

<p>In the Court of Appeal of Tanzania at Dar es Salaam Civil Appeal No. 39 of 2000 Kaji, J.A</p>	<p>WENGERT – WINDROSE SAFARI (T) LIMITED FRANZ JOSEF WENGERT EASTERN AIRCHARTER AND SAFARIS LIMITED Appeal from the Ex-part ruling and order of the High Court of Tanzania at Dar es Salaam by Katiti, J.</p>	<ul style="list-style-type: none"> - Section 8 of the Notarings Public and Commissioners for Oaths Act Cap.12. - The Jurat of attestation must state the place where the oath or affidavit was take or made. - The case of D.B. Shapriya & Co. Ltd Vs. Bish International B.V – Civil application No. 53 of 2002 (Unreported), by Ramadhani, J.A
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**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CORAM: (MSOFFE, J. A., KAJI, J. A., AND RUTAKANGWA, J. A.)

CIVIL APPEAL NO. 39 OF 2000

WENGERT – WINDROSE SAFARI (T) LIMITED.....1ST APPELLANT
FRANZ JOSEF WENGERT.....2ND APPELLANT
EASTERN AIR CHARTER AND SAFARIS LIMITED3RD APPELLANT

VERSUS

BIDUGA AND COMPANY LIMITED1ST RESPONDENT
HILLARY J. BIDUGA.....2ND RESPONDENT

**(Appeal from the Ex-Parte Ruling and Order of the
High Court of Tanzania at Dar es Salaam.)**

(Katiti J.)

Dated the 18th of August, 1999

in
Misc.Civil Cause No. 72 of 1998

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23 April, 2007 & 31st May, 2007

JUDGMENT OF THE COURT

KAJI, J.A.:

In this appeal, Wengert-Windrose Safari (T) Limited, Franz Josef Wengert, and Eastern Air Charter and Safaris Limited, who are the 1st, 2nd and 3rd appellants respectively, are appealing against the decision of the High Court (Katiti.J.) in Miscellaneous Civil cause No. 72 of 1998 dated 18/8/1999.

In that cause the respondents, Biduga and Company Limited and Hillary J. Biduga, who were the 1st and 2nd applicants respectively, had applied for the following orders under sections 112(3) and 115(2) of the Companies Ordinance Cap.212:-

1. That the court should direct the calling of a General Meeting of the Eastern Air Charter and Safaris Limited (3rd appellant) within seven (7) days of the date of the court's order, or as soon as the court could deem fit.

2. That the said General Meeting should be conducted under the Chairmanship, supervision, direction and guidance of an officer of the office of the Registrar of Companies and a suitable officer to be appointed by the court to be the secretary of the said General Meeting.
3. That the agenda in the meeting should include, among others:-
 - (a) The company's affairs in general and the operations of the company's air craft in particular.
 - (b) Profits and loss, balance sheets, books of accounts and auditors' reports since 1990.
 - (c) Share holding and share certificates,.
 - (d) Dividends and interest.

The appellants controverted the application by filing a counter affidavit and a supplementary affidavit. When the pleadings were ready, the matter was fixed for hearing on 17/8/1999. However on that scheduled date the appellants were absent. It would appear the respondents' advocate was not ready for hearing on that day. He

prayed for an adjournment till the following day for an ex parte proof. His request was granted.

On the following day the respondents' advocate made an ex parte oral submission. The respondents' application was granted as presented. It is against this decision that the appellants are appealing. They are advocated for by Mr. Deogratias Lyimo. The respondents are represented by Mr. Lukwaro.

In the memorandum of appeal, the appellants, through their advocate, preferred five (5) grounds of appeal. However at the hearing the appellants' counsel abandoned grounds Nos 4 and 5 and argued grounds Nos. 1 and 2 jointly and ground No 3 separately, which were all vehemently contested by the respondents' learned counsel.

But in the course of hearing the appeal it came to light that, in the High Court, the jurat of attestation in the affidavit accompanying

the chamber summons did not disclose the place where the oath or affidavit was taken or made. Thus, before proceeding to the finality of the appeal, we felt it was necessary first to find out and decide whether that application, which led to this appeal, was properly before the High Court. We asked the learned counsel for both parties to address us on this. The first to address us was Mr. Lyimo. He pointed out that under section 8 of the Notaries Public and Commissioners for Oaths Act, Cap 12, the jurat of attestation must state the place where the oath or affidavit was taken or made. The learned counsel observed that, indeed in the High Court the jurat of attestation in the affidavit signed by Hillary J. Biduga did not state the place where the oath or affidavit was taken or made. He held the view that the affidavit was incurably defective incapable of supporting an application.

A further perusal of the record revealed that, even the counter affidavit of the appellants signed by the 2nd appellant Franz Josef Wengert the jurat of attestation did not disclose the place where the oath or affidavit was taken or made. On this the learned counsel

pointed out that there was a rubber stamp of the Commissioner for Oaths before whom the oath was taken showing the place to be Dar es Salaam, and that, in his view, this satisfied the requirement of section 8 cited above. But when he was informed of some cases in which the jurat which had rubber stamps but the Court had held that the same was not enough to satisfy the requirement of the above provision, he left the matter into the hands of the Court.

On his part, Mr. Lukwaro, learned counsel for the respondents, conceded the defect. He also conceded the legal position that a defective affidavit cannot support an application. But he was quick to point out that in the instant case the defect in the affidavit is not one of the appellants' grounds of appeal but was raised by the Court *suo motu*. The learned counsel contended that the defect did not prejudice the appellants whose counter affidavit had also a similar defect, and that the Court should sort of "close its eyes". He did not elaborate.

The requirement that a jurat of attestation must state the place where the oath or affidavit was taken or made is provided for under Section 8 of the Notaries Public and Commissioners for Oaths Act Cap. 12 which reads:-

8: 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.

In the instant case it is common ground that the jurat of attestation in the affidavit of the 2nd respondent Hillary J. Biduga did not state the place where the oath or affidavit was taken or made.

Now, what is the effect of an affidavit whose jurat does not state the place where the oath or affidavit was taken or made?

Addressing a similar issue, a Single Judge of the Court (Ramadhani, J.A) in the case of D. B. Shapriya & CO. LTD V Bish. International B.V- Civil Application No. 53 of 2002 (unreported) had this to say:-

The section (i.e section 8) 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.....

On our part we respectfully join hands with the learned single Judge in his observation. The requirement is mandatory. Since the requirement is mandatory, an affidavit which does not comply with it

is incurably defective. Thus, in the instant case where the jurat of attestation in Hillary J. Biduga's affidavit did not state at what place the oath or affidavit was taken or made, was incurably defective. What is the effect of an application which is supported by a defective affidavit? We think the answer is obvious. It is incompetent. Thus, in the instant case the purported application which led to this appeal was incompetent and the learned judge should have struck it out for being incompetent.

In the event, and for the reasons stated, in exercising our revisional jurisdiction under Section 4 (2) of the Appellate Jurisdiction Act, 1979, we do hereby quash the proceedings and decision of the High Court. Since the defect in the jurat was raised by the Court *suo motu* each party is to bear its own costs.

DATED at DAR ES SALAAM this 23rd day of May, 2007.

J. H. MSOFFE
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

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

I.P. KITUSI
DEPUTY REGISTRAR