

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

MISCELLANEOUS CIVIL APPLICATION NO. 1 OF 2023

*(Originating from the decision of the trial court of Mpanda District at Mpanda in
Probate and Administration Cause No. 21 of 2022)*

JONESTER TRASEUS RWABIGENDELA@ JONESTER JONES.....APPLICANT

VERSUS

ELIZABETH NELSON.....RESPONDENT

RULING

23rd February, 2023 & 15th May, 2023

MRISHA, J.

Before this court the applicant has lodged an application for an extension of time within which to appeal out of time against the ex parte judgment of the trial court of Mpanda **(the trial court)** in Probate and Administration Cause No. 21 of 2022 which was delivered on 04.10.2022.

The application is made by way of Chamber summons under section 14(1) of the Law of Limitation Act, 1971 (CAP 89 R.E. 2019) and is supported by an Affidavit duly sworn by one **Jonester Rwabigendela**.

Through her application the applicant also prays for costs of this application and any other relief this court will deem fit and just to grant.

Upon filing of the said application, the respondent raised a Preliminary objection against the said application which, as a matter of procedure led to stay of the applicant's application pending determination of such preliminary objection; hence this ruling.

The said preliminary objection contains five points namely: -

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 **jurat of attestation** of the affidavit is defective.
 - iii. The affidavit contains **legal arguments**.
 - iv. The affidavit contains **hearsay statements**.
 - v. The affidavit contains words which **impeach court record** and court process
2. **That**, the application is incompetent for being brought against a party who was not a party in the decision which is sought to be challenged i.e. Elizabeth Nelson.

3. **That**, the application is not maintainable because the prayers sought in the chamber summons are not supported by the prayers sought in the affidavit.
4. **That**, the application is incompetent for being preferred under incorrect enabling law.
5. **That**, the application has been belatedly filed as it is overtaken by events as the probate file has already been closed.

The preliminary objection was heard by way of written submissions and both parties enjoyed the legal services of learned counsel. Submitting in chief in respect of the first point of preliminary objection, Mr. Lawrence John representing the respondent stated that the trite law is that verification clause in an affidavit must be properly verified and that the law does not allow blanket verification without reference to the specific paragraphs, as was stated in the case of **Anatol Petr Rwebangira vs Principal Secretary Ministry of Defence and Another** [2019] TLR 243 (CA).

He also submitted that in the present application at paragraph 11 of the affidavit the deponent has verified that the same is within her knowledge, but reading the particular paragraph it is plain that the same was not within her knowledge because the application was drawn and

lodged by her counsel, hence in no way she could understand such disposition, that is how much time it took her counsel to prepare the application, and also the residence of her counsel be in her knowledge which make the applicant's verification clause fatal.

Mr. Lawrence also submitted that the applicant has also deposed legal matters in paragraphs 8(i), 8(ii) and 8(iii) of her affidavit which matters could in no way be in her knowledge since she is not a lawyer. That the applicant, on the other hand, has omitted to verify sub-paragraphs thus making the verification clause fatal and incurable because it is the principle of law that verification clause has to verify all paragraphs with sub-paragraphs if any, as per the case of **Mlela Ramadhan vs Mahona Butungulu** Misc. Land Case Application No. 20 of 2019 HC(T) at Tabora (unreported) which was also cemented in the case of **Jonester Traseas Rwagibendela@Jonester Jones vs Elizabeth Nelson Ngaiza** Application for Revision No. 6 of 2022 HC(T) at Sumbawanga(unreported).

The said counsel also faulted the applicant for violating Order VI, Rule 15(2) of The Civil Procedure Code, CAP 33 R.E 2019(the CPC) which requires a person who verifies a pleading to do so with reference to numbered paragraphs, as it is generally known as that affidavit is part of

pleading, hence, the applicant being the deponent ought to observe the mandatory requirement of verification governing pleadings including affidavits.

Mr. Lawrence pointed out that there is another anomaly on the adverse party which is that the verification clause shows that the affidavit has been verified by another person that is **Jonester Rwabigendela** while the applicant is **Jonester Traseas Rwabigendela@Jonester Jones** which is a total confusion.

