

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

**MISC. CIVIL APPLICATION NO. 6 OF 2022**

(Arising from Probate and Administration Cause no. 7 of 2020)

IN THE MATTER OF APPLICATION FOR LETTERS OF ADMINISTRATION OF ESTATE BY  
MARIAM NAWASHA

**THERESIA HASSAN MALONGO (Next friend of Leah**

**G. Kurwijila and Nicholas G.**

**Kurwijila.....APPLICANT**

**VERSUS**

**MARIAM JUMA NAWASHA(Administratrix).....RESPONDENT**

**RULING**

*10 & 28 March, 2022*

Through chamber summons supported by an affidavit, the applicant herein has lodged her complaints under Rule 105 of the Probate rules [GN No. 10 of 1963] and section 95 of the Civil Procedure Code [Cap 33 R.E 2019] (CPC), as a next friend of Leah G. Kurwijila and Nicholas G. Kurwijila.

Before the application could be heard on its merit the respondent filed a notice of preliminary objection and raised three points as follows: -

1. The Applicant has no *locus standi* to act as a next friend of Leah and Nicholas Gabriel Kurwiira vide judgment of Manundu Primary Court and subsequently the Ruling of Probate and Administration Cause No. 7 of 2020 of High Court of Tanzania at Mwanza.
2. That the affidavit contains extraneous matter of prayer.
3. That the jurat of attestation is not properly attested.

At the hearing, Advocates Yuda Kavugushi and Pauline Rwechungura appeared for the applicant and respondent respectively.

Mr. Pauline argued that the applicant who is a next friend of Leah and Nicholas has no *locus standi* in the application because there are 2 judgments which denied the applicant that power; the first is a judgment in matrimonial cause No. 16/2013 before Manundu Primary Court which stated "*Watoto wote wawili wataishi na mdai mpaka watakapofikia umri wa kujitegemea*". He added that this order has never been revised to date as the respondent has never appealed against it.

The second decision is an order in Matrimonial Probate and Administration Cause No. 7/2020 before High Court Mwanza which agreed with the Manundu Primary Court.

He argued that the applicant Theresia Hassan Malongo is contravening the court orders, any other person can be a guardian but not her.

In the second ground of objection, the learned counsel stated that the applicant's affidavit is too long and it contained extraneous matters of prayer, however he was not specific on the said prayers. He just mentioned that paragraphs 3 to 7 and 15 to 18 of the affidavit are irrelevant as they talk about a case which is still before the court of law.

As regards the 3<sup>rd</sup> ground the learned counsel submitted that the copy of an affidavit issued to him is not dated something which is contrary to section 7 of the Notary Public and Commissioner for Oaths Act.

Mr. Kavungushi's reply was that the learned counsel failed to understand the term 'next friend' and he confuses it with a 'guardian'. He differentiated the decision of Manundu Primary Court because it was about divorce and custody of children and submitted that in Probate Cause No. 7 of 2020 Theresia Hassan Malongo filed an application as a guardian not as a next friend. Referring to **Blacks' Law dictionary** he stated that the meaning of a guardian and next friend are different. A guardian is defined

as 'one who has duty to care for another's person or property because of the other's infancy or incapacity' while 'a next friend is a person who appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff but who is not a party to the lawsuit and is not appointed as a guardian'. He added that children have power to choose any person to stand as the next friend. He insisted that in both 2 cases referred by the applicant, the one who was disqualified was a guardian not a next friend and therefore the preliminary objection holds no water.

In the 2<sup>nd</sup> preliminary objection, he replied briefly that the affidavit reflects prayers in chamber summons. Whether it is too much or too less depends on what is in the deponent's mind. And in respect of the 3<sup>rd</sup> ground of preliminary objection he replied that there is a need of evidence as the counsel referred to his own copy which he states there is no date. He explained that his case was a filed online the scanned documents are dated 25.1.2022 and it was stamped by court. The commissioner for oaths is Maligisa Sakila P. O. BOX 1400 Mwanza. That the court should check online documents. In alternative, he argued, if the affidavit is indeed not dated, the said omission should not vitiate justice as it does not prejudice any party.

In rejoinder Mr. Pauline stated that in his opinion, the Primary Court's order touches both guardianship and next friend. The Court was satisfied that the children's mother is incompetent therefore, she cannot be a guardian or next friend. He complained that if the affidavit contains a lot of information, they cannot understand what exactly the deponent wants before the court. He finalized by stating that there cannot be two different copies of affidavits referring to the same application.

