IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 486 OF 2019

(Originating from High Court Probate and Administration Cause No. 39 of 2019)

IN THE MATTER OF THE ESTATE OF THE LATE DR. REGINALD ABRAHAM MENGI, DECEASED

IN THE MATTER OF THE PROBATE AND ADMINISTRATION OF ESTATES ACT [CAP 352 R.E. 2002]

IN THE MATTER OF THE PROBATE AND ADMINISTRATION OF ESTATES RULES

IN THE MATTER OF AN APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A CAVEAT

JACQUELINE NTUYABALIWE MENGI ---------- 1ST APPLICANT

JACQUELINE NTUYABALIWE MENGI
AS NEXT FRIEND OF JAYDEN
KIHOZA MENGI (A MINOR) ---------- 2ND APPLICANT

JACQUELINE NTUYABALIWE MENGI
AS NEXT FRIEND OF RYAN
SAASHISHA MENGI (A MINOR) ---------- 3RD APPLICANT

VERSUS

BENSON BENJAMIN MENGI ------ 1ST RESPONDENT/1ST PETITIONER

WILLIAM ONESMO MUSHI ------- 2ND RESPONDENT/2nd PETITIONER

ZOEB HASSUJI ---------- 3RD RESPONDENT/3rd PETITIONER

SYLVIA NOVATUS MUSHI --------- 4TH RESPONDENT/4th PETITIONER

ABDIEL REGINALD MENGI -------- 5TH RESPONDENT/1ST CAVEATOR
BENJAMIN ABRAHAM MENGI ---- 6TH RESPONDENT/2nd CAVEATOR

RULING

Date of last order: 19/02/2010
Date of ruling: 09/03/2020

MLYAMBINA, J.

1. Introduction

The instant application has been taken at the instance of Mutabuzi & Co Advocates and Legis Attorneys and it is supported by the affidavits of Jacqueline Ntuyabaliwe Mengi and Advocate Dosca Mutabuzi. The application is made under *Section 14(1) of the Law of Limitation Act*[1] *and Sections 68(e) and 95 of the Civil Procedure Code.*[2] Basically, it is an Application for orders that this Honourable Court extends time for the Applicants to file a caveat in respect of Probate and Administration Cause No. 39 of 2019. In response, the Caveators filed Counter Affidavits together with four *plea in limine litis*, namely:

(a). That the contents of paras 4, 6, 7, 7 (a) to 7 (e), 8, 13, 17, 19, 28, 55 (a) to 55 (e), 56 (a) to 56 (k), 57 (a) to 57 (o), 58 (a) to 58 (j), 59 (a) to 59 (f), 68, 71, 73 and 75 are either hearsay, argumentative, expressing opinion/legal points,

[1] [Cap 89 R.E 2002].
[2] [Cap 33 R.E. 2002]).

insulting, scandalous, and therefore must be expunged from the record.

(b). That the application is misconceived and bad at law for contravening Section 59(1) and (3) of the Probate and Administration of the Estates Act, Cap 352 R. E. 2002;

(c). The application is misconceived and bad at law for being overtaken by events as there is no longer a Petition as this Honourable Court does not have jurisdiction to entertain another caveat/application after the suit is set for hearing; and

(d). That the supporting Affidavit is incurably defective for containing defective verification.

The applicants were represented by Senior learned Counsel Dosca Mutabuzi and learned Counsel Jonathan Mbuga. The petitioners were represented by Senior Counsel Elisa Abel Msuya and Irene Mchau and the caveators were represented by Senior Counsel Nakazael Lukio Tenga, learned Counsel Roman Masumbuko, and Khamis Mfinanga.

2. Background

On 2nd day of May, 2019 Dr. Reginald Abraham Mengi passed away. Following his demise, on 10th day of July 2019, Benson

Benjamin Mengi, William Onesmo Mushi, Zoeb Hassuji and Sylvia Novatus Mushi (hereinafter to be referred as Petitioners) filed a Probate Cause before this Court seeking to be appointed as Probate administrators of the estate of the late Dr. Mengi. It was registered as Probate Cause No. 39 of 2019. On 29th day of July, 2019 general citation was issued via *Daily News* Paper[3] and *Government Gazette* dated 2nd day of August, 2019.[4]

Consequently, on 30th day of July, 2019 Abdiel Reginald Mengi and Benjamin Abraham Mengi (hereinafter to be referred as caveators) filed a joint caveat made under Section 58 of Cap 352 (*supra*) and Rule 82 of the Probate and Administration of Estates Rules. Rule 82 (2A) of the Probate Rules requires a party to file caveat within 30 days after the citation and the petitioner is required to file a reply within 30 days as against the caveat.

Being time barred, on 13th day of September, 2019 the Applicant herein Jacqueline Ntuyabaliwe Mengi in her own capacity and as a Next Friend of Jayden Kihoza Mengi (a minor) and Ryan Saashisha Mengi (a minor) filed an application for extension of time within which to file a caveat. The application was made under Section 14(1) of the Law of Limitation Act,

[3] ISSN 0856-3812 No. 12,434.

[4] ISSN 0856-0323 GN. No. 31.

1971[5] and Sections 68(e) and 95 of the Civil Procedure Code, 1966.[6] The application was against the petitioners and the caveators. The supporting affidavit of Jacqueline Ntuyabaliwe Mengi has encountered the afore four enumerated serious legal objections which forms the centre of this ruling.

3. Submission of the Parties' Counsel on *Plea in Limine Litis*

Learned Counsel Roman Masumbuko on behalf of the caveators argued together the 1st, 2nd and 3rd preliminary objection. He pegged the 1st preliminary objection on para 4, 6, 7, 7 (a) -7 (b), 8, 13,17, 18, 28, 55 (a) – (e), 56 (a) - (k) 57 (a) – (o), 58 (a) - (j), 59 (a) - (f) 68, 71, 73 and 75. According to Counsel Masumbuko, all the listed para are either hearsay, argumentative expressing opinion or legal points, extremely insulting and scandalous and therefore must be expunged from the court records.

