

IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

APPLICATION FOR REVISION NO. 6 OF 2022

(Originated from the decision of the Court of District Delegate of Mpanda at Mpanda in Probate and Administration Cause No. 21 of 2022)

BETWEEN

JONESTER TRASEAS RWABIGENDELA@JONESTER JONES...APPLICANT

VERSUS

ELIZABETH NELSON NGAIZA RESPONDENT

RULING

10th November, 2022 & 19th January, 2023

A.A. MRISHA, J.

This ruling is in respect of a Preliminary objection raised by the respondent against the Civil Application No. 6 of 2022 which was filed by the applicant challenging the judgment of District Delegate of Mpanda in Probate and Administration Cause No. 21 of 2022. In essence, the Respondent raised three points of preliminary objections which are: -

1. That the application is not maintainable for being supported by an incurably defective affidavit in the following aspects;
 - i. The verification clause of the affidavit is defective.

- ii. The affidavit is a hearsay, hence defective.
 - iii. The jurat of attestation is defective.
 - iv. The affidavit contains untruth statements and extraneous matters by way of opinions and legal arguments.
2. That the application is incompetent for being improperly brought because the applicant had not exhausted the required remedies i.e., a right to appeal against the impugned Judgment or apply to the trial court to set aside the ex-parte Judgment.
 3. That the application is improper for being supported by the Decree and ex-parte Judgment which does not tally to each other.

On 10th November, 2022 when this matter came for hearing of Preliminary objection Counsel for the respondent prayed to drop ground number three of preliminary objections and opted to proceed with grounds number one and two respectively. The respondent was represented by Mr. Laurence John, Advocate from Moissanite Attorneys, while the applicant was represented by Mathias Budodi, Advocate from Budodi Advocates Zonal Law Chambers.

Arguing in support of the first limb of the preliminary objection, Mr. Laurence contended that the application is not maintainable for being

supported by an incurable defective affidavit; more specific in the verification clause. He argued that the affidavit must be properly verified as the law does not allow a blanket verification without specifying paragraphs.

To buttress his argument, he referred the case of **Anatol Peter Rwebangira vs Principal Secretary Ministry of Defence & National Service Another** [2019] T.L.R 43. He stated that paragraphs 7(i),7(ii) and 7(iii) of the applicant's affidavit are not verified. According to him that caused verification clause fatal.

Mr. Laurence went on to submit that if the deponent does not verify sub paragraphs in the verification clause, the affidavit become fatal. He refered the case of **Mlela Ramadhan vs Mahon Butungulu, Misc. Land Case Application No. 20 of 2019** HC Tabora (unreported) at page 5.

Also, he argued that deponent failed to follow the procedure provided under Order VI Rule 15(2) of the Civil Procedure Code [Cap 33 R.E 2019], which require the deponent to verify and disclose source of the information; he referred paragraphs 8 and 9 of the applicant's affidavit which does not disclose the source of information.

Arguing that the affidavit is hearsay hence defective and that the jurat of attestation is defective, Counsel for the respondent combined his

argument and stated that an advocate for the applicant swear the matters are not permissible to swear under the provision of the law and the advocate Mr. Deogratius Phailod Sanga was not an advocate in the trial Court in the Probate Cause No. 21 of 2022. The applicant was represented by Ms. Pendoveera Nyanza in the trial court, hence is defective.

He cited the case of **Lalago Cotton Ginnery and Oil Mills Company Ltd vs The Loans and Advances Realization Trust (LART)**, Civil Application No. 80 of 2022 (unreported); this case was quoted with approval in the case of **Tanzania Breweries Ltd vs Herman Bildad Minja**, Civil Application No. 11/18 of 2019 CAT (unreported) at page 14. Mr. Laurance argued that save for the paragraph 8 and 9, the deponent state that he received information from Jonester Traseas Rwabigendela and also the affidavit mentioned another person particularly on paragraph 4, 5 and 6 without supporting with their affidavit; that led an affidavit to be hearsay. He cited the case of **Said Salim Hamdun and 2 others vs The Administrator General**, Misc. Civil Application No. 267 of 2022 HC DSM (unreported) at page 7 and see the case of **Laconia Investment Ltd vs TIB Development Bank Ltd**, Civil Application No. 270/01 of 2020 CAT

DSM at page 4 and the case of **Alex Doto Massaba vs AG and 3 others** Vol. 1 TLR.

