IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MKUYE, J.A., KENTE, J.A. And KIHWELO, J.A.)

CIVIL APPLICATION NO. 332/01 OF 2021

JACQUELINE NTUYABALIWE MENGI.....1st APPLICANT
JACQUELINE NTUYABALIWE MENGI AS A NEXT
FRIEND OF JAYDEN KIHOZA MENGI (A MINOR) .....2nd APPLICANT
JACQUELINE NTUYABALIWE MENGI AS A NEXT
FRIEND OF RYAN SAASHISHA MENGI (A MINOR.....3rd APPLICANT

VERSUS

ABDIEL REGINALD MENGI.....1st RESPONDENT
BENJAMIN ABRAHAM MENGI.....2nd RESPONDENT
BENSON BENJAMIN MENGI.....3rd RESPONDENT
WILLIAM ONESMO MUSHI.....4th RESPONDENT
ZOEB HASSUJI.....5th RESPONDENT
SYLVIA NOVATUS MUSHI.....6th RESPONDENT

(Application for Revision of the decision of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam)

(Mlyambina, J.)

dated the 18th day of May, 2021
in
Probate Administration Cause No. 39 of 2019

.....

RULING OF THE COURT

20th September & 1st December, 2022

MKUYE, J.A.:

This is an application for revision. It is made by way of a notice of motion under section 4 (3) of the Appellate Jurisdiction Act, [Cap. 141 R.E.2019] (the AJA) and Rule 65 (1), (2), (3), (4) and (5) as well as Rule 4 (2) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Essentially, the applicants are seeking this Court to call for and examine the record of proceedings of the High Court of Tanzania (Dar

es Salaam District Registry) in Probate and Administration Cause No.39 of 2019, particularly, the judgment and decree of that Court (Mlyambina, J.), dated 18th May 2021 which nullified the "Last Will" and testament of the late Dr. Reginald Abraham Mengi dated 17th August 2017 and appointed the 1st and 2nd respondents as co-administrators of the estate of the late Dr. Reginald Abraham Mengi.

In particular, the applicants sought the Court to make the following orders:

> *(a) An order setting aside the High Court's order nullifying the last Will and Testament of the deceased dated 17th August 2017, and instead make a declaratory order that the Wiil is legally valid.*
>
> *(b) An order setting aside the High Court's order appointing the 1st and 2nd respondents to be administrators of the estate of the deceased, instead make an order appointing the 3rd, 4th, 5th and 6th respondents or with the applicant or the applicant alone as the executor(s) of the Will or administrator(s) of the estate if the Will is not held to be valid.*
>
> *(c) An order in any case, removing from the decree the part of it which requires the appointed administrators to file final*

accounts of the estate within 6 months from the date of their appointment.

(d) Make any other order as the court may deem fit and proper to make.

The application is supported by two affidavits deponed respectively by the 1st applicant and the counsel for the applicants. On the other hand, the respondents have resisted the grant of application by affidavits in reply.

At this juncture it is noteworthy that, initially, the application was met with preliminary objections which were overruled by this Court for lack of merit meaning that the application would have been ripe for its hearing. However, again, ahead of hearing of the said application, the 1st and 2nd respondents on 12th July 2022 lodged a notice of preliminary objection (the PO) on a point of law to the effect that the application is incompetent for having been supported by incurably defective affidavits for containing arguments, hearsay, opinions and extraneous matters impeaching the credibility of the judicial officers and the trial court record.

When the application was called on for hearing, the applicants were represented by Messrs Audax Vedasto Kahendaguza and William Mang'ena, learned advocates; the 1st and 2nd respondents were represented by Messrs Michael Ngalo and Roman Masumbuko, learned

advocates and the 3rd, 4th, 5th, and 6th respondents enjoyed the services of Mr. Elisa Abel Msuya teaming up with Ms. Regina Kiumba also learned advocates.