Counsel Masumbuko maintained that it is a rule or principle on the affidavit which have been embodied in various cases that an affidavit must contain facts only which are within the knowledge of the deponent. In his view, that principle comes from *Order XIX Rule 3 of the Civil Procedure Code.* As to what

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[5] Cap 89 R.E 2002.

[6] Cap 33 R.E 2002.

should not be contained in the affidavit, he cited the famous case of *Uganda v. Commissioner ex-parte Matovu*[7] in which the Court stated:

> *Such affidavit should contain extraneous matters by way of objection or legal arguments or conclusion.*

Counsel went on to cite the *case of Phantom Modern Transport 1985 Ltd v. DT Dobie Tanzania Ltd.*[8] and the decision of *Leighton offshore TTE LTD Tanzania Branch v. D.B. Shapriya Co. Ltd*[9] *at page 6-7.*

In all those cases, according to Counsel Masumbuko, they state what an affidavit should contain because an affidavit is a substitute of evidence in court. It was stressed by Counsel that if the facts are not in the knowledge, the source must be mentioned and that source should be able to give evidence.

On particular paras, Counsel Masumbuko pointed out that paras 4 and 6 are hearsay as there is no affidavit of that person, nobody can swear on behalf of the deceased. He re-cited the *Phantom case*. He went on to submit that paras 7 and 7 (a) – (e) are hearsay as well. These are matters informed by Dr. Mengi. Para 13 is also hearsay while paras 19 is expression of opinion. Para 28 is both expression of opinion and

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[7] 1966 EA 514 at 520.

[8] Court of Appeal of Tanzania at Dar es Salaam, Civil Reference No. 15 of 2001.

[9] High Court of Tanzania Commercial Division at Dar es Salaam, Misc. Commercial Application No. 225 of 2015.

argumentative while para 55 (a) – (e) contain argumentation, hearsay and contain opinion. Para 56 (a) –(k) are argumentative, and forms opinion. Para 57 (a) – (o) are scandalous, insulting and some are hearsay and argumentative.

Further, paras 58 (a) (J) contain hearsay information. paras 59 (a) (f) are argumentative, hearsay and scandalous. Para 68 is hearsay and the court should not rely on it. Para 71 is argumentative and contains opinion and paras 73 and 75 also contain opinion. Counsel Masumbuko, therefore, prayed that the listed paras which are hearsay, argumentative expressing opinion, scandalous and insulting be expunged. In his view, if all these paras are expunged what remains cannot hold the application.

On the third point of objection, Counsel Masumbuko basically submitted that the application has been over taken by events and conflict with probate procedures. Counsel Masumbuko asserted that Probate proceedings are special. When they turn to be contentious must strict follow *Section 58 and 59 and Rule 82 of the Probate Rules.* Thus, once a caveat is lodged, as it been done in this case the 5th and 6th Caveators, the whole proceedings must comply with rule 82 because under Section 58 and 59 of the Probate Acts, the petition becomes a contentious suit.

In such a situation, *Section 52 (b) of the Probate and Administration Act* takes effect, and the petitioner becomes the plaintiff and the Caveators becomes defendants. To buttress that position, Counsel Masumbuko cited the case of *Revenanth Eliawory Meena v. Albert Eliawory Meena and Another*,[10] page 13.

In found view of Counsel Masumbuko, the Court cannot go back to issuing another citation. If the Court is to allow this application, the proceedings will be illegal. Since the suit in Probate No. 39 of 2019 has already matured. This Hon. Court cannot go back to deal with caveat. The proceedings must proceed under Section 52 of the Probate Administration Act.

On 4th point of incurable affidavit, Counsel Masumbuko re-cited the *case of phantom* on facts within knowledge of the deponent and in *Leighton case* at page 6 and 7. In his view, the 4th line from the last part of the verification are statement given by the informer. Therefore, this affidavit is defective.

In support of the submissions by Counsel Masumbuko, Senior Counsel Nakazael Lukio Tenga amplified that the purpose of having caveat is a procedure which enables someone with interest in the caveat to participate in the proceedings in the court once a petition has matured into a suit. She explained

[10] Civil Revision no. 1 of 2017 Court of Appeal of Tanzania at Arusha.

further that under *Section 59 of the Probate Act,* there are procedures of intervening into a suit. This is by filing an application under the Civil Procedure Code.

In reply, Counsel Jonathan Mbuga for the Applicants commenced by submitting that all the preliminary objections raised and argued by the 5th and 6th Caveators have no merits in law and facts.

On the Caveators' submissions that para 4, 6, 7, 8, 13, 17 and 58 are hearsay because they cannot be verified, Counsel Mbuga, admitted that generally speaking, an affidavit is substitute of oral evidence. He further admitted that as a matter of law and procedure, a deponent is required to depone facts which he (she from his personal knowledge. Therefore, hearsay is not admissible. However, in his view there are exception to the above general rule as regards the affidavit where by hearsay can be admissible. One of the instances is where the deponent can show the source of information as required under Order XIX Rule3 of The Civil Procedure Code. Counsel Mbuga went on to cite the case of *Standard Goods Cooperation Ltd v. Harackchand Nathar and Co.*[11] (Kenyan decision). In that case the court discussed and held that the deponent is required to state the source of information.

[11] 1950 EACA 99.

It was Counsel Mbuga submission that the Applicants' affidavit complied with the above requirement of the law as she clearly stated that the source of information was Dr. Abraham Reginald Mengi when he was alive. Further, there is no dispute that Dr. Mengi is no more in this world. The question before this court is; *whether there is any statutory law or case law which forbids the wife of the deceased deponent to rely the information from the deceased.* Counsel Mbuga went on to answer such issue in negative. He submitted further that there are no statutory or case law which forbids the deponent from relying or stating that the source of information was obtained from the deceased.

