

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 259 OF 2023

(Arising From Land Case No.120 of 2023)

DENNIS SIARA KESSY 1ST APPLICANT

THADEUS ALOYCE AMANI 2ND APPLICANT

HURUMA ALOYCE LUPANGE 3RD APPLICANT

HILDA FRANCIS NYAMBO (*the Administratrix of the Estate of
deceased Francis Nyambo*) 4TH APPLICANT

RACHEL NYANGOMA RUTTA 5TH APPLICANT

HANS MASAMU 6TH APPLICANT

HALIMA IBRAHIM ISSA 7TH APPLICANT

AMRICK MAMUYA (*the Administrator of the Estate
of deceased Asseri Zakayo Mamuya*) 8TH APPLICANT

MARY EPHATA KIMAMBO 9TH APPLICANT

MOSHI SELEMANI IGIRO 10TH APPLICANT

SALEH ALLY SALEH 11TH APPLICANT

SEBASTIAN NGIMBWA 12TH APPLICANT

LIGHTNESS WILLIAM MUNGAYA 13TH APPLICANT

MWINYI SAIDI MWINYI 14TH APPLICANT

RICHARD ROMAN KOBELLO (*the Administrator of the Estate*

Alle

of deceased Roman Saidi) 15TH APPLICANT

EVANCE TOMAN KAVISHE (*the Administrator of the Estate*
of decease Roman John Kavishe) 16TH APPLICANT

MONICA ROMAN KAVISHE (*the Administratix of the Estate*
of deceased Roman John Kavishe) 17TH APPLICANT

SHEKHA HILAL AMOUR 18TH APPLICANT

SULEIMAN KOMBO GHARIB (*the Administrator of the Estate*
of deceased Khalid Kombo Gharib 19TH APPLICANT

ABDULLAH OTHMAN SHEHE 20TH APPLICANT

ALLY RASHID DAMIYE 21TH APPLICANT

KHAMISI SAIDI KHAMISI 22ND APPLICANT

MOHAMED SALEH SULEIMAN 23RD APPLICANT

SEIF ABDALLAH KIMBWEMBWE 24TH APPLICANT

SKOLA STEPHEN SANGA (*the Administrator of the Estate*
of deceased Alatwinusa Msigwa) 25TH APPLICANT

MWANAHAMISI RAMADHANI MTORO 26TH APPLICANT

LEO ALOYCE NINGA 27TH APPLICANT

MAIMUNA MOHAMED SULEIMAN 28TH APPLICANT

LILIAN TIMOTHY KWEKA (*the Administrator of the Estate*
of deceased Timoth Kundaseni Kweka) 29TH APPLICANT

ZIADA OMARY KIMBWEMBWE (*the Administratix of the Estate*
of the deceased Omari Mohamedi Kimbwembwe) 30TH APPLICANT

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LIPINA ELIMELECK LUSANJA 31ST APPLICANT

VERSUS

DAR RAPID TRANSIT AGENCY (DART) 1ST RESPONDENT

PERMANENT SECRETARY, MINISTRY OF PRESIDENT'S OFFICE,

REGIONAL ADMINISTRATION AND LOCAL GOVERNMENT.. 2ND RESPONDENT

HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

RULING

20/6/2023 & 27/6/2023

A. MSAFIRI, J.

By chamber summons, the applicants are seeking the grant of temporary injunction against the respondents. The application is brought under Section 68(e) and Order XXXVII Rule 1 and 2 of the Civil Procedure Code [Cap 33 R.E 2022] (the CPC) together with any other enabling provisions of the law and is accompanied by the affidavit deponed jointly by the applicants.

Upon being served with the application, the respondents lodged the preliminary objection to the effect that: -

- (a) The application is incompetent for being supported by an affidavit which is incurably defective for contravening Section 8 of the Notaries Public and Commissioners for Oaths Act [CAP*

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*12 R.E 2019] and Section 10 of the Oaths and Statutory
Declarations Act [CAP R.E 2019]*

On 25th May 2023, this Court ordered the preliminary objection to be disposed of by way of written submissions and the same was complied with. During the hearing of this preliminary objection, the applicants were represented by Mr. Barnabas Paschal Nyalusi, learned advocate and respondents have enlisted the legal service of Mr. Mathew Fuko, learned state attorney.

Arguing in support of the preliminary objection, the counsel for the respondents submitted that the jurat of attestation in the deponents' affidavit is defective as it violates Section 10 of the Oaths and Statutory Declarations Act [CAP 34 R.E 2019], for not showing whether the deponents were known or introduced to the Commissioner for Oaths.

He argued further that, a specific statement of identification has to be given in the jurat of attestation, failure to state or indicate in the jurat whether or not the deponents are known to the Commissioner for Oaths or how he identified the deponents, is material omission which renders the affidavit incurably defective. *Alle*

To bolster his arguments, he cited the case of **Ramadhani Pazi & Wambura Malima vs Tanzania Civil Aviation Authority, Revision No. 325/2023 HC Pg.7 &9.**

He argued further that, the application at hand, having contained the above stated defect renders the whole application incompetent and he prayed that the application be struck out with costs.

The counsel for the respondents submitted in addition that, the jurat of attestation in the applicants' affidavit lacks place and date on which an oath was taken, contrary to the mandatory requirement under Section 8 of the Notaries Public and Commissioners for Oaths Act, which makes the affidavit incurably defective, and hence be struck out with costs.

In reply to the submissions by the respondents' counsel, the counsel for the applicants argued that, the preliminary objection has been brought under the wrong provision of the law. That, Section 10 of the Oaths and Statutory Declarations Act (Supra) relied upon by the respondents applies to statutory declarations and not affidavit. He implored me to follow my decision in **Abubakari Zuberi & 13 Others vs Ashura Mohamed Seng'ondo &6 others (Land Application No.531 of 2022) (12591) (24 November 2022) Pg.7** while I was

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citing the case of **Magovind Savani vs Juthalal Velji Ltd (1969) HCD 278** and prayed for this court to overrule the preliminary objection raised by the respondents with costs as it no longer has the legs to stand.

