IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO.81 OF 2008

ANNANDUMI ALEX alias KIPAA ..... APPLICANT/PLAINTIFF

VERSUS

ZAHARA ADAMU MUNISI ..... 1ST RESPONDENT
HALID ADAM MUNISI ..... 2ND RESPONDENT

Date of last order: 11.09.2009
Date of final submissions: 22.10.2009
Date of ruling: 04.11.2009

RULING

MAKARAMBA, J.:

On the 9th day of July 2009, the Applicant filed in this Court a Chamber Summons under Order IX Rule 9(1) of the Civil Procedure Code [Cap.33 R.E. 2002] supported by the Affidavit of the Applicant seeking for orders that this Court be pleased to set aside the dismissal order made on 08/07/2009 and restore the suit for further court proceeding stage.

On the 24th day of August, 2009, the Counsel for the 1st Respondent filed a Notice of Preliminary Objection on a point of law that the Affidavit of Annandumi Alex alias Kipaa filed in support of the application to set aside the dismissal order contains an incurably defective verification clause and a jurat in contravening the provisions of Order XIX Rule 3 of the Civil Procedure Code, 1966 [Cap.33 R.E. 2002].

The learned Counsel for the 1st Respondent submitted that there are four incurable defects in the affidavit, three of which he raised in the notice for preliminary objection and one in the course of his submission. First, the verification clause is sworn in plural while there is only one deponent. Second, the verification clause attests that the source of all facts deponed in the affidavit are from the personal knowledge of the deponent, while by their nature the contents of paragraphs 2, 3 and 5 can only be from information from the court record; and paragraph 4 and 7 can only be from information and from advice of deponent's advocate. Third, the *jurat* is sworn jointly while there is only one deponent. The fourth defect that the identity of the person who administered the declaration is not fully disclosed as required by the Oaths and Statutory Declaration Act, Cap.34 R.E. 2002 was raised in the course of the submissions by the learned Counsel for the 1st Respondent.

Amplifying on the defects in the applicant's affidavit, the learned Counsel for the 1st Respondent revisited the principles governing affidavits as stated in the authoritative work, ***Mogha's Law of Pleadings.*** It was the submission of the learned Counsel for the 1st Respondent that the first principle is that the person making the affidavit should be fully described in the affidavit but in the present case the affidavit is sworn by one person but supposedly verified by several persons because the verification clause is in

plural and therefore the identify of those persons is not described at all as there is no disclosure of who are the other declarants to the verification.

The second principle is that every person or place referred to in the affidavit should be correctly and fully described, so in that he or it can easily be easily identified but in the present case, both in the verification clause and in the jurat neither the identity of those other persons who associate themselves with the affidavit nor their place of residence are disclosed.

The third principle is that the oath or affirmation must be singular and must be sworn/affirmed in the first person but this is not the case in the present affidavit.

The learned Counsel for the 1st Respondent submitted further that the verification clause attests that the source of all facts deponed in the affidavit are from the personal knowledge of the deponents while this is not true as by their nature the contents of paragraphs 2, 3, and 5 could only have come from information from the court record and not personal knowledge of deponents. It was the further submission of the learned Counsel for the 1st Respondent that the contents of paragraph 4 and 7 can only be from information from deponent's and from advice of deponent's advocates.

On the defects in the jurat, the learned Counsel for the 1st Respondent pointed out three defects namely that the jurat is sworn jointly while on record there is only one applicant in the Chamber Summons and the affidavit bears the signature of only one deponent, while the other persons supposed to have taken the oath or affirmed are not named. This according to the learned Counsel for the 1st Respondent violates the principle stated in ***Mogha's*** that the declarant in the jurat should use the first person by adopting the words "***I affirm or make oath***" while in the

present case the declarant contravenes the principle by using the words "***we***...."