It should be noted that at the hearing, we adopted the approach of hearing both the point of objection and the merit of the application so that should the PO be sustained, the matter would end there and if the PO is overruled, then we would proceed to determine the application on merit. However, having gone through the same we have formed our opinion that the PO suffices to dispose of the entire application without determining the entire application on merit.

When invited to submit on the PO, Mr. Lamwai argued that the affidavits of Jacqueline Ntuyabaliwe Mengi (the 1st applicant) and Audax Vedasto Kahendaguza (counsel for the applicants) are defective since their respective verification clauses do not show which information was from their own knowledge and the one from other sources. He pointed out that, once information is in the affidavit, which is a substitute to evidence, the verification clause must state clearly the source of the information. To bolster his argument, he referred us to the case of **Jamal Mkumba and Another v. Attorney General**, Civil Application No. 240/01 of 2019 (unreported).

As regards the affidavit of Jacqueline Ntuyabaliwe, (the first applicant), Mr. Lamwai argued that the sources of information from Gaspar Nyika and Vedasto Kahendaguza who averred to have advised the deponent are not stated in the verification clause instead the deponent has shown that all information was from her own personal knowledge. Besides that, Mr Lamwai submitted that the said affidavit contained extraneous matters not required to be in there. He elaborated that, in paragraph 5 of affidavit the deponent mentioned some documents without stating their source; and that in paragraphs 8 and 9 the deponent impeached the High Court record which raised arguments. The learned counsel further contended that, paragraph 10 contains conclusions and opinions expressing feelings of the deponent but their sources are not shown and that in paragraph 11 of affidavit the decree and judgment are questioned without showing the source of information. It was his further submission that paragraph 13 depicts assumptions, opinions and arguments while in paragraph 14 there are arguments, opinions, impeachment of the record and hearsay while the Deputy Registrar (DR) one Fovo who has been mentioned has not been stated in the verification clause.

He, therefore, concluded that out of 14 paragraphs of the 1st applicants' affidavit, there remains paragraphs 1, 2, 3 and 4 which are intact but cannot support the application.

In relation to Mr. Kahendaguza's affidavit, Mr. Lamwai contended that it contained opinions, legal proof, cross examinations or challenges as depicted in paragraphs 2, 3, 4, 6, 7, 10 and 11 which was contrary to regulation 96 (4) of the Advocates Profession (Conduct and Etiquette) Regulations 2018 (GN No 118 of 2018) (the Regulations). He elaborated that the said provision prohibits an advocate as a witness on among others to express personal opinions or beliefs; to assert things which are subject to proof, cross examination or challenge. For instance, he pointed out that paragraph 2 of the affidavit contains impeachment of the record of the High Court while the trial judge cannot swear an affidavit to controvert it; paragraph 3 depicts negativity on the part of the deponent; and in paragraph 4, the name of certain Mshanga is mentioned while he did not swear an affidavit.

Mr. Lamwai contented further that paragraphs 5 and 6 of the affidavit are argumentative and consist of opinions and conclusions, while also in paragraph 6 there is impeachment against the High Court record. As to paragraph 8, he said, it is argumentative and impeaching the record and in paragraph 9 of affidavit there are arguments. He

explained further that paragraph 10 is argumentative and mentions the Registrar (DR) who has not sworn an affidavit; and in paragraph 11 the deponent is impeaching the record of the High Court. Apart from all that, the learned counsel contended that, the verification clause does not state the source of information from the persons being referred in the affidavit who have also not sworn or affirmed any affidavit.

In his view, given the omissions committed by the applicant's advocate, only paragraph 1 and 7 remain intact and if the other paragraphs are expunged, the remaining paragraphs cannot support the application.

In this regard, it was Mr. Lamwai's argument that the application is rendered incompetent and, therefore, liable to be struck out. In the end, he beseeched the Court to find that the PO is merited and strike out the application for being incompetent.

