

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM SUB DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**MISC. CIVIL APPLICATION NO. 276 OF 2022**

**ABRAHAM ALLY SYKES.....APPLICANT**

**VERSUS**

**MLUGURU PAULA SYKES AND KHWEMAH ALLY SYKES**

**(Administrators of the estate of the late ZAINABU SYKES.....1<sup>ST</sup> RESPONDENT**

**ABDOUL SYKES.....2<sup>ND</sup> RESPONDENT**

**ALHAJ ARAF SYKES.....3<sup>RD</sup> RESPONDENT**

**RULING**

Date of last Order: 15<sup>th</sup> Dec, 2022

Date of Ruling: 03<sup>th</sup> March, 2023

**E. E. KAKOLAKI J**

This ruling seeks to address the preliminary objection raised by the applicant beseeching this Court to dismiss the application for being supported by the affidavit which is bad in law for containing legal argument and conclusive language, in contravention of the mandatory provisions of Order XIX Rule 3 of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC).

Briefly in this matter the applicant is seeking for leave to appeal to the Court of Appeal and the application is supported by two affidavits of the applicant and his advocate one Dr. Chacha Bhoke Mulungu. The same is contested by

the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who filed their joint counter affidavit to that effect while raising a preliminary point of objection subject of this ruling. The 1<sup>st</sup> respondent seem not to challenge the application as he did not file any counter affidavit.

As a matter of practice when raised preliminary objections must be disposed of first. It is from that practice this Court opted to have the raised preliminary objection determined first in which both parties were represented and the hearing proceeded in writings. The applicant appeared represented by his advocate Dr. Chacha B. Murungu, while the 2<sup>nd</sup> and 3<sup>rd</sup> respondents enjoying the services of Mr. Daniel B. Welwel, learned advocate, as the 1<sup>st</sup> respondent did not file any submissions obviously for not being interested.

In support of the preliminary objection, Mr. Welwel contended that, under Order XIX Rule 3(1) of the CPC, cemented with the position in the case of **Uganda Vs. Commissioner of Prisons, Ex-parte Matove**, [1966] E.A, an affidavit is supposed to contain only statement of facts which are of deponent's own knowledge and/or which the deponent believes to be true, for being a substitute of oral evidence. According to him it is not supposed to contain irrelevant or extraneous matters by way of objection, prayers, legal argument and conclusion, rather statements of facts. He lamented that,

contrary to the law the applicant's affidavit in paragraphs 3,4,10,10(a),(b),(c) and (d) as well as paragraphs 3,4,6,6(a),(b),(c) and (d) of the applicant's advocate (Dr. Chacha Murungu) contain conclusive comments and legal arguments instead of facts. He said, for instance paragraph 3 in both applicant and his advocate's affidavit reads, "... *the High Court was supposed to make an order in line with section 64 and 72 of the Probate and administration of Estate Act, [Cap. 352 R.E 2019].*" However, in my case, the High Court did not make such Order in probate and Administration Cause No. 53 of 2014 as envisaged. Instead, the High Court made a judgment not in Probate and Administration Cause No. 59 of 2014 but in No. 53 of 2014.

Mr. Welwel went on submitting that, the above excerpt of paragraphs 3 in both affidavits is used in the submission as example of several offending statements deposed by the applicant in the supporting affidavits of his application, hence a picture that most of the words and/or statements used therein are opinions and legal issues/arguments, rendering the affidavits defective. In his understanding learned counsel argued, this Court can proceed to order the offensive paragraphs be expunged or disregard them and continue to determine the application on merit, for being

inconsequential, basing on the position taken by the Court of Appeal in the case of **Msasani Peninsula Hotel Limited and 6 Others Vs. Barclays Bank Tanzania Limited and 2 Others**, Civil Application No. 192 of 2006, quoting with approval its decision in the case of **Phantom Modern Transport [1985] Limited Vs. D.T Dobie (Tanzania) Limited**, Civil Reference No. 15 of 2001 and No. 3 of 2002 (CAT). He however, took the view that, to him that was not the right course hence implored the Court to be pleased to take the root taken by this Court in **Nasreen Hassanali Vs. Agakhan Health Services Tanzania**, Revision Application No. 84 of 2021 (HC-unreported), to uphold the preliminary objection and proceed to strike out the offensive paragraphs and further find the remaining paragraphs insufficient to support the applicant, hence strike it out with costs for being incompetent.