On the cited case of *Phantom Modern Transport (1995) Ltd (supra) and Leighton,* Counsel Mbuga was not able to see if those cases are supporting the arguments of the Caveators. His view, according to those cases the deponent is supposed to disclose the source of information. He Further distinguished the cases cited for being not probate cases. These cases refer to general principles which demand disclosure of sources of information. The understanding of Counsel Mbuga on probate matters was that hearsay cannot be avoided because both parties are litigating on the estate of the deceased who is no longer in this World.

Counsel Mbuga asserted that, as a matter of law, Section 2 of the Evidence Act is not applicable when dealing with matters of affidavit. The issue of affidavit is governed by *Order XIX of the Civil Procedure Code.*

However, Counsel Mbuga invited this court to borrow the jurisprudence in the Evidence Act on fair and just basis taking into account that oral evidence which are governed by Evidence Act are the best evidence than evidence by way of affidavit.

Further, Counsel Mbuga submitted that hearsay in the Evidence Act is strictly prohibited because Section 62 of Act requires oral evidence to be direct. However, Section 34 of Evidence Act provides for some exception where hearsay evidence can be admitted. In view of the Counsel, where the source of information is the dead person, there is no harm for this court to rely on information received from the deceased provided the source of information is provided.

Counsel Mbuga was of view that, since the deponent was in official capacity as the wife of the deceased and she stated very clear where she obtained the source of information as required by the law, this court should ignore the prayer to expunge para 4, 6, and 8, 13, 17, and 58 of the affidavit.

As regards para 55 (a)-(f), also para 56 (a) – (k) para 57 (a) – (f) which the Counsel for the Caveators submitted that all are argumentative or hearsay or opinion save for para 57 (b) and (c) which he said are scandalous and insulting, Counsel Mbuga attacked the respondent's submission by stating that he did not even pinpoint which part of those para are argumentative hearsay or opinion. He just mentioned that in a blanket form. He argued that Counsel Masumbuko failed to allocate which part among the three the Caveators' Counsel was referring.

Counsel Mbuga underlined that this is a court of law. Thus, one function of the court of law is to make decision. It is not to assist the parties to pinpoint which part of those paras are argumentative, hearsay or of opinion.

Counsel Mbuga, therefore, prayed that the objection be dismissed because extraneous matters have not been identified. As regards para 57 (b) and (c) which were said to be scandalous and insulting, Counsel Mbuga was of view that those are the matters the court can address comprehensively at the time of hearing of the main petition and not at this stage. In his view, the court cannot just look on the para and say this para is scandalous or hearsay without even looking at what has been replied by the Caveators in their counter affidavit. In his view, the law also provides the right of the respondent to counter those scandalous or insulting statements

(if any) by way of filing counter affidavit and not by way of raising preliminary objection.

It was the reply submission of Counsel Mbuga that, it is premature for the Counsel of the respondent to move the court to expunge those paras without hearing the parties.

Despite the submission that all impugned paras are statements of facts as required by the law, Counsel Mbuga admitted that para 68, 71, 73 and 75 are legal opinion and argumentative.

Besides, Counsel Mbuga was submitted that it is a matter of law, if the court finds all the paras as stated in the preliminary objection are defective of which he strongly disputed, this court has three options to take.

One, to expunge or overlook those offensive paras and leave the substantive part of the affidavit intact if are sufficient enough to dispose the application in question. *Two*, to allow the deponent to file a fresh affidavit. *Three*, the court can struck out the entire application. To back up such position, he cited the case of *Rustamali Shivji Karim Merani v. Kamal Bhushan Joshi.*[12] He further cited the case of *Convergence Wireless Networks (Mauritius) Led and 3 Others v. Wia Group Ltd and 2 Others.*[13]

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[12] Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 80 of 2009, at page 7 (unreported).

[13] Court of Appeal of Tanzania Civil Application No. 263 B of 2015 (unreported) at page 9-10.

Counsel Mbuga requested the court to overlook the offensive paras, if the court finds all the paras are defective, because the remaining para are sufficient to dispose the application. Counsel Mbuga went on to submit that the pending application is for extension of time in which the applicant seeks to file a caveat. In such application the applicant is required to show two things. *First*, where she was in all those days until the time expired. *Second*, she has an interest in the Probate as per Section 5-61 of the Probate Act.[14] Thus, para 51-54 show clearly where the applicant was until the time expired.

Also, para 67 shows the extent of delay. The applicant counted for each day of delay as deponed under para 1,2.3, 5, 9, 10, 11, 12 and so many others shows that the applicant is an interested party. In view of Counsel Mbuga, the remaining paras are sufficient to dispose the application. He invited this Court to apply Rule 116 of the Probate Rules which gives wide discretion of this court once it finds the application is defective to amend or give any order. Counsel Mbuga thus invited this court to go through the oxygen principle in the case of *Alliance One Tobacco Tanzania Ltd and Another v. Mwajuma Hamis and Another,*[15] at page 3, 4 and 5 in which this Court observed:

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[14] Cap 352.

[15] Miscellaneous Civil Application No. 803 of 2018 High Court of Tanzania at Dar es Salaam District Registry (Unreported).

It is the current law of the land that Courts should uphold the overriding objective principle and disregard minor irregularities and unnecessary technicalities so as to abide with the need to achieve substantive justice. That proposition of the law is well reflected in the provision of Section 6 of the Written Laws Miscellaneous Amendment Act No. 3 of 2018 ...

Though dismissal of the objection is likely to encourage laziness to lawyers in doing their homework prior filing applications and so hamper the development of jurisprudence, I find the call made by the applicant adds more value in the administration of substantive justice. Upholding the raised preliminary objection is a punishment to the client for the mistake done by its Counsel. Indeed, upholding of the preliminary objection will cause wastage of time and resources to both litigants and to the Court, multiplication of unnecessary cases, and over burdening litigants with unnecessary costs. Upholding the same objection will not solve the dispute of the parties. Indeed, the Court will be used as a vehicle of miscarriage of justice at the expenses of legal technicalities.

