

TANZANIA / JUDGMENT

20130820 TZHC Dar es Salaam

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TZHCDECIDED
20 August 2013

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM MISC.
COMMERCIAL APPLICATION CASE NO. 42 OF 2012 BETWEEN

1. EMMANUELJAGELO
2. MARINE WORLD LOGISTICS
3. CONTAINER WORLD LOGISTICS J APPLICANTS
4. BARRETTO HAULIERS (T) LIMITE VERSUS MULTIMODAL TRANSPORT AFRICA LTD RESPONDENT RulNg (20 th August, 2013) Nyangarika, J. On 26.6.2013, the above applicants, through Eloquent Law Attorneys, filed an application, under rule 4 of Order 12 of Civil Procedure Code [Cap 23 RE_2002), seeking judgment on admission and a specific order that the respondent pay the applicant, the sum of Tshs 42,500,000/=, which is the outstanding balance sum. On 19.7.2013, the respondent, though Millennium Law Chambers Advocates, filed a Counter Affidavit, affirmed by one, Syed Abbas Rizvi, opposing the application. That counter Affidavit is now being allenged by Page I 1 Mr. Wawa, Learned Counsel for the defendant that it is incurable defective for being wrongly attested. I heard both, Mr. Wawa and Yuda Thadei, Learned Counsels for and on behalf of the applicants and respondent, respectively, and also for and against the objection. Mr. Yuda Thadei, readily, conceded to the objection but was quick to point out that the same objection should apply to the Affidavit sworn by one, Richard Burreto, which supports the application as it is also defective. The Counsel contended that the effect of defectiveness of the said Affidavit should be that there is no application before me. Mr. Wawa, on the other hand, also conceded to the defect in the Affidavit sworn by one, Richard Burreto, but blamed Mr. Yuda Thadei, for not raising the objection earlier on _and also for taking him by surprise. There is a recent decision of the Court of Appeal in M/S Bulk Distributors Ltd V. Happyness William Mollel, AR. Civil Application No.4 of 2008 (CA)_(Unreported) which has been referred to by Mr. Wawa, where on page 4 of the typed ruling, it was held by the Court of Appeal as follows: "It is now settled that an omission to show, in the jurat of attestation, when, where and name or authority, before whom the oath is administered, renders the Affidavit incurable defective. " . -/ -----z----- ' Page I 2 Both, the Affidavit and Counter Affidavit are incurable defective, as conceded by the Counsels. The incurable defective Affidavits renders the present application of no effect. This, in my view, was a point of law,

which, even if, not raised by the Counsels, would have been raised by this court suo muto. Therefore, there is no truth in the complaints by Mr. Wawa as to the question of surprises or raising the objection earlier on, as these have no relevancy and the objection on point of law raised, could have been raised at any stage. Section 8 of the Notaries Public and Commissioner for Oath Act (Cap_12 RE 2002) is coached in the following words; "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" (more emphasis added). From the above provision, it is very clear that the name of the Notary Public or Commissioner for Oath under whom an oath or attestation is made must indicate the name, place and the date of attestation. The act of disclosing one's name has the benefit of authenticating the document. The aforesaid provision of the law uses the catch word "shall" and under section 53(2) of the Interpretation of Law Act (Cap 1 RE 2002) when the word "shall" is used "it means that the function must be performed". Page I 3 . When an Affidavit lacks the name of the attesting officer who did the attestation, it makes the jurat of attestation defective, hence the supporting Affidavit ineffective. (See also Felix Francis Msokamali V. Jamal A. Tamim, Civil Application No.4 of 2012 (unreported) and Samwel Kimaro V. Hidayat Didas, Civil Application No.20 of 2012 (CA)(unreported). I therefore sustain the preliminary objection raised and strike out the Affidavit, Counter Affidavit together with the application. Each side shall bear its own costs as both presented defective Affidavit and Counter. Affidavit, respectively. Order accordingly, K.M.Nyangarika, Judge At Dar es Salaam 20 th day of August, 2013. 900-words. Page ! 4

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