Talking about the second sub point of the first point, Mr. Lawrence submitted that it is the legal requirement under section 8 of the Notaries Public and Commissioner for Oaths CAP 12 R.E. 2019 that the notary public and commissioner for oaths must 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.

He went on to submit that in her affidavit the applicant seems to have signed the same at Dar es Salaam on 31.01.2023 and sworn before the commissioner for oaths on unstated date at Dar es Salaam which is quite wrong and contrary to the requirement of the law as stated in the case of **DPP vs Dodoli Kapufi and Another**, Criminal Application No. 11 of 2008, CAT at Dar es Salaam (unreported).

Mr. Lawrence also indicated that there is another confusion of names between the applicant, the one who took oath and the person who sworn before the Commissioner for Oaths. He said the applicant is called **Jonester Traseas Rwabigendela@Jonester Jones**, but the one who took oath is called **Jonester Traseas Rwabigendela** which names seems to have been used interchangeably hence affecting the validity of the jurat of attestation.

Arguing on the sub point that the affidavit contains legal arguments Mr. Lawrence submitted that the affidavit contains legal arguments and prayers in paragraphs, 7 and 9 something which is not allowed as per the case of **Uganda vs Commissioner for Prisons Exparte Matovu** 1966(EA) 514 and the case of **Barreto Hauliers [T] Ltd vs Tata Africa Holdings [Tanzania]** Misc. Commercial Application No. 39 of 2022 HC[T] DSM (unreported).

As for the fourth sub point that the affidavit is hearsay, Mr. Lawrence submitted that under paragraphs 2,3,4,8(i),8(ii),8(iii),9,10,11 and 12 the deponent(applicant) seems to have narrated the hearsay story instead of deponing herself as if there are two persons, the deponent and the applicant which makes the affidavit to be a hearsay contrary to the direction of the court in **Alex Dotto Massaba vs AG and Three**

Others [2020] 1 T.L.R 352(HC) where it was held that affidavit should not contain hearsay statements.

Submitting on the fifth and last sub point the counsel for the respondent stated that on paragraph 8(ii) of the affidavit the applicant has condemned the trial court that it was in defiance with the ruling of the High Court of Tanzania at Temeke dated 10.06.2022.

According to him "defiance" is not a good word to be used in describing the conduct of the court and proceedings and it is a violation of the settled law as stated in the case of **Jacqueline Ntuyabaliwe Mengi and 2 Others vs Abdiel Reginald Mengi and 5 Others**, Civil Application No. 332/01 of 2021 CAT at Dar es Salaam(unreported), that the affidavit should not contain the words that impeach court record.

Turning on the second point of objection Mr. Lawrence submitted that it is the position of the law that names of the parties have to appears they did in the previous proceedings as per the case of **Joseph Magombi vs Tanzania National Parks (TANAPA)**, Civil Appeal No. 114 of 2016 CAT at Dar es Salaam(unreported) where intel alia, it was stressed that, *"...We further say, that unless a proper procedure has been followed to change or alter a name, no change of party's name should occur".*

He also invited this court to make reference to the case of Salim Amour Diwani vs Vice Chancellor Nelson Mandela African Institution of Science and Technology and Another, Civil Application No. 116/01 of 2021 CAT (unreported) where it was held, *intel alia*, that *"...parties in the proceedings should at any given time appear as they did in the previous proceedings, unless there is a reason for not observing that."*

Applying the above principle to the instant application the learned counsel submitted that the party who was granted letters of administration and who is the applicant in this application sought to sail the decision of the trial court in, was **Elizabeth Nelson Ngaiza** and not **Elizabeth Nelson** who is the third party and not recognized in the court decree, proceedings and in the Ex parte Judgment, hence making orders against that third party will only bring confusion because the same will not be executable.

