

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 308 OF 2021
(Originating From Probate Cause No.70 of 2019)

KHAIROON INDERJIT JANDU..... APPLICANT

VERSUS

BHARAT PURSHOTTAM BORKHATARIA.....1ST RESPONDENT

THE ADMINISTRATOR GENERAL..... 2ND RESPONDENT

RULING

Date of Last Order: 06th April 2022.

Date of Ruling: 06th May 2022.

E.E. KAKOLAKI, J.

The Applicant in this application Khairoon Inderjit Jandu, and caveator in Probate and Administration Cause No. 70 of 2019, which is pending before this court by way of chamber summons supported by affidavit of her advocate one Amina Nyahori, has moved this court under section 65 of the Probate and Administration of the Estate Act, Cap 352 R.E 2002 and Order XLIII Rule 2 of the Civil Procedure Code, [Cap 33 R.E 2019], for the following orders:-

1. This court be pleased to give such special directions to the Administrator General in respect of the deceased's Estate.

2. Any other order as the court may think fit and just.

Briefly on the 09/04/2020 this court appointed the 2nd respondent an administrator of the estate of the late Inderjit Singh Jandu, *pendente lite* after a legal battle between the applicant and 1st respondent who had petitioned for letters of administration in Probate and Administration Cause No. 70 of 2019. As deposed in the applicant's affidavit, life did not go smoothly on her side since she was subjected to several criminal proceedings on forgery and money laundering offences in different courts together with her daughter. It is claimed that, the 2nd respondent has failed to intervene despite of several reminders from the applicant hence the present application seeking for court's intervention to issue special directions to the 2nd respondent to intervene in her criminal charges.

Upon being served with a chamber summons, both respondents filed their counter affidavits strenuously challenging the merit of this application. Further to that the 1st Respondent through his advocate Mr. Jerome Joseph Msemwa filed a notice of preliminary objection on points of law to the effect that, **one**, Counsel Amina Nyatiori is not competent to file an application on behalf, **second**, the jurat of or attestation of the affidavit is incurably defective, **third**, the entire depositions in the affidavit are based on hearsay

and **fourth**, the applicant has wrongly invoked the provision of section 65 of the Probate and Administration of the Estate Act Cap 352 R.E 2002. So he prays this court to dismiss the application with costs.

On the 23rd September 2021, applicant's counsel prayed for leave of the court to file a reply to both counter affidavits by both respondents, the prayer which was granted and ordered to file them within seven (7) days. To the court's dismay, the applicant without any justification failed to heed to the court's order of 23/09/2021 nor appeared in court to assign reasons of her failure to so comply. Again when the matter came for mention on the 20/09/2021, the applicant never appeared in court something which prompted the 1st respondent's counsel to pray to the court for disposal of the raised preliminary points of objection by way of written submissions, in which the filing schedule orders were slotted to that effect. It is also noteworthy with concern that, up to 06/04/2022 when the ruling date was fixed the applicant had never filed her written submissions opposing the raised preliminary points of objection nor appeared in court to explain as to what happened to her or her advocate. In that regard it was only the 1st respondent who filed his written submissions in support of the raised preliminary points of objection.

In view of the above position this ruling will be based on 1st respondent submissions only filed by Ms. Salha Mlilima, counsel for the 1st respondent and the pleadings by the parties as it appears the 2nd respondent too opted not to say anything regarding the preliminary objections.

In her submission Ms. Mlilima opted to start arguing the first and third preliminary objections jointly followed by the rest separately in which this ruling will follow the same stream. It was in her contention that applicant's counsel Amina Nyahori is not competent to file an application on behalf of the applicant and that the entire depositions in the affidavit are based on hearsay. She said, the affidavit in the applicant's application is sworn by the Applicants advocate who verified that all the facts stated therein are true and best known of her own knowledge and belief something which contravenes the provisions of Order XIX Rule 3(1) of the Civil Procedure Code, [Cap 33 R.E 2019],(CPC).To glue her argument the Court was referred to the case of **Yobu Sikilo & 16 Others Vs. Furahini Vuhaye**, Misc. Land Application No.105 of 2018 (HC-unreported) quoting the case of **Lalago Cotton Ginnery and oil Mills Company Limited Vs. The Loans and Advances Realisation Trust (LART)**, Civil Application No.80 of 2002(CAT-Unreported) where it was held that, the advocate can swear the affidavit on

behalf of his/her client only on matters which are to his/her personal knowledge.