As regards the 2nd and 3rd point of objection, of which the respondent Counsel dealt with Section 58, 59 (b) of Cap 352 together with rule 82 and argued that the application before this court is overtaken by events, Counsel Mbuga responded that the Counsel for respondent meant that Section 58 ceases to be applicable when Section 52 (b) and rule 82 comes into play. Thus, in the sense, the Counsel for respondent meant that there is no room for this court to entertain any person who wants to file caveat. Counsel Mbuga replied that it is a very wrong interpretation of the law. Thus, one needs no case law for interpretation of these provisions because are very clear.

According to Counsel Mbuga, Section 58 provides avenue for anyone who have interests in the deceased estate to file caveat against application for grant of probate or letters of administration. That, caveat can be filed at any time before termination of the petition for probate or letters of administration.

After going through the law and the rules, that is the only entrance of any person to join the proceedings of the petition, Counsel Mbuga submitted that Section 59 (1) require the court not to proceed with the determination of the petition until determination of the caveat filed by the Caveators. Thus, the said provision acts as a restraint or stay of the petition proceeding.

It was submitted by Counsel Mbuga that, when the court deals with caveat proceedings, that is where Section 52 (b) and rule 82 of the probate rules comes into play. Section 52 (b) requires the court to apply procedures applicable nearly as in the suit, that is why the probate causes are especial proceedings.

Counsel Mbuga posed one question; which proceedings between the two, under which procedure can any person who have an interest in the deceased estate join the proceedings? He then proceeded to submit that the answer of that question is found in Section 58. It is only by filing caveat against the petition and not to join the caveat proceedings.

Counsel Mbuga was of the firm view that the application is proper before the court because Section 58 allows any person to join. Dismissal is always applicable when the matter is determined on merits and not terminated on preliminary objection. The right order is for striking out. To bolster up the argument, Counsel Mbuga referred the court to the case of *Yahya Athumani Kissesa v. Hadija Omari Athumani and 2 Others.*[16] It was Counsel Mbuga submission that it is not proper for the respondent to request for dismissal order.

On the defectiveness of the verification clause, Counsel Mbuga submitted that defect may come if the court expunges the

[16] Court of Appeal of Tanzania, Civil Appeal No. 105 for 2014 (unreported), at page 9 and 10.

alleged perfective paras. Even if the court expunges and finds the verification defective, the court has jurisdiction to allow rectification of the defective verification. On that note, Counsel Mbuga invited the court to read the decision of *Sanyou Service Station Ltd v. BP Tanzania Ltd (now Puma Energy (T) Ltd,* Civil Application No. 185/2017 of 2018 at page 8, 9, and 10. In that case the court allowed amendment of the defective verification clause.

In the premises, Counsel Mbuga prayed the preliminary objection be dismissed with no costs.

On her part, learned Counsel Mutabuzi amplified the point that the application been overtaken by events. It was her position that this application has not been over taken by events. While referring to the respondent's submission that the matter became contentious when 5th and 6th Caveators entered a caveat and that no any other interested party is allowed to file any caveat, Counsel Mutabuzi viewed it as a very wrong interpretation of the law. She then cited the case of *Nuru Hussein v. Abdulghani*[17] in which The Court of Appeal held that:

> *Where such a situation abstains it becomes imprudent, if not fraudulent to exclude them in the*

[17] [2000] TLR 221.

proceeding for that would make a conclusive decision almost impossible. We are mindful of the submission that the applicant can intervene by way of other intervening and not by way of caveat any more.

Counsel Mutabuzi asserted that in the advent of the overriding principle, there is no need to waste more time to file other application under Order I rule 10 of the Civil Procedure Code to file other application while the parties are before the Court. Doing so would be burdening the litigants and wasting resources. Counsel Mutabuzi invited the Court to take judicial notice of the applicant presence in Court on 16/09/2019.

Counsel Mutabuzi went on to maintain, the submission that the application has been over taken by events is in disregard of the fact which is apparent on the record that rule 82(3) of The Probate Rules was not complied with. That, through this case, the applicant could not find anywhere this court is forbidden to issue another citation.

In view of Counsel Mutabuzi, the remedy available is to file an application for extension since the time for the Applicant to file a caveat has elapsed.

In rejoinder to the 1st objection, Counsel Masumbuko told the Court that the case of *Rustamali Shivji (page 4,6)* and

convergence wireless (page 5-7) cited by the applicant agrees with the principle. Counsel Masumbuko went on to distinguish the Kenyan case cited by Counsel Mbuga as it does not address the issues raised as preliminary objection. What is in agreement para 4,6,7 (a)- (e) 8, 13, 17, 19 and 20 are hearsay. There is no an affidavit of a person to confirm with regard to para 65 (a) – (f), 66 (a) –(k) 67 (a)- (o) 58 (a) – (j) and 59 (a)- (f).

On the issue of comparing to the counter affidavit, Counsel Masumbuko submitted that there is no procedure which requires the court to look at the counter affidavit. It is not a point to wait till the matter is heard in evidence. Counsel Masumbuko invited the Court to look at *Rule 16 of order VI of Civil Procedure Code* which restricts matters which are scandalous.

Counsel Masumbuko called upon the Court to expunge the admitted defective paras 68, 71, 72 and 75. In the alternative, the only option is to expunge the defective paras and to struck out the application because the paras are consequential to the determination of the application, without the said paras there are no issues to be brought to the court. There is no room to amend these issues. One cannot amend scandalous issues. The only way is to expunge them.

Counsel Masumbuko distinguished Rule 116 of the Probate Rules as it is is not relevant to these proceedings because the applicant is not a party to this case. The overriding objective principle cannot be applied blindly. On that note, Counsel referred the court in the case of *Mondoros Village Council and Other v. Tanzania Breweries Ltd.*[18]

On the second preliminary objection, in relation to Para 68, Counsel Masumbuko noted that it has been admitted the source of information has not been provided. If one gives verification that person must be called in court. The verification was done when that person has passed away. Counsel distinguished the *Phantom case* because it did not say the source of information can be a deceased person.