Additionally, Mr. Laurance forcefully submitted that the affidavit contains untruth statement and extraneous matters by way of opinions and legal arguments. He denoted paragraph 2 of the affidavit by stating that the applicant is a lawful wife of the deceased person without supporting with a marriage certificate; this is contrary section 55(a) of the Law of Marriage Act [Cap 29 R.E 2019].

He also argued that annexure BAZLC/3 mentioned in the paragraph 6 of the applicant affidavit is read different from what is stated in the applicant affidavit, that led the affidavit contain falsehood statement. He supported his argument by citing the case of **Kidodi Sugar Estate and 25 others vs Tanga Petroleum Company Ltd**, Civil Application No. 110 of 2009 CAT DSM (unreported) at page 4.

On the other hand, he argued that an affidavit contains legal arguments and prayers specifically in paragraphs 7(i), (ii) and (iii), 8 and 9; he strengthened his argument by citing the case of **Uganda vs Commissioner of Prison Expert Matovu**, 1966 EA 514.

Arguing in support of the second limb of the Preliminary Objection, Mr. Laurance strenuously contended that the application is incompetent for being improperly filed because the applicant had not exhausted the required remedies i.e., a right of appeal against impugned Judgment or apply to the set aside the ex-parte Judgment. He cited the case of **Halis Pro Chemi vs Wela A.G**, 1969 TLR 269.

He argued that the applicant filed the present application wrongly since she appears in trial court as an objector and taught to file caveat but she never complied with, that led to ex-parte judgment being delivered against her. He further submitted that the remedy for expert judgment is whether to appeal or to set aside expert judgment and he cited the case of **Dangote Industries Ltd Tanzania vs Warnercom (T) Limited**, Civil Appeal No. 13 of 2021 (unreported) at page 6 and 7. He thus prayed to strike out the application entirely for the reasons of incompetence, with costs.

In reply to the first limb of the preliminary objection, the applicant's counsel resisted the preliminary objection raised by Respondent and he submitted that an affidavit supporting an application is competent before

this Court and the alleged defectiveness on the part of the verification have been misconceived.

He submitted that Order VI, Rule 16 of the Civil Procedure Code govern the pleadings and an affidavit does not fall under pleadings within the meaning of Order VI Rule 1 of the Civil Procedure Code. Alternatively, Mr. Budodi submitted that Order VI Rule 15(2) of the Civil Procedure Code does not make any mention of verifying sub paragraphs, rather it requires verifications of paragraphs.

He argued that the verification of paragraph 7 of the affidavit covers roman (i), (ii) and (iii) which are sub paragraphs. He invited this court to make reference to the case of **Mlela Ramadhani** (supra) and he stated that that is a High Court decision, hence it does not bind this court; he added that each case must be decided based on its own facts.

He prayed this court to apply the principle of overriding objective under provision of section 3A and B of Civil Procedure Code and order amendment or supplementary affidavit. He referred the case of **Hamed Rashid Hamed vs Mwanasheria Mkuu and others** [1998] T.L.R. 35.

Coming to the issue of paragraph 8 and 9 of affidavit which are alleged that the fact is not in the knowledge of the applicant's Counsel, he

submitted that an affidavit was sworn by an advocate who stated illegality warrant a ground for revision. Regarding the paragraph which is alleged to contain hearsay statement, Mr. Budodi also submitted that Mr. Deogratus Sanga is a counsel for the applicant with full instruction to represent the applicant and a is custodian of all documents, hence he is conversant with this matter.

Speaking on the issue of verification clause, Mr. Budodi submitted that the applicant has disclosed the source of information under paragraphs 2, 3, 4, 5, 6 and 7 of his affidavit. He relied his submission on provision of Order 6 Rule 15(2) of the Civil Procedure Code, that one can verify upon the information received and believed to be true; this does not amount to hearsay statement, he argued.

He also submitted that paragraph 4 which mention the names of Mr. Ezekiel Josiah and Irene Jonas, and paragraph 8 which mention RITA are proper and do not require another affidavit; he distinguished the case of **Said Salim Hamdun** (supra).

Regarding the issue of untruth statement and extraneous legal matter, the applicant's counsel finds non in the affidavit. He submitted that this ground of preliminary objection disqualifies to be a ground of objection

with the defect of the principal established in the case of **Mukisa Biscuits vs Westend Distributors Ltd**, 169 EA 696; that the objection goes to the issue of evidence and not a point of law. He stated that the contents of paragraph 7 of the affidavit are statement of facts as to the grounds for the revision which is intended to be challenged, and that paragraph 9 is not a prayer. He therefore prayed that the first limb of objection be overruled by this court for lack of merit.