Concluding of the second point Mr. Lawrence submitted that the act of changing the name of the party from Elizabeth Nelson Ngaiza to **Elizabeth Nelson** without order of the court is fatal as it was stated in the case of **Inter-Consult Limited vs Mrs Nora Kasanga and Another** [2019] 1 T.L.R 362.

Submitting on the third point of objection the learned counsel stated that it is a trite law that all applications must be made by chamber summons and supported by an affidavit as per Order XLIII, Rule 2 of the CPC. He further submitted that there is a confusion in the applicant's application because while he seems to impugn the decision of the trial court, at the top of the application the applicant seems to show that his application originates from the Probate and Administration Cause No. 21 of 2022 of the trial court of Mpanda hence defeating the quoted provision of the CPC which makes it mandatory for the applications to be made by chamber summons and supported by an affidavit.

Mr. Lawrence cited the case of **Daniel Marwa vs Hassan Hussein Fungo and 5 Others**, Misc. Land Application No. 15 of 2019 HC at Dar es Salaam(unreported) to substantiate a principle of law that mixture of prayers in the chamber summons and the affidavit makes the application untenable.

When submitting on the fourth point of objection the learned counsel stated that under section 72(1)(2) of the Probate and Administration of Estates Act, CAP 352 R.E. 2019 it is stated that all applications for appeal and Revision shall use Civil Procedure Code. He clarified that

under the CPC there is specific section that governs applications for extension of time, which is section 93 of the CPC.

He argued that the applicant's act of using section 14(1) of the Law of Limitation Act, CAP 89 R.E. 2019 while there is a specific law governing circumstances is fatal and the same renders the application incompetent. To bolster his submission on that point the learned counsel cited the case of **Leonard Magesa vs M/S Olam [T] Ltd**, Civil Appeal No. 117 of 2014 CAT[T] at Mwanza (unreported) where it was stated that, *"...incorrect citation of the enabling provision is fatal. He then implored this court not to grant the prayers sought by the applicant for failure to cite the proper enabling provision of the law"*.

Talking about the fifth ground Mr. Lawrence submitted that it is a trite law as observed in **Saada Rashid vs Abdallah Rashid**, PC Civil Appeal No. 12 of 2020, HCT at Arusha (unreported) that once the probate file is closed and the inventory is filed, the court becomes *functus officio*; the other remedies available for the person aggrieved with the administration or distribution of the properties are such as instituting a separate civil case against the administrator in his personal capacity.

To him, the applicant was duty bound to resort to those remedies and not to file the instant application before this Honourable court due to the

fact that the probate file in the trial court has already been closed. In winding up, the learned counsel submitted that all the anomalies complained of by the respondent cannot be salvaged by the principle of overriding objective as the same goes to the root of the matter in line with the decision of the **District Executive Director Kilwa District Council vs Bogeta Engineering Ltd**[2019] 1 T.L.R. 271 which held that, "the overriding objective principle cannot be applied blindly against the mandatory provision of the procedural law which goes to the very foundation of the case."

He concluded his submission in chief by praying for all points of preliminary objection to be sustained with costs and that the present incompetent application be dismissed.

On the other side of the coin, Mr. Mathias Budodi who represented the applicant, categorically opposed all the preliminary points raised and argued by the counsel for the applicant for lack of merit, and urged this court to overrule the same with costs and allow the applicant to amend some parts of her affidavit which, according to him are curable under the principle of overriding objective introduced by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2018.

He clarified that the verification clause is not defective because the applicant instructed her advocate to prepare documents on 19.01.2023 and on 31st January, 2023 she signed the document, hence she has knowledge about the time used to prepare the said documents. Also, what deposed under paragraphs 8(i)(ii)(iii) is based on her knowledge because first she is the beneficiary and she did not give her consent for the filing of probate cause and second is that she was a party in the ruling of the High Court of Tanzania at Temeke dated 10.06.2022.

The learned counsel also submitted that the applicant has not deposed legal matters in paragraphs 8(i)(ii)(iii) of her affidavit; what she did was to state the point of illegality which is allowed by the law hence the case of **Anatol Peter Rwebangila** (supra) cited by the applicant's learned counsel is distinguishable in the sense that in the instant application the facts deposed are on the applicant's knowledge, hence the verification is proper.

