IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: LUBUVA, J.A., MROSO, J.A., And RUTAKANGWA, J.A.)

CIVIL APPLICATION NO. 100 OF 2004

ZUBERI MUSSA ..... APPLICANT

VERSUS

SHINYANGA TOWN COUNCIL..... RESPONDENT

(Application for Review from the Decision of the Court of Appeal of Tanzania at Mwanza)

(Kisanga, J.A., Lubuva, J.A., Lugakingira, J.A.)

dated the 16th day of November, 2001
in
Civil Appeal No. 16 of 1999

RULING OF THE COURT

19 February & 16 March, 2007

RUTAKANGWA, J.A.:

Before us is an application for review of the decision of this Court, hereinafter to be referred to as the Court, dated 16th November, 2001 in Civil Appeal No. 16 of 1999. This application by notice of motion was filed on 14th July, 2004 pursuant to the leave granted to the applicant by the Court on 4th July, 2004 when we struck out his earlier application for review. The said notice of

motion is supported by an affidavit sworn by Mr. M. K. Mtaki, learned Counsel for the applicant.

When the application was called on for hearing Mr. Muna, learned counsel for the respondent, raised a point of preliminary objection, notice of which had earlier been filed. The ground of objection reads thus:-

> "That the affidavit filed in support of the notice of motion is bad in law in that it contains a jurat of attestation which is incurably defective."

Submitting briefly and precisely in substantiating his ground of objection Mr. Muna asserted that the affidavit in support of the notice of motion or the affidavit, is defective in as much as it is not shown in the jurat of attestation the place where the affidavit was made. According to the learned advocate this omission offended against the mandatory provisions of section 8 of the Notaries Public and Commissioners for Oaths Act, Cap. 12, Revised Laws, Edition 2002, hereafter the Act.

Section 8 of the Act reads as follows:-

> "Every Notary Public and Commissioner for Oath before whom any oath or affidavit is taken or made under this ordinance shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made" (emphasis is ours).

He contended that since the provision is couched in mandatory terms, the Commissioner for Oaths cannot with impunity opt out of the statutory obligation to state in the jurat the place where the affidavit was made. Failure to comply with this mandatory requirement of the law rendered the affidavit incurably defective, he argued. In support of his submission he referred us to some past decisions of the Court on the issue, the most recent being:-

(a) **Theobald Kainam v. The General Manager, K.C.U [1990] Ltd –** BK Civil Application No. 3 of 2002 (unreported) and

(b) **The Registered Trustees of Joy In The Harvest v. Hamza Sungura –** Civil Application No. 3 of 2003 (unreported).

In both applications the notices of motion which were supported by such defective affidavits were held to be incompetent and struck out. Mr. Muna invited us to follow suit and strike out this application with costs.

Mr. Mtaki resisted the objection and put up some formidable arguments in defence of his affidavit which patently did not show in the jurat of attestation at what place it was made, a fact he readily conceded. The anchor of his argument was that the two decisions relied on by Mr. Muna were no longer good law as they have been overruled by the decision of the Court in the case **The Judge In-charge High Court Arusha v. N.I.N. Munuo Ng'uni,** Civil Appeal No. 45 of 1998 (unreported). Without addressing us particularly on the issue that was at stake in that case, Mr. Mtaki invited us to accept and adopt the observation of the Court in the **Munuo** case (supra) to the effect that:-

> "... Now, it is trite law that procedural irregularity should not vitiate proceedings if no injustice has been occasioned ... we agree with the respondent that rules should not be used to thwart justice. In fact a prominent judge in this jurisdiction the late BIRON, J.

said ... that rules of procedures are handmaids of justice and should not be used to defeat justice" pp. 2–3 of the typed judgement.

The Court, went on to observe thus:-

"To clinch it all, the thirteenth Amendment to the Constitution has promulgated Article 107A which provides, in sub-article 2 (e), as follows:

(2) Katika kutoa uamuzi wa mashauri ya madai na jinai kwa kuzingatia sheria, mahakama zitafuata kanuni zifuatazo, yaani:

(a) ...

(b) ...

(c) ...

(d) ...

(e) Kutenda haki bila ya kufungwa kupita kiasi na masharti ya kifundi yanayoweza kukwamisha haki kutendeka.

That can be translated as follows:

> (2) In the determination of civil and criminal matters according to law, the courts shall have regard to the following principles, that is to say:
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) administering justice without being constrained unduly by technical requirements, which are capable of preventing justice from being done" (emphasis is ours) at pp. 3–4.

