

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISCELLANEOUS CIVIL APPLICATION NO. 267 OF 2022**

*(Arising from Misc. Civil Application No. 409 of 2022 before Hon. Banzi, J.)*

**IN THE MATTER OF THE ESTATE OF THE LATE SALIM HAMDUN SAID**

**AND**

**IN THE MATTER OF APPLICATION FOR REVOCATION OF GRANT OF LETTERS**

**OF ADMINISTRATION OF THE ADMINISTRATOR GENERAL**

**BETWEEN**

**SAID SALIM HAMDUN ..... 1<sup>ST</sup> APPLICANT**

**NASHWA SALIM HAMDUN ..... 2<sup>ND</sup> APPLICANT**

**KHADIJA SALIM HAMDUN ..... 3<sup>RD</sup> APPLICANT**

**VERSUS**

**THE ADMINISTRATOR GENERAL ..... RESPONDENT**

**RULING**

22<sup>nd</sup> September and 26<sup>th</sup> October, 2022

**BANZI, J.:**

The Applicants in this matter are seeking a restraining order against the Respondent from doing anything in the deceased estate pending determination of application for revocation of letters of administration to the Respondent. The application is supported by affidavit of Mr. Daudi Mzeri,

learned counsel for the Applicants. The Respondent, on the other hand, apart from opposing the application, has raised preliminary point of objection as follows;

*The affidavit is incompetent, misconceived and bad in law for being hearsay.*

At the hearing, the Applicants had the services of Messrs. Ramadhan Maleta and Daudi Mzeri, learned counsel, while the Respondent enjoyed the services of Ms. Clementina Rishela, learned State Attorney. By consent, the preliminary point of objection was argued by way of written submission.

Ms. Rishela began her submission by explaining principles of affidavit that; an affidavit shall be confined to the facts which the deponent is able of his own knowledge to prove; an affidavit which mentions another person is hearsay unless that other person swears as well and lastly, an advocate can swear on behalf of his client on matters which are in his personal knowledge only and not those in the personal knowledge of his client. Expounding on the first principle, she submitted that, the affidavit in support of the application has been affirmed by the advocate for the Applicants who is not able to prove any fact basing on his own knowledge but rather, depends on the information supplied to him by the Applicants after he acknowledged that in his verification. She further submitted that, the affidavit in question

is incurably defective for failure to meet the requirement of Order XIX Rule 3 (1) of the Civil Procedure Code [Cap. 33 R.E. 2019] (“the CPC”).

Moreover, it was her contention that, in verification clause, learned counsel verified that, what he had deponed is based on the information acquired from the Applicants. Thus, for his affidavit to be used in court, there must be affidavit of the Applicants to support his affidavit for it not to be hearsay. Since there is no affidavit of the Applicants, the affidavit of the advocate remains hearsay and cannot be relied upon. She supported her argument by citing the case of **Dr. Hamisi S. Kibola and Two Others v. Saleh Salim Al Amry**, Misc. Civil Application No. 317 of 2019 HC Dar es Salaam Registry (unreported). Furthermore, she cited the case of **Joseph Peter Daudi and Another v. Attorney General and Three Others**, Misc. Land Application No. 447 of 2020 HC Land Division (unreported) which referred the case of **Lalago Cotton Ginnery and Oil Mills Company Limited v. The Loans and Advances Realization Trust (LART)**, Civil Application No. 80 of 2002 CAT (unreported) which emphasised on the third principle that, an advocate can swear and file affidavit in proceedings which he appears but on matters which are in his personal knowledge only. She concluded her submission by stating that, this application is incompetent and

untenable in law for being supported by incurably defective affidavit. Thus, she prayed for the application to be dismissed with costs.

Mr. Maleta on the other hand, strongly resisted the preliminary point of objection. Basically, he argued that, it is the trite law that, the deponent of the affidavit must disclose in verification clause the sources of his information and in the particular case, counsel who deposed categorically mentioned the source of information being from his clients. He cited the case of **Anatol Peter Rwebangira v. The Principal Secretary Ministry of Defence and Another**, Misc. Civil Application No. 548/2004 of 2018 HC (unreported). He added that, in the alternative, if the affidavit is found to be defective, such defect is curable in law as it was stated in the case of **Jacqueline Ntuyabaliwe Mengi and Two Others v. Benson Benjamin Mengi and Four Others**, Misc. Civil Application No. 186 of 2019 HC Dar es Salaam Registry (unreported). He urged this Court to follow the case of **General Marketing Co. Ltd v. A. A. Sharif** [1980] TLR 61 on dispensation of justice without being tied up to technicality and the case of **Amos Kabota v. The Republic**, Criminal Application No. 24/11 of 2017 CAT (unreported) which emphasised on substantive justice. In that view, he prayed that, if there is defect, the same should be treated as minor and the Applicants be ordered to amend affidavit to cure the defect and the case be heard on merit.

Having carefully considered the arguments by counsel of both parties on the point of objection, the main issue for determination is *whether the impugned affidavit is defective*.

It is common knowledge that, affidavit is a sworn statement in writing made under oath or on affirmation before an authorised officer or Magistrate. See the case of **OTTU v. AG and Others**, Misc. Civil Application No. 15 of 1997 HC at Dar es Salaam (unreported).

It is worthwhile noting here that, Order XIX, Rule 3 (1) of the CPC clearly provides that:

***"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted: Provided that, the grounds thereof are stated."***(Emphasis supplied).