On his part, Mr. Msuya took off by declaring his stance that he was partly conceding to the PO and partly disagreeing with it. In relation to the 1st applicant's affidavit, Mr. Msuya argued that all paragraphs were in order as according to him, the deponent narrated what transpired in the proceedings. However, he submitted that, although in paragraph 14 the deponent stated that she was told by Mr. Audax that he had met DR Fovo and told him that the rectification of decree was rejected, this was

not reflected in the verification clause. Mr. Msuya insisted that, paragraph 5, 8, 9 and 10 of her affidavit were not offensive as suggested by Mr. Lamwai. However, he was of the view that the offensive paragraph could be expunged and proceed with the remaining paragraphs.

With regard to Kahendaguza's affidavit, he argued that all paragraphs were proper except paragraph 11. He pointed out that although in paragraph 11 of the affidavit the deponent averred that he was given information by the DR, he did not show it in the verification clause. He said, as this defect is incurable, the said paragraph could be expunged or, alternatively, the deponent could be allowed to amend it to enable the hearing to proceed.

In response, Mr. Kahendaguza in the first place subscribed to what was submitted by Mr. Msuya except for paragraphs 14 of the 1st applicant's affidavit and 11 of his affidavit which, he said, were offensive.

Regarding paragraph 14 of the 1st applicant's affidavit that she was told by advocate Audax, he argued that, she was stating what she was told by advocate Audax and as such it was not a hearsay averment. In relation to paragraph 11 of his affidavit, he contended that despite the fact that he stated to have received information from DR Fovo while

there is no affidavit of the said DR, the circumstances of this case do not make such paragraph hearsay. In his view, in the said paragraph he was asserting what he heard from DR Fovo.

Otherwise, Mr. Kahendaguza, conceded to the principles propounded in the decisions cited by the respondents contending that, according to the case of **Phantom Modern Transport (1985) Limited v. D.T. Dobie (Tanzania) Limited,** Civil Reference Nos. 15 of 2001 and No.3 of 2002 (unreported), the offensive paragraphs could be expunged and enable the Court to proceed with hearing of the application on merit as the errors are inconsequential. He, therefore, prayed to the Court to overrule the PO raised and dismiss it. Alternatively, Mr. Kahendaguza urged the Court that should it find the paragraphs offend the affidavit, it should rely on the case of **Jamal Mkumba and Another** (supra) and allow the applicants to amend the affidavits.

In rejoinder, Mr. Lamwai stressed that paragraphs 14 of the 1st applicant's affidavit and 11 of Mr. Kahendaguza's affidavit contain hearsay because there is no supporting affidavit from DR Fovo. He was of a firm view that the source of information ought to have been stated in the verification clause.

With regard to Mr. Msuya's submission, it was Mr. Lamwai's contention that paragraph 14 of the 1st applicants' affidavit and paragraph 11 of Kahendaguza's affidavit containing information from other persons required verification. He insisted that Regulation 96 (1) and (4) of the Regulations was relevant on this aspect. He added that, all the offensive paragraphs are very material in the application and the remaining ones cannot support the application. In this regard, he, beseeched the Court to find that the PO is merited and proceed to strike out the application.

Having examined the point of PO raised and the submissions from either side, we think that, the issue for this Court's determination is whether the two affidavits in support of the notice of motion are defective. And if the answer is in the affirmative, what would be the wayforward.

The 1st and 2nd respondents' complaint is that paragraphs 5, 8, 9, 10, 11, 12 and 14 of the 1st applicants' affidavit and paragraphs 2, 4, 5, 6, 8, 9, 10, and 11 of Mr. Kahendaguza's affidavit are incurably defective as they contain arguments, hearsay evidence, sentiments, speculations, suppositions, assumptions, opinions, conclusions and impeachment of the High Court record for containing matters which are not on record as they question the credibility of the court officers including the DR and

the trial judge who have not sworn or affirmed affidavits to admit or controvert those assertions. The counsel for the applicants contend that all paragraphs are in order as they narrate what transpired and Mr. Msuya also is of the same view except for paragraph 11 and 14 of Mr. Audax and the 1st applicant's affidavits respectively.

