IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PROBATE AND ADMINISTRATION CAUSE NO. 60 OF 2007

FRIDA ANDREW KAIZA
(As Attorney of Loyce Butto Shushu
Macdougal, Adminstrator of the Estate
of the Late Neil Richardson MacDougal).....APPLICANT

Versus;

1. VEDASTO MUGYABUSO KUJWALIRE.....1ST RESPONDENT
2. KICHERE JOHANESS NYAMHANGA.....2ND RESPONDENT

RILING

9/02/2012 & 24/07/2014.

Utamwa, J.

This is a ruling on a preliminary objection (PO) lodged by the two respondents, Vedasto Mugyabuso Kujwalire and Kichere Johaness Nyamhanga against the application filed by the applicant, Frida Andrew Kaiza (As Attorney of Loyce Butto Shushu Macdougal, Adminstrator of the Estate of the Late Neil Richardson MacDougal), by way of a chamber application supported by an affidavit. According to the chamber summons, the application is preferred under "Rule 14 of the Probate and Administration Rules, Cap. 352 of the Revised Laws 2002" seeking for the following orders;

a) That the respondents be ordered by this Honourable Court to disclose before the Court all company information, financial information, money in bank, books of account, properties, assets and liabilities and how they have dealt with Studi Baker (T) Limited from 13th October, 2005 when Neil Richardson MacDougal passed away.
b) That the respondents be ordered to release to the applicant all information relating to Studi Baker (T) Limited and allow the Administrator of the estate of

Neil Richardson Macdougall to participate in the running of the said company as an Administrator of the estate of the late Neil Richardson Mackdougall who was the majority shareholder in the said company.

c) That the respondents be ordered by the court to pay to the Attorney of the Administrator of the estate of the late Neil Richardson Mackdougall all moneys (dividends) resulting from the shares of the deceased person held in the said company from the death of the deceased person to date.
d) Costs of this application be provided for.
e) Any other or further reliefs as the court shall deem fit and just to grant.

Previously, this matter was before another Judge who was transferred to another station. Before the matter was assigned to me, the predecessor Judge had granted an application, by the said Loyce Butto Shushu Macdougall, for resealing the grant of the probate dated 17 August, 2006, issued in the High Court of Justice of United Kingdom in the District Probate Registry in Manchesta under ss. 4, 94, 95 and Rules 97 and 98 of the Probate and Administration Act Cap. 352, R. E. 2002 and s. 95 of the Civil Procedure Code, Cap. 33 R. E. 2002, see order dated 04/08/2008. Following that order, the above mentioned application was filed in this court on 21/10/2008.

The PO is based on the following four points;

1. The application has been filed under wrong enabling legislation coupled with non citation of enabling legislation to that effect. The applicant has filed his application under rule 14 of the Probate and Administration of Estates, the legislation which does not exist in our legal system. The application is defective and ought to be struck out.
2. The respondents have been wrongly sued because they are quite distinct from the company, i. e, Studi Baker (T) Limited in which the applicant demands the disclosure of landed properties and other information in that regard. The two respondents are only subscribers in the said company and therefore their legal personalities are quite different.
3. The applicant has no *locus standi* to sue the respondents because the document purporting to be the power of attorney is incurably defective in the manner that it violates section 44 of the Advocates Act. It also violates provisions of s. 8 of the Notary Public and Commissioner for Oaths.

4. This application is *res subjudice* because there is a pending suit at the Land Division of the High Court, Land Case No. 220 of 2008 filed by the respondents herein, on the 10th day of September, 2008 concerning the landed properties in question including the matter concerning Studi Baker (T) Limited.

For these points the two respondents urged this court to dismiss the application.

The predecessor Judge ordered parties to dispose of the PO by way of written submissions, the respondents accordingly filed their written submissions in chief and the applicant filed her replying submissions. The respondent however, did not wish to file any rejoinder. The case was then assigned to me following the transfer of the predecessor Judge, hence this ruling. As my adjudicating scheme, I opt to test the four points of the PO one after another (in case it will be necessary to test all of them) starting with the first point.

