

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 263 OF 2022

**IN THE MATTER OF THE ESTATE OF THE LATE JOSEPH KULWA NYIGA
AND**

**IN THE MATTER FOR APPLICATION FOR LETTERS OF
ADMINISTRATION BY**

MARY GAO LUPATU APPLICANT

VERSUS

KULWA ITUMBAGIJA NYIGA 1ST RESPONDENT

KULEKWA KULWA ITUMBUGIJA 2ND RESPONDENT

MANGE KULWA ITUMBAGIJA 3RD RESPONDENT

NYIGA KULWA ITUMBUGIJA 4TH RESPONDENT

CONDRADY/BULUBA KULWA 5TH RESPONDENT

[Arising from Probate Administration Cause No. 123 of 2021]

RULING

28TH February and 21st March, 2023

KISANYA J.:

The above named applicant petitioned, before this Court, for letters of administration of the estate of the late Joseph Kulwa Nyiga. During the pendency of the said petition (Probate and Administration Cause No. 123 of 2021), the applicant has filed the present application seeking an order for appointment of a receiver to protect the properties

of the late Joseph Kulwa Nyiga from further damage or waste. Her application is by chamber summons predicated under “section 10 Rule 24 of the Probate and Administration of Estates Act, [Cap. 252, R.E. 2020]” and is supported by an affidavit deposed by the applicant, Mary Gao Lupatu.

The respondent filed a joint affidavit to contest the application. In addition, the respondents lodged a notice of preliminary objection on the points of law to the following effect:

- 1. The application is incompetent for being brought under non-existing law.*
- 2. The application is incompetent for containing an affidavit with a defective verification clause.*

With leave of the Court, the preliminary objection was argued by way of written submissions which were filed by Messrs Frederick Mwakinga, and Godon Nashon Waduma, learned advocates for the applicant and respondents, respectively.

Submitting on the first limb of objection, Mr. Waduma argued that the law cited in the chamber summons does not exist. He then contended that the applicant has failed to move the Court and thus, prayed that the application to be struck out with costs. To supplement

his submission and prayer, the learned counsel cited the case of **Awadhi Ibrahim Msuya (Administrator of the LATE Ibrahim Swalehe vs Jamila Salehe Kiluwasha (Administrator of the estate of the late Mwanaidi Msuya and Another, Land Application No. 498 of 2022, HCT Land Division at DSM and Project Manager Es-Kooo International Inc. Kigoma, Civil Application No. 22 of 2019, CAT at Tabora.** In the latter case, the Court of Appeal held that:

"It is now settled law that the wrong citation of the law, section, subsection and or paragraph of the law or non-citation will not move the Court to do what is being asked so to do and accordingly the application is incompetent."

Arguing on the second limb of objection, Mr. Waduma submitted that the verification clause of the supporting affidavit was in contravention of Order VI, Rule 15(1),(2) and (3) of the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC). His submission was based on the contention that the name of the verifier was not disclosed. In that regard, he argued that the person who verified the facts deposed in the affidavit is not known. Citing the case of **Juma Ibrahim Mkomi and 2 Others vs Association of Tanzania Tobacco Traders**, Misc. Civil

Application No. 4 of 2016, HCT Labour Division at Tabora (unreported), he argued that this Court is not in a position of predicting the person who verified the information stated in the affidavit.

That said, the learned counsel prayed that the application be struck out for being incompetent before the Court. He was of the further view that the principle of overriding objective cannot be employed.

Mr. Mwakinga strongly resisted the preliminary objection. On the first point of objection, he submitted that the respondent had not cited the law under which the application ought to have been brought. It was his contention that the last amendment to the Probate and Administration of Estates Act was by the Written Laws Miscellaneous Amendments), Act No. 1 of 2020 which came into force on 21st February, 2020. On that account, he was of the view that the objection holds no water.

As for the second point of objection, Mr. Mwakingwe submitted that the verification clause was signed by the deponent namely, Mary Gau Lupatu. He further submitted that the case relied upon by the respondent's counsel are not applicable in the circumstances of this

case.

In view of the foregoing, Mr. Mwakingwe held the view that both points of objection were meaningless. He therefore, asked the Court to dismiss them with costs.

Mr. Wadumu rejoined by reiterating that there is no law which was revised in 2020. He contended that the applicant's counsel had confused the term "revised edition" and "miscellaneous amendments". On the second point of objection, he reiterated his submission that the verification clause is defective for want of verifier's name as held in **Juma Ibrahim Mkomi and 2 Others** (supra).