According to Rule 49 (1) of the Rules 2, every formal application to the Court must be supported by one or more affidavits of the applicant or some other person or persons who have knowledge of the fact. The question we ask ourselves at this juncture is what is an affidavit?. Fortunately, this is not the first time this Court asks this question. In the case of **The Director of Public Prosecutions v. Dodoli Kapufi and Another**, Criminal Application No.11 of 2008 (unreported), the Court gave a definition of affidavit in law as follows:

> *"A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths." Black's Law Dictionary, 7th Edition pg 58*
>
> *or*
>
> *"It is a statement in the name of a person, called a deponent, by whom it is voluntarily signed or sworn to or affirmed. It must be confined to such statements as the deponent is able of his own knowledge to prove but in certain cases may*

contain statements of information and belief with grounds thereon. Taxman's LAW DICTIONARY, D.P. MITTAL at pg 138"

In that case, the Court went on to state the essential ingredients of any valid affidavit which include:

> *"(i) the statement or declaration of facts etc by the deponent;*
>
> *(ii) the verification clause;*
>
> *(iii) a jurat; and*
>
> *(iv) the signatures of the deponent and the person who in law is authorized either to administer the oath or to accept the affirmation."*

It should be noted that, apart from the ingredients stated above, the affidavits must be confined to facts and must be free from extraneous matters. This stance was stated in the case of **Chanda and Company Advocate v. Arunaben Chaggan Chhita Mistry and 2 Others**, Civil Application No.25 of 2013 (unreported) while adopting the decision in the case of **Uganda v. Commissioner of Prisons Ex parte, Matovu** (1966) E.A. 514 where the East African Court of Appeal stated as follows:

> *"As a general rule of practice and procedure an affidavit for use in Court, being a substitute for oral evidence, should only contain statements of facts and the circumstances for which the witness deposes either of his own knowledge ...* ***such***

affidavit should not contain extraneous matters by way of objection or prayer or legal arguments or conclusions." [Emphasis added]

On top of that, the affidavit must be verified by the deponent on what is true based on knowledge, belief or information whose source must be disclosed in the verification clause.

In dealing with this matter, we shall be guided by the principles stated above.

We have perused the affidavits in question and for ease of reference we have found it appropriate to reproduce the relevant paragraphs of both affidavits as hereunder:

Affidavit of Jaqueline Ntuyabaliwe Mengi:

5. That, the 3rd, 4th, 5th and 6th Respondents opened a Probate and Administration Cause No.39 of 2019, whose copies of the opening documents, proceedings, judgment, decree and other documents and matter involved within and after the case appear in the Record of Revision accompanying this Affidavit and the Notice of Motion at each appropriate page stated in the Index of the Record and form part of the present application.

8.That ***I even appointed a lawyer, Advocate Audax Kahendaguza Vedasto, to watch my brief in the matter but he was not recorded, not even allowed to speak, not even allowed to file final submissions written submissions for the Applicant.*** *I was only called as a Court witness and on the date I went to testify I was with my said Advocate Audax who raised to introduce himself as watching the Present Applicants' brief* ***but he was told by the Honourable Presiding Judge that he would not be allowed to speak or be recorded because I was, and the Applicants in general were, not parties in the case.***

9. That I made my last attempt to take part in the case by instructing Advocate Audax to apply to be allowed to file final submissions in the case but, although he later served me a copy of the letter he wrote to make that request (which is part of the record of this revision) to take part in the case by filing the final written submissions, ***he told me the request was orally rejected for the present Applicants not being parties to the probate case.***

