IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 334 OF 2022
(Original Probate and Administration Cause No. 102 of 2020)
In the matter of the estate of the late JOHN MAKITAUO@JOHN PHILIPO PUKA

AND

IN THE MATTER OF Appointment of PRISCA JOHN MJINDO as administratrix of the Estate of the Late JOHN MAKITAUO @ JOHN PHILIPO PUKA.
AND
In the matter of the Application for Removal of PRISCA JOHN MJINDO as administratrix of the Estate of the Late JOHN MAKITAUO @ JOHN PHILIPO PUKA
AND
And in the matter of the Application for Appointment of REMMY HAMISI PUKA as an administrator of the Estate of the Late JOHN MAKITAUO @ JOHN PHILIPO PUKA
BETWEEN
REJOICE PHILIPO PUKA……..1ST APPLICANT
JAQUILINE PHILIPO PUKA……2ND APPLICANT
IRENE PHILIPO PUKA……3RD APPLICANT
AND
PRISCA JOHN MJINDO as administratrix of the Estate of the Late JOHN MAKITAUO @ JOHN PHILIPO PUKA ……RESPONDENT

RULING

25th March & 16th June 2023

MKWIZU J,

Applicants have applied for revocation of letters of appointment of Mrs Prisca John Puka, the respondent in this application on the ground that the petition was fatally defective for the petitioner had concealed to the

court important information relating to the applicants and the marital status between the petitioner and the deceased. The application is brought by a chamber summons under section 49(1)(a)(b)(c) and (2) of the Probate and Administration of Estates Act Cap 352, Rule 29 of the Probate Rules,1963 supported by a joint affidavit by the applicants.

The respondent welcomed the application with a series of objections brought to court through two notices of objections both containing eight points of law. The preliminary objections were heard by way of written submissions. The respondent enjoyed legal services from Mr. Joseph Kiyumbi Sungwa the learned advocate while the applicants were represented by Miss Benadetha Shayo the learned advocate. In his written submissions, the respondent's counsel opted to drop some of the preferred objections, some were merged and argued only seven grounds in total.

Submitting for the 1st preliminary objections, Mr. Sungwa for the respondent argued that the Application is incompetent and thus untenable in law for contravening the mandatory provisions of the law, to wit, Section 20(1)(b) and (c) of the Interpretation of Laws Act [Cap. 1 R.E. 2019] ("ILA"). He maintained that the application has been brought under the Probate and Administration of Estate Act without citing the chapter number and the year it was passed contrary to what the law requires. He relied on the case of **Kenedy Mhoro Versus Clementina Komba And John Mkinga**, Miscellaneous Land Case Application No. 12 Of 2020 (HC-Unreported), suggesting that the omission renders the application defective.

In his second point, Mr. Sungwa argues that the joint affidavit sworn by the Applicants is bad in law and thus untenable as it is tainted with lies/false information. He in elaboration said the applicant's averment in paragraph 11(b) of the supporting affidavit that Probate and Administration No. 102 of 2020 was filed in court during the pendency in court matrimonial cause no. 8 of 2020 is a false averment because Probate and Administration No. 102 of 2020 was filed on 30th December 2020 while Petition for divorce was withdrawn on 12th December 2020. Citing to the court the case of **Watwego Kinanda Versus Jane Moris And Another,** Misc. Civil Application No. 537 OF 2017(unreported)*,* he said, an affidavit that is tainted with untruths is no affidavit at all and cannot be relied upon to support an application.

Thirdly, the respondent's counsel pointed out that the joint affidavit sworn by the Applicants is fatal and thus untenable in law for containing hearsay. He said the Applicants have erroneously verified in their affidavit that the contents of paragraph number 10 are true to the best of their knowledge while it is Remmy Hamis Puka who filed the probate case at Temeke District Court which was later dismissed and not them. Therefore, whatever transpired in Court at Temeke is best known by Remmy Hamis Puka and not the Applicant. He cited the case **Uganda versus Commissioner of Uganda Versus Commissioner Of Prisons Ex Parte Matovu***, [1966]1 EA 514*, and **Anatol Peter Rwebangira Versus Principal Secretary, Ministry Of Defence And National Service, Attorney General,** Civil Application No. 548/04 OF 2018 (CAT unreported) stressing that the Applicants ought to have stated in the verification clause that the contents of paragraph 10 of the affidavit are information received from Remmy Hamis Puka and not from their knowledge.

Fourthly, he asserted that the joint affidavit sworn by the Applicants is defective and thus untenable for containing opinions, arguments, and conclusions. His contention here is that paragraph 11(c) of the joint affidavit, contains matters of beliefs.

The fifth point argues that the jurat of attestation in the joint affidavit sworn by the Applicants, Remmy Hamis Puka and Modest Sebastian Tesha are fatally defective or failed to disclose how the Commissioner for Oaths came to know the deponents. He on this relied on the case of Thomas **John Paizon Versus Khalid A. Nongwa**, Land Application No. 249 Of 2014 (HIGH COURT DSM), and section 10 *of the Oaths and Statutory Declarations Act Cap. 34 R.E. 2002*

Sixth, the affidavit sworn by Remmy Hamis Puka is fatally defective for containing facts/averments which are irrelevant and not reflected or supported by the prayers in the chamber summons. He said, having been mentioned in paragraph 10 of the joint affidavit, Remmy Hamis Puka was duty bound to swear an affidavit in respect of that fact only and not more than that.

Respondents counsel seventh point was that the supporting affidavit of Modest Sebastian Tesha who is neither a party to Miscellaneous Civil Application No. 334 of 2022 nor mentioned in the Applicants' joint affidavit is untenable in law for want of prayers in the chamber summons to support it and for want of relevance to the instant application. He contended that, for a person to swear or affirm a supporting affidavit he or she must have been mentioned in the affidavit by the Applicants or the Respondent in respect of a particular information he might have provided

to them. But in this case, Modest Sebastian Tesha has sworn a supporting affidavit which is attached in the Applicant's joint affidavit without being mentioned by the Applicants in their joint affidavit or his averments being reflected therein. He invited the court to expunge both the affidavit by Remmy and Modesta Sebastian. And lastly prayed for the striking out of the application with costs.

The applicant's counsel began his submission by attacking the respondent's submissions for citing Misc. Civil Application No 646/2021 instead MISCELLANEOUS APPLICATION NO. 334 OF 2022, accusing him of not filing any submission in support of the preliminary objections she raised in this matter as ordered by this court with a prayer to have the preliminary objections struck out.

Arguing the points raised in the alternative, the applicant's counsel said, Section 20 (1) of The Interpretation of Laws Act, [Cap. 1 R.E. 2019) is the general provision that can be used only when the specific Law has not provided how the law is to be cited. Stressing that the applicants have cited the Probate and Administration of Estates Act*,* as directed in Section 1 (1) of the said Act. And that had it been Parliament intended to include the year in which the Act was passed or the chapter given to the act it would have been stated in the citation section. In any case, she argued, none or wrong citation of the law is not fatal as long as the court has the requisite powers to entertain the matter**.** He cited to the court the case of **A.M. Steel & Iron Mill Vs Tanzania Electricity Supply Company Ltd**, Misc. Civil Application No. 02 Of 2021 And **Joseph Shumbusho Vs Mary Grace Tigerwa And 2 Others**, Civil Appeal No. 183 OF 2016 (Ca-Unreported). She in the alternative sought assistance from the overriding objective principle provided under Section 3A (1) and Section 3B (1), (2)

(a) (b) (c), and (2) of the Civil Procedure Code, Cap. 33 R.E 2019 inviting the court to disregard minor irregularity or technicality i**f any** to abide by the need to achieve substantive justice.

Responding to the second preliminary point raised, Ms Benadetha said, the argument that the applicant's averment in paragraph 11 of their joint affidavit is false is a wrong contention as it is not in dispute that Respondent had filed *Matrimonial Cause No 8 of 2020* and she requested the same to be withdrawn after the demise of Late JOHN MAKITAUO @ JOHN PHILIPO PUKA. The applicants have not supplied any false information or any lies. On the contrary, she said, it is the Respondent who is cheating and misleading the court. She prayed that the 2nd point of objection is overruled.

On the third ground, Ms Bernadeta said, the contents of paragraph 10 of the Applicants' affidavit are not hearsay. They are the facts within the knowledge of the Applicants as the persons involved in the preparation of the application filed by REMMY HAMIS PUKA as the beneficiaries who guided the administrator on matters which were not in his knowledge and that they were also shown the documents filed in court.