It is clear from the position of the law above that, affidavit being a sworn written evidence in substitute of oral evidence, it must be confined to such statements as the deponent is able of his own knowledge to prove and not otherwise. See also unreported decisions of the Court of Appeal of Tanzania in the cases of **Philip Bernard Mlay v. Idd Gahu**, Civil Appeal

No. 43 of 2009 and **Juma Busiga v. Zonal Manager TPC** (Mbeya), Civil Application No. 8 of 2004.

Also, it is important to underscore that an advocate can swear and file affidavit in proceedings in which he appears for his client, but on matters which are in the advocate's personal knowledge only. This principle was settled in the case of **Lalago Cotton Ginnery and Oil Mills Company Limited** (supra). In another case of **Tanzania Breweries Limited v. Herman Bildad Minja**, Civil Application No. 11/18 of 2019 CAT at Dar es Salaam (unreported), the Court of Appeal after quoting the position in **Lalago**, case, it went on and stated that:

*"From the above, an advocate can swear and file an affidavit in proceedings in which he appears for his client but on matters which are within his personal knowledge. These are the only limits which an advocate can make an affidavit in proceedings on behalf of his client."*

What I gathered from the position of the law above is that, as a general rule, a lawyer who appears as advocate shall not testify or submit their own affidavit evidence before the Court unless they are specifically permitted by law or the court to do so or unless the matter is purely formal or

uncontroverted. But for controverted matter, it is not advisable for a party's advocate to depone to evidentiary facts. By deponing to such matters, the advocate is stepping down from his privileged position at the Bar, into the witness box. It is seemly for an advocate to discharge his duty to the court and his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case.

In the instant matter, it is undisputed that Mr. Daudi Mzeri, learned counsel is representing the Applicants by appearance before this Court. It is also undisputed that, the affidavit in support of the application is made and affirmed by the same counsel Mr. Mzeri who appears for the Applicants. When you mirror the paragraphs of the affidavits (the affidavit and counter affidavit), they state contentious matters which must be in the personal knowledge of parties themselves. Moreover, looking closely at the impugned affidavit which contains 13 paragraphs, it is apparent that, the deponent verified that, what is stated in all paragraphs is the information supplied to him by the Applicants. In other words, the whole affidavit contains statements of other persons than the deponent. That is to say, whatever has been deposed by Mr. Mzeri in the impugned affidavit was not within his personal knowledge but in the knowledge of the Applicants. This in itself clearly indicates that, the whole affidavit is nothing but hearsay. At page 7

of the case of **Lalago Cotton Ginnery and Oil Mills Company Limited**

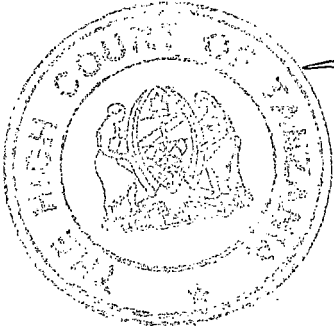
(supra) it was held that:

*"It is obvious, therefore, that an **affidavit** or counter-affidavit **which contains hearsay statements** or arguments instead of facts is incurably defective. I have to hold that the counter-affidavit which was filed by Mr. **Chuwa is incurably defective** and it is ordered that it be struck off."*(Emphasis is mine).

In our case, apart from being hearsay, the affidavit of Mr. Mzeri would still be defective in the verification clause because there is no averment by him that he believed to be true what was told to him by the Applicants. Although he disclosed the source but there is no averment on his belief to the said source to be true. In that regard, the whole affidavit remains to be hearsay and thus, incurably defective as it was stated at page 7 in the the case of **Lalago Cotton Ginnery and Oil Mills Company Limited**. Under these circumstances, the case of **Amos Kabota** is distinguishable because in the matter at hand, there is nothing to amend as the whole affidavit is incurably defective.

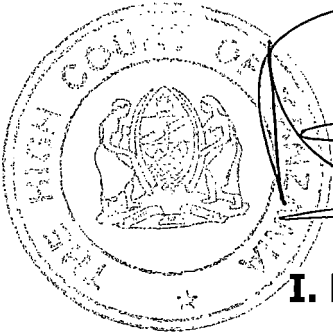
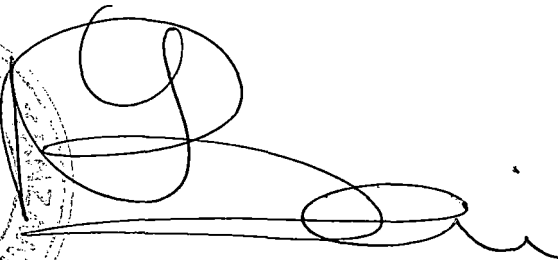


For those reasons, it is the finding of this Court that, since the affidavit is incurably defective, there is nothing to support the application at hand. Thus, I find the objection merited and is hereby sustained. Consequently, the application is hereby struck out for being supported by incurably defective affidavit. Owing to the nature of the matter, each party shall bear its own costs.



**I. K. BANZI**  
**JUDGE**  
**26/10/2022**

Delivered this 26<sup>th</sup> October, 2022 in the presence of Ramadhan Maleta, learned counsel for the Applicants and Ms. Clementina Rishela, learned State Attorney for the Respondent.



**I. K. BANZI**  
**JUDGE**  
**26/10/2022**