

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

MISC. CIVIL APPLICATION No. 449 OF 2019

*(From original Probate Administration Case No. 63 of 2007 of the High
Court of Tanzania at Dar es Salaam)*

**In the matter of the Estate of the late GILIAD MBONEA
MBWAMBO who passed away on 5th January, 2004**

AND

**In the Matter of an Appointment of MARY MCHOME MBWAMBO
and AMOS MBWAMBO as the Administrators of the Estate of
GILIAD MBONEA MBWAMBO**

AND

**In the Matter of the Application for Removal of MARY MCHOME
MBWAMBO and AMOS MBWAMBO as an Administrator of the late
GILIAD MBONEA MBWAMBO**

AND

**In the Matter of an Application for APPOINTMENT of GADISON
MBONEA MBWAMBO as an Administrator of the Estate of the late
GILIAD MBONEA MBWAMBO**

BETWEEN

ELIHAKI GILIAD MBWAMBO PETITIONER

Versus

MARY MCHOME MBWAMBO..... 1st RESPONDENT

AMOS MBWAMBO.....2nd RESPONDENT

RULING

30th April, 2020 - 4th June, 2020

J. A. DE - MELLO J;

The Petitioner is dissatisfied with the administrators, one **Mary Mchome Mbwambo** and **Amos Mbwambo** and, has filed this Application praying for the following orders;

- 1. That, the Honourable Court be pleased to vacate the orders made on 25th September, 2008 by the High Court of Tanzania by appointing the Respondents herein as an Administratrix and Administrator respectively of the Estate of the late GILLIARD MBONEA MBWAMBO.**
- 2. That, this Honourable Court be pleased to Revoke the Letters of Administration granted to the Respondents herein and, appoint GADISON MBONEA MBWAMBO (the brother of the deceased) to be an Administrator of the Estate of the late GILIAD MBONEA MBWAMBO.**
- 3. That, the Respondents be ordered to file inventories for all assets/properties of the deceased sold and, or leased during the time they have been administering the estate to date.**

Accompanying the application is the Affidavit of the Petitioner whereas; the Respondents filled separate Counter Affidavits, resisting the Application accompanied with a **Preliminary Objection** on the following points of law;

- 1. That, the Affidavit supporting the purported Application is incurably defective for violating the mandatory provisions of section 8 of Notaries Public and Commissioners for Oaths Act Cap. 12 as amended.**
- 2. That, the reply to the Counter Affidavit is incurably defective on the ground that, it has been sworn by a person who is not a party to this Application, that is, it has been sworn and filed by one Zakayo Ndobir Lukumay the Advocate for the Petitioner, hence contravening the requirements of the provisions of Order XIX, Rule 3(1) and (2) of the Civil Procedure Code, Cap. 33.**

Written submissions were preferred and, all in compliance with the joint submissions, arguing that, the jurat in the said Counter Affidavit sworn by Advocate for the Petitioner does not disclose or state whether the said Counter Affidavit was sworn in the presence of an attesting Advocate. This, he further asserts, is in contravention to **section 8** of the **Notaries Public and Commissioner for Oaths Act, Cap 12** as amended which dictates that,

“Every Notary Public and Commissioner for Oaths before whom any Oath or Affidavit is taken or made

under this Act shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made.”

Likewise, the same Counter Affidavit does not state whether the Oath has been taken in the presence of the said Commissioner or that, the Commissioner for Oaths has just signed without the presence of the said deponent. The requirement of stating specifically that, the said Oath has been taken in before one, is mandatory and, not an optional requirement, whereby in the said provision the word “**shall**” has been used. Regarding the second ground of objection is that, the reply to the Counter Affidavit is incurably defective for being on the ground that, it has been sworn by a person who is not a party to this Application. That is, it has been filled by one **Zakayo Ndobir Lukumay** the Advocate of the Petitioner hence contravening the requirements of the provisions of **Order XIX Rule 3 (1)** and **(2)** of the **Civil Procedure Code, Cap. 33**.

Order XIX, Rule 3 (1) states that;

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted”

The swearing of the Counter Affidavit by the Petitioner’s Advocate while not part but, only representative of a party to the suit, cannot swear an Affidavit on behalf of the party who has all qualifications to do so, as he becomes a witness to facts which are not of his own knowledge but

information from his client. Under the oxygen principle, which reminds Courts to avoid technicalities in dispensation of justice can not apply here considering the gravity of the contravention as was what the case of **Mondorosi Village Council & 2 Others vs. TBL & 4 Other, Civil Appeal No. 66 of 2017.**

Opposing the objection, Counsel for the Petitioners finds them not pure point of law as the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696.** He finds confusion raised as to which the objections are directed to whether on Affidavit, Counter Affidavit or Reply to Counter Affidavit? It is clear, he asserts that, what is on record is Chamber summons supported by the two Affidavits, made a reply to the Counter Affidavit, and, surprised to see the Counsel for the Respondent raising objection on their own Counter Affidavit. This being the case, neither the Affidavit nor reply to Counter Affidavit are defective, having fulfilled the requirement of the law in as far as insertion of the name and, attesting officer is concerned, indicating that, it has been sworn before the attesting officer as shown in **page 5** of the reply to the Counter Affidavit. Regarding the second ground of Preliminary Objection is that, the law is very clear, not prohibiting Counsels to swear Affidavits on facts that, are within his knowledge to prove information gathered from the Applicants, which he believes to be true. The error in paragraph one of the reply the Counter Affidavit can be remedied by the oxygen principle considering a similar error made by the Respondent's Counsel when he objected her own Counter Affidavit. While in one with the position held in the case at hand has not, **Mondorosi Village Council and 2 Others** case

vs. **TBL and 4 Other, Civil Appeal No. 66 of 2017** violated the of mandatory provisions of law, **section 8** of the **Notaries Public and Commissioner for Oaths Act, Cap. 12** and, **Order XIX, Rule 3** of the **Civil Procedure Cap. 33**. Rejoining, Counsel for the Respondent, reiterated his earlier submissions stressing that, reference was to reply to the Counter Affidavit and not the Affidavit.