Regarding the alleged anomaly that the applicant omitted to verify sub paragraphs, Mr. Budodi pointed out that the same is curable under the principle of overriding objective and the court has discretionary power to grant the applicant leave to amend the defective as was stated in the case of **Sanyou Service Station Ltd vs BP Tanzania Ltd (Now**

Puma Energy (T) Ltd), Civil Application No. 185 of 2018 where the Court of Appeal held that,

"...the Court's powers to grant leave to a deponent to amend a defective affidavit, are discretionary and wide enough to cover a situation where a point of preliminary objection has been raised and even where the affidavit has no verification clause."

In supporting the above point, Mr. Budodi also cited the case of **Ramadhan Mikidadi vs Tanga Cement Company Ltd**, Civil Application No.275/01 of 2019 in which the Court of Appeal held that,

"...We are aware that a defective verification is amenable to amendment by the applicant upon being granted leave by the Court."

Finally, on that point, Mr. Budodi submitted that the case of **Mlela Ramdhan and Jonester Traseas Rwagibendela@Jonester Jones** (supra) are distinguishable since both of them are not binding to this court but the case of **Sanyou Service Station Ltd and Ramadhan Mikidadi** (supra) are binding to this court.

The learned counsel also submitted that the deponent has not violated Order VI, Rule 15(2) of the CPC because the said provision is applicable to pleadings defined under Order VI, Rule 1 of the CPC and affidavit is not among the pleadings, hence Order VI, Rule 15(2) of the CPC is not applicable on affidavit.

Also, the applicant's counsel submitted that it is not true that the jurat of attestation is defective since it is possible for a person at Sumbawanga on the same date to arrive at Dar es Salaam depending of the type of transport, hence the fact that the applicant signed at Sumbawanga and on the same date at Dar es Salaam is not fatal. He also submitted that there is date on the jurat of attestation; therefore the case of DPP cited by the respondent's counsel is distinguishable.

As for the allegation that the affidavit was verified by a different person, Mr. Budodi submitted that it was the applicant who verified the same and that the applicant's use of names interchangeably can be cured by the principle of overriding objective per section 3A (1)(2) of the CPC and the cited case of **Joseph Magombi vs Tanzania National Parks**(supra).

He also submitted that the affidavit does not contain hearsay because the applicant is the one who sworn in the affidavit and that the issue of

grammar is minor which is curable under the principle of overriding objective. Mr. Budodi also submitted that the applicant's affidavit does not contain words which impeach court record and court process because what the applicant stated therein is that the court did not follow the direction of the High Court of Tanzania at Temeke which is a point of illegality and is allowed in law.

Coming to the second point of preliminary objection Mr. Budodi submitted that in the present case there is not change of names by the applicant but the applicant used names interchangeably. He said the remedy for a party who uses names interchangeable is to order amendment of the proceedings so that the party can state a proper name. According to him, that is curable under the principle of overriding objective and the case of Joseph Magombi(supra).

Coming to the third point, Mr. Budodi submitted that it is not true that the affidavit does not support the chamber summons because the affidavit shows that this application is from Probate and Administration Cause No. 21 of 2022, Mpanda District Court, hence there is not mixture of prayers in the chamber summons and in the affidavit.

He concluded that like the previous points, the third point has no merit and the case of **Daniel Marwa** (supra) is distinguishable in the sense

that in that case the prayers in the chamber summons were confusing while in the instant application the prayers in the chamber summons are clear.

Submitting in relation to the fourth point, the applicant's counsel stated that the applicant cited a proper enabling provision of the law in her Chamber summons which is section 14(1) of the Law of Limitation Act [CAP 89 R.E. 2019] and the counsel for the respondent misconstrued section 93 of the CPC which according to him, is limited to situations where the limitation period has been set by the court. He added that in the instant application the limitation period is set by statute and therefore section 93 of CPC cannot be applied to move the court to extend such statutory period.