10.That after the judgment I directed my lawyer-Audax Kahendaguza Vedasto to make a formal process of revision of the High Court decision. ***Among the parts of the judgment which***

struck me most was a part that stated that the Deceased who died in my hands in May 2019, and who among other things, wrote a book, I CAN, I MUST, I WILL, the Spirit of Success in 2018, which was inaugurated by the then President of Tanzania, the late John Magufuli in 2018, whose parts were admitted in evidence as part of Exhibit D2, had, since 2016 when he suffered a stroke, his mind impaired in such a way that he would not understand what he was writing in the Will in August 2017. I felt also touched by part of the holding that stated that I was having custody of the Will. I read many other parts of the judgment which upon discussion with my lawyer Audax Kahendaguza Vedasto, I took a concluded view *that needed a consideration of this Court, at the end of which discussion I instructed him to put all them together in form of a Revision Application and file the present application to have a decision of this Court thereon revised.*

11.That Mr. Audax then came out with the draft Application, with the grounds of Revision appearing in the Notice of Motion of this Application, which I endorsed and gave him green lights and instructions to iron and generally

to prepare, file, and pursue the present Revision to its end.

13. That I then instructed Advocate Audax to bring to the attention of the Court this new thing in the decree not in the judgment, which we both thought to be accidental, and to ask for its correction. Later Advocate Audax served me with a copy of the letter to the Registrar of the High Court dated 1st June, 2021 informing the Court of the disparity and calling upon the Court to rectify it. A copy of that letter is part of the Record.

14. That Mr. Audax told me that the letter was not acted on forthwith and when he went to inquire about it early in July, 2021, he was told that ***the Presiding Judge directed him to see the Registrar on that. My said lawyer's report to me thereafter was that he, on 2.7.2021, met Registrar Fovo who told him that the said request of rectification was rejected because it was not brought through a formal application of mine.*** *Mr. Audax told me, however, that he* ***told the Registrar that that was legally and practically impossible, upon which the Registrar promised to table the concern to the Presiding Judge for a redirection.*** *Now, what came last in my said lawyer's report of July 8, 2021 was that the Registrar served him a*

letter, dated 6/7/2021 (copy of it in the Record of this Application), communicating to him the same decision of the Court's inability or unpreparedness to act on the notification of disparity and prayer of rectification of the decree in the absence of my formal application. When I discussed the matter with my lawyer I instructed him to include this decision in what to take to the Court of Appeal in this Revision to question the legality of..... .

Affidavit of Mr. Audax Kahendaguza Vedasto:

"2. *That I was first appointed to act for the Applicants in the matter giving rise to the present one late in September, 2020 and my first date of active part... in the case in court was 5/10/2020 when I appeared before the Trial Court in the hearing of Probate and Administration Cause No.39 of 2019. I introduced myself as watching the brief of the Applicants who are persons named in the Will at issue as heirs.* ***I asked the trial Judge to record me and to give me a right of audience when circumstances call for but he orally told me he would only give me a chair to sit and hear what goes on but he would not give me that opportunity I had requested to appear on record or take part in doing anything in the case because the persons I stated to be representing were not parties in the case. In the***

dialogue about this matter, he asked me to tell him if I had any authority allowing me to take any material partion record, and I supplied to him copies of 2 Kenyan decisions and one legal writing published in the face book which he took but for which he uttered no word. *Copies of those decisions whose copies I was supplied with when I asked for proceedings and all documents in the case after judgment was delivered in the case are part of the Record of Revision herein:*

3. That I attended hearing also of CW1 and CW2 in full and made the same prayer of getting recognition as an advocate watching ***the Applicants' brief but the reply and action of the Honourable Presiding Judge was the same negative.***

4. That in all other instances when the matter was coming for hearing when I did not myself attend, ***I assigned my fellow Advocate, Advocate Pascal Livin Mshanga from my Auda & Co. Advocates Law Firm, to enter appearance in the same style and he was always coming back to me after respective sessions with the same report in substance.***

