- Defective Affidavit (Jurat) = appl. defective/incompetent: be struck out
contravene R. 48(1), 2009 – p5; s. 8 Cap 12
p. 6
17.4

PROCEDURE

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RUTAKANGWA, J. A., KALEGEYA, J. A., And MASSATI, J. A.)

CIVIL APPLICATION NO. 147 OF 2010

1. THE GOVERNMENT OF THE GREAT SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA
2. THE HON. ATTORNEY GENERAL .... **APPLICANTS**

VERSUS

MEIS INDUSTRIES LIMITED .... **RESPONDENT**

(Application for Extension of time to file Application for stay of Execution and Application for stay of Execution from the decision of the High Court of Tanzania at Dar es Salaam)

(Karua, J.)
dated the 26th day of October, 2010
in
Civil Case No. 124 of 2010

RULING OF THE COURT

18 March & 12 July, 2011

KALEGEYA, J. A.:

The Applicants, by way of a Notice of Motion filed under s.4 (2) of the Appellate Jurisdiction Act (Cap 141 R.E. 2002) and Rules 10, 11, (2) (d) (i) and 4 (2) (b) of the Court of Appeal Rules 2009, seek for orders that:

> *"1. Extension of time order be granted in favour of the Applicants so that they can apply for an order of stay of execution of the Drawn Order and Decree of the High Court pending Application of revision before the Court, and*

2. *Application for stay of execution of the Drawn Order and Decree from judgment of the High Court dated 26 October, 2010 in Civil Case No. 124/2010, on the ground that the revision has greater chances of success."*

The said notice of motion is supported by an affidavit of Mr. Chidowu, Principal State Attorney, who also represented the Applicants during the hearing of the application.

Upon being served with the Notice of Motion, among others, the Respondents who were represented during the hearing by Mr. Matunda and Mr. Kamara, learned Counsel, raised seven preliminary objections as follows:

"1. *The Honourable Attorney General of the United Republic of Tanzania does not have locus or legal authority to plead for, act for and or represent the Government of The Great Socialist Libyan Arab Jamahiriya, the First Applicant herein.*
2. *The Application is legally incompetent for having been initiated by Attorney General as amicus curie without leave of the Court.*
3. *The Application is frivolous.*
4. *An application for extension of time to apply for stay of execution is wrongly made.*

5. *The Applicants application is incompetent for being supported by an Affidavit that is defective in as much the jurat thereof does not show the place where the oath was administered.*
6. *The non-verification of paragraph 7 of the Affidavit renders the Application for stay of execution incompetent.*
7. *The Applicants' application for stay of (sic!) is made under wrong provision of the law."*

Procedurally we have to determine the preliminary objections first.

While we commend the counsel for their concerted efforts, in support and against, in their respective research as exemplified by their submissions, both written and oral, in terms of Rule 106 of the Court of Appeal Rules, 2009, on our part, we are more than persuaded that dealing with just one of the preliminary objections, No. 5 on the list, disposes of the matter – that is, the one challenging the validity of the supporting affidavit which has a defective jurat.

The Respondents' counsel, relying on s.8 of the Notaries Public and Commissioners for Oaths Act [Cap 12, R.E 2002] and decisions of this Court such as **D.P.Shapriya & Co. Ltd Versus Bish International Bv** (2002) 1 E.A. 47 **and Ghati Mathusela versus Matiko w/o**

Marwa Mariba (CAT – Mwanza Registry, Civil Application No. 6 of 2006) urged us to strike out the application for incompetency due to lack of a supporting affidavit as the one at hand is incurably defective for failure to state in the jurat at what place it was sworn.

On his part, the learned Principal State Attorney, Mr. Chidowu, though seemingly conceding to the omission, sought an escape route by disowning the application. To appreciate this tactic, let part of his written submissions tell it all. He states:

> *"On the as (sic) issue that the affidavit is defective this point again should not stand; given the circumstances of the case, whereby the Attorney –General simply notified the court on the existence of the proceeding, finding and orders of the trial court.* ***The Attorney General was not a party and is not a party*** *in these proceedings the Attorney General is just drafted as a friend of the court as he did in the case* ***ATTORNEY GENERAL V. BUTAMBARA (1996)*** *(supra). Let the Court invoke its revisional jurisdiction on this matter and Attorney General to advise the Court."*
>
> [**Emphasis added**].

Further to the above, he orally submitted that the Notice of Motion should be treated as being akin to a letter by the Attorney General applying for leave to be joined as a friend of the Court.

Having considered the counsel's submissions and the law, on our part, we have no spec of doubt that indeed the application before us is incompetent.

Rule 48 (1) of the Court of Appeal Rules, 2009, unreservedly provides that any formal application to the Court, should be by way of a Notice of Motion supported by an affidavit. Aware of this, the Applicants purported to come to the Court by employing the mode. Unfortunately however, the affidavit, sworn by the same Mr. Chidowu is silent about the place where the same was taken. This is in violation of s.8 of Cap 12 R.E. 2002 which provides:-

> *"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"* [**Emphasis added**].

As rightly pointed out by the learned counsel for the Respondents, this Court has, in various decisions including **Bish** and **Matiko** (supra);

The Registered Trustees of Joy In the Harvest v Hamza Sungura, Civil Application No. 3 of 2003; **Theobald Kainami v The General Manager, K.C.U (1990) LTd-BK** Civil Application No. 3 of 2002 and **Zuberi Mussa vs Shinyanga Town Council, (MWZ)** Civil Application No. 100 of 2004 to mention a few, held that an affidavit which does not comply with the mandatory requirements of s.8 of Cap 12 (R.E. 2002) is incurably defective. The Court in the **Zuberi case** insistingly exposed the impregnable position of the principle thus:

> *"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, ... to hold otherwise."*

As the affidavit at hand is incurably defective, in terms of Rule 48, there is no application worth the title before the Court. This disposes of the matter.