I have given a deserving weight to the submissions of counsel for both sides. For convenience in determination, I prefer to start with the second point of objection. The issue for consideration is whether the affidavit is defective for want of name of the verifier, and if the answer is in the affirmative, whether the application is incompetent on account of the said defect.

According to Mr. Waduma, this objection finds its basis on Order VI, Rule 15(1),(2) and (3) of the CPC. I have gone through the said

provision. It provides for verification of pleadings. According to Order VI, Rule 1 of the CPC, the word "pleadings" refers to a plaint or a written statement of defence and other subsequent pleadings presented in accordance with rule 13 of Order VIII. Thus, the provision in support of the objection does not deal with verification of an affidavit. I am fortified by the case of **Loshya Investment Limited vs Visiontech Computers Limited**, Commercial Case No. 56 of 2005, HC Commercial Division at DSM (unreported) when Massati, J. (as he then was) held as follows:-

"Mr. Uronu has referred to O. VI r. 15 as the law governing verification of affidavits. With respect I think, he is wrong. O. VI r. 15 only applies to verification of "pleadings". O. VI r. 1 defines "pleading" to mean a plaint, written statement of defence, and other subsequent pleadings as may be presented under r. 13 of O. VIII. So by necessary elimination, r. 15 of O. VI does not apply to affidavits. The law on affidavits is set out in O. XIX r. 3 of the Civil Procedure Code 1966."

In the light of the above stated position, the second point of objection is misconceived. Even if I was to hold that the verification is defective for want of name of verifier, it is now settled position of law

that a defective verification is amenable to amendment with leave of the court. See for instance, the case of **Jamal Mkumba and another vs The Attorney General**, Civil Application No. 240/01 of 2019 (both unreported), in which the Court of Appeal held:-

"We think this is one of those cases which demands for substantive justice in its determination. But, we are satisfied that the respondent will not be prejudiced by an order of amendment of the affidavit so as to accord a chance to the applicant to insert a proper verification clause according to the law and parties be heard on merits".

Reverting to the first point of objection, the issue is whether the application is brought under non existing law. Mr. Mwakinga conceded that the application is preferred under "section 10 Rule 24 of the Probate and Administration of Estates Act, [Cap. 252, R.E. 2020]". At the outset, I agree with Mr. Waduma that the Probate and Administration of Estate Act was not revised in 2020. All laws are revised under the Law Revision Act [Cap. 4, R.E. 2019]. Although the Probate and Administration of Estate Act was amended by the Written Laws Miscellaneous Amendment Act, No. 1 of 2020, it was not revised in that year. Pursuant to sections 12 and 20 of the Interpretation of

Laws Act, Cap. 1, R.E. 2010, the applicant ought to have cited the Probate and Administration of Estate Act, Cap. 352, R.E. 2002 and the law which amended the provision cited in the chamber summons. Since this was not done, I find merit in the argument that the application is brought under non-existing law.

The law is settled that wrong citation or non- citation of the enabling provisions renders the application incompetent. See the case of **China Henan International Co-operation Group versus Salvand K.A. Rwegaira** [2006] TLR 220 in which the Court of Appeal of Tanzania underscored that:

"here the omission in citing the proper provisions of the rule relating to a reference and worse still error in citing a wrong and in applicable rule in support of the application is not in our view, a technicality falling within the scope and purview of Article 107A(2) (e) of the constitution. It is a matter which goes to the very root of the matter."

I am alive of the principle of overriding objective enshrined under section 3B of the CPC which requires to consider substantive justice as opposed to legal and procedural technicalities. Therefore, the issue whether wrong citation or non-citation of the enabling provision is

curable is decided basing the circumstances of each case.

In the instant case, even if I was to assume that the applicant intended to cite the Probate and Administration of Estate Act, Cap. 352, R.E. 2002, "section 10 Rule 24" referred to in the Chamber Summons is not found in that Act. In that regard, I am of the considered opinion that the defect pointed out by the learned counsel for the respondent cannot be cured by invoking the principle of overriding objective. Therefore, I hold that the application is incompetent for being preferred under non-existing and provision of law.

For the foregoing reasons, the second point of objection is hereby sustained. Consequently, the application is struck out for being incompetent before the Court. The applicant is at liberty to file a fresh application in accordance with the law. Considering that this is a probate matter, I make no order as to costs.

DATED at DAR ES SALAAM this 21st day of March, 2023.



S.E. KISANYA
JUDGE
21/03/2023