

TANZANIA / JUDGMENT

JOHN BURA HAYMORA

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13 November 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB - REGISTRY OF
MANYARA AT BABATI MISCELLANEOUS CRIMINAL APPLICATION NO. 16544 OF 2024
(Originating from criminal case no. 94 of 2020 the Resident Magistrate Court of Manyara at
Babati) JOHN BURA HAYMORA.....APPLICANT VERSUS THE
REPUBLIC..... RESPONDENT

RULING

6th & 13th November, 2024. Mwihambi, J. The applicant, John Bura Haymora, filed an application for extension of time under section 379 (2) of the Criminal Procedure Act [Cap. 20 R.E. 2022] to file appeal before the High Court in respect of Judgment of the Resident Magistrate Court in Criminal Case No. 94 of 2020. Before hearing of the application, learned advocate of the applicant, Mr. Philbert Akaro, filed notice of a preliminary objection that at the first day of hearing of the application the applicant shall raise a preliminary objection on point of law that the counter affidavit filed by the respondent is incurably defective having not being attested in contravention to section 8 of the Notaries Public and Commissioners for Oaths Act, [Cap. 12 R.E. 2019]. Indeed, in the first day of hearing the preliminary objection was raised that the counter affidavit is incurably defective for not being attested at all which contravenes section 8 of the Notaries Public and Commissioners for Oaths Act [Cap 12 R.E. 2019]. It was the applicant's argument that for a statement to be regarded as an affidavit it must be sworn before a Commissioner for Oath. The said commissioner must see the deponent and write that he/she has seen the deponent swear before him, and that the commissioner knows the deponent personally or the deponent has been introduced to the commissioner by an attesting officer. Then the commissioner shall affix the commissioner stamp and sign the document. By so doing that statement then qualifies to be an affidavit. He further argued that, the said counter affidavit has no endorsement by commissioner for oaths, no name, qualification, signature, address nor stamp, and no specification as to whether the deponent is known or has been introduced to him. He further argued that this defect is incurable and therefore it cannot be said that there is a counter affidavit before this Court. The applicant referred to the case of Linda Cosmas v. George Shida and 2 Others, Civil Application No. 183/08 of 2020 in the Court of Appeal of Tanzania at Mwanza, where the Court distinguished curable and incurable defect in an affidavit, and finally in page 10, last para the Court stated that- "... a reading of section 8 of the Act and cited cases reveals that not any irregularity would have a serious effect of rendering a jurat of attestation

incurably defective. In very dear terms, they are to the effect that it is only failure to show when, where and before what authority (whom) the affidavit was taken which are the only serious deficiencies which render a jurat of attestation and an affidavit as a whole incurably defective subject to be expunged." In the case of *Mianzi Mkilya v. Raheli Mpinga*, Miscellaneous Land Application 80 of 2023 the High Court of Tanzania, Dodoma Sub Registry, April 2024, the Court in page 11 paragraph 2 held that where the affidavit is incurably defect the court cannot order amendment in jurat attestation as this will imply changing the oath or affirmation one has made, and the implication to that will be to water down the nature of oath by allowing people to do so casually, that making statement on oath is a serious thing that must be seriously adhered to. The applicant closed his submission by praying that the respondent's counter affidavit be expunged from court's records. The respondent's response was very brief, Mr. Benedict Kapera, Senior State Attorney argued that in the respondent's records and records in Court, the counter affidavit is attested and the jurat followed all necessary conditions under section 8 of the Notaries Public and Commissioners for Oaths Act [Cap 12 R.E. 2019]. That the counter affidavit has been attested by Advocate who also signed and affixed a stamp as a Commissioner for Oath. Thus, the requirements of section 8 have been met. The learned State Attorney further argued that the cited cases do not apply as they base on unattested affidavit while their affidavit is duly attested. He summed up with a prayer that the preliminary objection be dismissed and this Court to take regard of our counter affidavit filed on 22nd July, 2024. In a brief rejoinder, the applicant reiterated his submission and prayed that the Court can go through the records and satisfy itself if whether the counter affidavit has complied to the set out legal requirements. Section 8 of the Notaries Public and Commissioners for Oaths Act [Cap 12 R.E. 2019] whose compliance is in question, provides: "Every notary Public and commissioner for oaths before whom any oath or affidavit is taken or made under this act shall insert his name and state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made" This provision has been elaborate in various cases. In *Matrac Tanzania Ltd v. Raymond Costa*, Civil Application No. 11/2010 the court laid down the principle that for an affidavit to be valid it must be sworn or affirmed before a person authorized and who must certify in the jurat of attestation the fact of making of the affidavit before him and the date and place when and where it was made. In *Shaapriya and Co. Ltd v. Bishi Intenational BV* (2002) EA at page 48 to 49 Ramadhani, JA (as he then was) stated: "the place at which an oath is taken has to be shown in the jurat. The requirement is mandatory the notary Public and commissioner 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." On the other hand, records in this Court show that the respondent's counter affidavit was filed twice on Monday 22nd July, 2024; one copy was filed electronically and the other one was filed physically (in a hard copy). The copy that was filed electronically has all the defects that the applicant raised, and the one filed physically is partially filled. Taking the assumption that the physical one is "correctly attested" the question that may arise is which one can be said to properly filed. This brings us to the Judicature and Application (Electronic Filing) Rules, 2018 in which Rule 8 and 9 provide: "8. AH pleadings, petitions, applications, appeals and such other documents shall be filed electronically accordance with these Ru/es.

9. The official record of the court shall be the electronic case Tile (ECF), proceedings pertaining to that case, together with any documents and exhibits filed under the conventional method." Therefore, in the light of the Judicature and Application (Electronic Filing) Rules, 2018 the properly filed one is the one filed electronically. However, considering the defects it has in the light of section 8 Of Notaries Public and Commissioners for Oaths Act [Cap 12 R E. 2019] I find the preliminary objection raised by the Applicant to have merits and hereby sustained. I therefore order the counter affidavit filed by the respondent in this application be expunged from court's records. The Court will proceed to determine the main application. JUDGE 12.11.2024 Ruling delivered today in the presence of the Applicant John Bura Haymora, Mr. Philbert Akaro, Advocate for the Applicant and Mr. Benedict Kapera, Senior State Attorney for the respondent. B/C Miss Fatina R. Haymale (RMA) present. N.J. MWIHAMBI JUDGE 12.11.2024

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Prepared on 13 October 2026 · Esheria