He fortified his stance by citing the case of **Edward Msago vs Agha Khan Sports Club**, Civil Appeal No. 15 of 2002, HC(T) at Dar es Salaam in which it was held that,

"Section 93 cannot be used to extend time limited by law but can only be used to extend periods fixed by the court in its judicial capacity and not in its rule making capacity"

On the fifth ground Mr. Budodi submitted that the counsel for the respondent has misunderstood the principle of *functus officio* because once the inventory has been filed the court which becomes *functus officio* is the court in which the inventory was filed and not the High Court.

He also submitted that this is an application for extension of time hence it cannot be said to be *functus officio* and the case of **Saada Rashid (supra)** is distinguishable to the case at hand because it deals with appeal which the present application deals with application for extension of time. Basing on the above authorities the counsel for the applicant implored this court to dismiss the Preliminary Objection with costs.

In rejoinder Mr. Lawrence reiterated his previous position and went on to submit that the overriding objective principle cannot be applied in the instant case due to several anomalies he pointed out which make the whole affidavit to be incurably defective as it goes to the root of the case. He referred the case of **District Executive Director Kilwa District Council vs Bogeta Engineering Ltd** [2019] 1 T.L.R. 271 on that point.

He also submitted that a supplementary affidavit can only be filed where there is proper existing affidavit as per the recent case of **Registered**

Trustees of St. Anita Greenland Schools and 6 others vs Azania Bank Limited, Civil Application No. 168/16 of 2020 CAT at Dar es Salaam.

The above being the rival submissions of the counsel for both parties in the present application, the issue to be determined by this case is whether or not the preliminary objection raised by the counsel for the respondent is proper before the eyes of the law.

Going by the said objection, it appears to me that the same is intended to fault the applicant's application in five points which I need not to reproduce here because I have already done so earlier.

In raising such points, the counsel for the respondent has implored me to dismiss the instant application with costs. It is obvious that should that prayer be granted by this court; the applicant will have no room to pursue her prayer for extension of time to appeal against the impugned decision of the trial court; the only remedy for her will be to appeal to the higher court.

This is because it is a trite law that a preliminary objection raises a point of law which if upheld, disposes of the suit and saves the time of the court and of the parties by not going into the merits of the application as the point of law disposes of the matter summarily (See the case of

Eusto Ntagalinda vs Tanzania Fish Process Ltd, Civil Case No. 08 of 2011(unreported).

However, due to the reasons which I am going to provide shortly in this ruling, I think that this is not a proper case to choose the way which the counsel for the respondent's counsel has suggested.

It is the submission of the respondent's counsel that the instant application is not maintainable for being supported by an incurably defective affidavit and that the same is incompetent for being brought against a wrong person who was not a party in the decision which is sought to be challenged.

The counsel for the respondent has also claimed that the prayers sought in the chamber summons are not supported by the prayers sought in the affidavit and that the application has been preferred under incorrect enabling provision of the law. His last argument is that the application has been overtaken by events.

The law on preliminary objection is well settled that the same should only raise a point of law which, if upheld, will dispose of the matter summarily. If a preliminary objection contains a mixture of points of law and fact which require proof then it cannot be sustained.

This court's fortification is premised in the celebrated case of **Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd** (1969) EA 696 which was cited with approval in various cases in our legal system including the case of **Eusto Ntagalinda vs Tanzania Fish Process Ltd(supra)**, **Cotwu (T) Ottu Union and Another vs Iddi Simba And 7 Others**, Civil Application No. 40 of 2000, **The National Bureau de Change Ltd vs Tanganyika Cheap Stores Ltd & Others**, Commercial Case No. 236 of 2001(unreported), and the case of **Abdallah Hitler Ramadhani vs Hassan Abubakar Mwinchumu**, Misc. Land Application No. 185 Of 2019, HC(T) at Dar es Salaam (unreported), just to mention a few.

In defining what a preliminary objection means the Court, in the case of **Mukisa Biscuits'** case stated, *intel alia*, at page 696 that, "*A preliminary objection consists a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit...*".

