

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

MISC. CIVIL APPLICATION NO. 41 OF 2019

SARAH TUMVILE KAPONOLAAPPLICANT

VERSUS

1. ABLA MESHACK NSUHUZWA 1st RESPONDENT

2. ADELA MESHACK NSUHUZWA 2ndRESPONDENT

RULING

KIHWELO, J.

The Respondent represented by Rajabu Semgonja, Advocate, raised preliminary objections as follows:

- "1. That the application is incompetent for wrong and/or non-citation of the enabling provision of the law;*
- 2. That the application is incompetent for being supported by a defective affidavit;*
- 3. That the application is misconceived for being preferred without legs to stand on."*

The appellant appeared in person unrepresented and with leave of this Court the preliminary objection was argued by way of written submissions which were duly filed by the parties in accordance with the schedule fixed by the Court.

I wish to point out at the outset that this ruling was reserved by my late brother, Bongole, J, who unfortunately passed away a couple of days before composing it. Consequently, the record has been re-assigned to me.

In support of the preliminary point of objection, the Respondent elected to argue only two points out of the three points of preliminary objections raised by abandoning the second point of preliminary objection.

In support of the first ground of preliminary objection the Respondent valiantly argued that the application was incompetent on account that the application was made under section 49 of the Probate and Administration of Estate Act Cap 352 R.E 2002 (Henceforth "the Act") and Rules 14 and 29 of the Probate Rules ("the Rules") as well as section 95 of the Civil Procedure Code, Cap 33 R.E 2002 ("the CPC"). According to the Respondent there is no such provision of section 49 of the Act. To buttress his point, he cited the case of **CHONGQUING FOREIGN TRADE & ECONOMIC COOPERATION (GROUP) CO LTD VERSUS ZAKAYO M. MSENIGI**, Misc. Land Case Application No. 63 of 2016, High Court of Tanzania at Tabora (unreported). The Respondent went further to argue that the provision of section 20(1) of the Interpretation of Laws Act, Cap 1 R.E 2002 is very categorical on the manner upon which laws have to

be cited and insistently argued that citing section 49 of the Act as well as Rules 14 and 29 of the Rules is not proper and renders the application defective.

The Respondent strongly argued that the provisions cited have subsections which ought to be specifically cited which subsections of the said provision is referred to and went on to argue that since there was non-citation or wrong citation then the application was defective and therefore should be struck out with costs.

In further arguing the second limb of preliminary objection the Respondent was fairly brief by arguing that the application offended the provision of Rule 5 of the Rules in that it did not comply to the requirement of using Form 1 as set out in the First Schedule to the Rules. In the strength of the above the learned counsel for the Respondent argued that the preliminary objections should be upheld and the application be dismissed with costs.

In response to the submission by the learned counsel for the Respondent, the applicant vehemently began by faulting the argument raised by the Respondent's counsel in that it is a misconception to think that non-citation of the subsection of the provision referred is fatal because the application was entertained by the whole section of section 49 of the Act as well as the whole cited provisions of the Rules. He strenuously argued that the cited case of **CHONGQUING FOREIGN TRADE** (supra) is distinguishable and that it is not binding upon this Court. He further cited

the case of **Saggu v Roadmaster Cycles** (U) Ltd 2002 1EA 258 in which the court held that, where an application omits to cite any law at all, or cites a wrong law, but the jurisdiction to grant the order exists, the irregularity or omission can be ignored and the corrected law inserted.

The applicant forcefully argued that the court is required to deal with cases justly and to have regard to substantive justice and not to be tied by technicalities. To fortify his argument, he referred to the cases of **Yakobo Magoiga Gichere v Peninah Yusuph**, Civil Appeal No. 55 of 2017 (unreported) and **Gaspar Peter v Mtwara Urban Water Supply Authority (MTUWASA)** (Civil Appeal No. 35 of 2017 (unreported) which discussed at length the principle of overriding objective brought by the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018 [Act No. 8 of 2018]. He also challenged the counsel for the Respondent by arguing that the reference to the provision of section 20 of the Interpretation of Laws Act was premised on an erroneous interpretation not meant for by the legislature. Finally, he prayed upon the Court to invoke the overriding objective since the defect if any did not occasion any injustice on the part of the Respondent.

From the preliminary points of objections and the submissions of the parties, the issue that clearly emerges and cries for my determination is whether or not the preliminary points of objections are meritorious.

This issue has exercised my mind quite considerably. However, I have considered the fact that the applicant has cited the relevant

provisions of the law only that the sub-sections of the relevant provisions have not been cited. More intriguing is the fact that the applicant is a mere layperson unaware of the legal technicalities which in my view should not defeat the interest of justice.

I have taken inspiration from the decision in the case of **Saggu v Roadmaster Cycles** (supra) in which the court held that, where an application omits to cite any law at all, or cites a wrong law, but the jurisdiction to grant the order exists, the irregularity or omission can be ignored and the corrected law inserted.

It is instructive that the law has to be construed liberally in order to do justice. This is the essence of the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018 [Act No. 8 of 2018] which introduced the overriding objective guiding the courts machinery in the determination of justice to facilitate just, expeditious, proportionate and affordable resolution of the civil disputes governed by this Act.

In the event, the preliminary objections are hereby overruled.



P.F. KIHWELO

JUDGE

10/12/2020



Ruling to be delivered by the Deputy Registrar on a date to be fixed.



P. F. KIHWELO

JUDGE

10/12/2020



Date: 17/12/2020

Coram: Hon. B.R. Nyaki, Deputy Registrar

Applicant: Absent with information that she is sick

Respondents: 1st }
2nd } Present all in person also represented by Frank
Kavishe, Advocate.

B/Clerk: Grace Mkemwa, RMA

Court:-

Ruling delivered this 17th day of December, 2020 in the presence of Mr. Frank Kavishe, Advocate for the Respondents but in absence of the Applicant.

Right of appeal explained.



B.R. NYAKI

DEPUTY REGISTRAR

17/12/2020

Order:-

- Mention on 23/03/2021.
- The file be tabled before Judge Incharge for re-assignment.



B.R. NYAKI

DEPUTY REGISTRAR

17/12/2020

