

Jurat
— Place where affidavit was made.

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 53 OF 2002

BETWEEN

D. B. SHAPRIYA & CO. LTD. APPLICANT

AND

BISH INTERNATIONAL B. V. RESPONDENT

(An application for stay of execution
of the decision of the High Court of
Tanzania at Dar es Salaam)

(Msumi, J.K.)

dated the 6th day of May, 2002

in

Misc. Civil Case No. 243 of 2001

REASONS FOR DECISION

RAMADHANI, J.A.:

On 12th June, 2002, I allowed a preliminary objection but reserved my reasons which I now give.

The applicant filed a notice of motion seeking to stay the execution of the decision of MSUMI, J.K. The respondent countered that by raising a preliminary objection that the affidavit filled by the applicant contravenes s. 8 of the Notaries Public and Commissioners for Oaths Ordinance, Cap. 12. It was contended that the affidavit does not indicate the place where it was sworn. Mr. George Kilinda, learned advocate for the respondent, submitted that s. 8 requires a jurat to show the place at which an affidavit was sworn. The learned advocate observed that there is a rubber stamp impression of Messrs. El Hamry Advocates containing the name "Dar es Salaam". However, Mr. Kilinda said that that was not

enough and does not comply with the law. He referred me to a case of the High Court of Kenya: Narok Transit Hotel Ltd. & Giden Letoya Hapu v. Barclays Bank of Kenya Ltd., Civil Case No. 12 of 2001 (Milimani Commercial Courts). He also cited Msoza Transport Ltd. v. Nzareki Investment Co. Ltd., Civil Application No. 16 of 1992, (CAT) (unreported).

In reply Prof. G. Mgongo Fimbo for the applicant said that the defect does not go to the root of the affidavit. He said that an affidavit is evidence in court and that it consists of two things: the facts stated and the oath. He argued that the affidavit in question satisfies both and that the omission to state where it was sworn is remedied by the rubber-stamp impression. He said that the Kenyan case is bad law because the purpose of s. 5 (in pari materia with our s. 8) was not discussed. He submitted that the purpose of that section is to authenticate that the deponent was actually sworn. Evidence of that, he argued, is available in the present case. The learned advocate pointed out that the Court of Appeal case is irrelevant because it dealt with a non-disclosure of the source of information.

Mr. Kilind^u responded by saying that if an affidavit is defective then there is nothing before the Court and it ought to be struck out because there is nothing to amend.

First of all, with all due respect to Prof. Fimbo, his treatment of an affidavit as containing two things is too simplistic and casual. An affidavit has been defined as a written document containing material and relevant facts or statements

relating to the matters in question or issue and sworn or affirmed and signed by the deponent before a person or officer duly authorized to administer any oath or affirmation or take any affidavit. It follows from this definition that an affidavit is governed by certain rules and requirements that have to be followed religiously.

After the above introductory remark of what is an affidavit and what it contains, let us see what section 8 of Cap. 12 prescribes:

Every Notary Public and Commissioner for Oaths 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 mine.)

I am unable to agree with Prof. Fimbo's submission. The section categorically provides that the place at which an oath is taken has to be shown in the jurat. The requirement is mandatory: Notary Publics and Commissioners for Oaths "shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made". The use of the word "truly" in my considered opinion underscores the need to follow the letter of the provision. This provision is not a sheer technicality as Prof. Fimbo would want this Court to find.

Halsbury's Laws of England, Vol. 17 paragraph 316 emphasizes that requirement and cites at Foot Note 4 Pilkington v. Himsworth, (1835) 1 Y & C Ex 612 that Parties cannot waive regularities

in the form of a jurat. That case also said that defective affidavits could be filed with the leave of the court. Here such leave was not even asked for.

I have surveyed the affidavit of Kishor Shapriya and it is glaringly evident that the jurat does not disclose the place where the affidavit was made. Admittedly, there is a rubber stamp impression of Mr. El Maamry, learned advocate, which has "Dar es Salaam" on it. The rubber stamp impression reads:

Said H. El Maamry, Advocate Notary Public
& Commissioner for Oaths, Dar es Salaam.

This is on all fours with the Narok Transit Hotel Ltd. The learned judge, ONYANGO OTIENO, J., found the affidavit to contravene s. 5, which is in pari materia with our s. 8. Prof. Fimbo invited me not to be persuaded by that authority which he regarded to be bad law because it omitted to discuss the purpose of section 5. He submitted that the purpose is authenticity that the deponent was actually sworn. According to Prof. Fimbo authenticity could be achieved by the rubber stamp impression. So, to him the omission is trivial.

But as I have said above the requirements to be contained in an affidavit have all to be observed to make it authentic. Here that has not been the case. It is not for a deponent to pick and choose what is and what is not important.

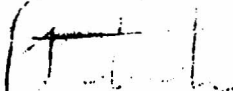
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DATED at DAR ES SALAAM this 22nd day of August, 2002.

A.S.L. RAMADHANI
JUSTICE OF APPEAL



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


(F.L.K. WAMBALI)
DEPUTY REGISTRAR