

*Affidant - place & date - omission - fatal.
- identification of deponent - failure
to state - fatal.*

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 24 OF 2003

**SIMPLISIUS FELIX KIJUU ISSAKA APPLICANT
VERSUS
THE NATIONAL BANK OF COMMERCE LIMITED RESPONDENT**

**(Application for stay of execution from the Judgment and
Decree of the High Court of Tanzania Commercial Division,
at Dar es Salaam)**

(Dr. Bwana, J.)

**dated the 12th ay of March, 2003
in**

Commercial Case No. 175 of 2002

R U L I N G

KAJI, J.A.:

In this application, Simplisius Felix Kijuu Issaka, is applying for stay of execution of the decree of the High Court Commercial Division (Dr. Bwana, J.) in Commercial Case No. 175 of 2002, pending determination of the intended appeal, notice of which was filed on 24.3.2003 which was in time.

In that case the appellant, who was the defendant, had been sued by the respondent, the National Bank of Commerce Ltd. for payment of Shs. 19,153,957/= being money lent to him by the respondent, plus interest. The applicant admitted the principal

amount but denied the interest, alleging that the respondent had waived the interest. His defence did not satisfy the trial court. He was condemned for the principal amount which he had admitted and the interest accrued. He was dissatisfied with the decision on interest. He lodged a notice of appeal intending to appeal against it to this Court.

Meanwhile he filed this application for stay of execution pending determination of the intended appeal.

When the matter was called on for hearing, the respondent through its advocate Mr. Magai from Ishengoma, Masha, Mujulizi and Magai Advocates, raised a preliminary objection, notice of which had been filed earlier. In that preliminary objection, Mr. Magai raised two grounds of objection, namely:

- (1) That the affidavit of Simplisius Felix Kijuu Issaka filed in support of the application is incurably defective.
- (2) That the applicant has failed to take necessary steps to prosecute the appeal.

The preliminary objection was argued by Mr. Mujulizi, learned counsel on behalf of the respondent.

Arguing the first ground of objection, Mr. Mujulizi contended that the applicant's affidavit supporting the notice of motion does not show where the oath was taken, and the Commissioner for Oaths did not show whether he knew the applicant or was shown to him by somebody he knew who also knew the applicant. It was the learned counsel's submission that, this offended section 10 of the Oaths (Judicial Proceedings) and Statutory Declarations Act NO. 59 of 1966 and the Notaries Public and Commissioners for Oaths Ordinance, Cap. 12.

Arguing the second ground of objection Mr. Mujulizi contended that, the applicant lodged his notice of appeal on 24.7.2003, and that up to now, after a period of well over two years, he has failed to file the memorandum of appeal. It is the learned counsel's submission that the applicant has failed to take a necessary step to prosecute the appeal, and that the notice of appeal should be struck out with costs.

On his part, the applicant contended that, the oath was taken at Dar es Salaam as witnessed by the rubber stamp of the Commissioner for Oaths before whom the oath was made, and that the Commissioner for Oaths knew him by his name after he had been introduced to him by somebody who knew him, and that that introducer knew him by being introduced to him by somebody else earlier.

On the second point of objection, the applicant contended that, he applied for a copy of judgment, decree and proceedings and made some follow up, whereby he managed to obtain a copy of the judgment and decree. Since he was residing far away at Mwanza and Kondoa, he was advised by the court officials to go back home and wait, and that when the other documents would be ready, he would be notified for collection. Since then he had never been notified. He promised to bring a letter from the trial court to that effect before the delivery of the ruling. Indeed on 2.8.2005 he brought a certificate of delay from the Registrar of the High Court Commercial Division to the effect that the period from 24.3.2003 when the applicant filed the notice of appeal and applied for copies of

judgment, proceedings and decree, to 14.7.2005 when the said proceedings, judgment and decree were ready for collection, should be excluded. It is to be observed that the 14th July, 2005 was the day when the preliminary objection was heard.

In my ruling I will start with the second ground of objection, that is whether the applicant has deliberately failed to take a necessary step to prosecute the appeal.

The letter from the Registrar of the High Court Commercial Division mentioned above, is as clear as day light that the necessary documents were not ready for collection before 14.7.2005. In that respect, the applicant cannot be said to have deliberately failed to prosecute the appeal by the time the preliminary objection was filed, that is, on 3.8.2004. According to the applicant's submission, his last follow up was in April 2003 when he was advised by court officials that since he was residing far away at Mwanza and Kondoa, it would be wise to go back home and wait to be called for collection when the same were ready for collection. He did not produce anything tangible to support this allegation, but I have found nothing to

disbelieve him on this. That follow up in April 2003 to me, was a sign of diligence. The second ground of objection is overruled.

As far as the first ground of objection is concerned, that is, the defect in the applicant's affidavit, it is common ground that the affidavit does not show at what place the oath was made or taken. This is contrary to the requirement of section 8 of the Notaries Public and Commissioners for Oaths Ordinance Cap. 12. It is true the affidavit is stamped with a rubber stamp of the Commissioner for Oaths before whom the oath was made, but that shows only his name and address. It is not conclusive evidence that the address appearing there is the place where the oath was taken.

Secondly, the affidavit does not show whether the Commissioner for Oaths knew the applicant personally or whether the applicant was identified to him by somebody whom the Commissioner for Oaths knew personally. This is contrary to the requirement of section 10 of the Oaths (Judicial Proceedings) and Statutory Declarations Act No. 59 of 1966.



This being the case, it is evident that the applicant's affidavit in support of the notice of motion is defective.

The crucial issue is as to what is the effect of a defective affidavit in support of a notice of motion.

In my view, a defective affidavit in support of a notice of motion renders the application incompetent. It leaves the application without legs on which to stand.

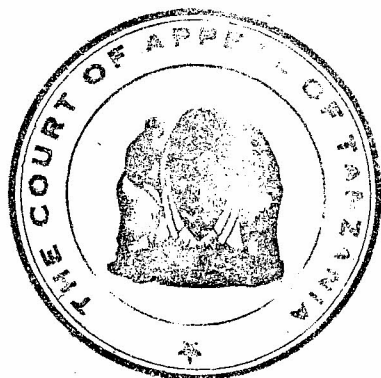
Since the application is incompetent for being supported by a defective affidavit, it must be struck out.

In the event, and for the reasons stated, I sustain the first ground of objection and strike out the application for stay of execution, with costs.

DATED at DAR ES SALAAM this 19th day of August, 2005.

S. N. KAJI
JUSTICE OF APPEAL

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



(S. M. RUMANYIKA)
DEPUTY REGISTRAR