In response, Mr. Murungu resisted the submission by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' arguing that, the two affidavits do not contain arguments and conclusions as argued hence not in violation of the provision of Order XIX Rule 3(1) of the CPC. To him the affidavits present facts and matters in which deponents are in knowledge of or received advice and information in which its source is disclosed. Conversely he argued, it is the respondents counter

affidavit that contain conclusions and argument in which the applicant saw no reason to raise objection to as they could be cured by amendment or filing of supplementary affidavit to save time and go to substantive justice. In light of that submission he took the view that, this is one of case in which this Court should invoke its powers under the provisions of section 3A and 3B of the CPC, and proceed to consider the application on merit instead of embarking on technical aspect of preliminary objection. He therefore beseeched this Court not to strike out the application should it find the assailed paragraphs of both affidavits are offending the law, instead should overlook them and proceed to determine the application as held in the cited case by the respondents in **Peninsula Hotel Limited and 6 Others** (supra). In the end, the Court was prayed to dismiss this preliminary objection with costs.

In his brief rejoinder Mr. Welwel, while insisting the cited paragraphs above offended the provisions of the law as cemented in **Commissioner for Prisons, Ex-parte Matovu** (supra), attacked the applicant's prayer to this Court to invoke the principle of overriding objective on the ground that, the same cannot be applied in this matter as it is not a panacea and its introduction was not meant to enable the parties circumvent the mandatory

rules of the Court or turn blind to the mandatory provision of the law as it was held in the case of **SGS Societe Generale De Surveillance SA and Another Vs. VIP Engineering and Marketing Limited and Tanzania Revenue Authority**, Civil Appeal No. 124 of 2017 and **Mondorosi Village Council and 2 Others Vs. Tanzania Breweries Limited and 2 Others**, Civil Appeal No. 66 of 2017 (CAT-unreported).

With the above cited authorities, Mr. Welwel implored this Court to sustain the preliminary objection picked against the applicant and strike out the incompetent application with costs, the position which was taken by the Court of Appeal in **Jacqueline Ntuyabaliwe Mengi and 2 Others Vs. Abdiel Reginald Mengi and 5 Others**, Civil Application No. 331/01 of 2021 (CAT-unreported) and **Nasreen Hassanali** (supra) and refrain from following the course taken in **Msasani Peninsula Hotel Limited and 6 Others** (supra), as prayed by the applicant.

I have dispassionately considered the rivalry submission of both counsel for the parties and perused the impugned affidavits with view of establishing whether the same violate the law as claimed by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. It is evident to this Court that, parties are not in dispute that, the law

providing for matters to be contained in the affidavit which is the substitute of oral evidence is Order XIX Rule 3(1) of the CPC which 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:*

*Provided that, the grounds thereof are stated.*

It is also a principle of law as enunciated in the celebrated case of **Commissioner for Prisons, Ex-parte Matovu** (supra), that an affidavit should restrict itself to statements of facts and circumstances in the personal knowledge of the deponent or information which he believes to be true. That it should not contain conclusive comments, legal arguments and/or objection or prayers. In so doing the Court observed and I quote:

*"As general rule of practice and procedure, an affidavit for use in Court, being a substitute for oral evidence, should only contain statements of facts and circumstances to which witness deposes either of his own personal knowledge or from information which he believes to be true. Such an affidavit must not contain extraneous matter by way of objection or prayer or legal argument or conclusion."*

See also the case of **Jacqueline Ntuyabaliwe Mengi and 2 Others** (supra).

Again it is trite law that, he who alleges must prove existence of the alleged fact(s) and the burden of so proving rests on the party seeking the Court to believe that such alleged fact exists. The provisions of section 110 and 112 of the Evidence Act, [Cap. 6 R.E 2022] and the cases of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004 (CAT-unreported), **Nathaniel Alphonse Mapunda and Benjamin Mapunda Vs. R** [2006] TLR 395 and **Paulina Samson Ndawavya Vs. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017 (CAT-unreported). Stressing on the above referred principle of law the Court of Appeal in the case of **Abdul Karim Haji** (supra), had this to say:

*“...it is an elementary principle that he who alleges is the one responsible to prove his allegations.”*

In this matter Mr. Welwel contends that, both paragraphs 3,4,10,10(a),(b),(c) and (d) of applicant’s affidavit and paragraphs 3,4,6,6(a),(b),(c) and (d) of the applicant’s advocate in support of the application, offend the provisions of Order XIX Rule 3(1) of the CPC, for containing conclusive comments, legal arguments and/or provision of the



law and cited example being paragraphs 3 of both affidavits, in which Mr. Murungu disputes in that, they are in compliance of the law for disclosing on facts in deponents knowledge which and what was advised, which sources of information is provided. Mr. Welwel says the two paragraphs contain opinion and legal issues/arguments. For clarity and easy appreciation of both parties' arguments, I find it apposite to quote the assailed paragraphs from both affidavits of the applicant and his advocate. To start with applicant's affidavit paragraph 3 reads:

