

**IN THE HIGH COURT OF TANZANIA**

**COMMERCIAL DIVISION**

**AT DAR ES SALAAM**

**MISCELLANEOUS COMMERCIAL APPLICATION NO. 54 OF 2019**

*(Arising from Commercial Case No. 60 of 2019)*

**BETWEEN**

**GODREJ CONSUMER PRODUCTS LIMITED.....APPLICANT**

**VERSUS**

**TARGET INTERNATIONAL (T) LIMITED.....RESPONDENT**

Last Order: 11<sup>th</sup> Nov, 2019

Date of Ruling: 24<sup>th</sup> Feb, 2020

**RULING**

**FIKIRINI, J.**

This is a ruling on preliminary point of objection raised by the counsel for the plaintiff against the defendant suit basing on the ground that the affidavit of Mr. Mohamed Ramzanali Virian is defective as it did not comply with mandatory requirement of section 8 of Notaries Public and Commissioner for Oath Act, Cap

12, Miscellaneous Amendment No.2 of 2016 R.E 2002 (the Notaries Public Act).

The counsel is thus inviting the Court to struck out the application.

At the hearing, Mr. Francis Kamuzora assisted by Mr. Kenneth Kolowa learned advocates appeared for the applicant while the respondent enjoyed legal services of Mr. Edwin Webiro learned advocate. Both advocates, respectively, made oral submission for and against the preliminary objection.

Submitting on the defect on the counter affidavit in support, Mr. Kamuzora submitted that, the counter affidavit contravened the dictates of section 8 of Notaries Public Act as amended by Written Laws Amendment Act of 2016. The *jurist* of attestation which appears on page 4 of the counter affidavit does not state the name of the attesting officer within the *jurat* as required in the law. In support of his submission cited the case of **Darusi Gidahosi v R, Criminal Appeal No. 1 of 2011** (unreported), in that decision the Court of Appeal concluded that the name of the Notary must be within the *jurat* of attestation and that the consequence was striking out the counter affidavit.

This was however, different from what the provision of section 8 of the Notaries Public Act, provided previously which did not state specifically that the name of the officer who administered the oath should be inserted in the *jurat*. As a result there has been conflicting decisions of the Court of Appeal. To resolve the conflict

the amendment of section 8 of the Notaries Public Act was made and the *jurat* of attestation currently ought to have 4 things: *one*, the name of the Commissioner for Oaths; *two*, the person who makes the affidavit; *three*, the place where affidavit was made; and *four*, the date when the affidavit was made. Stressing on the compliance to the mandatory requirement provided under the Amendment made, the Court of Appeal, in the case of **Darusi Gidahosi v R, Criminal Appeal No. 1 of 2011 (unreported)** (copy attached) echoed its stance. It was thus Mr. Kamuzora's submission that the affidavit sworn by Mohamed Ramzanali Virani offended section 8 of the Notaries Public Act (after the Amendment) as the *jurat* did not include within it the name of the Commissioner for Oaths. He urged the Court to struck out the counter affidavit with costs.

Opposing the objection it was the respondent submission that the preliminary point of objection is completely misplaced. The counter affidavit in question has duly complied with the Notary Public Act, which required the name of the advocate one Salha Yusuf Rashid before whom the counter affidavit was sworn to appear in the *jurat* of attestation. Otherwise there was no prescribed form as to how should the *jurat* of attestation should look like. Therefore since the affidavit is in the form which has been adopted by this court for a number of years it was his submission that the *jurat* was not defective. To buttress his point he referred this Court to the

case of **Moto Matiko Mabanga v Ophiri Energy and 2 Others**, Civil Application 465/01 of 2017 faced with similar situation the Court of Appeal of Tanzania held the *jurat* in question was not different from many others which the Court sees every day in course of its work. Which is a similar case in the present case the name of attesting officer has been inserted at the end of the *jurat* and also appears in the stamp appended, submitted, Mr. Webiro, .