Ms. Benadeta also opposed the fourth objection faulting the affidavit for containing opinions, arguments, and conclusion. She contended that the contents of paragraph 11(c) of the affidavit of the applicants are the advice received from the advocate that they honestly believe to be true. He referred the Court to the decision of **Subramaniam Vs Public Prosecutor** 1956 1 WLR on page 970 para 3 where the Privy Council held.

"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. ***It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement****. It is not hearsay and is admissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."[*emphasis added].

She was of the view that even if paragraph 11(c) of the applicant's affidavit would contain opinion, arguments, and conclusion as alleged by the respondent it could not make the affidavit so offensive as to cause an application to be struck out and thereby deny the court an opportunity to determine the matter on merits. She invited the court to apply the principle in the case of **Dar Es Salaam Education And Office Stationery Vs. Nbc Holding Corporation And Others,** Civil Application No. 39 of 1999, CA –DSM (unreported)**, where** the court held**:**

"It is correct that an affidavit is required to contain only matters of fact and not arguments. it is equally correct that at the hearing an applicant is required to present arguments based on the facts deponed to the affidavit. So, according to O. XIX Rule 3, the sequence is that facts are given in the affidavit while arguments are made in court. If that is the case, could it, in the name of justice, be said that advancing arguments in an affidavit is so offensive as to cause an application to be struck out and thereby deny this final Court of Justice an opportunity to determine the matter on merits? Forms and procedures are

handmaids of justice and should not be used to defeat justice…..I hold the same view concerning prayers contained in the affidavit. Prayers have to be made in Court at the hearing otherwise there is no point in making the Application. So making them prematurely in an affidavit should not be the reason for avoiding determining the Application".

On the issue of **jurat of attestation** Ms. Benadetha argued that all three affidavits had complied with the provisions of Section 8 of the Notary Public and Commissioner for Oaths Act, Cap. 12 R.E. 2002 as amended by Section 47 of the Written Laws (Miscellaneous Amendments) (no. 2) Act, 2016, and Section 10 of The Oaths and Statutory Declarations Act [CAP. 34 R.E. 2019]. To her, the submissions by the respondent's counsel that the attesting officer has not indicated in the jurat of attestation whether he knows the deponents personally or was introduced to him by Bernadetha Shayo is incorrect because the Attesting officer has indicated that the deponents were introduced to him by BERNADETA SHAYO who is known to him personally.

Regarding the Affidavit sworn by Remmy Hamis Puka and Modesta Sebastian Tesha, the applicant's counsel said, the Respondent's argument that REMMY HAMIS PUKA was duty bound to swear an affidavit in respect of facts on matters deposed in the Affidavit of the Applicants is not supported by any rule to that effect. He added that the affidavit is written evidence containing statements of facts in which the deponent deposes either of his knowledge or information from another person which he believes to be true. And an affidavit can be sworn not only by the party to the Application but by any person who knows the facts in issue. Ms. Benadeta said the Affidavits of REMMY HAMIS PUKA and MODEST

SEBASTIAN TESHA are relevant to the Application No. 334 of 2022 because they have been mentioned in the Chamber Summons and the Deponents have knowledge of the contents contained thereto. She last argued with the court to overrule all the preliminary objections with costs.

I have considered the parties' arguments for and against the preliminary objections brought before the court. The first preliminary objections should not delay the court further. Though there is indeed an omission by the applicants to specify the chapter number of the Act they are referring to and the revised edition, such omission in my view is minor and occasion no injustice to the respondent. Faced with a similar issue, the Court of Appeal in **Joseph Shumbusho Vs Mary Grace Tigerwa And 2 Others**, Civil Appeal No. 183 Of 2016 (Ca-Unreported) held:

> *"Citation of superfluous provisions of the law in the chamber application does not make the application incompetent. Given the fact that the respondents had cited section 49 of the Probate and Administration Act which deals with revocation and removal of the administrator the citation of the inapplicable provision of law did not make the Respondents' application incompetent."*
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> This court has also in the case of A**.M. Steel & Iron Mill Vs Tanzania Electricity Supply Company Ltd,** Misc. Civil Application No. 02 Of 2021 said:
>
> *"…it is a settled legal stance now that, none or wrong citation of the law is not fatal as long as the court has the requisite powers to entertain the matter".*

The first point of preliminary objection is overruled.