Regarding the second limb of the preliminary objection, the applicant's counsel submitted that the application is competent before this court, hence the remedy sought is proper according to the nature and circumstance of the trial proceeding. He referred the case of **Mariam Dorina and Justine Daniel vs Kisha Lugemalila**, PC Civil Appeal No. 31 of 2003 HC DSM at page 2 in which it was held that, "*It is only a party to the proceedings who has a right of appeal.*" The remedy for third parties interested in the subject matter is Revision.

In light of the above authority, Mr. Budodi argued that the applicant was not a party to the trial court, therefore being a third party, she has a remedy to file for Revision as per the case of **Mariam Dorina** (*supra*). Also, he cited the case of **VIP Engineering and Marketing Ltd vs**

Mechmar Corporation (Malaysia) and Berhad of Malaysia, Civil Application No. 163 of 2004 CAT (unreported) at page 9. He invited this court to overrule the second limb of preliminary objection and costs to follow the main application.

The respondent's counsel made a rejoinder by reiterating what he had stated in submission in chief and he further submitted that the overriding objective does not apply to the matter which goes to the roots of the case and distinguish all cases referred by the applicant's counsel.

After a careful consideration of the submissions of the learned counsel, the point for determination is whether the applicant's application is accompanied by a proper affidavit as required under Order XIX Rule 3(1) of the Civil Procedure Code which categorically states:

"Affidavit shall be confined to such fact as the deponent is able of his own knowledge to prove, except as interlocutory applications on which statements of his belief may be admitted: Provided that, the ground thereof is stated".

It is clear from the position of the law above that, an affidavit for use in court, being a substitute for oral evidence, should only contain

statements of facts and circumstance to which the witness deposes either of own personal knowledge or from information which he believes to be true. see **Uganda vs Commissioner of Prisons, Exapрте Matovu** [1966] 1 EA 514.

In the case of **Mantrac Tanzania Ltd vs Raymond Costa**, Civil Appeal No. 11 of 2010 (CAT-Mwanza, unreported), the Court held that "*an affidavit intended to be used in judicial proceedings should, among other things, be properly verified*".

It follows therefore that the requirement to properly verify the affidavit is set as a mandatory requirement under the law. However, in the present application the applicant verifies paragraph 7 and left to verify sub paragraph of (i), (ii) and (iii) of paragraph 7 of the affidavit. The rule governing the modus of verification on the contents of the affidavit that can be acted upon and the consequences for non-compliance that affidavit was defective and incompetent. See the case of **Silima Vuai Fom vs Registrar of Cooperatives and three others** [1995] T.L.R 44.

That being said, this court do concur with the counsel for the respondent that the said affidavit is defective, and its defectiveness goes to the root of the case, and the same cannot be cured by the principle of

overriding objection under section 3A and B of the Civil Procedure Code by ordering amendment or supplementary affidavit. As it was decided in the case of **Njake Enterprises Ltd vs Blue Ltd and Rock Venture Company Ltd**, Civil Appeal No. 69 of 2017 (CAT) (Unreported) where the Court had this to say:

"Also, the overriding principle can not be applied blindly on mandatory provisions of the procedural law which goes to the very foundation of the case. This can be gleaned from the objects and reasons introducing the principle in the Act."

Since the affidavit support this application that the sub paragraphs (i), (ii) and (iii) of the paragraph 7 are not verified but there is a blanket verification clause regarding paragraph 7 of the affidavit, the sub paragraph ought to be verified and not blanket verified. This has been a position of this Court as it was stated in the case of **Mlela Ramadhani vs Nahoma Butungulu**, (supra), in determining the issue of sub paragraph of the verification clause. This court held that:

"The sub paragraph ought to be verified separately and not generally."

In the end, since the present application is based on the defective affidavit, the same cannot be maintained as it lacks legs to stand on. Subsequently, since the above first point is enough to dispose this matter, I cannot proceed to determine the remaining ground of preliminary objection while the affidavit is defective.

Accordingly, the first ground of preliminary objection is sustained, hence the application is struck out with cost.

It is so ordered.




A.A. MRISHA
JUDGE
19/01/2023

Date - 19/01/2023
Coram - Hon M.S. Kasonde - DR
Applicant - Absent
Respondent - Absent
B/C - A.K. Sichilima

Order: Ruling delivered in absence of both parties this 19th day of January, 2023.



A handwritten signature in blue ink, appearing to read "M.S. Kasonde", is written over a horizontal line.

M.S. KASONDE
DEPUTY REGISTRAR
19/01/2023