However, before we conclude, we feel we should make three observations.

To start with, there is nothing wrong, for the Hon. Attorney General to seek leave to be joined as a friend of the Court in a befitting cause. Such causes would include where public or government interests, however remotely, are involved. Obviously this would include a situation where a foreign government's interests are involved, and more specifically where such interests touch or have a nexus with the government of Tanzania. Seeking leave however should be in consonance with the usual procedure which is not a new domain to the Hon. Attorney General.

The second observation is on inclusion of s.4 (2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2003] as one of the provisions of the law under which the aborted application was brought. With respect to the Principal State Attorney, even if the application had not suffered from the already discussed malaise, the said section would have been expunged as it is irrelevant. We appreciate that in the Notice of Motion it is indicated,

among others, that stay of execution is being sought "*pending Application of revision before the Court*" but citation of revisionary provisions is premature at this stage as this is not an application for revision, for, that one, matters going as expected, is yet to come. That apart, even if it was to be assumed that indeed it is an application for revision, s. 4(2) of Cap 141 cited is irrelevant. The relevant provision which an applicant, in the obtaining situation, should cite is s. 4(3) as can clearly be gleaned from the following provisions of Cap 141 (supra):-

> "s. 4(2) *For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred upon it by this Act, the Court of Appeal shall, in addition to any other power, authority and jurisdiction conferred by this Act, have the power of revision and the power, authority and jurisdiction vested in the court from which the appeal is brought.*
>
> (3) *Without prejudice to subsection (2), the Court shall have the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court."*

The Court in Civil Application No. 1 of 2002, **Benedict Mabalanganya vs Romwald Sanga** (unreported) clearly put the applicability of the sections as follows:

> *"Before we come to that and for the avoidance of doubt, we better say that section 4 of the Appellate Jurisdiction Act, 1979, (hereinafter referred to simply as AJA, 1979) confers upon this Court powers of revision. The Court can exercise those powers in one of two ways: under section 4(2) the Court can revise proceedings in the course of hearing an appeal. Two, under section 4(3) the Court may on its own motion call for and examine the record of any proceedings before the High Court. Through case law (**Halais Pro-Chemie v. Wella A.G.** [1996] T.L.R. 269] this Court has extended sub-section (3) to cover instances where the Court is moved to exercise its jurisdiction of revision."*

Although the principle of law that citation of a wrong provision of the law or non-citation thereof renders the application incompetent is well settled in our law (**NBC vs Sadrudin Meghji**, Civil Application No. 20 of 1997; **Interter East Africa vs B &S International**, Civil Appeal No. 46 of 1997; **China Henenan International Cooperation Group vs Salvand K.A. Rwegasira**, Civil Reference No. 22 of 2005; **Citibank**

Tanzania Ltd, Tanzania Telecommunication Company Ltd and four others, Civil Application No. 65 of 2007) if the current application had not been netted in another profound flaw, that principle would not have been put into play because other relevant provisions were cited hence our reference to just expunging that which is irrelevant.

And lastly is an observation on Mr. Chidowu's tactics during the prosecution of the application.

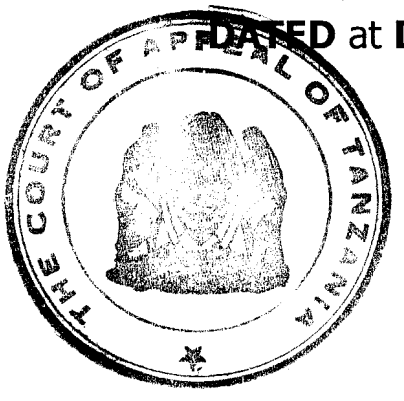
With greatest respect to the Principal State Attorney, we found it very novel in the legal domain. The current application (though found to be defective) was purportedly initiated by the two Applicants by a Notice of Motion. We are using the term "purported" because, although hurriedly indeed one may take the duo to be the applicants, a scrutiny of the said Notice of Motion and the defective affidavit, clearly show that it is the 2nd Applicant, the Attorney General, who is solely in action.

Apart from the impleading title, there is nothing else which would suggest that the 1st Applicant is indeed an applicant as such for there is no representative thereof so indicated. And even more suprising, nowhere does the 2nd Applicant claim to stand in that capacity. Without going into the issue of whether the 1st Applicant is indeed an applicant in the eyes of the law for even the defective affidavit does not allege to be a joint one, or

the question on how the Attorney General can join proceedings as a friend of the Court, on the Court record's face value there is no way Mr. Chidowu's oral submission: that the Attorney General is not an applicant but just a friend of the Court, can stand. Why? First, there is no Court's leave to so act. Two, the glaring Notice of Motion and affidavit cannot under whatever extension of reasoning be equated to a letter by the said Attorney General requesting to be made a friend of the Court. Thirdly, the most serious of it all, once he tactically disowns the application which is held to be incompetent, there would be no application for which he would seek the Court's order to be joined and made a friend of the Court. It is a very unfortunate tactic aimed at salvaging a still-born application.

That said, for reasons explained, we hold that the application before us is incompetent and it is struck out accordingly.

DATED at **DAR ES SALAAM** this 12th day of July, 2011.



E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

L.B. KALEGEYA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL