

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KIMARO, J.A., LUANDA, J.A., And MMILLA, J.A.)

CIVIL APPLICATION NO. 6 OF 2011

SHARIFA AHMED KAIDI APPLICANT

VERSUS

MARGRETH MASAO RESPONDENT

**(Appeal from the judgment of the High Court of Tanzania
at Arusha)**

(Rugazia – RM (E.J))

dated 7th day of October, 1997

in

Civil Appeal No. 8 of 1996

RULING OF THE COURT

18th & 26th November, 2013

MMILLA, J.A.:

Imboru Chambers, Advocates instituted Civil Application No. 6 of 2011 by way of Notice of Motion under Rules 89 (2) and 90 (a) of the Tanzania Court of Appeal Rules, 2009 (**the Rules**) on behalf of the applicant, Sharifa Ahmed Kaidi. It was intended to move the Court to strike off the Notice of Appeal to this Court filed by the respondent, Margreth Masao, against the decision by Hon. Rugazia, Resident Magistrate with Extended Jurisdiction (as he then was) in Civil Appeal No 8 of 1996 dated 7.10.1997 on the ground that the respondent failed to institute the

appeal within time provided for under Rule 90 of the Rules. Mr. Akonaay Sang'ka, learned advocate, appeared for the applicant.

On the other hand, Mr. Herbert Makange, learned advocate appeared for the respondent. He had filed a notice of preliminary objection on a point of law anchored on a lone ground that the applicant's affidavit in support of the application is irremediably defective that ought not to be acted upon for want of the names of the attesting officer in its jurat whose effect by reason of that omission, is to have the entire application struck out with costs.

In support the ground raised, Mr. Makange submitted that the portions relating to jurat of both affidavits filed in support of the application shows that the name of the attesting officer has not been disclosed. He argued that such a requirement has been stressed in several cases decided by this Court, including those of **Felix Francis Mkosamali v. Jamal A. Tamim**, Civil Application No. 4 of 2012, CAT, Tabora Registry, **M/S Bulk Distributors Ltd v. Happyness William Molllel**, Civil Application No. 4 of 2008, CAT, Arusha Registry and **Samwel Kimaro v. Hidayat Didas**, Civil Application No. 20 of 2012, CAT, Mwanza Registry (all unreported). In the first two cases, he said, the Court was

firm that lack of the names of the attesting officer makes the jurat defective, the effect of which is to render the application incompetent liable to be struck out. He thus urged the Court to hold that the affidavits in this regard are defective attracting the striking out of the present application.

On the other hand, Mr. Sang'ka countered the objection raised by his learned colleague basing on the third case of **Samwel Kimaro v. Hidaya Didas** (supra) in which, he said, two of the Hon. learned judges of this Court departed from the position previously held by the Court in the cases **Felix Francis Mkosamali v. Jamal A. Tamim** and **M/S Bulk Distributors Ltd v. Happyness William Mollel** (supra). He supported the views of those two judges that omission by the attesting officer to indicate the name on the jurat does not in any way offend the provisions of section 8 of the Notaries Public and Commissioners for Oaths Act Cap. 12 of the Revised Edition, 2002 (**the Act**) because indication of the name of the attesting officer is not a requirement under that provision but a mere practice. Accentuating that he was impressed by that stand, he requested the Court to dismiss the preliminary objection raised by the respondent's advocate.

In a brief rejoinder, Mr. Makange contended that it is settled law that names of attesting officers must be indicated, and that it is not a question of being impressed, but the question is; what is the law at the moment? In his view, the answer is that the law is as restated in the first two cases of **Felix Francis Mkosamali v. Jamal A. Tamim** and **M/S Bulk Distributors Ltd v. Happyness William Mollel** (supra).

Even, he went on to say, in the case of **Samwel Kimaro v. Hidaya Didas** (supra) the two Hon. Judges who departed from the position previously held by the Court in the said two cases referred to above said they were having a second thought as regards the import of section 8 of the Act, but that the law remains to be as restated in the said two cases cited above. He once again pressed us to dismiss the preliminary objection.

After carefully considering the submissions of both counsel for the parties as well as traversing the decisions of this Court referred to above, we wish to take note of the opinions made by the two Hon. Judges in the said case of **Samwel Kimaro v. Hidaya Didas** (supra). We highly respect their views which are founded on reconsideration of the scope of section 8 of the Act. However, we agree with Mr. Makange that the

decisions in the cases of **Felix Francis Mkosamali v. Jamal A. Tamim** and **M/S Bulk Distributors Ltd v. Happyness William Mollel** (supra) in which the Court restated the requirement to indicate the name of the attesting officer on that portion of the jurat of attestation is good law. In our view, it is not enough for the attesting officer to just sign and impress a rubber stamp thereat. The rationale is that not all commissioners for oaths and notary public listed under section 10 (2) of the said Act have personal stamps. The list of commissioners under that provision include any persons employed by the Government of the United Republic and who, under the provisions of section 3 of the Advocates Act are entitled to practise as advocates of the High Court; any persons employed by the Tanzania Legal Corporation established by the Tanzania Legal Corporation (Establishment) Order, and who, under the provisions of section 3 of the Advocates Act, are entitled to practise as advocates of the High Court; the Registrars of the Court of Appeal, the Registrars of the High Court and every Deputy Registrar; magistrates and Administrative Officers in the service of the Government of the United Republic. In our firm view, the rubber stamp impressions of many of them without more will be meaningless. It is an unhealthy situation for affidavits signed by such commissioners without disclosing their names to be acted upon for, that

way, there will be no easy way of braving or overcoming deceit or treachery. Such a situation has attracted us to accept it as a fact that the previous position should be followed at least until when, perhaps, the said provision of law may have been reassessed.

For reasons we have given, we uphold the preliminary objection raised by Mr. Makange, in consequence of which we find both affidavits in support of the application defective, hence that the application is incompetent. We accordingly strike it out with costs.

DATED at **ARUSHA** this 25th day of November, 2013.




N.P. KIMARO
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL