

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAM**

AT DAR ES SALAAM

CIVIL REVISION NO. 37 OF 2020

JULIUS GEORGE KIBAJA APPLICANT

VERSUS

MWATANGA OMARY RESPONDENT
***(Revision from the decision of the District Court of Ilala at Ilala
in Civil Revision No. 43 of 2017)***

RULING

15th and 17th August, 2022

KISANYA, J.:

Julius George Kibaja is, by way of chamber summons, moving the Court under section 44(1)(b) of the Magistrate Courts Act (Cap. 11, R.E. 2002) (now R.E. 2019) for an order of calling and examining the record, proceedings, ruling and order of the District Court of Ilala at Ilala dated 23rd April, 2017 in Civil Revision No. 43 of 2017. The application is supported by an affidavit of Julius George Kibaja as the administrator of estate of the late Said Sela.

Before going further, I find it appropriate to preface this ruling with brief facts which led to this application. The applicant moved the District Court of Ilala at Ilala in Civil Revision No. 43 of 2017, for an order of

revision of the proceedings of the Ilala Primary Court in Probate Cause No. 72 of 2003. Before the application could be determined on merit, the respondent, Mwatanga Omary filed a notice preliminary objection on the points of law that; the applicant had no cause of action against the respondent; the court was *fanctus officio*; and that, the application was defective for wrong citation of the parties. In its ruling dated 23rd April, 2018, the District Court upheld the objection. Having done so, it went on dismissing the application. Feeling that the proceedings and decision of the District are tainted with illegality, the applicant filed the present application for revision.

The respondent filed counter affidavit in which he contested the application.

When the application was called on for hearing, the applicant was represented by Mr. Godfrey Ukwonga, learned advocate whereas, the respondent was represented by Prof. Abdallah Safari, learned advocate assisted by Mr. Jumbe Safari, learned advocate.

At the very outset, Mr. Ukwonga informed the Court that the application had been overtaken by events following the judgment of the District Court of Ilala dated 23rd May, 2022 in Probate Appeal No. 10 of

2021. Therefore, the learned counsel urged this Court to record that the application has been overtaken by event. In alternative, he prayed to withdraw the application.

In reply, Prof. Safari argued that this matter cannot be withdrawn. His argument was based on the contention that the application is incompetent for want of affidavit. To be specific, the learned counsel was of the view that the application and the chamber summons are at variance on the person who filed the present application. Thus, he submitted that the proper recourse is to strike out the application.

Rejoining, Mr. Ukwonga submitted that the application was competent before the Court and it was duly supported by an affidavit.

I have considered the submissions made by the learned counsel for the parties. The issue for my determination is whether the application is incompetent.

As hinted earlier, Prof. Safari was of the view that the application is incompetent because it is supported by an affidavit which is at variance with the chamber summons. It is an established position of law that an application before this Court is made by way of chamber summons and

supported by an affidavit. Therefore, application which is not supported with affidavit is incompetent before the Court.

The record pertaining to this application displays that the chamber summons was filed by Julius George Kibaja in his personal capacity. However, as rightly observed by Prof. Safari, the supporting affidavit shows that it was filed by Julius George Kibaja as the administrator of estate of the late Saidi Sela. In law, the chamber summons and affidavit are deemed to have been filed by two different persons. Since the applicant to this application is uncertain, I am of the considered view that the said defect goes to the root of the matter because. For instance, it is not known as to whether the decision will be made in favour or against the Julius George Kibaja in his personal capacity or as the administrator of estate of the late Saidi Sela. In the light of the foregoing, I agree with Prof. Safari that this application is incompetent before the Court.

It is a timebound principle of law that an incompetent matter cannot be amended, withdrawn or adjourned. The law is further settled that the proper recourse against an incompetent matter is to strike out the same. There is a plethora of authorities which advocate that stance. See for instance, the case of **Ghati Methusela vs Matiko Marwa**

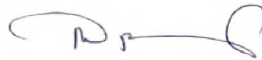
Mariba, MZA Civil Application No. 6 of 2016 (unreported) in which the Court of Appeal held that:-

"It is now established that an incompetent proceeding, be it an appeal, application, etc., is incapable of adjournment, for the court cannot adjourn or allow to withdraw what is incompetently before it."

Being guided by the above decision, the plaintiff's prayer to have this matter marked overtaken by event or withdrawn cannot be granted. In the circumstances, the proper remedy is trike out this application.

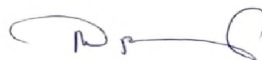
In view thereof, this application is hereby struck out. Given the nature of this matter, each party is ordered to bear its own costs.

DATED at DAR ES SALAAM this 17th day of August, 2022.



S.E. Kisanya
JUDGE

COURT: Ruling delivered this 17th day of August, 2022 in the presence of the applicant and respondent.



S.E. Kisanya
JUDGE
17/08/2022