Whether or not **section 8** of the **Notaries Public and Commissioner for Oath Act, Cap. 12** has been violated and whether an Advocate can swear an Affidavit on behalf of his client, is subject matter which this Court is moved to determine. While this is the case, I observe a lot of errors on both submissions, confirming laxity and, negligence on the part of Counsels to the extent of mixing up pleadings in support of their arguments. This can not be condoned. Also I have also noticed absence of signature in the Petitioners Certificate of Urgency. Commencing with the first ground of the Preliminary Objection, you will recall the presence of different school of thoughts by the Superior Court on "**Jurat**". It all depends on which side rather angle one would prefer to enters. However, in the case of **Abdul Issa Bano vs. Mauro Daolio, Civil Application No. 563/02 of 2017, Court of Appeal of Tanzania at Arusha**, observed as follows;

"...the absence of jurat or omission to show the date and place of oath was administered or the name of authority and or the signature of the deponent against the jurat is what renders the affidavit incurably defective".

With the approval of the above case, **Kwariko J.A**, and, citing the case of **Director of Public Prosecutions vs. Dodoli Kapufi & Another, Criminal Application No. 11 of 2008, Court of Appeal of Tanzania (Unreported)** confirming contravention, rendering the Affidavit incurably defective. Now for the alleged defects in the reply to the Counter Affidavit, I find them to be minor and, not to the root of the matter. The Court and coming from the above, observes and, appreciates different writing styles by Counsel which do not distort the content and the meaning, as observed in use of **"in the presence and, before me"**. Regarding second ground, as to whether or not an Advocate can swear and file an Affidavit of his own client, the case of **Lalago Cotton Ginnery and Oil Mills Company Limited vs. The Loans and Advances Realization Trust, Civil Application No. 80 of 2002, Court of Appeal of Tanzania at Dar Es Salaam**, it was held that;

"...an Advocate can swear and file an Affidavit in proceedings which he appears for his client, but on matters which are in Advocate's personal knowledge only."

Further that;

"On information supplied would still be defective on verification because one is not conversant it is believed to be true on what he was told by him. Therefore, it becomes hearsay".

In the case of **NBC Ltd vs. Superdoll Trailer Manufacturing Co. Ltd. Civil Application No.13/02 Court of Appeal of Tanzania at Dar es Salaam** stating that;

"Affidavit which mentions another person is hearsay unless that other person swears as well."

This position was also cemented in the case of **Salima Vuai Fom vs. Registrar of Cooperative Societies and Three Others [1995] TLR 75 CAT**, holding;

'Where an affidavit is made on information, it should not be acted upon by any court unless the sources of information are specified.'

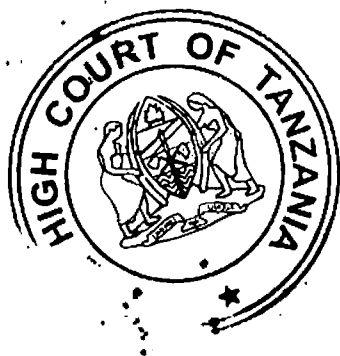
From the case at hand, **paragraphs 1, 2 and, 11** is to information best known to Counsel's own knowledge, and, what is stated on **paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17,18, 19, 20, 21, 22, 23, 24,** and, **25** of the reply to the Counter Affidavit are the information supplied to him by the Petitioner. This being the case, the case of **Benedict Kimwaga vs. Principal Secretary Ministry of Health, Civil Application, No. 31 of 2000, Court of Appeal of Tanzania** where it was held that;

"...if an affidavit mentions another person, that other person has to swear an affidavit. However, the information of that other person is material evidence because without the other affidavit it would be hearsay."

Meaning that, there was a need for the Petitioners to supply their own Affidavit to support the information mentioned in other grounds expect **paragraphs 1, 2 and, 11**. The argument will however remain that, the source of information has been disclosed, which is not sufficient in as far as **Order XIX Rule 3 of the Civil Procedure Code, Cap 33**, rendering such Affidavit inadmissible. An Affidavit from the source is require in support thereto, contrary, such evidence remains hearsay. For avoidance of doubt, the Court finds it impracticable to expunge the defective **paragraphs 3, 4, 5, 6, 7,8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25** of the reply to the Counter Affidavit, as the remaining paragraphs will not suffice the presence Petition, all touching to its roots.

The Preliminary Objections raised are sustained on merits. This being is a Probate and Administration, this Court orders for parties to bear for their own costs.

It is so ordered.



J. A. De-Mello
J. A. DE-MELLO

JUDGE

4th June, 2020.