

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY OF MOSHI
AT MOSHI**

MISC CIVIL APPLICATION NO 12 OF 2022

(Originating from Probate and Administration Cause No. 6 of 2012, High Court of Tanzania at Moshi)

**IN THE MATTER OF APPLICATION FOR REVOCATION OF LETTERS
OF ADMINISTRATION ISSUED TO ALFRED ALEXANDER ITAEL
KWEKA, GLADNESS S/O ALEXANDER AND PETER S/O ALEXANDER
AS ADMINISTRATORS OF THE ESTATE OF THE LATE ALEXANDER
ITAEL**

BETWEEN

MARY ALEXANDER ITAEL KWEKA APPLICANT

AND

ALFRED ALEXANDER ITAEL KWEKA1ST RESPONDENT

GLADNESS S/O ALEXANDER 2ND RESPONDENT

PETER S/O ALEXANDER 3RD RESPONDENT

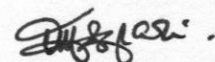
13/07/2022, 08/09/2022

RULING

MWENEMPAZI, J

The applicant herein named filed on application under Section 49(1) (e) and Section 49(2) of the Probate and Administration of Estates Act, Cap 382 R.E 2019 read together with Rule 29(1) of the Probate Rules, GN No. 369 of 1963 praying for orders that:-

1. This Honourable Court be pleased to revoke the letters of Administration issued to the Respondent's on 11th day of December,



2020 in Probate and Administration cause No. 6 of 2012 and thereafter proceed to appoint the Applicant herein as a new administrator of the Estates of the said late ALEXANDER ITAEL.

2. costs of this application be provided for
3. Any other relief(s) this Honourable Court may deem fit and just to grant.

The application is supported by an affidavit sworn by John Kivuyo Lairumbe. The Respondents are vehemently opposing the application and they have filed a counter affidavit sworn by Mr. Elikunda George Kipoko. Together with the counter affidavit, they also filed a notice of Preliminary objection with four points of Law as follows:-

1. That the Application is fatally incompetent as the Application is supported by a defective affidavit.
2. That the application is finally incompetent as the Application is supported by an affidavit of a stranger to the case.
3. That the application is fatally incompetent as it against strangers to the case.
4. That the application is misconceived as it has been overtaken by events.

On the basis of the said points, the Respondents pray that the application be dismissed with costs.

At the hearing of the Preliminary objection the applicant was being represented by Mr. John Kivuyo Luirumbe, Advocate and the Respondents were being served by Mr. Elikunda George Kipoko. The counsel for

Respondents prayed to drop point's No. 2, 3 and 4 and submitted on the 1st point only.

The counsel for the Respondent submitted that apparently the counsel for applicant deposed the affidavit and went further to verify that all paragraphs are true to the best of his own knowledge.

There is nowhere in the affidavit where the deponent states that he had represented the applicant, either in the same case or in matters incidental in this case. This makes the affidavit defective; the Counsel Cited the case of **Joseph Peter Daudi and Zulfa Seif Mtulia Vs. Attorney Journey (sic) General and Three others** (Miscellaneous Land Application No. 447 of 2020) [2021] TZHC 127 Land D (9 March, 2021). In it, several cases were cited, including the case of **Tanzania Breweries Limited Vs. Herman Bildad Minja**, Civil Application of Tanzania at Dar es Salaam (unreported). In the just cited case of the Court of Appeal of Tanzania, another case of **LALAGO COTTON GINNERY AND OIL MILLS COMPANY LTD AND THE LOANS AND ADVANCES REALIZATION TRUST (LARY), CIVIL APPLICATION NO. 80 OF 2001, CAT** at Dar es Salaam (unreported) where it was observed that;

"An advocate can swear and file an affidavit in proceedings in which he appears for his client, but on matters which are in the Advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally know what transpired during those proceedings".

[Signature]

It was the prayer of the counsel for the respondent that the application be struck out. In his view, if the advocate depones that the facts are from his own knowledge and he is now an advocate in the very case, then it makes that affidavit to be defective to support the application.