When the attention of Mr. Mtaki was drawn by the Court to the fact that the decision in **Munuo's** case could not by any stretch of imagination have overruled the decisions relied on by Mr. Muna, as these were delivered on 17/07/2003 and 01/03/2005 respectively while the former decision was handed down on 05/05/2002, he prevaricated. He urged us then to hold the said two decisions were given *per incuriam* and in utter disregard of the constitutional

provisions. He accordingly urged us to hold that section 8 of the Act should be construed as being directory and not mandatory in nature and then hold that the omission in the jurat is an innocuous one and proceed to dismiss the preliminary objection with costs. Mr. Muna rejoined by arguing that article 107A (2) (e) should be read subject to article 107B of the Constitution

We have given due consideration to the thought provoking submissions by both counsel. We have duly read all the cases and the constitutional provisions referred to us by the two resourceful learned advocates and we have found them of considerable interest. However, without in anyway disregarding the great industry and effort shown by both counsel in their submissions in this matter, we are constrained to observe that we have found the case of **Munuo** and the two constitutional provisions to be of little assistance in the determination of the issue before us.

Of course article 107B reads in Kiswahili as follows:-

> *"Katika kutekeleza mamlaka ya utoaji haki, mahakama zote zitakuwa huru na zitalazimika kuzingatia tu masharti ya Katiba na yale ya sheria za nchi."*

Rendered in English it would read:

> "In discharging their judicial functions, all the courts shall be independent and shall be bound only by the provisions of the Constitution and the laws of the land".

There is, clearly, nothing in this provision which would lend support to Mr. Muna's proposition that article 107A (2) (e) of the Constitution should be read subject to the provisions of article 107B. This latter provision only guarantees the independence of the judiciary. That is that the judiciary shall be independent of any person or authority in discharging judicial functions.

Likewise, we think that **Munuo's** case which was decided before article 107A (2) (e) featured in our Constitution, as observed in **Hamza Sungura's** case (supra), did not do away with all rules of procedure in the administration of justice in the country. Article 107A (2) (e) of the Constitution does not contemplate that either. Learned counsel for the applicant, Mr. Mtaki, at the prompting of the Court, admitted that much and we think correctly so.

We wish to observe that the objection in **Munuo's** case, which was based on rule 87 (2) of the rules, was all the same dismissed. Furthermore, in our decided opinion, article 107A (2) (e) is so couched that in itself it is both conclusive and exclusive of any opposite interpretation. A purposive interpretation makes it plain that it should be taken as a guideline for court action and not as an iron clad rule which bars the courts from taking cognizance of salutary rules of procedure which when properly employed help to enhance the quality of justice delivered. It recognizes the importance of such rules in the orderly and predictable administration of justice. The courts are enjoined by it to administer justice according to law only without being unduly constrained by rules of procedure and/or technical requirements. The word 'unduly' here hould only be taken to mean "more than is right or reasonable; excessively or wrongfully": See CHAMBERS TWENTIETH CENTURY DICTIONARY, at page 1469. One cannot be said to be acting wrongfully or unreasonably when he is executing the dictates of the law.

That not every procedural rule is outlawed by article 107A (2) (e) was made manifest by the Court in **China Henan International Cooperation Group v. Salvand K.A. Rwegasira,** Civil Reference No. 22 of 2005 (unreported) The respondent in the reference challenged its competence on the ground that the Court had not been properly moved because a wrong provision of the rules had been cited. In its ruling dated 21st March, 2006 sustaining the preliminary objection, the Court held that "it is now settled that wrong citation of a provision of the law or rule under which the application is made renders the application incompetent".

Regarding article 107A (2) (e), the Court went on to say:-

> "... In this case, as already indicated, the circumstances are such that we can hardly glean any element of technicalities involved. The role of rules of procedure in the administration of justice is fundamental. As stated by Collins, M.R. in **Re Coles and Ravenshear (1907) 1 KB 1**, rules of procedure are intended to be that of handmaids rather than mistresses. That is, their function is to facilitate the administration of justice. Here, the omission in citing the

> proper provision of the rule relating to a reference and worse still the error in citing a wrong and inapplicable rule in support of the application is not in our view, a technicality falling within the scope and purview of Article 107A (2) (e) of the Constitution. It is a matter which goes to the very root of the matter as urged by Mr. Kamugisha ...".

As already indicated earlier on in this ruling, this is a formal application brought under the provisions of the rules although the notice of motion is silent on the particular provision. It is specifically provided in rule 45 of the rules that all applications to the Court shall be by notice of motion stating the grounds of the application. It is further provided in rule 46 (1) as follows:-

> "Every formal application to the Court shall be supported by one or more affidavits of the applicant or of some other person or persons having personal knowledge of the facts".