On the third point, Counsel Masumbuko submitted that, as the suit is contentious now under rule 52, the argument that there is no procedure limiting filing caveat is out of place. Thus, the fact that there is a contentious matter, the only applicable provision is Section 52 (b) (*supra*). It turns into a suit as per the decision in *Nuru Hussein v. Abdulghani Ismail Hussein.*[19]

Counsel Masumbuko distinguished the cited case of *Yahya Athumani Kissesa v. Hadija Omari Athumani and 2 Others (supra)* to the effect that the nature of the case was not a land

[18] Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 66 of 2017 at pp. 15-16.
[19] 2000 TLR 218.

matter but taken to a land court. The instant application is overtaken by events. The Applicants have no room to came back. Once the application is dismissed, it will be determined on merits.

In her rejoinder, Senior Counsel Tenga stated that it is not true that there is no law which forbids the deponent to rely on information of the deceased husband. She stressed that under Section 34 of Evidence Act hearsay evidence can be admitted but the applicant's application does not fit unto the provision of Section 34 of Evidence Act.

It was the humble view of Senior Counsel Tenga that the requirement of the law under Order XIX Rule 3 of the Civil Procedure Code of disclosing source of information is to make the other side to verify the information. If the source of information cannot be verified renders such affidavit worthless. On applicability of evidence act in affidavit, Senior Counsel Tenga added that what is meant by Section 2 of Evidence Act is that affidavit should not be admitted whole sum as evidence until they comply with the conduits set under Order XIX Rule 3 of the Civil Procedure Code. Affidavit can be used as evidence if they pass the threshold of order XIX Rule 3 (*supra*).

Senior Counsel Tenga admitted that it is true under Section 58 of Probate Administration Act a person who have interests can

enter caveat. The caveat envisaged under Section 58 is against grant of the probate. The applicant has not indicated to be against the grant of the probate.

4. Analysis and Application of the Law

Having considered the contested affidavit and the rival submissions by Counsel for the parties, the following are the deliberations of this Court.

The court will start with the main contention laying the basis to legal terms worth addressing, namely: "hearsay", "argument" and "opinion". Starting with definition of the referred terms, according to *Black's Law Dictionary,*[20] at page 726, "hearsay" means:

> 1. *Traditionally, testimony that is given by a witness who relates what he or she known personally, but what others have said and that is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under the rules of evidence. 2. In federal law, a statement (either a verbal assertion or non-verbal assertive conduct), other than one made by the declarant while testifying at the trial*

[20] 7th Edition, St. Paul, Minnesota, 1999 (Bryan A. Gardner – Editor in Chief).

or hearing, offered in evidence to prove the truth of the matter asserted.

The judicial definition of the word hearsay can be gathered in among cases, the case *of Kinyatti v. Republic*[21] where the Court defined hearsay or indirect evidence as; *an assertion of a person other than the witness testifying, offered as evidence of truth of that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence.*

The court in *Kinyatti case* (*supra*) stated the rule regarding hearsay evidence to the effect that:

> a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact stated. However, hearsay evidence may be admitted if the statement containing it is made in conditions of involvement or pressure and within proximity but not exact contemporaneity *as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused. (emphasis added)*

Though the Kinyatti case can be distinguished with the present case, in that it dealt with admissibility of oral hearsay evidence,

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[21] (1976-1985) 1 EA 234 at p. 235.

whereas the issue in this case is on defectiveness of the supporting affidavit for containing *inter alia,* hearsay paras, the point that the Court want to stress is the effect of hearsay evidence. Without a supporting written sworn affidavit of the person alleged to have said such words, there can be a danger of using such words for the benefit of the maker or to ruin the accused. In that regard, presence of the one alleged to have said such words is quite important in ascertaining the truth. If such person cannot be found, such piece of evidence has to be expunged from the affidavit.

In the daily cited case of *Uganda v. Commissioner of Prisons, ex-parte Matovu (supra)* it was held as follows:

> ... as a general rule of practice and procedure, an affidavit, for use in court, being a substitute for oral evidence, *should only contain statements of facts to which the witness deposes either of his own personal knowledge or from information he believes to be true.*

As to paras containing information from other sources, the Court of Appeal in *Salima Vuai Foum v. Registrar of Cooperative Societies and three Others*[22] the Court of Appeal underscored at page 76 that:

[22] [1995] T.L.R. 75.

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

According to the applicant's Counsel, the statements alleged to be hearsay were given to the deponent by the deceased one Dr. Reginald Abraham Mengi during his life time. The immediate question is the effect of "hearsay" in law? In *Mustapha Raphael v. East African Gold Mines Ltd,*[23] stated:

> An affidavit is not a kind of superior evidence. It is simply a written statement on oath. It has to be factual and free from extraneous matters such as *hearsay*, legal arguments, objections, prayers and conclusions.

With due respect to the deponent's statement that the statements alleged to be hearsay were made by the deceased, one Dr. Mengi during his life time, the same makes no difference with regard to contents of an affidavit. A duly research by this Court found nothing in exception to the fate of statements made by a deceased person and that made by a living person. Moreover, even if the same is said to have been made by the deceased Dr. Reginald Abraham Mengi, the same lacks proof as he cannot resurrect and come to prove the same

[23] Court of Appeal of Tanzania, Civil Application No. 40 of 1998 (Dar es Salaam Registry, (Unreported).

leave alone the Christian belief of Jesus Christ in the Bible. In *Benedict Kimwaga v. Principal Secretary Ministry of Health,*[24] the Court held:

> if an affidavit mentions another person, then 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.

In *NBC Ltd v. Superdoll Trailer Manufacture Co Ltd,*[25] the Court held that affidavit which mention another person is hearsay unless that other person swears as well.