The learned Counsel for the 1st Respondent in the course of his submission raised an additional objection that in the jurat the address of the person who administered the oath in the jurat is not disclosed in full and this contravenes section 8 of the ***Notaries Public and Commissioners for Oaths Act*** [Cap.12 R.E 2002] and section 10 of the ***Oaths and Statutory Declarations Act***, [Cap. 34 R.E. 2002] read together with the schedule to the Act, which require that the person (Commissioner for Oaths) taking the oath or declaration must append his signature, qualification and address. The learned Counsel for the Applicant took issue with the manner in which the learned Counsel for the 1st Respondent has raised this particular objection in that it has not been raised formally in the notice filed in this Court and therefore this Court should not determine on the issue. The learned Counsel for the 1st Respondent submitted in rejoinder and rightly so in my view, that a preliminary objection on a point of law can be raised by a party any time even on appeal or it can be raised by a court suo motu. As submitted by the learned Counsel for the 1st Respondent, and rightly so in my view, the fact that the learned Counsel for the Applicant has also argued the objection to the jurat shows that the applicat has not been prejudiced by the further preliminary objection relating to the defects in the jurat without leave of the court.

The learned Counsel for the 1st Respondent submitted further that there is a chain of authorities from the High Court and Court of Appeal which have held that omission to disclose the full address of the Commissioner for Oaths is a defect in the jurat that renders an affidavit fatally defective. Merely putting a box office number on the rubber stamp

does not amount to disclosing full address by the Commissioner for Oaths, the learned Counsel for the 1st Respondent further submitted, citing the decision of the Court of Appeal of Tanzania in **ZUBERI MUSSA VS SHINYANGA TOWN COUNCIL Civil Application No.100 of 2004** (Rutakangwa, Lubuva, Mroso, JJA] which was a review of the decision of the same Court [Kisanga, Lubuva and Lugakingira JJA.], in Civil Appeal No. 16 of 1999, where it was held that:

> *"The Court was of a firm conclusion that the need to show in the jurat the place where the oath was taken is indispensable, and this cannot be substituted by the name of the place in the advocate's rubber stamp. After all such rubber stamp is never part of the jurat of attestation."*

In that case the Court held that the affidavit filed in support of the notice of motion is bad in law in that it contained a jurat of attestation which was incurably defective as it did not show the place it was made, which omission offended against the mandatory provisions of section 8 of the ***Notaries Public and Commissioners for Oaths Act***, [Cap.12 R.E 2002].

The learned Counsel for the 1st Respondent surmised that the cumulative effect of the defects in the deponent's affidavit, namely that an affidavit sworn to the best of deponent's knowledge is useless; that an affidavit not properly verified cannot be treated as evidence; that a defective affidavit cannot be amended; that the jurat is wholly defective therefore rendering the affidavit incurably defective, and therefore an application supported by an incurably defective affidavit as is the case presently must be dismissed. In support of this line of reasoning and the prayer, the learned Counsel for the 1st Respondent cited in his submissions

the decision of the Court of Appeal of Tanzania in **PHANTOM MODERN TRANSPORT (1985) LIMITED VS D.T. DOBIE (TANZANIA) LIMITED Civil References No.15 of 2001 and 3 of 2005.**

The learned Counsel for the 1st Respondent prayed that since the cumulative effect of the defects is to render the affidavit incurably defective then it deserves to be struck out and the application to set aside the dismissal order should be dismissed with costs as it has no affidavit on which to stand.

The learned Counsel for the Applicant in reply submitted that verifying and swearing the affidavit in plural when the applicant is one is "just a minor error which does not go to the root of the substance of the whole affidavit", and implored this Court to the logic that the record shows that in the present application there is only one applicant. It was the further submission of the learned Counsel for the Applicant that the jurat clause bearing the words "***jointly***" and "***are***" is just a mistake which cannot invalidate the whole application or affidavit and that it was meant one person, and this can be seen from the beginning of the affidavit where the person swearing the affidavit is only one, Annandumi Alex Alias Kipaa, and therefore these are not serious mistakes which go to the substance and therefore the court can ignore them and proceed with the hearing of the application.