*3. Pursuant to the advice I have received from my advocate Dr. Chacha Bhoke Murungu, in determining petitions for the grant of probates or letters of administration, the High Court is required to make an Order but not a judgment. In this regard, my advocate has advised the following: "**the High Court was supposed to make an Order in line with section 64 and 72(1) of the Probate and Administration of Estates Act, [Cap. 352 R.E. 2019].**" However, in my case, the High Court did not make such an order in Probate and Administration Cause No. 59 of 2014 nor did it make an Order in Probate and Administration Cause No. 53 of 2014 as envisaged. Instead, the **High Court made a judgment** not in Probate and Administration Cause No. 59 of 2014 but in No. 53 of 2014.*

As for the applicant advocate's affidavit paragraph 3 reads:

3. That, I also advised Abraham Ally Sykes that, in determining petition for the grant of probates or letter so administration, the High Court is required to make an Order but not a judgment a judgment. I gave him the following advice: ***“the High Court was supposed to make an Order in line with section 64 and 72(1) of the Probate and Administration of Estates Act, [Cap. 352 R.E. 2019].”*** However, in my case, the High Court did not make such an order in Probate and Administration Cause No. 59 of 2014 nor did it make an Order in Probate and Administration Cause No. 53 of 2014 as envisaged. Instead, ***the High Court made a judgment*** not in Probate and Administration Cause No. 59 of 2014 but in No. 53 of 2014.

Now looking at the two cited paragraphs from both affidavits which no doubt their contents look to be similar and connoting the same thing, the issue for determination by this Court is whether they contain opinions and legal issues/arguments rendering them defective as alleged by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent. Having examined them the answer to the issue is yes as the statement ***“the High Court was supposed to make an Order in line with section 64 and 72(1) of the Probate and Administration of Estates Act, [Cap. 352 R.E. 2019].”*** However, in my case, the High Court did not make such an order in Probate and Administration Cause No. 59 of

*2014 nor did it make an Order in Probate and Administration Cause No. 53 of 2014 as envisaged. Instead, **the High Court made a judgment...***" in my humble opinion contain nothing but a legal argument, which is prohibited in the affidavit. I therefore find paragraphs 3 in both affidavits of the applicant and his advocate, offending the provision of Order XIX Rule 3(1) of the CPC, for containing legal arguments.

Concerning the rest of the provisions, I think that need not detain this Court much as the principle as alluded herein above is so clear that he who alleges must prove. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents apart from asserting that, paragraphs 4,10,10(a),(b),(c) and (d) of applicant's affidavit and paragraphs 4,6,6(a),(b),(c) and (d) of the applicant's advocate in support of the application, offend the provisions of Order XIX Rule 3(1) of the CPC, in their submission said nothing on them, hence a finding that, their allegations remain unproved.

Having so found, the next question is what the remedy to the affidavit containing offensive paragraphs is. The law is settled that, unless the defects in the affidavit are incurably defective to the extent of not supporting the application, the remedy is to expunge offensive paragraphs or disregard them to allow the Court to proceed with hearing and determination of the

application basing on the remaining paragraphs. This legal stance was stated in the cases of **Ignazzio Messina Vs. Willow Investment SPLR**, Civil Application No. 21 of 2001 and **Chanda and Company Advocates Vs. Arunaben Chaggan Chhita Mistry and Others**, Civil Application No. 25 of 2013 (CAT) when citing the case of **Phantom Modern Transport (1985) Limited** (supra). In **Chanda and Company Advocates** (supra) the Court stated thus:

*"Where the offensive paragraphs are inconsequential, they can be expunged leaving the substantive parts of the affidavit remaining intact so that the Court can proceed to act on it."*

Applying the above principle in this matter this Court is of the finding that, the offensive paragraphs are hereby expunged therefrom. Having expunged paragraphs 3 in both affidavits and considering the fact that the same are referring to the advices rendered to the applicant, I hold the view that the contents therein are inconsequential hence the Court can still proceed with determination of the application basing on the remaining paragraphs of the affidavits.

In the premises and for afore stated reasons, the preliminary objection is sustained to the extent explained above. I therefore refrain from accepting Mr. Welwel's invitation to take the course taken in the cases of **Jacqueline**

**Ntuyabaliwe Mengi and 2 Others** (supra) and **Nasreen Hassanali** (supra) of striking out the application for being incompetent, as in this matter the offensive paragraphs do not render the whole affidavits incurably defective to affect competent of the application. I thus order the application is to proceed with hearing on merit.

Each party is to bear its own costs.

It is so ordered.

Dated at Dar es salaam this 03<sup>rd</sup> day of March, 2023.



E. E. KAKOLAKI

**JUDGE**

03/03/2023.

The Ruling has been delivered at Dar es Salaam today 03<sup>rd</sup> day of March, 2023 in the presence of Dr. Chacha Murungu, advocate for the applicant, Mr. Jacob Kaisi, advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and Ms. Asha Livanga, Court clerk and in the absence of the 1<sup>st</sup> respondent.

Right of Appeal explained.



E. E. KAKOLAKI

**JUDGE**

03/03/2023.