The counsel for the respondents argued further that, all the important information has been contained in the affidavit and there is no any propositions raised on whether there is any defect associated with the inherent substance of the affidavit rather the court record is very clear that respondents were even able to respond to the substantive issues contained in the affidavit by filing their counter affidavit before this court on 24th May, 2023.

Regarding to the identification of deponents to the Commissioner for Oaths, the counsel for the respondents cited the case of **Bwaheri Masauna vs Ulamu Wisaka, Misc. Land Application No. 55 2020 [2020] TZHC 4624 (13 December 2020, and Alphonse Dionezio Boniphace vs Shirika la Upendo na Sadaka (Labour Revision No.8 of 2021) [2022 TZHCLD 1 (2 February 2022)**


It was the applicants' counsel arguments in line with the findings of the cited cases that, the respondents did not show in their submissions

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how the alleged anomalies occasion the miscarriage of justice to invite this court to strike the entire application.

As to the question of place and date of attestation, the counsel for the applicants submitted that the case of **Ramadhan Pazi (Supra)** cited by the respondents has been for quiet sometime overtaken by a series of decisions that the defective affidavit is curable. He referred to the case of **Bwaheri Masauna (Supra)** as one of the precedents to the new development regarding the status of the defective affidavit.

Further, the counsel for the applicants submitted that, the provisions of Section 8 of the Notaries Public and Commissioners for Oaths Act and Section 10 of Oaths and Statutory Declarations Act have not expressly stated that the affidavit lacking a description on place, dates and not bearing the prescribed format are incurable. That, since the provisions are silent, an aspect of curability and incurability of affidavits has been always guided by the principle derived from the most recent precedents which points out that such affidavits are curable.

Finally, the counsel for the applicants invited the Court to consider the principle of overriding objective and overrule the preliminary objection with costs. 

The counsel for the respondents did not file their rejoinder submissions, hence the court proceeded with this ruling.

Having gone through the rival submissions of the counsel for both parties, the question for determination is whether the preliminary objection raised is meritorious.

To begin with the first question that the affidavit violates Section 10 of the Oaths and Statutory Declarations Act, the counsel for respondents submitted that the Commissioner for Oaths did not indicate in the *jurat* of attestation of the applicant's affidavit, whether he knew the deponent or the deponent was introduced to him by a person he knew. The Court of Appeal in **DPP. vs Dodoli Kapufi and another** Cr. Appl no. 11/2008, pointed out three matters which the Commissioner for Oath must indicate. It stated that-

*"Of greater significance in the determination of this application, in our considered opinion, is the **"jurat"** The word **"jurat"** has its origin in the latin word **"jurare"** which meant **"to swear"**. In its brevity a **jurat** is a certification added to an affidavit or deposition stating when, where and before what authority (whom) the affidavit was made. See, section 8 of the Notaries Public and Commissioners for Oaths Act, Cap 12 R.E. 2002. Such authority usually, a Notary Public and/or Commissioner for Oath, has to certify three matters, namely: -*

(i) that the person signing the document did so in his presence,
(ii) that the signer appeared before him on the date and at the place indicated thereon, and
(Hi) that he administered an oath or affirmation to the signer, who swore to or affirmed the contents of the document. [See BLACK'S LAW DICTIONARY.

Having gone through the above quoted holding, I did not see where the Court of Appeal indicated that the affidavit would be incurably defective if the Commissioner for Oaths failed to indicate that he knew the deponent or the deponent was introduced to him by the person he knew. I therefore concur with the counsel for the respondents that the Commissioner for Oaths' failure to indicate that he knew the deponent or the deponent was introduced to him by the person he knew does not amount to an incurably defective affidavit. It is my view that the affidavit may be defective but not incurable.

The applicants' affidavit shows the name, and address of the Commissioner for Oaths. It does not indicate the place and the date when it was taken. This is contrary to Section 8 of the Notary Public and Commissioners for Oaths Act. The said section provides that; -

8. *Every notary public and commissioner for oaths before whom any oath*

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*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**, (emphasis added)*

I enjoin with the counsel for the respondents that the anomaly regarding the Commissioner for Oath's failure to indicate the date and place on which an oath was taken is not fatal since it does not prejudice the respondents. In addition, Section 8 does not specifically state that the anomaly will make the affidavit incurable rendering the whole application incompetent.

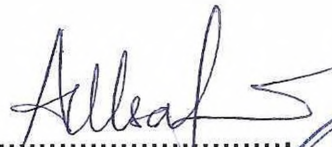
It is my firm view that invoking the overriding objective is very important at this point so as to meet the ends of justice. See the cases of **Alphonse Dionezio Boniphace (Supra)** and **DDL International Ltd vs. Tanzania Harbours Authority Tanzania Revenue Authority and Parastatal Sector Reform Commission (Civ. Appl. No. 8/2001(unreported) CAT**. The latter case stated that *"the Court will in fit cases, exercise discretion to grant leave to amend the affidavit"*

In the foregoing, I find that the applicants' affidavit is defective for contravening Section 8 of the Notaries Public and Commissioner for Oaths Acts and Section 10 of the Oaths Statutory Declarations Act.

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However, the defectives are not fatal. They can be cured by amendment. I hereby grant leave to amend the affidavit to rectify the defects as prayed for by the counsel for the applicants. The amended affidavit to be filed on or before 06/7/2023.

Costs shall be in due course.



A. MSAFIRI, J.

JUDGE

27/6/2023