Mr. Webiro, discussing the case of **Gidahosi (supra)** cited by the applicant, argued that the case was distinguishable from the case at hand. In **Gidahosi's** the name of attesting officer was not inserted at all while in case at hand the name was inserted. Concluding his submission he prayed for this Court to find the preliminary objection raised lacks merit.

In rejoinder Mr. Kamzora submitted that the main issue is what *jurat* of attestation is. He submitted that the *jurat* of attestation start with the word affirmed at Dar es Salaam and ends at the date 2<sup>nd</sup> July 2019. Although, the counsel for the respondent submitted that there was no format, but the form can be taken from section 8 of the Amendment, since under original section 8 the requirement was to state date and place only. The counter affidavit has complied with the old version. But after the amendment the name should be inserted. Therefore the case of **Gidahosi (supra)**,

was not distinguished as submitted since the amendment was a statute passed by the parliament, he submitted.

After the amendment of section 8 of Notary Public and Commissioner for Oath Act, Cap. 12 by Act No. 2 of 2016, the new provision now reads as follows:

*“Every notary Public and Commissioner  
for oath before whom any oath or affidavit  
is taken or made under this Act shall  
insert name, state truly in the jurat of attestation  
at what place and on what date  
the oath of affidavit is taken or made.”*

Currently, this is the position which is to be abided with by all those who swear affidavit. The submission that there is no form and therefore what used to be how should the affidavit look like be upheld, would defeat the purpose of the amendment, which I do not think is correct. And this perspective is taken guided by the decision in the case of **Elfazi Nyatega & Three Others v Caspian Mining Limited, Civil Application No. 44 of 2017** when the Court of Appeal made reference to the case of **Gidahosi** (supra) stating that:

*“It is now mandatorily required by the law  
that an authority by the law that an authority  
who administers oath or affidavit has to insert*

*his or her name in the jurat of an affidavit.*

*Failure of that mandatory requirement*

*renders the affidavit incurably defective.”*

Examining the preliminary point of objection raised in light of the above stated legal position in place, it is evident that the counter affidavit of Mr. Mohamed Ramzanali Viriani falls short as the name of attesting Officer Salha Yusufu Rashid does not appear in the proper part of the affidavit as required the law. From the new provision the name ought to be have been inserted in the part of affidavit where the attesting officer described his knowledge of the deponents. In the current counter affidavit the said name appears in the *jurat* of attestation after the word “Before Me”.

The point of objection raised by the plaintiff through Mr. Kamuzora is thus valid.

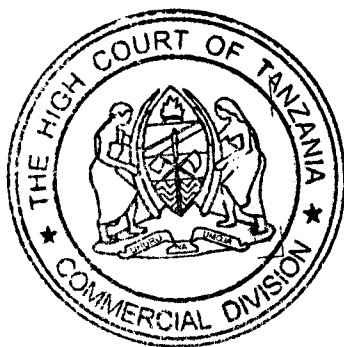
The only question this Court will be asking itself is whether striking out of the counter affidavit for being defective as decided in the case of **Gidahosi** (supra) would be the best approach.

Considering that parties do come to Court to have their controversies resolved and not otherwise. Striking of the particular document though the appropriate measure but the Court has to always be there to advance substantive justice rather than technicalities which can be cured by ordering an amendment or in the present case

order filing of a fresh counter affidavit. This will not only further cause of justice but avert unnecessary waste of time and resources as well as flooding the courts with refilled applications since the law allows that.

Also, taking into account the prescription under Rule 5 of the High Court (Commercial Division) Procedure Rules 2012 as amended by GN. No. 107 of 2019 as well as emphasis on upholding the overriding objective principle which underscores doing away with irregularities which are curable and focus on achieving substantive justice, I find this scenario deserves such order.

Based on the above reasons, I allow the counter affidavit of Mr. Mohamed Ramzanali Viriani to be amended in compliance with section 8 of Notaries Public Act. Therefore the objection is sustained but with no order for striking out the counter-affidavit instead the defendant is ordered to file amended counter-affidavit within seven (7) from the date of this ruling. Costs to follow events. It is so ordered.



**P.S FIKIRINI**

**JUDGE**

**19<sup>th</sup> FEBRUARY, 2020**