It was in Ms. Mililima's further contention that, paragraph 2,3,4,5,6,7 and 8 of the affidavits contain hearsay evidence as the applicant's counsel did not represent the applicant in the main case to be acquainted with all those fact. She said that, all the facts therein are facts that she must have heard or being told by another person and not to her own knowledge or belief. To strengthen this argument the counsel referred the court to paragraph 6 of the applicant's affidavit and went on to submit that, procedurally the deponent should have stated in the verification where she got the information, if the same was not given by somebody else who should have sworn an affidavit to that effect. She cited the case of **Jestina George Mwakyoma Vs. Mbeya -Rukwa Autoparts and Transport Limited**, Civil Application No. MBY 7 of 2000 (CAT-unreported). Before resting her submission while inviting the court to be guided by the principles in the cases **Salima Vuai Fom Vs. Registrar of Cooperatives Societies and 3 Others**(1995) TLR 75 and **Unyangala Enterprises Ltd & 5 Others Vs. Stanbic Bank(T) LTD**, Civil Application No.56 of 2004,

where it was held that, courts should not rely on affidavits containing hearsay, he invited the court to dismiss the application with costs.

I have keenly followed the arguments by the learned counsel for the 1st respondent regarding the first and third grounds of objection. It is true as rightly submitted by her that an advocate has got a right to swear and file an affidavit in court on a matter he/she appears for his/her client. However that right is subjected to conditions that he/she will only do that matters which he/she has personal knowledge. This settled position of the law was stated in the case of **Lalago Cotton Ginnery and oil Mills Company Limited** (supra) where the Court of Appeal observed thus:

"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."

Now to start with the first limb of the complaints by the 1st respondent that Counsel Amina Nyahori is incompetent to file this application on behalf of the applicant, I find the same is without merit and hereby dismiss it. I so do as the position whether the advocate can file an application on behalf of the applicant is well settled as stated in the **Lalago Cotton Ginnery and oil Mills Company Limited** (supra) in as long as the sworn/affirmed affidavit

the application is on matters which are to his/her own personal knowledge. The above finding on the first limb takes me to the second limb as to whether the affidavit sworn by the said Amina Nyantori (applicant's advocate) contains hearsay evidence hence contravening the provisions of Order XIX Rule 3(1) of the CPC. In this limb Ms. Mlilima's lamentation is that the deponent (Ms. Amina Nyahori) who never represented the applicant in the main suit/petition deposed to the effect that all facts stated in the affidavit are true and best of her own knowledge and belief thus strayed from the basic requirement as dictated under Order XIX Rule 3(1) of the CPC that, an affidavit should be confined to the facts in the knowledge of the deponent save for interlocutory application in which matters of beliefs can be accommodated.

Before embarking onto discussion of the provision of Order XIX Rule 3(1) of the CPC, I find it imperative to discuss albeit briefly on what an affidavit is and what makes it a valid one. An affidavit is defined by Mitra's **Legal & Commercial Dictionary**, 6th Edition, by Tapash Gan Ghoudhury, published by Eastern Law House (2013) page 47, to mean; *a written statement confirmed by oath, for use as evidence in court; or a written or printed declaration or statement of facts, made voluntarily and confirmed by the*

oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.”.

In the similar note the Court of Appeal in the case of **DPP Vs. Dodoli Kapufi and Patson Tusalile**, Criminal Appeal No.11 of 2008 defined an affidavit to mean;

*“A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths.” BLACK’S LAW DICTIONARY, 7th edition at page 58; **or** It is a statement in the name of a person called a deponent by whom it is voluntarily signed or sworn to or affirmed. It must be confined to such statements as the deponent is able of his own knowledge to prove but in certain cases may contain statement of information and belief with grounds thereon” Taxmann’s Law Dictionary, D.P Mittal at pg.138.*

The Court went on to provide the essential ingredients of a valid affidavit to be, the statement or declaration of facts by the deponent, a verification clause, jurat and the signatures of the deponent and the person who in law is authorised either to administer the oath or to accept the affirmation. What is discerned from the above definitions therefore is that for any affidavit to be a valid one the same must be voluntarily sworn or affirmed and signed by the person making it *before* a person having authority to administer such

oath or affirmation and must be confined to such statements as the deponent is able of his own knowledge to prove, though in certain cases it contain statement of information and belief stating the grounds thereon.

Now tuning to centre of dispute it the second limb above as to whether the affidavit affirmed by Amina Nyahori is a hearsay or not and whether it is against the law, I find it worth to cite the provisions of Order XIX Rule 3 the CPC, complained to be infringed. It reads:

"3.-(1) 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."

What I discerned from the above cited provision of the law is that, any affidavit shall be strictly confined to facts in which are in the personal knowledge of the deponent with exceptional to interlocutory applications only where facts on beliefs might be accepted. This position of the law was also taken by the Court of Appeal in the case of **Jestina George Mwakyoma** (supra) when observed that:

"The deponent to an affidavit must have personal knowledge of the fact to which he depones. True, persons other than the

applicant may also supply affidavits, but if they do, they must be persons who depose to what they personally know. In contrast, a deponent to whom O.19 r 3 applies depose to facts known to him and in interlocutory applications, to statements of his belief...”