In supporting the first point of the PO Mr. Stolla, learned counsel for the respondents submitted that, the cited "rule 14 of the Probate and Administration of Rules, Cap. 352 of the Revised Laws 2002" is a non-existent law. He added that, non-citation or wrong citation of the enabling law renders an application incurably defective and liable to be struck out. He cited the Court of Appeal of Tanzania (CAT) decision of **Fabian Akonaay v. Matias Dawite, CAT Civil Application No. 11 of 2003, at Arusha** (unreported) to fortify his argument. The **Fabian Akonaay Case** followed the decision of the East African Court of Appeal in **Abdul Aziz Suleiman v. Nyaki Farmers Cooperative Ltd [1966] EA 406** and other previous decisions of the CAT in **NBC v. Sdrudin Mghji, Civil Application No. 20 of 1997, Rukwa Auto parts Ltd v. Jestina G. Mwakyoma, Civil Appeal No. 45 of 2000** and **Citibank (T) Ltd v. TTCL and others, Civil Application No. 65 of 2003.**

The learned counsel for the applicant (The Noble Attorneys) reacted to the respondents' arguments in respect of the first point of PO as follows; That procedural rules are intended to serve justice and not to defeat it. In supporting this point, they cited article 107A (2) (e) of the Constitution of the United Republic of Tanzania, Cap. 2, R. E. 2002 which directs that in administering justice courts should not be overwhelmed by procedural technicalities to the extent of defeating justice. They further argued that, in the matter at hand, the applicant intended to

cite rule 14 of the Probate Rules which is the relevant law, the added words " & Administration" were just a typing error. They also cited the decision of this court in **Ramadhani Nyoni v. Ms. Haule & Company (1996) TLR. 71** (Mkwawa J, as he then was) that held *inter alia* that procedural rules should not be used to defeat justice and courts must look into matters sympathetically with broad mind and most realistic approach in order to do justice to cases.

The learned counsel for the applicant further contended that, the complained of irregularity is curable under s. 95 of Cap. 33 which vests this court with powers to make necessary orders. They thus urged the court to exercise such powers for purpose of doing justice; otherwise dismissing the application for the irregularity will defeat justice.

From the arguments by the parties, it is not disputed that there was an irregularity in citing the enabling law in the chamber application at hand. Their contention is on the effect of that irregularity. While the respondent argues it was fatal the applicant submits that it was not. As I indicated earlier, the application is made under "*Rule 14 of the Probate and Administration Rules, Cap. 352 of the Revised Laws 2002.*" The applicant argues that she intended to cite "s. 14 of the Probate Rules" and not the way the law was cited in the chamber summons. It is true that the Probate Rules (GN. No. 10 of 1963 as amended from time to time) cannot not be cited in the way shown in the chamber application. The same is cited simply as the "Probate Rules", since rule 1 of the Probate Rules directs thus; "*These Rules may be cited as the Probate Rules*". I thus agree with the parties that there was an irregularity in citing the enabling law. The issue here is therefore, whether or not the irregularity in citing the enabling law renders the application incurably defective.

In my settled views, the way the enabling law was cited seriously offends the procedure of citing enabling laws for, one cannot be sure whether the application is preferred under the Probate Rules or under main Act, i. e. Cap. 352 unless he firstly engages into perusing the two legal gadgets. But, it is the duty of a party making an application before a court to properly cite the enabling law, especially where the party is legally represented like the applicant in the matter under discussion. Parties moving courts in applications must therefore, come with specific provisions they want the court to rely upon in granting the reliefs they are seeking, they should not just gamble on the applicable law or leave it to the courts to find for them, which is the relevant enabling law for the orders sought in the

application. In the case of **Bahadir Sharif Rashid and 2 others v. Mansour Sharif Rashid and another Civil Application No. 127 of 2006, at Dar es Salaam** the CAT discouraged the trend of uncertain citation of enabling laws in applications and made useful remarks; and I quote the relevant part for ease of reference;

> *"The court should not be made to go on a fishing expedition pouring over sections, rules and the like in order to ascertain whether or not it has jurisdiction to make the particular order"*

It follows thus that, the applicant's argument that the irregularity was a mere typing error will not relief her since it intends to pre-empty the PO. The law is to the effect that, such typing errors (if any) must be rectified by the party himself, before hearing of the matter commences, see the holding of the CAT in **Chama Cha Walimu Tanzania v. The Attorney General, TCA Civil Application No. 151 of 2008, at Dare es Salaam** following its previous decision in **Harish A. Jina (by his attorney Ajar Patel) v. Abdulrazak Jussa Sulleiman, ZNZ, Civil Application No. 2 of 2003.**

Even if it could be taken that the irregularity was a mere typographical error as argued by the applicant (though I do not take it so), the way the applicant cited rule 14 of the Probate Rules would still be insufficient in law for, the rule has three sub-rules. The applicant did not however, cite under which specific sub-rule the application was brought. This alone, is a fatal violation of the law capable of rendering the application incurably incompetent; see the CAT decision in the case of **Joseph Ntogwisango and another v. the Principal Secretary Ministry of Finance and another, CAT, Civil Application No. 109 of 2002, at Dar es salaam** (unreported) following the **Abdul Aziz Suleman Case** (supra).

Moreover, rule 14 of the Probate Rules is only a rule that provides for the procedure of making some applications related to probate matters. I will quote the same verbatim for the sake of a readymade reference;

> "14. Applications to be ex parte;
>
> (1) Every application required to be made under these Rules by chamber summons shall, unless otherwise provided, be made ex parte:
>
> Provided that, where any party other than the applicant is affected by the application, the court may adjourn the hearing of the application

and order that a notice of the application and a copy of the affidavit filed in support thereof be served upon such party.

(2) A chamber summons shall be in the form prescribed in Form 4 set out in the First Schedule.

(3) The notice referred to in the proviso to paragraph (1) shall be in the form prescribed in Form 5 set out in the First Schedule."

On the other hand, the law requires a person moving a court of law in make some orders in an application to cite not only the law that guides the procedure of making the application, but also the law that gives the court the powers to make the orders sought and the law that gives the applicant the entitlement to the orders, see the envisaging by the CAT in the **Chama Cha Walimu Tanzania Case** (supra). In my view, rule 14 of the Probate Rules neither vests jurisdiction to this court to make the sought orders in the application at hand nor gives the applicant the right to such orders. It only guides on how to make some applications by way of chamber summons as observed earlier. This omission adds a hot nail to the applicant's application.

For the above reasons, the applicant's argument that procedural technicalities should not overwhelm this court as per article 107A (2) (e) of the Constitution cannot be forceful. In the **Chama Cha Walimu Tanzania Case** (supra) it was held that, the omission to cite the enabling provisions of law or wrong citation in applications is not a procedural technical/matter within the scope of article 107A of the Constitution, rather it is a serious omission that goes to the root of the matter. It must be born in mind here that, the CAT is the highest court in our court system/hierarchy and its decisions are laws of the land binding to all other courts and tribunals of this country regardless of their correctness, see the CAT decision in the case of **Jumuiya ya Wafanyakazi Tanzania v. Kiwanda cha Uchapishaji cha Taifa [1988] TLR 146.** This position is by virtue of the common law doctrine of *stare decisis* which is applicable in our jurisdiction. This court must thus follow the precedents by the CAT in the **Chama Cha Walimu Tanzania Case** (supra) and those cited by the respondents (supra). It cannot, under the circumstances, follow the decision of this court in the **Ramadhani Nyoni Case**

(cited by the applicant supra) since it was made by a Judge of this court with whom I enjoy a concurrent jurisdiction.

Again, the prayer by the applicant for this court to cure the irregularity under s. 95 of Cap. 33 is an afterthought that cannot be considered at this stage for, the same was not cited in the chamber summons as one of the enabling law. That was thus a non-citation which cannot be rectified by the court at the stage of arguing the PO. As hinted previously, the law is to the effect that it is the duty of the parties to rectify their pleadings themselves before hearing, and not for the court to do so for them, otherwise the courts will be bias, see the **Chama Cha Walimu Tanzania** Case. The law and judicial ethics requires court to be impartial in administering justice. It is also trite law now that, the inherent powers of this court under s. 95 of Cap. 33 are exercisable only where the law has made no provision governing a particular matter at hand, see the decision by the CAT in the case of **Aero Helicopter (T) Ltd v. F.N. Jansen [1990] TLR 142.** In the matter at hand the applicant does not argue that there is no law that governs the situation facing her application. She only wants to take shelter under those provisions as a renovation measure, the course which is not permissible in law. Section 95 of Cap. 33 is not a *spare tyre* provision for use when one fails to properly cite the enabling law in an application.

Having observed as above, I answer the issue posed above positively that the irregularity in citing the enabling law renders this application incurably defective. The remedy to an incurably defective application is to strike it out. This finding therefore, suffices to dispose of the entire application without considering the rest of the points of PO. I will not thus test those other points for, that will amount to beating a dead horse. I therefore, strike out the application with costs. It is accordingly ordered.

JHK. UTAMWA

JUDGE

24/07/2014

24/07/2014

CORAM; Hon. Utamwa, J.
For Applicant; Mr. Magusu Advocate, for Mr. Mashaka advocate.
For Respondent; Present First Respondent only.
BC; Mrs. Kaminda.
Court; ruling delivered in the presence of Mr. Magusu advocate holding briefs for Mr. Mashaka advocate for the applicant and in the presence of the first respondent in chambers this 24th day of July, 2014.

JHK. UTAMWA

JUDGE

24/07/2014