The learned Counsel for the Applicant submitted further that on the submission that the contents of paragraphs 2, 3 and 5 of the affidavit are deposed on information from the court record and not personal knowledge of the applicant, the learned Counsel for the Applicant submitted that the applicant was personally present in Court on 01.07.2009, and therefore swears what she witnessed in court. On the contents of paragraph 5 of the

affidavit the learned Counsel for the Applicant submitted that this is information based upon the applicant's independent study on 08.07.09 of the court proceedings that the suit was dismissed, and this is a personal knowledge of the applicant after study of the court record. In buttressing this point the learned Counsel for the Applicant relied on the decision of the Court of Appeal in **HAMED RASHID HAMED VS MWANASHERIA MKUU (1997) T.L.R. 35** where such approach was upheld and thus it was found that there was no ground for requiring the deponent to disclose the source of his belief.

The learned Counsel for the Applicant however, has conceded in his submissions that the affidavit indeed has the defects the learned Counsel for the 1st Respondent has tried to point in his submissions. According to the learned Counsel for the Applicant, however the defects are "*just minor errors which do not go to the root of the substance of the whole affidavit and therefore the Court should just ignore them*" and have enjoined this Court to proceed with the hearing of the application. The learned Counsel for the 1st Respondent was quick to rejoin that as soon as it came to the Applicant's knowledge that his affidavit is defective he ought to have taken steps to apply to remedy the defects instead of appealing to the Court to ignore the defects and proceed with determination of the application. The learned Counsel for the 1st Respondent went further to the extent of even of proposing what the learned Counsel for the Applicant should have done to cure the defects by either seeking leave of the Court to file supplementary affidavit or by withdrawing the application with leave to refile.

Affidavits in support of interlocutory orders like the present one are regulated by the provisions of Order XIX Rule 3 subrule 1 and 2 of the Civil Procedure Code, which has received befitting attention in the works of

leading authors in the field such as the authoritative ***Mogha's Law of Pleadings*** 14th Edition, Calcutta Eastern Law House. Order XIX Rule 3 subrule 1 and 2 of the Civil Procedure Code lays down the general principle of law on affidavits in the following terms:

> *"O.XIX. R.3 (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted:*
> *Provided that the grounds thereof are stated.*
> *(2) The costs of every affidavit which unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall (unless the court otherwise directs) be paid by the party filing the same" (the emphasis is of this Court).*

In **PHANTOM MODERN TRANSPORT (1985) LIMITED VS D.T. DOBIE (TANZANIA) LIMITED Civil References No.15 of 2001 and 3 of 2005**, (CAT) (unreported) Mroso, J.A (as he then was) at page 6 top of the typewritten judgment quoted with approval the general rule of practice and procedure on affidavits stated in **UGANDA V. COMMISISONEDR OF PRISONS EX PARTE MATOVU [1966] E.A. 514** at page 520, a decision of a three judge panel of the High Court of Uganda, thus:

> *"...as a general rule of practice and procedure, an affidavit for use in court being a substitute for oral evidence, should only contain statements to which the witness deposes either of his own knowledge or ...Such an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion.*

In the present application, the applicant's affidavit is in support of the application to set aside the dismissal order of this Court. It therefore falls

within the class of the affidavits envisaged under Order XIX Rule 3(1)&(2) of the Civil Procedure Code [Cap.33 R.E. 2002], being a substitute for oral evidence for use in court. The said affidavit has been taken by a single deponent but in the verification clause it is rendered in the following terms: "*All what is stated in paragraphs 1 to 7 is of **our** knowledge true.*" The verification is also purported to be sworn "**jointly**" although it there is only one deponent. I must emphasize here that much as this could be "just a minor error" as argued by the learned Counsel for the Applicant, this Court cannot just ignore it. However, considering that an affidavit is a substitute for oral evidence for use in court, under the circumstances it will be difficult as it is for this Court to determine whether the present application concerns only one applicant or there are some other undisclosed applicants. It does not require much logic to realize that a single deponent cannot swear that "what is stated is of our knowledge true" and "jointly" but verify singularly. However, this defect is not fatal as it does not go to the root of the matter and in my view can be remedied by allowing the applicant to file a fresh properly verified affidavit.