I will start by the meaning of *locus standi*. It has been explained in the case of ***P Gupta v. Union of India AIR SC 149***, that: -

*"The traditional rule in regard to locus standi is that judicial redress is available only to a person who has suffered a legal injury of violation of his legal right or legally protected interest by the impugned action of the state or public authority or any other person or who is likely to suffer."* (emphasis supplied) and also in the case of ***The Attorney General v. Malawi Congress Party and Another, Civil Appeal no 32 of 1996*** it was stated that:-

*"Locus standi is a jurisdictional issue. It is a rule of equality that a person cannot maintain a suit or action unless he has an interest in the subject of it, that is to say unless he stands in a sufficient close relation to it so as to give a right which*

*requires prosecution or infringement of which he brings the action."*

As mentioned earlier, the applicants herein are minors named Leah Gabriel Kurijwila and Nicholas Gabriel Kurwijila the law requires a minor to sue either through a guardian or a next friend.

Suits by or against minors is governed by order XXXI of the CPC. Under rule 1 of order XXXI, it is stated that:-

1. *"Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.*

And rule 4 of order XXXI provides further that: -

*"Any person **who is of sound mind and has attained majority may act as next friend of a minor** or as his guardian for the suit, provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff".*

As the matter is before me is an application as opposed to a suit, I borrowed a definition from the Black's Law Dictionary defines a suit as '*any proceeding by a party or parties against another in a court of law*'. It is therefore prudent to state that the law governing a suit can also govern a

civil application when it comes to a party intending to sue or be sued as a minor.

It is important to note that rule 105 of the Rules is to the effect that:-

*"An application to the court for directions to an executor or administrator in regard to the estate or in regard to the administration thereof shall be by chamber summons supported by an affidavit giving full particulars of the directions sought and reasons for the same."*

Thus, from the above provisions I can gather the following. **One;** Rule 105 empowers the court to issue directions to an executor in regard to the estate they are administering and does not give any restrictions as to who can make this type of application. **Two;** If a plaintiff is a minor, he will need a next friend to sue on his behalf and any person who is of sound mind and has attained the age of majority can act as a next friend of a minor.

I agree with the counsel for the applicant that the counsel for the respondent is confusing between a next of friend and a guardian. The two

are not the same and do have the same capacity in a suit even the clarification is not the same.

The applicants herein have chosen Ms. Theresia Hassan Malongo who is their biological mother to be their next friend. It is undisputed that the court order in **Matrimonial Cause No. 16 of 2013** before Manundu Primary Court granted custody to Gabriel Nimrod Kurwijila, the plaintiff therein, who is now the deceased and is the biological father of Leah Gabriel Kurijwila and Nicholaus Gabriel Kurwijila, who are the minors herein and not otherwise. In respect of the relevant legal provisions explained above, I do not see how the court orders referred by the respondent limit the applicant from being the next friend as she is an adult she is of sound mind and not a defendant in this application.

As the affidavit in support of the application underscores the interest of the applicant being the biological mother of the heirs who are minors, ignoring the applicant by questioning of her capacity will be placing the rights of the issues at stake. The administrator of estate does not have a right to temper or misuse the estate. As to whether the allegation is true or not it all goes upon hearing of the application.



Considering the fact that a Preliminary Objection must be in a point of law, as per **Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd** [1969] EA 696 I do not see any violation of law which hinders Theresia Hassan Malongo to stand as a next friend of the applicant. Therefore, the first ground lacks merit and it is overruled.

The second point of objection states that the affidavit contains extraneous matters of prayers. The counsel for respondent did not indicate which law was violated even after being prompted by the court to and in his submission he did not state which paragraph and which words contained the said prayers. Instead, he stated that there are many paragraphs and much information which were unnecessary. I will not waste time in this point as it is not worth of a preliminary objection and it holds no water.

The last ground refers to the jurat of attestation. The respondent's counsel is alleging that he was issued with a copy of an affidavit which is not signed. I have revisited the said affidavit in the court's record and the applicant and deponent parts are duly signed by one T. Malongo and as submitted the applicant, the commissioner for oath is one Maligisa Sakila.

The affidavit is stamped and dated 25<sup>th</sup> January 2022. Section 3A (1) of the CPC is to the effect that:


*"The overriding objective (of the Civil Procedure Code) shall be to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by this Act".*

Therefore, so long as the court's copy of an affidavit is signed, if the copy issued to the respondent do not have a signature, that omission cannot render the application incompetent. Considering the overriding objective as provided for under section 3A (1) of the CPC, this objection is overruled.

In the upshot, for the reasons given hereinabove, I hereby overrule the preliminary objections raised for they all lack merit.

It is so ordered.



  
**L. J. ITEMBA**  
**JUDGE**  
**28.03.2022**