5. That I made the Applicants' last attempt to take part in the case on 12th November, 2020 when ***I wrote and submitted to the trial***

court a letter asking it to allow me to write a final submission of the case for the Applicant. *A copy of that letter is part of the Record of Revision. On 19/9/2020 after hearing of witnesses in that matter was completed and before the court made an order for filing final submission, with me in court in the style mentioned hereinabove, this letter was presented to the parties' advocates who were given an opportunity to comment thereon. At the end the court rejected the prayer of my filing the applicants' submission.*

6. That when this case was completed, I for the applicants applied for proceedings and was supplied with the same. However, ***upon reading them, I realized that there is no part that recorded what happened to that request of mine to write written submission of the applicants and of my (sic) and my firm's part in the case generally except on the aspect of service of summons*** *and appearance of the applicants as Court witnesses in which I and my firm were involved and, in the process and on that aspect, we were mentioned at several parts of the record.*

8. That upon looking at the decree and the judgment supplied, I noted a new matter coming in the decree which was not in the judgment.

This was the inclusion of an order directing the 1st and 2nd Respondents appointed to be administrators of the estate to file final inventory and accounts of the estate within 6 months of the date of their appointment.

10. That in course of follow up of the matter, on Friday, 2nd July 2021, I met the Registrar, ***Hon. Fovo, whom the Presiding Judge had told me to see for the reply of my letter. In our oral discussion about it he told me that the trial Judge had directed that the applicants come by way of a formal application. I told him, however, that the Applicants are not eligible to file such application, they being not parties, and that in their position as strangers, what they would do was to notify the court of the shortfall which the Court would then act upon on its own, which*** *they had done through that letter of 1/6/2021. I also informed him that the time remaining made it practically impossible to earn anything out of that process, both in terms of the statutory time for applying for revision and also the duration of time the decree has required all assets of the Deceased to be fully disposed of. I informed him that, therefore, imposing a requirement that the Applicants come by a formal*

application stood as a turning down of their request.

11. ***That the Honourable Registrar told me that he would communicate the above mentioned concern of the Applicants to the trial Judge. However, at the end he has come with his formal reply to my June 1, 2021 letter through his July 6, 2021 letter which was served on me on 8th July, 2021 (that is 8 days before*** *the last day for filing the intended Revision) requiring me to file a formal application, if I want to have the decree of the case corrected. A copy of this reply letter containing the High Court's decision on the aforementioned request of rectification of the Applicants is contained in the Record of Revision."*

[Emphasis added]

Having examined the paragraphs in Jacqueline Ntuyabaliwe Mengi and Audax Kahendaguza Vedasto's affidavits, we agree with Mr. Lamwai that the same are defective. We note that paragraphs 8 and 14 of the 1st applicant's affidavit and paragraphs 10 and 11 of Kahenadguza's affidavit contain hearsay not supported by evidence. For instance, in paragraphs 14 and 11 of the respective deponents affidavits they have averred an information obtained from the DR Fovo regarding how best

they could deal with the so-called defective decree while the said DR has not sworn any affidavit to that effect. Paragraphs 8 of the 1st applicant's affidavit and paragraphs 2, 8 and 11 of Kahendaguza's affidavit contain impeachment of the High Court record regarding the trial court judge's refusal to allow the advocate's participation in the hearing of the matter before it including various prayers he made but were not recorded, while the presiding judge has no chance to controvert the averment. The contention that certain submission by the applicant's advocate was not reflected in the court record is a serious issue which tend to impeach the record but it is not supported by evidence. It should be noted that in our jurisdiction, it is a settled law that the court record is presumed to present accurately what actually transpired in court and as such it should not be lightly impeached – (see **Halfan Sudi v. Abieza Chichili** [1998] T.L.R. 527 and **Alex Ndendya v. Republic,** Criminal Appeal No. 207 of 2018 (unreported).

