

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

MISC. CIVIL APPLICATION NO. 153 OF 2020

(Arising from Probate and Administration Cause No. 02 of 2020)

ANASTAZIA BARONGO 1ST APPLICANT

KAIZA EMMANUEL BALONGO 2ND APPLICANT

VERSUS

KOKU EMMANUEL 1ST RESPONDENT

DICK EMMANUEL 2ND RESPONDENT

RULING

Date of the last order: 25.05.2021

Date of the Ruling: 25.05.2021

A.Z.MGEYEKWA, J

I am called upon in this matter to decide whether this court should exercise its discretion under Order XLIII Rule 2 and section 95 of Civil Procedure Code Act, Cap.33 [R.E 2019] to grant extension time to lodge a Notice of Appeal out of time to the Court of Appeal of Tanzania. The application is supported by an affidavit deposed by Anastazia Barongo,

the applicant. The respondent has demonstrated his resistance by filing a counter affidavit deponed by Koku Emmanuel, the 1st respondent and she lodged a preliminary objection as hereunder:-

- 1. That, the application before this court is incompetent and bad in law for containing a defective verification clause which us verified by a different person.*

When the matter was called for hearing on 25th May, 2021, the respondent enjoyed the legal service of Mr. Kelvin, learned counsel, the applicants were represented by Ms. Francisca, learned counsel.

The learned counsel for the respondent submitted that argued that the instant application of extension of time is defective. He stated that the applicants are Anastasia Barongo and Kaiza Barongo but reading the applicant's verification clause, Koku Emmanuel is the one who verified the affidavit. Mr. Kelvin valiantly argued that the said error is not a slip of the pen. Fortifying his argumentation, Mr. Kelvin cited the case of **Salima Vuai Foun v Registrar of Cooperative Societies & 3 Others** [1995] CAT No 75 where the court of appeal stated that the affidavit lacking verification is to be rejected.

On the above argumentation, Mr. Kelvin urged this court to strike out the applicants' application.

Responding, the respondent's Advocate admitted that the verification clause is defective. She stated that the remedy it is to strike it out. She urged this court to expunge the offensive paragraph or allow applicants to file a fresh affidavit. To support her submission she referred this court to the case of **Stanbic Bank v Kagera Sugar Limited**, Civil Application No. 57 of 2007. She urged this court not to be moved by technicalities rather apply the overriding principle as stated under section 3A (1) of the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018.

In conclusion, Ms. Francisca urged this court to allow the applicant to withdraw their application and file a fresh application.

In his brief rejoinder, the learned counsel for the respondent reiterated his submission in chief. Insisting, he argued that this court cannot expunge the verification clause since a defective affidavit cannot stand. He valiantly argues that the overriding principle cannot apply in this situation because a defective affidavit cannot be corrected.

In conclusion, the learned counsel for the applicant urged this court to strike out this application.

Upon hearing properly both parties tend to agree that the verification clause in the applicants' application is defective. I have taken time to

peruse the applicants' verification clause which appears on page 5 of the applicants' affidavit and I found that the person who verified the applicants' affidavit is one Koku Emmanuel, she not the maker. The law under Order VI Rule 15 (3) of the Civil Procedure Code Cap.33 [R.E 2019] clearly provides that verification is signed by the person making it. Therefore a defective verification clause cannot be amended. This was held in the case of **Samwel Kimaro v Hidayya Didas**, Civil Application No.20 of 2012, the Court of Appeal of Tanzania held that:-

"a defective verification clause cannot be amended. Any pleading with defective verification clause, is bad in law and the consequence of which is to strike it out."

Applying the above authority, it is clear that a defective verification clause cannot support an affidavit that means the affidavit is defective and cannot be acted upon by this court. This was observed in the case of **Malachi O Majwala and 84 others v Dar as Salaam City Council and the Attorney General**, Misc. Civil Case No. 14 of 1994 HC (unreported).

In the upshot, I find that the preliminary objection by the respondent's learned counsel is meritorious and holds a sway, the application is

improper before this court. Thus, I proceed to strike out the application.

Each party to shoulder his own costs.

Order accordingly.

Dated at Mwanza this date 25th May, 2021.


A.Z.MGEYEKWA

JUDGE

25.05.2021

Ruling delivered on 25th May, 2021 in the presence of Mr. Kelvin, learned counsel for the respondents and Ms. Francisca, learned counsel for the applicants.


A.Z.MGEYEKWA

JUDGE

25.05.2021