The counsel relying on the case of **D.T Debie (Tanzania) Ltd, Vs. Phantom Modern Transport (1985) Ltd, Civil Application No. 141 of 2001, court of appeal of Tanzania** (unreported) and argued that the defective paragraphs may be expunged. But if that will be the course, then, the affidavit will be rendered of no effect. He prayed the application be struck out with costs.

In reply to the submission in Chief, Mr. John Kivuyo Lairumbe, Advocate for the applicant submitted that the objection and submission made by the counsel for the Respondent has no merit. He prayed to reproduce an affidavit and prayed that it be adopted to be part of the submission. He admitted to have sworn the affidavit without full knowledge as stated at paragraph 2 of the affidavit. He submitted that the affidavit is not fatally incompetent and the information is from his client. The source of information is his client and there is a statement to that effect.

The counsel submitted that the Case of **DPP Vs. Dodori Kapufi and Another (Civil Appeal, No. 11 of 2008) [2011] TZCA 46 (06 may, 2011)** has been quoted in the case of **Sanyou Service Station Vs. BP Tanzania Ltd (Now PUMA ENERGY (T) LTD), (Civil Application No. 188 of 2018), [2019] TZCA 144 (20 May, 2019)** for the listing the essentials of a valid affidavit. He listed the said elements to be as follows:-




1. Statement of declaration of facts by the deponent;
2. Verification clause (which simply shows the facts the deponent asserts to be true of his own knowledge and or those based on information or beliefs).
3. Jurat
4. Signature of the deponent and the person who in law is authorized to administer the oath or accept the affirmation.

The counsel argued that the applicant's affidavit has all the ingredients stated in the case of the **Director of Public Prosecutions vs. Dodoli Kapufi and Patson Tusalile (Criminal Application No. 11 2008) [2011] TZCA 46(6 May 2011)**. He prayed that the objection be overruled with costs.

The advocate for the applicant also submitted on the essence of the Preliminary objection. He stated that the preliminary objection raised is not qualified to be called a Preliminary objection. He referred to the case of ***Mukisa Biscuits Manufacturing Ltd Vs. West End Distributors [1960] E.A 696*** at 701, where Sir. Charles Newbold P observed that: -

"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 assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but



unnecessarily increase costs and, on occasion, confuse the issues.

This improper practice should stop”.

According to the case of **Mukisa Biscuit Manufacturing Company Ltd Vs. West End Distributors** (Supra), a preliminary objection has following features: - **one**, it must be a pure point of law; **two**, it must be based on ascertained facts; **three**, it must arise from the parties’ pleadings or necessary inference thereto; **four**, it must not touch the court exercise of judicial discretion; and **five**, if the objection is argued it must be able to dispose the matter before the court completely.

The counsel argued that the objection raised by the respondent does not fit the criteria enlisted above and he has further argued that the counsel for the respondent has failed to cite the provision of law which has been contravened. The counsel prayed that the preliminary objection be struck out for failure to cite the enabling law on the basis of the decision in **Mathias Ndyuki and 15 others Vs. The Attorney General**, (Civil Application No. 144 of 2015) [2016] TZCA 207 (14 January, 2016) where it was held that:-

"The Respondent has raised the Preliminary objection without citing on enabling provision of law, (non-citation). The Respondent has therefore failed to move the court to consider the objection raised; thus rendering the same incompetent for non-citation”.

In rejoinder Mr. E. G. Kipoko, Advocate for the respondent submitted b y quoting paragraph 2 of the affidavit and verification and then argued that the same makes the affidavit worse. The verification aggravates the defect. Knowledge referred to in the verification clause is from more than one

person; it is about "our own knowledge". This is not proper. In his view the whole affidavit does not meet the criteria in **Sanyou Service Station Case (Supra)**.

Secondly, he admitted that he has not cited the law. But the case of **Mathias Ndyuki and 15 others Vs. The Attorney General (Supra)** is distinguishable in that in the court of Appeal of Tanzania a rule or law must be cited.

He then prayed to reiterate the submission in chief and that the objection raised is in order to the directives in the case of **Mukisa Biscuits Manufacturing Ltd Vs. West End Distributors Ltd (Supra)**. According to his opinion an affidavit in the chamber summons is a pleading; if it is pointed out to be defective, then, it is a suitable Preliminary objection which will dispose of the application.