The argument made by Counsel Mbuga that hearsay can be admissible where the deponent can show the source of information as required under Order XIX Rule 3 of the Civil Procedure Code is a far fetching point. It is the findings of the Court that showing the source alone do not make the affidavit admissible. (See *Kimwaga case supra).* There must be a supporting affidavit from the person alleged to have said such words. To the contrary such evidence remains hearsay.

If at the trial of the matter, the court would take of the position that the words in the impugned sworn affidavit of the applicant were spoken by Dr. Reginald Abraham Mengi, and other

[24] Court of Appeal of Tanzania, Civil Application No 31 of 2000.

[25] Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 13 of 2002 (Unreported).

sources like Dr. Kuashik Ranchod who is alleged under para 13 of the affidavit, the court will have a duty to ascertain their truth. The Privy Council in *Ratten v. R.*[26] as cited with approval in the case of *Brinks Ltd v Abu-Saleh and Others (No. 2),*[27] Lord Wilberforce said:

> *The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on "testimonially", that is as establishing some fact narrated by the words. Authority is hardly needed for this proposition, but their Lordships will restate what was said in the judgement of the Board in Subramaniam v Public Prosecutor:*[28] *"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is*

[26] (1971) 3 All ER 801 at 805, (1972) AC 378 at 387.
[27] (1995) 4 All ER 85.
[28] (1956) 1 WLR 965 at 970.

to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made.

In the instant case, the applicant has testimonially relied from the words heard from the deceased. para 4, 6, 7, 7 (a) - 7 (b), 8, 13,17, 18, 28, 55 (a) – (e), 56 (a) - (k) 57 (a) – (o), 58 (a) - (j), 59 (a) - (f) 68, 71, 73 and 75, though denied by the Applicants are hearsay evidence. For instance, para 4 and 13 of the impugned affidavit states:

4. *When the late Dr Reginald Abraham Mengi began courting me he told me that he had been separated from his wife, Mercy Ann Mengi (hereinafter referred to by her name or 'divorced wife', or 'former wife') for over 10 years during which time both of them had been having relationships with other persons.*

13. *Further, that Dr Kuashik Ranchod told me that my late husband had suffered a mild stroke and he was hospitalized for a few days.*

From the above, it is the position of this Court that the argument of the applicant is non-meritorious in law. Hearsay evidence cannot be relied upon by the Court. Even if relied

upon, the same are not good ground for extension of time to file caveat.

This court is of position that *Rule 3 of order XIX (supra)* gives an exception of the general rule on matters of belief and not hearsay. A person may believe something without hearing from anyone. To be precise *Order XIX Rule 3 (1) (supra)* provides:

> Affidavit shall be confined to such facts as the deponent is able of his knowledge to prove, *except on interlocutory applications on which statements of his belief* may be admitted. Provided that the grounds thereof are stated. *(emphasis added)*

While this court agrees that hearsay cannot be avoided because parties are litigating over the estate of the deceased, for the court to safely rely on such words spoken by the deceased, there must be a supporting affidavit of the deceased sworn prior his/her death. In that circumstances, an attesting officer may be brought as a compulsory witness.

Indeed, the point that the deponent was in official capacity as the wife of the deceased and that she stated the source of information lacks legal weight. The deceased should had sworn an affidavit prior his death. The same evidence may be supported with an affidavit of his attesting officer to make it not a hearsay and of truth.

I also agree that this is a court of law whose core function is to make decision and not to assist parties to point out defective paragraphs however, the impugned paragraphs are not long enough to be ascertained unless one reads them mechanically.

The reading of the phrases in paragraph 4 and 6 of the impugned decision, does not need a law degree for one to note that it is a hearsay evidence. The same applies to all impugned paragraphs of the application supporting affidavit.

On the other, according to *Black's Law Dictionary,*[29] *at page 103,* "argument" means:

1. A statement that attempts to persuade; especially, the remarks of Counsel in analysing and pointing out or repudiating a desired inference, for the assistance of a decision maker. 2. The act or process of attempting to persuade.

In the case of *Mustapha Raphael v. East African Gold Mines Ltd,*[30] the Court held that:

> An affidavit is not a kind of superior evidence. It is simply a written statement of oath. *It has to be factual and free from extraneous matters such as*

[29] 7th Edition, St. Paul, Minn., 1999 (Bryan A. Gardner – Editor in Chief).

[30] Court of Appeal Civil Application No 40 of 1998 at Dar es Salaam.

hearsay, legal arguments, objections, prayers and conclusions. (emphasis added)

In the case of *Dar es Salaam Education and Officer Stationery v. NBC Holding Corporation and Others,*[31] the Court of Appeal of Tanzania held that *advanced arguments in affidavit is so offensive as to cause an application to be struck out and thereby deny final court of justice an opportunity to determine a matter on merits.*

In the case of *Fortunatus Nyigana v. Permanent Secretary Ministry of Home Affairs & Another,*[32] the Court of Appeal held that an affidavit is defective for containing argumentative statement and argumentative para.

Legal Opinion is defined in *Black Law Dictionary (supra) at page 1120* as a written statement in which an attorney provides his or her understanding of the law as applied to assumed fact. The attorney may be private or attorney representing the states or governmental entity. A party may be entitled to rely on a legal opinion depending on factors such as the identity of the parties to whom the opinion was addressed and the law governing opinions.

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[31] Court of Appeal of Tanzania at Dar es Salaam, Civil Application No 39 of 1999.

[32] Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No 37 of 2014 258.

In the case of *Godgives Transport Ltd and Another v. Commercial Bank of Africa,*[33] the Court struck out the application on inter alia reason that the supporting affidavit contained legal arguments and opinions.

According to *Black Law Dictionary (supra) Scandalous matters a*re matters that are both grossly disgraceful and (defamatory) and irrelevant to action or defence. A federal court, upon a party's motion or on its own can order a scandalous matter to strike from pleading.

Insulting as per *Dictionary of Current English 7th edition* means causing or intending to feel offended: oxford Advanced learners.

With the afore definitions in mind, what stands to be the position of the law with regard to offensive paras in an affidavit? As correctly submitted by the learned Counsel for the 5th and 6th Caveators in the same *Phantom Modern Transport (1985) Ltd and D.T. Dobie (Tanzania) Ltd (supra)* that:

> It seems to us that where defects in an affidavit are inconsequential, *those offensive paras can be expunged or overlooked, leaving the substantive parts of it intact so that the Court can proceed to act on it.* If, however, substantive parts of an

[33] High Court of Tanzania, Commercial Division, Commerical Case No. 135 of 2018.

affidavit are defective, it cannot be amended in the sense of striking off the offensive parts and substituting thereof correct averments in the affidavit. *But where the Court is minded to allow the deponent to remedy the defects, it may allow him or her to file a fresh affidavit containing correct averments.* What in effect it means is that a fresh affidavit is substituted for the defective one. ...

It is the findings of this Court that if the offensive parts of the affidavit are retained, will affect the suit because the offensive parts which are insulting and scandalous hinges to the alleged characters of the caveators.

After going through the affidavit by Mrs. Jacqueline Ntuyabaliwe Mengi (personally and as legal representative of the 2nd & 3rd Applicants), it is clear that the pointed-out paras by learned friends for the 5th and 6th Caveators are defective in law for being either hearsay, argumentative or opinion.

It has been argued to the satisfaction of this Court that the contested paras 4, 6, 7, 7(a) to 7(e), 8, 13, 17, 19, 28, 55(a) to 55(e), 56(a) to 56(k), 57(a) to 57(o), 58(a) to 58(j), 59(a) to 59(f), 68, 71, 73 & 75 are either hearsay, argumentative, expressing opinion/legal points, insulting and scandalous as pointed out by Counsel for the 5th and 6th Caveators. The

immediate question is what should the appropriate order to be issued by this Court? The High Court in the case of *Omari Ally Omary v. Idd Mohamed and Others;*[34] Massati, J. (as he then was) had these to say:

> From the authorities contained in the decision of *the Court of Appeal in Lalago Cotton Ginnery and Oil Mills Company Limited v. LART*[35] *Phantom Modem Transport (1985) LTD v. D.T. Dobie (Tanzania) Ltd.*[36] *and Manorial Aggarwal v. Tanganyika Land Agency Ltd. & Others*[37] the position of the law can safely be summarized as follows:
>
> > As a general rule *a defective affidavit should not be acted upon by a court of law,* but in appropriate cases, where the defects are minor, the courts can order an amendment by way of filing fresh affidavit or by striking out the affidavit *but if the defects are of a substantial or substantive nature, no amendment should be allowed as they are a nullity, and there can be no amendment to a nothing.*

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[34] Court of Appeal of Tanzania, Civil Revision No. 90 of 2003 (Dar es Salaam Registry), (Unreported).

[35] Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 8 of 2003.

[36] Court of Appeal of Tanzania at Dar es Salaam, Civil References No. 15 of 2001 and 3 of 2002.

[37] Court of Appeal of Tanzania at Dar es Salaam, Civil Reference No. 11 of 1999.

In the light of the above legal authorities, it is the findings of this Court that the affidavit filed is defective and thus ruining its validity to stand in law. Thus, the application by the Applicants for extension of time to file caveat is incompetent to an extent that no order to file a fresh affidavit can salvage the situation.

Counsel for the 5th and 6th Caveators raised an issue of verification in the Applicants' affidavit in the 4th point of Preliminary Point of Objection. According to Sri. G.C. Mogha in the *Law of Pleadings in India,*[38] reads at pages 58 & 59 that:

> Want of signature or verification or any defect in either will not make the pleading void and a suit cannot be dismissed nor can a defence be struck out simply for want of, or a defect in the signature or verification of the plaint or written statement, as these are matters of procedure only. It has been treated to be a mere irregularity and curable by amendment. The defect may be cured by amendment, at any stage of the suit, and when it is cured by amendment, the plaint must be taken to have been presented on the date on which it was amended. If the defect is discovered in appeal, the appellate Court may, if it thinks fit, have the defect removed, but where the defect is such that it does

[38] 14th Edition, published by Eastern Law House.

not affect the merits of the case, no notice of it need be taken.

Likewise; in *Mulla, the Code of Civil Procedure,*[39] it reads at page 1181 that:

> A pleading which is not verified in the manner required by this rule may be verified at a later stage of the suit; even after the expiry of the limitation period. The omission to verify a pleading is a mere irregularity within the meaning of s 99 of the Code. The expression 'any error, defect or irregularity in any proceeding in any suit' includes signing and verification as laid down in O 6, rule 14 and 15 and could be cured at any stage.

In *F.A. Sapa v. Singora*[40] the Court underscored that:

> The object of requiring verification is clearly to fix the responsibility for the averments and allegations in the petition on the person signing the verification and at the same time discouraging wild and irresponsible allegations unsupported by facts.

Also, this falls under matters which need to be substantiated, meaning that, they are not pure points of law. In that regard,

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[39] 16th Edition, Volume II.

[40] [1991] 3 SCC 375.

out rightly; they ought not to have been raised as Preliminary Objection. Alternatively; even considering that the verification clause was as such defective, the following caters in redress. Order VI Rule 15(1) of the Civil Procedure Code,[41] that:

> Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the pleadings or by some other person *proved to the satisfaction of the Court to be acquainted with the facts of the case.*

Regarding essence of the verification and duty to be bound by whatever has been asserted, in *F.A. Sapa v. Singora (supra)* the Court underscored:

> *The object of requiring verification is clearly to fix the responsibility for the averments and allegations in the petition on the person signing the verification* and at the same time discouraging wild and irresponsible allegations unsupported by facts.

In SRI. G.C. Mogha in *The Law of Pleadings in India,*[42] it reads in pages 58 and 59 that:

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[41] [Cap. 33].

[42] 14th Edition, published by Eastern Law House.

> Want of signature or verification or any defect in either will not make the pleading void, and a suit cannot be dismissed nor can a defence be struck out simply for want of, *or a defect in the signature or verification of the plaint or written statement, as these are matters of procedure only. It has been treated to be a mere irregularity and curable by amendment.*

The above caters for the essence of clarity on whatever is asserted. The consequent question is, what stands the law position in redress? In Mulla, *The Code of Civil Procedure,*[43] *it reads at page 1181* that:

> A pleading which is not verified in the manner required by this rule may be verified at a later stage of the suit; even after the expiry of the limitation period. The omission to verify a pleading is a mere irregularity within the meaning of s 99 of the Code. *The expression 'any error, defect or irregularity in any proceeding in any suit' includes signing and verification as laid down in O 6, rules 14 and 15 and could be cured at any stage.*

[43] 16th Edition, Volume II.

The Indian position has been considered and domesticated with approval by the High Court in the decisions of: *Kiganga and Associated Gold Mining Company Limited v. Universal Gold N.L,*[44] and *Godfrey Basil Mramba v. The Managing Editor & 2 Others,*[45] in which the High Court in the two scenarios made orders for amendment of the pleadings in the interest of justice to the parties. But in the matter under scrutiny, an order for amendment cannot salvage the situation.

Being the case, such exercise of powers is consequent to substantiation of such allegations through hearing, the stage which has not been reached. Furthermore, even if such paras exist, the Court is mandated to go allow a party to file a fresh affidavit containing the correct averments. In other words, this falls within discretionary powers of the Court, hence, cannot be raised as a Preliminary Objection in purview of *Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd* [46] in which Sir Charles Newbold, P. kept that position at page 701:

> A preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. *It cannot be*

[44] Commercial Cause No. 24/2000 (Dar es Salaam Registry) (Unreported).

[45] Civil Case No. 166/2006, (Dar es Salaam Registry), (Unreported).

[46] (1969) EA 696

raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

From the above analysis, though Counsel for the parties argued on that issue, this Court is of a firm view that, for the sake of substantial justice; any defect in the verification clause be it in the affidavit or any other pleadings is curable in law. Therefore; the said preliminary objection on verification clause is hereby overruled for lack of merits.

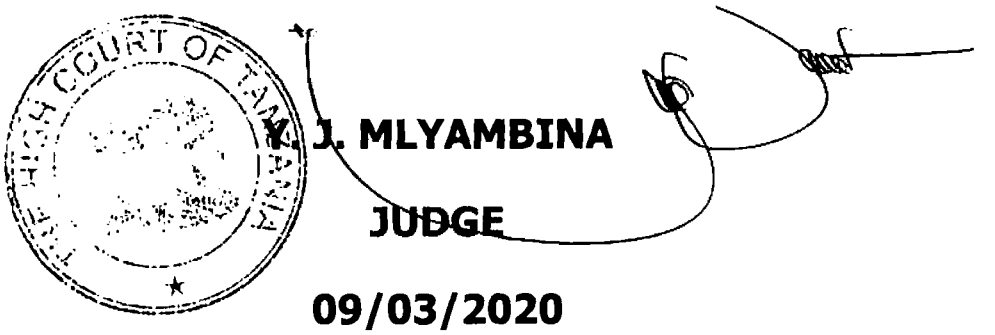
5. Conclusion

To sum up, this court agrees that under *Section 58 of the Probate Act (supra)* anyone who have interests in the deceased's estate can file a caveat against application for appointment of probate administrator. However, such caveat must comply with the requirement of *Rule 82 (2A) of the Probate Rules (supra).* It must be filed within 30 days after issuing of general citation. There is no procedure of joining caveat proceedings.

Although, it was proper to file an application for extension of time to file caveat, the filed caveat suffers serious defects as elaborated in this ruling. On account of the said defects in the supporting affidavit of Jacqueline Ntuyabaliwe Mengi for having hearsay, argumentation, expressing opinion/legal points,

insulting and scandalous paragraphs, the Court finds the application cannot be salvaged.

In the circumstances, the 1st *plea in limine litis* raised by the Caveators' Counsel is sustained on merits. Consequently, the application is hereby struck out. Considering that this is a probate and administration issue, this Court orders for parties to bear for their own costs.

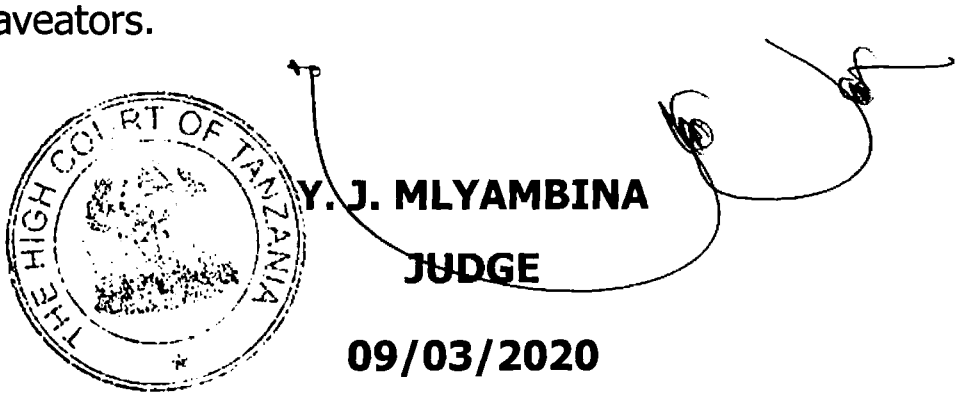


Y. J. MLYAMBINA

JUDGE

09/03/2020

Ruling delivered and dated 09th March, 2020 in the presence of Senior Counsel Dosca Mtabuzi and Counsel Jonathan Mbuga for the applicants and Senior Counsel Abel Msuya for the petitioners, Senior Counsel Nakazael Lukio Tenga, Counsel Roman Masumbuko, Hamis Mfinanga and Greyson Laizer for the caveators.



Y. J. MLYAMBINA

JUDGE

09/03/2020