On top of that, paragraphs 10 and 13 of the 1st applicant's affidavit and paragraphs 3, 5, 6, 8, 9 and 10 of Kahendaguza's affidavit contain arguments and negativity on the court record. There are also opinions, sentiments and feelings (see paragraph 10 of Ntuyabaliwe's affidavit) as well as assumptions and conclusions. Particularly, in paragraph 10 of Ntuyabaliwe's affidavit, she has deponed on how she was shocked to

learn in the High Court's judgment that the deceased who died in her hands was said to have suffered from stroke and his mind impaired. In a portion of the affidavit, she stated that "*the deceased who died in my hands in May 2019 and who among other things wrote a book I CAN, I MUST, I WILL the Spirit of Success in 2018... had since 2016 suffered a stroke, his mind impaired in such a way that he would not understand what he was writing in the Will in August 2017. I felt also touched by part of the holding that state that I was having custody of the Will...*" Indeed, there are arguments, impeachment of the court record, feelings or assumptions of the deponent, opinions and conclusions which are extraneous matters not allowed to be in the affidavit.

It is well settled that affidavits are to be confined in facts and have to be free from extraneous matters - (See **Ignazzio Messina v. Willow Investment SPRL**, Civil Application No.21 of 2001 (unreported) where the remedy to the affidavit which contains such extraneous matter is to expunge such offensive paragraphs or disregard them to allow the Court to proceed with the hearing and determination of the application basing on the remaining paragraphs. On this, we are guided by the decision in the case of **Chanda & Company Advocates** (supra) where the Court while citing the case of **Phantom Modern Transport (1985) Limited** (supra) stated as follows:

"Where the offensive paragraphs are in consequential, they can be expunged leaving the substantive parts of the affidavit remaining intact so that the Court can proceed to act on it."

Thus, on the basis of the above cited authority we expunge all the offending paragraphs of the affidavits of Ntuyabaliwe and Kahendaguza respectively as outlined hereinabove. As to the way forward, we shall determine it in the due course. Since the offensive paragraphs are the ones which carry the weight of the application we find that the remaining paragraphs cannot support the application.

Apart from that, the respondent's second limb of the PO is that the application is incompetent for being supported by an affidavit with defective verification clauses. It was Mr. Lamwai's argument that in each affidavit's verification clause the source of information from persons being referred to is not stated. In elaboration, Mr. Lamwai contended that though Mr. Nyika and Kahendaguza are mentioned in 1st applicant's affidavit, the source from them is not shown in the verification clause instead all the paragraphs are verified by the applicant to have come from her own personal knowledge which is not true. The learned counsel also assailed Mr. Kahendaguza's affidavit for suffering from the same ailment. It was his argument that once the information is in the affidavit, the verification clause must state clearly the source of such

information. To support his argument, he referred us to the case of **Jamal S. Nkumba and Another** (supra). He contended further that, although the 1st applicant in paragraph 14 of her affidavit has averred that she heard from Kahendaguza about what he was told by DR. Fovo such fact is not shown in the verification clause. Likewise, he said, Kahendaguza has not shown in the verification clause the source of information stated in para 11 of his affidavit regarding what he was told by DR. Fovo.

On their side, both Mr. Msuya and Mr. Kahendaguza seem to have no comment on this point of PO.

Unfortunately, the Rules do not define what is a verification clause. However, as alluded to earlier on, an attempt to define it was made by the Court in the case of **Dodoli Kapufi and Another** (supra) to mean the part of the affidavit showing the facts which the deponent asserts to be true of his own knowledge and the facts which are based on information from other source or belief.

