

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
AT DAR ES SALAAM**

**MISCELLANEOUS CIVIL APPLICATION NO. 548 OF 2016  
(Originating from Probate and Administration Cause No. 14  
of 2000)**

**ADMINISTRATOR GENERAL.....APPLICANT**

**Versus**

**DICKSON KASHURA.....RESPONDENT**

**RULING**

**B.R. MUTUNGI, J:**

The applicant in this application is seeking for the following reliefs;

*1. That this Honourable court be pleased to order the Respondent to surrender to the Applicant all properties that belonged to deceased, including*

*a) The Title Deed of Plot No. 94, Block N Located at Kariakoo- Faru Street*

*b) Plot No. 528, Block 'A' located at Sinza*

*c) Plot No. 67 Block 'T' located at Mwembechai-Magomeni,*

d) A house with No. MIC/12743 Block 13/174 located at Vingunguti- Sahara.

e) The Title Deeds of Plot No. 33 with C.T. No. 45668, Plot No. 34 with C.T. No. 45666 and Plot No. 35 with C.T. No. 45667 located at Tabata Industrial Area within Dar es Salaam City which the deceased had interests (majority shareholder)

2. That this Honourable court be pleased to order the respondent to allow the applicant to access some of the properties in which the deceased had interests including Plot No. 33 with C.T. No. 45668, Plot No. 34 with C.T. 45666 and Plot No. 35 with C.T. No. 45667 all located at Tabata Industrial Area within Dar es Salaam City which are now under the control and possession of the Respondent.
3. Costs of the application be provided for; and
4. Any other order this Honourable court may deem fit to grant.

The application is made under section 95 and Order XLIII Rule 2 of the Civil Procedure Code [Cap. 33 R.E 2002] supported by an Affidavit sworn by GILBERT PETER BUBELWA the applicant's Senior Officer.

The respondent on the other hand through the legal services of Mr. David A. Ntonge, has raised a preliminary objection to the effect that, the application is bad in law for being brought under the wrong provisions of the law. In the event, the court had first to determine the raised preliminary objection which has tasked me into writing this ruling.

When the matter was called up for hearing of the preliminary objection, Mr. Ntonge and Miss. Edna learned Advocate appeared for the respondent and applicant respectively. Mr. Ntonge argued that the cited provisions of the law were wrong and not specific. He went further by suggesting the applicant was supposed to have cited **Rule 105 of the Probate Rules** in support of the application. He thus prayed the application be struck out for incompetence.

In reply, Miss. Edna objected Mr. Ntonge's position. She went further by insisting the application is proper before the

court. She elaborated all that she is asking for are orders and not directives. These orders had already been granted by Hon. Shangwa, J. in this very court.

Mr. Ntonge in his rejoinder reiterated what he had narrated in the submission in chief.

After summarizing what had transpired at the hearing, the issue is whether the raised preliminary objection has merits or otherwise.

Having perused through the court record and read through the submissions from both camps, it has come to the attention of the court that the matter revolves around a probate matter. The applicant is seeking for orders to move the respondent to surrender the afore stated properties as numerated earlier in the ruling. In so doing the applicant has resorted to provisions found in the Civil Procedure Code (supra)

On the other side of the coin, the respondent has suggested the applicant ought to have cited **Rule 105 of the Probate Rules.**

From the outset, I find the raised preliminary objection in respect of the application at hand has merits. Consequently, I totally agree with Mr. Ntonge's position that Rule 105 of the Probate Rules should have been invoked herein. For the sake of clarity Rule 105 of the Probate Rules states as follows;

***'An application to the Court for directions to an executor or administrator in regard to the estates or in regard to the administration thereof shall be by chamber summons supported by an affidavit giving full particulars of the direction sought and reasons for the same.'***[Emphasis is mine]

The above cited Rule is applicable in this matter taking into account, the applicant is the administrator of the estate

of the late Simon Kashura. The same is confirmed by the decision of this court in Probate and Administration Cause No. 14 of 2000 before Hon. Mandia, J. (as he then was). In the said Ruling, the court had revoked the respondent's appointment and appointed the applicant to administer the said estates. In view of the foregoing, and the fact that the applicant intends to compel the respondent to surrender the said properties as prayed earlier, in my respective view, Rule 105 of the Probate Rules is most relevant and hence the proper enabling provision to move the court to do that which it has been asked to grant.

Having analyzed as above, it is obvious the applicant has wrongly moved the court by citing the wrong provision of law. The same renders the application incompetent before the court. This position was amplified by the Court of Appeal of Tanzania in the case of **EDWARD BACHWA AND OTHERS VERSUS THE ATTORNEY GENERAL AND ANOTHER,**

**CIVIL APPLICATION NO. 128 OF 2006 (CAT-DSM)**

**(UNREPORTED)** where at page 7 it was held;

*'...wrong citation of the law, section, sub-sections and/ or paragraphs of the law or non-citation of the law will not move the court to do what it is asked and renders the application incompetent.'* [Emphasis is mine]

Consequently, the application is hereby struck out with no costs for incompetence.

It is so ordered.



**B.R. MUTUNGI**

**JUDGE**

**10/5/2018**

Right of Appeal Explained.



  
**B.R. MUTUNGI**

**JUDGE**

**10/5/2018**

Read this day of 10/5/2018 in presence of Edna Kamala for the applicant and Elison Kashura the respondent's young brother.



  
**B.R. MUTUNGI**

**JUDGE**

**10/5/2018**