

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC.CIVIL APPLICATION NO. 354 OF 2022

(Originating from Misc. Civil Application No. 571 of 2018)

**IN THE MATTER OF THE ESTATES OF THE LATE WILFREM ROBERT
MWAKITWANGE**

AND

**IN THE MATTER OF AN APPLICATION FOR REVOCATION OF GRANT OF
LETTERS OF ADMINISTRATION TO THE ADMINISTRATOR GENERAL**

**(As Personal Legal Representative of the estate of the late WILFREM ROBERT
MWAKITWANGE)**

BY

DAVID MWAKITWANGE (As the Next of Kin of the deceased).....APPLICANT

VERSUS

ADMINISTRATOR GENERAL (As legal Personal Representative

of the Estate of the Late WILFREM ROBERT MWAKITWANGE.....RESPONDENT

RULING

Date of last Order: 15th Dec, 2022

Date of Ruling: 24th Feb, 2023

E.E. KAKOLAKI, J.

This ruling seeks to address the preliminary point of objection raised by the respondent against the applicant to the effect that, *the application is untenable in law for non-joinder of the law under Government proceedings Act, [Cap. 5 R.E 2019]*. The challenged application is preferred by way of

chamber summons under section 49(1) and 8(b) of the Probate and Administration of Estates Act, [Cap. 352 R.E 2002] and Rule 29(1) of the Probate Rules G.N. No. 10 of 1963, supported by the applicant's affidavit. As alluded to above, tenability of the application is challenged by the respondent who filed the counter affidavit to that effect before raising the preliminary objection, in which both parties were ordered to argue it by way of written submissions. The respondent was to file her submission in support of the objection on or before 29/11/2022 while the reply submission by the applicant was to be filed by 06/12/2022, and rejoinder submission by the respondent on 13/12/2022, as the matter was set for mention on 15/12/2022 with view of fixing a ruling date.

Though the applicant seem to have been drawn and filed the submission in person, throughout the proceedings was under representation of Ms. Mainda Omary, learned advocate, who contrary to the court's practice did not inform the Court the reasons for not preparing the submissions as she was present in Court on 15/12/2022, when the matter came for setting a ruling date. On the respondent's side the submissions were filed by Mr. Samwel Mutabazi, learned Principal State Attorney.

I had an ample time to study and consider submissions by the parties only to note that, the applicant's reply submission were filed on 08/12/2022, out of the scheduled time without leave of the Court despite of presence of his advocate in Court. It is the law that filing of submission outside the time ordered by the Court is tantamount to failure to prosecute the matter as the purported filed submission are not legally placed in the record. This legal stance was elucidated by the Court in the case of **P3525 LT Idahya Maganga Gregory Vs. The Judge Advocate General**, Court Martial, Criminal Appeal No. 2 of 2002 (unreported) when held that:

*It is now settled in our jurisprudence that the **practice of filling written submissions is tantamount to a hearing and; therefore, failure to file the submission as ordered is equivalent to nonappearance at a hearing or want of prosecution.** (Emphasis supplied)*

In light of the above authority the attendant consequence of filing submissions outside the specified time by the Court is to disregard the same and proceed to determine the matter on merit, the course which I do hereby take in this matter, for applicant's failure to file the submission within the prescribed time limit as ordered by the Court.

Having so found I now proceed to consider and determine the point of objection raised in which the glaring issue is whether the application is untenable for non-joinder of the Attorney General as per the requirement of the law under the Government Proceedings Act, [Cap. 5 R. R.E 2019]. It is Mr. Mutabuzi's contention that, applicant's act of preferring this application without joining the Attorney General infringed the provisions of section 6,(3) and (4) of the Government Proceedings Act, as amended by section 25(a) of the written Laws (Miscellaneous Amendments) Act, No. 1 of 2020. He argued the respondent being the executive agency the law requires when sued, the Attorney General must be joined as a necessary party as provided under section 6(3) of the Act, since his non-joinder vitiates the proceedings of any suit. He relied on the case of **Steven G. Malipula and Reginald Bugeraha Vs. Tanzania Revenue Authority (TRA)**, Civil Appeal No. 50 (B) of 2008 (CAT-unrepresented) where the Court held that the Attorney General was a proper party for fair determination of the suit hence to apply for joining him after the plaintiff's case was closed was too late. According to him in this matter since the applicant proceeded against the respondent without joining the Attorney General, that non-joinder vitiates the