A lot has been said and or argued. At the centre of all is the allegation by the Respondent's counsel that the affidavit in the application is fatally incompetent for being supported by a defective affidavit. In the submission of the counsel for the Respondent, he has stated that the affidavit has been deposed to by John Kivuyo Lairumbe, who is the advocate for the applicant. He has verified the same, that all paragraphs are true to the best of his own knowledge. However, nowhere in the affidavit he has stated that he had represented the applicant, either in the same case or in matters incidental to this case. This makes the affidavit defective. He has cited the case of **Joseph Peter Daudi and Another Vs A.G and 3 others (Supra)**.



In defence the counsel for the applicant has submitted that, I quote what he submitted and recorded by me, as shown hereunder: -

"The counsel for the respondent has submitted that I have sworn the affidavit without full knowledge as I stated in paragraph 2 of the affidavit. The affidavit is not fatally incompetent and have information from my client. The source of knowledge is my client and there is a statement to that effect".

The counsel for the applicant submitted in lengthy to show the legal requirement of the valid affidavit. While I do agree to the principles, for now I will skip and refer to the contents sought to be relied by the respondent to show the defects. The referred paragraphs in the affidavit are paragraphs 2 and the verification clause. Paragraph 2 reads:-

"That I am an advocate of the applicant herein. I have full knowledge and information concerning this matter, and as such I am dully authorized to make this affidavit on my own behalf as well as on behalf of the applicant herein who is my client".

In the submission by the counsel for the Respondent he states that the paragraph does not say '*the applicant gave him information*'. That statement is true and it is plain clear from the quoted paragraph.

The other paragraph which I would like to quote be the verification clause, it reads as follows:-

"I JOHN KIVUYO LAIRUMBE, being the applicant(sic) learned counsel do hereby verify that what is stated under paragraph



1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 inclusive are true to the best of our own knowledge”.

The counsel for respondent has remarked and or stated that the verification aggravates the defect. Knowledge referred to is of more than one person.

In the case of ***Jamal S. Mkumba and Abdallah Issa Namangu Vs. Attorney General, (Civil Application No. 240/01 of 2019) [2021] TZCA 756 (15th December, 2021)*** (tanzlii.org) the Court of Appeal of Tanzania observed that: -

"Verification Clause is one of the essential ingredients of any valid affidavit which must show the fact the deponent asserts to be true of his own knowledge and those based on information or beliefs"

And in the same case it also referred to the Case of ***Anatol Peter Rwebangiwa Vs. The Principal Secretary, Ministry of Defence and National Service and the Hon. Attorney General, Civil Application No. 548/04 of 2018*** (unreported) wherein it was held: -

"Where an averment is not based on personal knowledge, the source of information should be clearly disclosed".

I have no doubt that the verification clause is not specific as submitted by the counsel for the respondent. Although I agree to the legal principles submitted by the counsel for the appellant, I still find the affidavit itself has defects which will not render its evidence admissible if left as it is.



The question is what then should be the way forward. The respondent prays this court to strike out the affidavit which will essentially lead to striking out the whole application. In my opinion, the case as it is, deserve determination to achieve substantive justice; that it is, it be heard on merit. I am thus inclined to opt for utilization of the discretion of this court and order for amendment of the affidavit to cloth it with the needed specificity in the verification clause as it was decided in the case of ***Jamal S. Mkamba and another Vs. Attorney General*** (Supra). Since the parties will then be heard on merit, I believe, neither of them will be prejudiced. Instead, both sides will have a chance to defend their respective interests without delay if both of them will act promptly in accordance to the spirit of the court, that is, the expeditious hearing of the disputes involving estates.

For the reasons stated the objection is sustained. The affidavit is found to be defective. However, the applicant is given twenty-one (21) days to amend the affidavit so that the application is heard on merit. Cost to be borne by the applicant.

It is ordered.

Dated and Signed at Moshi this 8th September, 2022




T. M. MWENEMPAZI
JUDGE