Also, in the case of **Cotwu (T) Ottu Union and Another vs Iddi Simba And 7 Others (supra)** the Court of Appeal of Tanzania stated that "*A preliminary objection is in the nature of what used to be demurrer. It rises a pure point of law which is argued on assumption*

that all facts pleaded by the other side are correct. ***It cannot be raised if a fact has to be ascertained*** or if what is sought is the exercise of jurisdiction” [Emphasis added].

In elaborating more on the meaning and qualification of a preliminary objection, the Court of Appeal of Tanzania in the case of **Ibrahim Abdallah (the Administrator of the Estate of the late Hamis Mwalimu) vs Selemani Hamisi (The Administrator of the Estate of the late Hamis Abdallah)**, Civil Appeal No. 314 of 2020, CAT at Arusha (unreported) stated that, *“It is settled law that a pure point of law does not arise if there are contentions on facts yet to be ascertained by evidence.”*

In the instant application, my careful perusal on the submissions of the counsel for the parties herein reveals that all claims raised in the preliminary objection were denied by the counsel for the applicant which tells that more evidence is required to prove them. It appears that apart from raising points of law like hearsay statements, the preliminary objection raised by the respondent’s counsel contains some facts which require proof either by affidavit or oral evidence.

For example, the fact that the application has been brought against a wrong party and the fact that the same has been overtaken by events

because the probate file has already been closed in the trial court, need to be proved by way of documentary or oral evidence.

In my view the above reasons suffice to dismiss the said Preliminary objection for failure to pass the tests indicated in **Mukisa's Biscuit's** case. However, I have noted that there is a prayer by the counsel for the applicant that the applicant be granted leave to amend some defects occasioned in her affidavit like the use of names interchangeably and the omission to verify sub paragraphs in her affidavit.

The learned counsel has based his prayer on the principle of overriding objective provided under section 3A (1)(2) of the CPC which provides that, *"The overriding objective of this Act shall be to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by this Act"*. He has also referred this court to the case of **Joseph Magombi vs Tanzania National Parks** (supra) to cement his prayer.

Reading between lines the above provisions of the law as well as the cited case, it appears to me that such authorities go hand in hand with the provisions of Article 107(2)(e) of the Constitution of the United Republic of Tanzania, CAP 2 R.E. 2002 which provides that, *"In delivering decisions in matters of civil and criminal nature in accordance*

*with the laws, the court shall observe the following principles, that is to say - (a)N/A,(b)N/A,(c)N/A,(d) N/A and (e) **to dispense justice without being tied up with technicalities provisions which may obstruct dispensation of justice***"[Emphasis added].

Guided by the above principles as indicated above, I am of the considered view that the defects in the applicant's affidavit are curable under the principle of overriding objective and this court cannot allow to be tied up by the technicalities as doing so will obstruct dispensation of justice.

All the above being said, I find the preliminary objection raised by the counsel for the respondent to be improperly raised and devoid of merit. Consequently, the same is dismissed and the applicant is granted leave to amend her respective documents within 14 days from the date of this ruling. Costs of the suit shall abide by the end results of the instant application.

It is so ordered.


A.A. MRISHA
JUDGE
15.05.2023

Dated at Sumbawanga this 15th Day of May, 2023.




A.A. MRISHA
JUDGE
15.05.2023

ORIGINAL

Date - 15/05/2023

Coram - Hon. K. Saguda, Ag. DR

Applicant - Present

Respondent - Absent

B/C - J.J Kabata

Applicant: The matter is coming for Ruling, respondent not present, therefore am ready for Ruling today. That is all.


Sgd: K. Saguda
Ag. Deputy Registrar
15/05/2023

Court: The Ruling delivered this 15/05/2023 in the presence of the applicant, while in the absence of respondent, while in the presence of B/C Ms. Jackline.

Sgd: K. Saguda
Ag. Deputy Registrar
15/05/2023

Right of Appeal is fully explained.




K. Saguda
Ag. Deputy Registrar
15/05/2023