The purpose of verification in the affidavit is basically to enable the court to know which facts can be said to be proved on the affidavital evidence and those which may be true from information received from other persons or allegations based on records. This stance was taken by the Court in the case of **Lisa E. Peter v. AI-Hushoom Investment,**

Civil Application No.147 of 2016 (unreported) while making reference to an Indian case of **A.K.K. Nambiar v. Union of India** (1970) 35 CR. 121 where it was stated as follows:

> *"The importance of verification is to test the genuiness and authenticity of allegation and also to make the deponent responsible for allegations. In essence verification is required to enable the court to find out as to whether it will be safe to act on such affidavit evidence. In the absence of proper verification clause, affidavits cannot be admitted as evidence."*

We also need to emphasize that in case the averment is not based on personal knowledge, then the source of information must be clearly stated in the verification clause - (See **Anatol Peter Rwebangira v. The Principal Secretary, Ministry of Defence and National Service and Another,** Civil Application No.548/04 of 2018 (unreported).

Looking at the affidavits of the two deponents, it is clearly shown that some averments were based on information obtained from other persons. For instance, in paragraphs 8, 10, 11, 13 and 14 of the 1st applicant's affidavit reproduced earlier on, the deponent states the facts which have the source from other persons such as Mr. Gaspar, her former advocate and Mr. Kahendaguza but in the verification clause

these facts are not shown to have a different source. Likewise, in paragraphs 4, 10 and 11 of Kahendaguza's affidavit where Pascal Livin Mshanga and other persons including the DR are mentioned are not disclosed in the verification clause as to the source of the information the deponent has averred in those paragraphs.

In the case of **Jamal S. Mkumba and Another** (supra), the Court observed that:

> *"...verification clause is one of the essential ingredients of any valid affidavit which must show the facts the deponent asserts to be true of his own knowledge and those based on information or belief "*

Also, in the case of **Salima Vuai Foum v. Registrar of Cooperatives and 3 Others** [1995] TLR 75, where a chamber application filed in the High Court of Zanzibar was faced with a preliminary objection that the verification clause did not show the source of the deponent's knowledge of some facts, the Court stated that:

> *1) Where an affidavit is made on information it should not be acted upon by any court unless the sources of information are specified.*
>
> *2) As nowhere it is stated that the facts deposed to or in any particular paragraph it is stated that the facts deposed to or any of them/and if*

so which ones, are true to the deponent's knowledge, or as advised by his advocate, or are true to his information and belief, the affidavit was defective and incompetent, and was properly rejected by the Chief Justice."

In the matter at hand, it is an undisputed fact that in the verification clauses of the respective affidavits at pages 26 and 31 of the record the deponents have not disclosed the sources of information as both have indicated that it is according to personal knowledge of the deponents. Basing on **Jamal S. Mkumba and Another** (supra) and **Salima Vuai Foum** (supra) in order for an affidavit to be valid it must show which information is true of the deponent's own knowledge and which is based on information or belief. And this is to be stated in the verification clause. Failure to do so, therefore, renders the verification clauses of the affidavits defective.

The effect of the defective verification clauses is to render the application incompetent. This was a stance taken in the case of **Anatol Peter Rwebangira** (supra), when the Court was faced with akin situation in which the applicant failed to specify the matters of his own personal knowledge or information he received and believed. The Court

found that the application was incompetent and struck it out which, in our view would, be the proper remedy in the matter at hand.

With the foregoing, we are satisfied that the affidavits under discussion are defective for not only containing extraneous matters such as assumptions, arguments, opinions, conclusions, sentiments and feelings but also containing verifications which do not disclose the source of information. In the event, the defects render the application to be incompetent and, hence, we accordingly strike it out. Since the matter originates from probate, we make no order as to costs.

DATED at **DAR ES SALAAM** this 23rd day of November, 2022.

R.K. MKUYE
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

This Ruling delivered at Arusha via video conference this 1st day of December, 2022 in the presence of Mr. Baraka Msana holding brief for Mr. Audax Kahendaguza, counsel for the Applicants, Mr. Roman Masumbuko, Mr. Michael Ngalo, counsels for the 1st and 2nd Respondents and Ms. Ndehorio Ndesamburo holding brief for Mr. Elisa Abel Msuya, counsel for the 3rd, 4th, 5th and 6th Respondents, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL