

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IRINGA DISTRICT REGISTRY)**

AT IRINGA

PROBATE AND ADMINISTRATION REVIEW NO. 8 of 2019

*(Arising from the decision of the High Court in Probate and Administration
Appeal No.1 of 2017)*

**LEONARD KIVELEGE APPLICANT
VERSUS**

EDSON ELIA KIVELEGE 1ST RESPONDENT

BATON ELIA KIVELEGE.....2ND RESPONDENT

Date of Last Order: 21/11/2019

Date of Ruling: 17/12/2019

RULING

MATOGOLO, J.

The applicant one Leonard Kivelege has filed an application for review to this court. His application is by way of chamber summons supported by an affidavit.

The applicant was dissatisfied by the order directing the Trial Court to appoint the reputable and impartial person to be administrator of the Estate of the Late Elia Chapeka Kivelege in lieu of the parties to this case.

The said application was made under Order XLII Rule 1(1) (1), 3, 4 (2)(a), Section 78 (1)(a) and section 95 of the Civil Procedure Code (Cap 33 R.E 2002), for the following orders.

- 1. That this Honourable court be pleased to review and set aside the order that directed the trial court to appoint the reputable and impartial person to the administration of the estate of the late Elia Chapeka Kivelege.*
- 2. That ,this Honourable court be pleased to review and appoint one among the two brothers who are Joseph Elia Kivelege and Lumuliko Elia Kivelege to administer the estate of the late Elia Chapeka Kivelege in lieu of the reputable and impartial person.*
- 3. Any other orders that this Honourable court may deem fit to grant.*

The respondents upon filling their counter affidavit they also filled notice of preliminary objection on point of law basing on the following points,

- 1. That, the applicant's application is defective for Contravening the requirement of the law as to the form of an application for review.*
- 2. That, the application is defective for containing wrong enabling provisions of the law hence the court improperly moved.*

As usual, where a point of law is raised, the same is to be determined first. The parties were therefore invited to argue on the Preliminary objection raised. When the application came for hearing, the

parties appeared in person unrepresented. It was ordered by this court that the preliminary objection be argued by written submissions.

Submitting on the first point Preliminary objection the respondents argued that the applicant failed to comply with the requirement of the law required for an application for review provided under by the Civil Procedure Code, (CAP 33R.E 2002), The respondents insisted that failure by the applicant to follow those directions renders his application before this court incompetent.

Submitting on the 2nd point of objection the respondents argued that the application was made under wrong provisions among those provisions is O. XLII Rule 4 (2)(a), hence the respondents submitted that this provision was not fit for this application. Also the respondents added that the applicant in his application cited section 95 of the Civil Procedure Code which is used only where there is no specific provisions of law which can be used upon such application, according to them this provision is not fit for this application.

Lastly the respondents prayed to this court to dismiss the application with costs.

On his part, the applicant in reply to the 1st point of objection argued that there is no required form of review as opposed to what was filed by the applicant since they failed to show how it was supposed to be filed.

Arguing on the 2nd point of objection the applicant submitted that the respondent alleged that the application is defective for containing wrong

enabling provisions but they failed to disclose the said defect, The applicant, further submitted that the respondents were required to disclose their complaint. To cement his argument the applicant cited the following cases ***Emanuel Abraham Nanyaro versus Peniel Ole Saitabau (1987) TLR 47*** Where it was held that sufficient disclosure of cause of complaints entitle a judge to overrule Preliminary objection. And the case of ***Bikubwa Issa Versus Sultan Mohammed Zahran (1997) TLR 295*** in which it was held that Preliminary objection based on allegations, itself requires to be proved with evidence.

The applicant further submitted that what have been submitted by the respondents regarding Section 95 of Civil Procedure Code (CAP 33 R.E 2002) is only known to them but not the requirement of law. Lastly the applicant prayed to this court to dismiss the Preliminary objection with costs.

