal had the following to say concerning the applicability of that 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

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).

In that case, the Court of Appeal made a further reference to its other decision in the case of *Njake Enterprises Limited v. Blue Rock Limited & Another, Civil Appeal No. 69 of 2017* (unreported) and held that the case of Yacobo Magoiga Gichere (*supra*) was distinguishable.

In his submissions, Mr. Mlwale asked this Court to strike out the affidavit filed in support of the application. Ms. Bahati sought, as an alternative remedy and on the basis of the overriding objective principle, to be granted leave to make good the defects if any. With great respect, I find Ms. Bahati's prayers to be untenable.

As rightly stated by Mr. Mlwale, an affidavit found to be defective should be struck out. Once that is done there is nothing left to make good. Since it has been established that the affidavit in support of the Chamber Summons is defective, and, hence, liable to be struck out, similarly, the Chamber Summons cannot stand without a supporting affidavit. Order XLIII rule 2 of the Civil Procedure Code, [Cap.33 R.E. 2002], requires all applications made to this Court to be made by way of a Chamber Summons supported by an affidavit. In the absence of a supporting affidavit, the entire application becomes incompetent as well and should be struck out.

In the upshot, while I find that the preliminary objection raised by the Respondent lacks merit, I find, nevertheless, that the affidavit filed in support of the Chamber Summons is incurably defective as it does not conform to the requirements of section 10 of the *Oaths and Statutory Declarations Act* [Cap. 34 R.E 2002. For that reason, there being no affidavit to support the Chamber Application, the Application filed in this Court is hereby struck out with costs.



It is so ordered.

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DEO JOHN NANGELA

JUDGE,

High Court of Tanzania (Commercial Division)

09 / 07 / 2020

Ruling delivered on this 09th day of July 2020, in the virtual presence of Ms. Ernestilla Bahati, Advocate for the Applicants and Mr. Nobert Mlwale, Advocate for the Respondent.

A handwritten signature in black ink, appearing to read "Nangela", written over a dotted line.

DEO JOHN NANGELA

JUDGE,

High Court of Tanzania (Commercial Division)

09/ 07 / 2020