As for the contents in the affidavit, it is a general rule of practice and procedure that it should contain statements to which the witness deposes "*either of his own knowledge.*" Coming to the affidavit at hand, even ignoring for a moment that it is sworn "jointly" by one deponent, the contents of paragraph 3 thereof that on 01.07.09 the applicant's advocate sent another advocate to hold brief for him, this cannot not by any standard be said to be to the deponent's own knowledge, but rather to the knowledge of the advocate who was asked to hold brief for the applicant's advocate. Unfortunately this other brief holding advocate has not taken any affidavit to that effect.

As for the contents of paragraph 5 of the affidavit that the deponent found that her case had been dismissed, much as I could be prepared to buy into the argument by the learned Counsel for the Applicant and the case he has cited in support thereof, there is no statement in the affidavit indicating that the deponent indeed did peruse the court record which made her learn of the dismissal of the suit. This in my view is only a statement from the bar. It does not qualify as a substitute for the oral evidence of the applicant for use in court, which is what in the eyes of the law an affidavit is all about.

As for the defective jurat of attestation that the address of the person who administered the oath is not disclosed in full, the learned Counsel for the Applicant submitted that in compliance with section 8 of the ***Notaries Public and Commissioners for Oaths Act***, [Cap.12 R.E 2002] the jurat clause has indicated the date and place where oath is taken which is all that the law requires. There is therefore nothing fatal for the Commissioner for Oaths to indicate his address in his rubber stamp. The case of **ZUBERI MUSSA VS SHINYANGA TOWN COUNCIL** *(supra)* cited by the learned Counsel for the 1st Respondent in his submissions is therefore inapplicable. In the present case the jurat of attestation has shown the place where the oath was taken.

It is now settled law in this country that the requirement that the place where the oath is made or taken in the jurat of attestation in an affidavit for use in a court of law is statutory and will render an affidavit incurably defective if it does show where the oath was made or taken since that offends the mandatory provisions of section 8 of the ***Notaries Public and Commissioners for Oaths Act***, [Cap.12 R.E 2002]. This legal position has been stated time and again in a number of case authorities. I shall only

revisit some, beginning with **ZUBERI MUSSA VS SHINYANGA TOWN COUNCIL Civil Application No.100 of 2004** [Rutakangwa, Lubuva, and Mroso, JJA], which was a review of the decision of the same Court [Kisanga, Lubuva and Lugakingira, JJA] in Civil Appeal No.16 of 1999. In that case the affidavit which was filed in support of the notice of motion was found to be bad in law in that it contained a jurat of attestation which was incurably defective as it did not show the place where it was made. In that case the omission to show the place where the oath in the jurat of attestation was made was found to have offended against the mandatory provisions of section 8 of the ***Notaries Public and Commissioners for Oaths Act***, [Cap.12 R.E 2002.] The other case along this line of thinking is **THEOBALD KAINAM V. THE GENERAL MANAGER, K.C.U. [1990] LTD – BK Civil Application No.3 of 2002** (unreported) where it was stated that the requirement in this country that the place where the oath is made or affidavit taken has to be shown in the jurat of attestation is statutory and must be complied with. In that case, the affidavit which had only the rubber stamp of the advocate and the place where the affidavit was taken missing in the jurat was held to be incurably defective. In that case the application was struck out. In another case, that of **THE REGISTERED TRUSTEES OF JOY IN THE HARVEST V. HAMZA SUNGURA Civil Application No.3 of 2003** (unreported), where the Court of Appeal considered the issue of omission to specify the place where the jurat was executed not to be new in the administration of justice, it was found that the impugned affidavit did not show the place where the oath was made or taken and was held to be incurably defective. In that case the notice of motion was accordingly struck out. In yet another case, **ASHURA ABDULKADIRI V. THE DIRECTOR, TILAPIA HOTEL MZA Civil Application No.2 of 2005** (unreported), and