I have carefully read the arguments by the parties in their written submissions. Regarding the 1st point of objection the respondents are of the view that the application is defective for contravening the requirement of law as to how the application for review is to be made. The law relating to review is Order XLII Rule (1) and (3) of the Civil Procedure Code, which provides:-

- (1) Any person considering himself aggrieved:-*
- (a) by decree or order from which an appeal is allowed but from which no appeal has been preferred, or*

- (b) by a decree or order from which no appeal is allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or an account of some mistake or error apparent on the face of the record or for any other sufficient reasons, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.*
- (2) N/A*
- (3) The provisions as to the form of preferring appeal shall apply Mutatis Mutandis, to application for review."*

The application by the applicant is by chamber summons supported by an affidavit.

But it is instructive from Order XLII Rule 3 that the form of filing an appeal is that of filing application for review. An appeal is preferred by filing memorandum of appeal.

The application for review is therefore required to be preferred by filing memorandum of review. In the present application applicant did not present it by memorandum of review but by chamber summons supported by an affidavit contrary to what is directed in Order III Rule 3 of the Civil Procedure Code. It is that is why the respondents have raised preliminary objection stating that the application is defective for contravening the

requirement of the law as to the form of an application for review. The applicant in his reply submission did not adequately counter that objection as he just said the respondent ought to have shown how the application ought to be. I think the respondent has missed the point. The respondents have demonstrated the way an application for review should be brought in court. It is by memorandum of review as provided under Order XLII (3) of the Civil Procedure Code. The same cannot be brought by way of chamber summons supported by an affidavit. Order XLII Rule 3 above cited does not direct that way. Filing an application for review in other way than what is prescribed under the law is violation of that law. This point of objection has merit.

In the second point of objection it is the contention by the respondents that the application is defective for containing wrong enabling provision of the law hence the court was improperly moved.

In his application, the applicant cited Order XLII Rule 1(i)(3) (4)(2)(a), Section 78(1)(a) and Section 95 of the Civil Procedure Code.

Among the cited provisions, the applicable ones is Order XII Rule. 1 and (3) and Section 78(1)(a). But Section 95 which is general provision conferring inherent powers to the court to issue an order in the appropriate circumstances. However it is a settled principle of law that the general provision of law cannot be applied where there is a specific provisions catering for the matter at hand. However there is no harm where the inapplicable provision is cited alongside applicable provision as the court can disregard or over look the inapplicable provision and rely on the

applicable law that move the court to deal with the matter it is called upon to do. This was held in the case of **Attorney General v. Jeremiah Mtobeya**, Civil Appeal No. 65 of 2016 CAT at Dar es Salaam (unreported). In this case Section 95 was cited along with Order XLII (1) and (3) and Section 78(1)(a) of the Civil Procedure Code which are proper enabling provision. Section 95 can only therefore be over looked and the court can rely on the proper enabling provision which legally move it. This point of objection therefore lack merit the same is overruled.

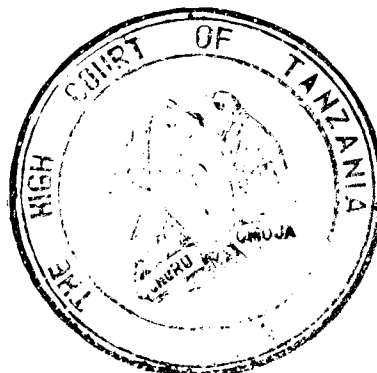
However as the applicant did not file his application for review in the required format, he has therefore violated the requirements of Order XLII (1)(3) of the Civil Procedure Code. This therefore rendered the application incompetent. An incompetent application cannot be acted upon, as it was held in the case of **Raphael Edward Mkingule Vs. Sylvanus Kimenya**, Civil Application No.2 of 2011, CAT at Iringa (unreported).

The only remedy available is for it to be struck out. This application is hereby struck out for being incompetent. The applicant to bear the costs.

Order accordingly.


F. N. MATOGOLO
JUDGE

17/12/2019



Date: 17/12/2019
Coram: Hon. L. M. Chamshama AG – DR
Applicant: Present in person
1st Respondent: Present in person
2nd Respondent: Present in person
C/C: Grace

COURT:

Ruling delivered today in the presence of both the Applicant and Respondent in person.



L. M. CHAMSHAMA
AG- DEPUTY REGISTER
17/12/2019