The function of stating the grounds and supplying affidavits is common knowledge. It reduces the amount of time to be spent and costs by taking the place of oral evidence. On the basis of the affidavits (counter-affidavits inclusive) the rights of the parties can be

conclusively determined beyond any reproach. The important point to be observed here is that the affidavits being contemplated here are those made in strict compliance with the provisions of s. 8 of the Act before a Commissioner for Oaths. Such affidavits are even recognized in the Constitution in Article 151 (1).

There is no gainsaying that the jurat of attestation is an essential ingredient of any affidavit. What the jurat should contain is conspicuously spelt out in s. 8 of the Act. As Mr. Muna correctly submitted the Commissioners for Oaths cannot, with impunity, decide to pick and choose what to include and what to omit in the jurat. He must duly conform with the requirements of the law or else, as was held by this Court in the two cases relied to by Mr. Muna. In a plethora of cases, this Court has held that an affidavit will be held to be incurably defective if in the jurat of attestation the place where the affidavit was made is not shown. We wish to emphasize here that this is not a mere incantation of lawyers. This is now settled law as reflected in the decisions of the Court in the following cases:

In **D. B. Shapriya and Company Ltd. v. Bish International B.V.,** Civil Application No. 53 of 2002 (unreported) a ground of

preliminary objection identical with the one under scrutiny was raised. The Court was of a firm conclusion 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. After all such rubber stamp is never part of the jurat of attestation. In similar vein the Court resolutely so held in the case of **Theobald Kainami v. The G.M. K.C.U. (1990) Ltd.** (supra).

In **Kainami's** case (supra) the Court unambiguously held as follows:-

> "Unfortunately for the applicant the courts in this country do not have the kind of leeway the courts in England have. 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" (emphasis is ours).

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 and the application was struck out.

When the Court was faced with an identical problem in **The Registered Trustees of Joy In The Harvest v. Hamza Sungura** (supra), it notably observed:-

> "The issue of omission to specify the place where the jurat was executed is not new in the administration of justice before this Court".

As the issue was aptly described to be not new, we shall quickly add that the decisions on the legal consequences for an affidavit suffering from such a defect are not only consistent but are now legendary. The Court after leading itself to these legendary decisions ultimately held that since the impugned affidavit did not show the place where the oath was made or taken, it was incurably defective. The notice of motion was struck out. Again on 14/03/06 the Court in **Ashura Abdulkadiri v. The Director, Tilapia Hotel**, MZA Civil Application No. 2 of 2005 struck out the notice of motion for identical reasons. Many other similar decisions by this Court and the High Court abound. Indeed the list is inexhaustible. We think that it cannot be more neatly and seriously put than by simply asserting with a tone of finality that all these cases constitute a line of recent decisions of

convincing authority on the issue. 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. After all article 107A (2) (e) constrains us to administer justice in strict compliance with the requirements of the law.

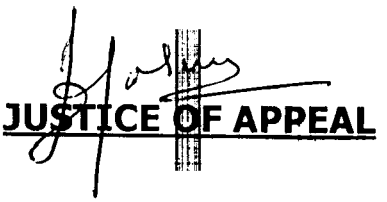
We would like to conclude this issue with this unavoidable observation. We have reached this conclusion while alive to the salutary caution sounded about one hundred years ago that precedents should be used as stepping stones in search of new principles and not as halting places. For this reason, we wholly subscribe to the observation by Benjamin N. Cardozo who said:-

> "... we must spread the gospel that there is no gospel that will save us from the pain of choosing at every step. There are times when precedents seem to lead to harsh or bizarre conclusions, at war with social needs. The law assumes the aspect of scholastic exercises divorced from the realities of life. In such junctures, judges would do well to keep before them as a living faith that a choice of methods is theirs in the shaping of their judgements" in THE GROWTH OF LAW, p.65.

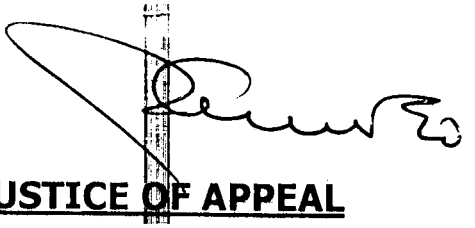
We are confident that from what we have with profundity attempted to demonstrate above, we have not led ourselves to such a bizarre conclusion. With the current state of both statutory and case law the time is not yet ripe for making or a u-turn on the issue as the law is already firmly settled. We shall need strong, cogent and what we would call irrefragable reasons to convince us to hold otherwise. Such reasons are patently wanting here.

Having so held and observed, we find ourselves constrained to uphold the preliminary objection. The application is accordingly hereby struck out with costs.

DATED at MWANZA this 16th day of March, 2007.



JUSTICE OF APPEAL



JUSTICE OF APPEAL



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