In the matter at hand, it is conspicuously seen from the affidavit in support of the application that Amina Nyahori being the advocate affirmed and signed it as deponent without any indication that she was so instructed by the applicant. To make the case worse she went on deposing facts on cases in which the applicant allegedly was or is being charged with as stated in paragraph 6 of the affidavit that I find it instructive to quote as I hereby do:

6. THAT it is a matter of fact that since the day the applicant through her advocate lodged a caveat in opposing the appointment of the 1st Respondent as an administrator, the applicant have been subjected to various criminal charges including;

- i. The Criminal Case No. 221 of 2020 at Ilala District Court which is before Hon. Mpaze, the Applicant is being charged for the offence of forgery against the deceased estate.*
- ii. The Economic Crime Case No. 54 of 2020 which is at Kisumu Resident Magistrate Court before Hon. Matembele,*

RM where the Applicant together with her family, advocate (Mohamed Majaliwa) her daughter and the Stanbic Manager, all being charged for forgery, theft and Money Laundering against the deceased estate; and

- iii. The Criminal Case No. 43 of 2021 at Kisumu Resident Magistrate Court which is before Hon. Mtega PRM where the applicant is being charged for forgery as well as against the deceased estate. The copies of charge sheet for the criminal case No. 21 of 2020 of Ilala District Court, Economic Crime Case No. 54 of 2020, Kisumu Magistrate Court are attached for easier of reference to form part of this affidavit and marked as Annexure HJ-2.*

Having considered the above cited paragraph only, one would note that, what the deponent was deposing to was not in her knowledge for not being the applicant's advocate in the cases referred therein which is the centre of complaint in this application, in which the applicant seeks intervention of the court. With such uncontroverted fact and others to be disclosed soon, I am convinced and therefore embrace Ms. Mlilima's proposition that, the deponent obtained from someone else all the information deposed in the affidavit and that she ought to have disclosed the source of those information in which she failed to do. My conclusion is rightly so being premised on deponent's averments such as *"there was a Probate Cause No. 43 of 201 at*

Ilala District Court”(in paragraph 3) and that “*there was a caveat lodged to oppose the appointment of the 1st respondent*” (in paragraph 5). As the above cited averments go, there existed a number of cases in different courts in which it is not disclosed by the deponent as to whether she was the one representing applicant in any or all those cases so as to be acquitted with the facts she was deposing to. In other word it was expected of her to depose the facts that she represented the applicant in the said cases referred in her averments in which she failed. This court on the need of the advocate to swear or affirm affidavit on the matters that are to his personal knowledge, in the case of **Ansebert Mugamba Ngurumo Vs.Charles John Mwijage & 2 Others**, Misc. Civil Application No.45 of 2015, while quoting **Lalago’s** Case (supra) had the following:

"An advocate can swear and filed 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 ..."

As found herein above in this application the Applicant's advocate decided to affirm on the facts which are not from her own knowledge contrary to

order XIX Rule 3(1) of the CPC. For easy reference I reproduce the verification clause in the impugned affidavit:

"VERIFICATION

I, AMINA NYAHORI being the Advocate for Applicant hereby verify that all what is stated in paragraph 1,2,3,4,5,6,7,8,9,10 and are true to the best of my knowledge and belief."

What appears in the verification clause above no doubt is contrary to the provisions of Order XIX Rule 3(1) of the CPC as well as the principle laid down by the Court of Appeal in **Lalagos's** case and **Jestina George Mwakyoma** (supra) for failure to disclose the source of the information contained in the affidavit something which rendered the same defective for containing hearsay evidence. This court in the case of **Maxcom Africa Plc Vs. UDA Rapid Transit Plc**, Misc. Commercial Cause No.85 of 2018, (HC-unreported) when deciding an application similar nature to the present one held thus:

"Failure to disclose the source of information then the affidavit is materially defective."

With that finding the second issue in the limb is answered in affirmative that the applicant's affidavit contains hearsay evidence. The 3rd ground of

objection therefore disposes of the application and I see no reason to deal with the rest to the ground for avoidance of academic exercise.

The next question is what the fate of the application where the affidavit is defective. The answer is not far-fetched as it was held in the case **Salima Vuai** (supra) that the affidavit not disclosing the source of information should not be acted on. The Court stated thus:

"Where as affidavit is made of information, it should not be acted upon by any court unless the sources of information are specified."

Similarly in the case of **Unyagala Enterprises Ltd and 5 Others** (supra) the Court of Appeal on the same subject matter held that:

"His affidavit contains a lot of hearsay evidence and so, it cannot be relied upon."

As in this matter the affidavit affirmed by Amina Nyahori contains hearsay hence defective, the present application is no longer supported by an affidavit. I therefore sustain the preliminary objection raised and proceed to strike out the application for being incompetent before the court.

I decline to order for costs as the matter originates from probate cause.

It is so ordered.

DATED at Dar es salaam this day of 06th day of May, 2022



E. E. KAKOLAKI

JUDGE

06/06/2022.

The ruling has been delivered at Dar es Salaam today on 06th day of May, 2022 in the absence of both parties and Ms. Asha Livanga, Court clerk.
Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

06/05/2022