proceedings hence the application is incompetent and ought to be dismissed with costs and so prayed.

It is true as submitted by Mr. Mutabazi and rightly held in the case of **Steven G. Malipula and Reginald Bugeraha** (supra) that, under section 6(3) of the Government Proceedings Act, any suit brought against the Government department, ministry, local government, executive agency, public corporation, parastatal organization or public company, after expiry of notice of 90 days which is a mandatory requirement under subsection (2) of section 6 of the Act, the Attorney General must be joined as a necessary party. See also the case of **MSK Refinery Limited Vs. TIB Development Bank Ltd and Another**, Misc. Civil Application No. 307 of 2020 (HC-unreported) where this Court found the application incompetent for applicant's failure to join the Attorney General as a necessary party.

The follow up question is whether under the circumstances of this matter the applicant was duty bound under section 6(3) of the Government Proceedings Act to join the Attorney General as a necessary party as submitted by Mr. Mutabazi. To answer the question at hand, I find it imperative to reproduce the said provisions of section 6(3) of the Act as amended which reads:

*(3) All suits against the Government shall, upon expiry of the notice period, be brought against the Government, Ministry, Government Department, Local Government Authority, Executive Agency, Public Corporation, Parastatal Organization or Public Company **that is alleged to have committed the civil wrong on which the civil suit is based, and the Attorney-General shall be joined as necessary party.***
(Emphasis supplied)

My reading and understanding of the above provision is that, the Attorney General shall be joined in a suit brought against the Government or its ministry, institution or department alleged to have committed civil wrong against the plaintiff or applicant. In other words there must be an independent civil suit instituted against the Government, ministry, department, authority, executive agency or organization for the requirement of the Attorney General to be joined, and in case of an application the one originating from such main suit as the case may be, since the term suit covers both main suit and application. See the case of **MSK Refinery Limited** (supra).

In this matter no doubt the application at hand is not preferred independent of any other suit as it originates from Misc. Civil Application No. 571 of 2018, in which the respondent was appointed as an administrator of the estate of

the late Wilfrem Robert Mwakatobe. Since the application originates from the already existing suit in which the respondent is the party to, I find the provision of section 6(3) of the Government Proceedings Act, inapplicable in this matter as joining the Attorney General in this application in my considered view is legally improper for not formerly being a party in which the application is stemmed. As each case is decided on its own merits, I answer the issue raised above in negative in that, this application is tenable as it was not necessary to joined the Attorney General as a necessary party who was not a party to Misc. Civil Application No. 571 of 2018 in which the present application emanates.

In the event and for the fore stated reasons, I am satisfied that, the raised preliminary objection is destitute of merit and the same is hereby dismissed.

The matter is therefore to proceed with hearing on merit.

Being a probate matter, I order each party to bear its own costs.

It is so ordered.

Dated at Dar es salaam this 24th day of February, 2023.



E. E. KAKOLAKI

JUDGE

24/02/2023.

The Ruling has been delivered at Dar es Salaam today 24th day of February, 2023 in the presence of Ms. Mainda Omary, advocate for the applicant and Ms. Asha Livanga, Court clerk and in the absence of the respondent.

Right of Appeal explained.

A handwritten signature in blue ink, appearing to be 'E. E. Kakolaki', written over a horizontal line.

E. E. KAKOLAKI
JUDGE
24/02/2023.