the notice of motion was also struck out for the same reasons. In **D.B. SHAPRIYA AND COMPANY LTD V. BISH INTERNATIONAL B.V. Civil Application No.53 of 2002** (unreported), it was held that the need to show in the jurat the place where the oath was taken was indispensable and this cannot be substituted by the name of the place in the advocate's rubber stamp, and after all such rubber stamp is never part of the jurat of attestation. Emphasizing on the long chain of decisions on the legal consequences for an affidavit suffering from a defective jurat of attestation, Rutakangwa J.A in in **ZUBERI MUSSA VS SHINYANGA TOWN COUNCIL Civil Application No.100 of 2004** observed that those decisions are not only consistent but are now legendary, and proceeded to state at page 15 of that decision as follows:

> *"We are unhesitatingly of the view that the principle laid down in these cases to the effect that the requirement in this country that the place where and the date when an oath or affidavit is taken or made must be shown in the jurat of attestation is a statutory one which must be complied with and not a dispensable technical requirement is now deeply rooted in our jurisprudence. Every affidavit, therefore which does not conform with the statutory requirements of s.8 of the Act shall be treated as incurably defective until such time when the courts will be given a statutory leeway, as the courts in England, to hold otherwise."*

In the present application the argument by the learned Counsel for the 1st Respondent is that the address of the person who administered the oath is not disclosed in full in the jurat of attestation. The issue is whether this has offended section 8 of the ***Notaries Public and Commissioners for Oaths Act,*** [Cap.12 R.E. 2002], which stipulates that:

*"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."*

According to the long chain of authorities on defective jurat of attestation for lack of showing the place where the oath is made or taken in the jurat of attestation, which I have endeavoured to outline above albeit briefly, makes me be at one with the learned Counsel for the Applicant that the decision **ZUBERI MUSSA VS SHINYANGA TOWN COUNCIL** (supra) cited by the learned Counsel for the 1st Respondent in his submissions, is inapplicable in the present circumstances. The case authorities I have examined above, in my view, do not touch on non disclosure in full of the address of the person who administered the oath as constituting a defect in the jurat of attestation. In the eyes of the law such non disclosure does not offend any known law. In any case as it was stated in **D.B. SHAPRIYA AND COMPANY LTD V. BISH INTERNATIONAL B.V. Civil Application No.53 of 2002** (unreported), the need to show in the jurat the place where the oath was taken was indispensable and cannot be substituted by the name of the place in the advocate's rubber stamp which is never part of the jurat of attestation.

As to the issue whether a defective affidavit can be amended there is divided opinion some arguing that a defective affidavit can be amended so that the offensive parts can be expunged, leaving the rest of the paragraphs intact and other such as ***Mulla on the Code of Civil Procedure Code*** Vol.II 15th Edition at page 1508, argue that "*a defective affidavit cannot be amended but a fresh affidavit setting out the facts correctly can be filed.*" Some case authorities however point in the direction

that where defects are not fatal they can be expunged or overlooked, leaving the remaining part of the affidavit intact. A number of decisions of the Court of Appeal of Tanzania say that a defective affidavit can be amended. Some of these decisions were cited by Mroso J.A (as he then was) at page 9 of his judgment in **PHANTOM MODERN TRANSPORT (1985) LIMITED VS D.T. DOBIE (TANZANIA) LIMITED** (supra). They include **SALIMA VUAI FOUM V. REGISTRAR OF COOPERATIVE SOCIETIES AND THREE OTHERS [1995] T.L.R. 75,** wherein it was stated that it is in the discretion of a court to allow amendments of a defective affidavit. Another case is that of **UNIVERSITY OF DAR ES SALAAM V. MWENGE GAS AND LUBOIL LTD. Civil Application No.76 of 1999** (unreported), where Samata CJ (as he then was) referring to decision in ***Salima Vuai Foum case*** stated thus:

> *"It would appear that a court has discretion to allow a deponent of an affidavit lacking a verification clause to amend the affidavit. I take it that by using the word "amend" this Court meant that the court can, if circumstances justify it, grant leave to the deponent to file an affidavit having a verification clause. I hold this view because I take it to be an undisputed proposition of law that something that is null and void is incapable of being amended. You cannot amend nothing. Being a discretionary power, the power to grant leave to a deponent to file an affidavit which has a verification clause must be exercised with justice and common sense."*

In that case the verification clause had no verification clause and the former C.J Samata exercised his discretion to refuse leave to "amend" by filing a fresh affidavit with a verification clause. It was the view of Mroso, JA at page 10 of **PHANTOM MODERN TRANSPORT (1985) LIMITED VS D.T. DOBIE (TANZANIA) LIMITED** (supra) that:

"Where defects in an affidavit are inconsequential, those defective paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it. If however, substantive parts of an affidavit are defective, it cannot be amended in the sense of striking off the offensive parts and substituting thereof correct averments in the same affidavit. But where the court is minded to allow the deponent to remedy the defects, it may allow him or her to file a fresh affidavit containing correct averments. What in effect it means is that a fresh affidavit is substituted for the defective one. To that extent one may possibly say that the original affidavit is being "amended."

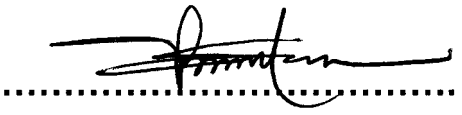
It was the submission of the learned Counsel for the 1st Respondent that in his view the cumulative effect of the various defects in an affidavit renders it substantially defective and therefore incurably defective. With due respect to the learned Counsel for the 1st Respondent I am hesitant to take such drastic measures. There are two reasons. One is that there is mutuality of defects in both the applicant's affidavit and the 1st respondent's counter affidavit. I have already indicated the extent of the defect in the applicant's affidavit. As for the 1st Respondent's counter affidavit, indeed as submitted by the learned Counsel for the Applicant, the first respondent's counter affidavit is not dated in the jurat of attestation. It was the further submission of the learned Counsel for the Applicant that the 1st Respondent's counter affidavit bears only the month and year but the space for the date has been left blank. The learned Counsel for the Applicant surmised that this is a serious defect as it contravenes section 8 of the ***Notaries Public and Commissioners for Oaths Act***, [Cap.12 R.E. 2002], which requires the jurat to show the date when it was taken. The learned Counsel for the Applicant prayed that the 1st Respondent's counter

affidavit should therefore be struck out and the court grant the application as if no counter affidavit to contest the same had been filed.

As I intimated to earlier I have determined that there are defects in the applicant's affidavit but which are curable by way of "amendment" by the applicant filing a fresh affidavit with correct averments. In this respect I have taken the judicial path treaded by Mroso, J.A (as he then was) in **PHANTOM MODERN TRANSPORT (1985) LIMITED VS D.T. DOBIE (TANZANIA) LIMITED.** This, I believe, will meet the ends of justice and accord more with logic to allow the applicant to remedy the defects by filing a fresh affidavit containing correct averments.

As for the 1st respondent's counter affidavit, it is my considered view that this was raised to preempt the preliminary objection raised by the 1st Respondent. I find no reason therefore to determine it and accordingly I dismiss it.

In the upshot the preliminary objection raised by the 1st Respondent is upheld to the extent indicated above. The affidavit in support of the application is hereby struck out with costs and with it the application also crumbles as it no longer have legs to stand on. It is accordingly ordered.

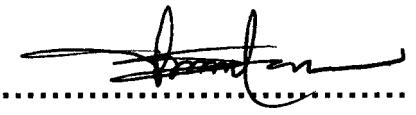


R.V. MAKARAMBA

JUDGE

05/11/2009

Ruling delivered in Chambers this 5th day of November, 2009 in the presence of Dr. Mapunda, Advocate for Mr. Kyaruzi, Advocate and in the presence of Dr. Mapunda, Advocate, for the Respondent.



R.V. MAKARAMBA

JUDGE

05/11/2009

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