The second and third preliminary objections are not pure points of law worth consideration at this stage of the proceedings because to resolve the points properly the court would need evidence as to when the Matrimonial Cause No. 8 of 2020 was withdrawn vis Avis the date of the lodging of this application and evidence relating to how the applicant came to know the facts in respect to Probate case at Temeke District Court. The two objections do not meet the test set out in **Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd** [1969] E. A 696 where the position was made that a preliminary point of law cannot be raised if any fact has to be ascertained or what is sought is the exercise of the judicial discretion. Several cases have cited with approval the **Mukisa's Biscuit** case (supra) including that of **Karata Ernest & Others v Attorney General**, Civil Revision No. 10 of 2010 (unreported) where the court of Appeal gave a firm holding that :

> *"Where a point taken in the objection is premised on issues of mixed facts and law, that point does not deserve consideration at all as a preliminary objection. It ought to be argued in the normal manner when deliberating on the merits or otherwise of the concerned legal proceedings*."

These two objections are overruled.

The next point raised is that the applicant's joint affidavit is untenable for containing opinion, argument, and conclusion. This point was specifically attacking paragraph 11(c) of the supporting affidavit. I have revisited the applicant's affidavit. The content of the refereed paragraph was verified to contain advice received from the applicant's advocate and which the applicants honestly believe to be true. Explaining the rules of affidavits, the court in the case of **UGANDA VERSUS COMMISSIONER OF**

PRISONS EX PARTE MATOVU (supra) cited by the respondent's counsel, the Court held: -

> *"As a 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 the witness deposes either of his knowledge or* ***from information which he believes to be true****. Such affidavit must not contain extraneous matters by way of objection or prayer or legal argument or conclusions."*

Insisting on the same point the court in **Kubach & Saybrook Ltd vs Hasham Kassam & Sons Ltd** [1972] HCD 228 HCD said, a court will not act upon an affidavit that does not distinguish between matters stated on information and belief and matters deposed to from the deponent's knowledge or as regards the former which does not set out the deponent's means of knowledge of his grounds or belief.

In a verification clause, the deponent is required to indicate facts he asserts to be true of his knowledge and those based on information or beliefs. This requirement is said to enable the court to test the genuineness and authenticity of allegations and to make the deponent responsible for the allegations. See **Lisa E. Peter v. Al- Hushoom Investment**, Civil Application No. 147 of 2016 (CAT- unreported). The Applicants verification clause under scrutiny reads as follows:

> *"VERIFICATION*
>
> *WE* ***REJOICE PHILIPO PUKA, JAQUELINE PHILIPO PUKA, AND IRENE PHILIPO PUKA****, do hereby verify what we have stated in paragraphs 1,2,3,4,5,6,7,8,9,10, and 12 and herein*

above is true to the best of our knowledge except for paragraphs 11(a), (b), (c) and (d) which is true advice from our advocate BENADETH SAHAYO."

The verification clause in the attacked affidavit has disclosed the source of the information in paragraph 11(c) as required by the law, thus falling under the ambit of the expected information in an affidavit. This point is as well baseless.

In the seventh point, the jurat of attestation of the affidavits in support of applications is being attacked for failure disclose as to how the Commissioner for Oaths came to know the deponents. The applicant's counsel was specific that the name of the identifying officer is indicated under section 8 of the Notary Public and Commissioner for Oaths Act, as amended by Section 47 of the Written Laws (Miscellaneous Amendments) (no. 2) Act, 2016, and section 10 of The Oaths and Statutory Declarations Act [CAP. 34 R.E. 2019]. My interest is section 10 of The Oaths and Statutory Declarations Act which is worded:

"Where under any law for the time being in force any person is required or is entitled to make a statutory declaration, the declaration shall be in the form prescribed in the Schedule to this Act".

The Prescribed form reads:

"This Declaration is made and subscribed to by the
said A. B.
who is known to me personally (or who has been identified to me by .....; (Signature of the person taking the declaration) the latter being known to me personally) this ..... day of (Signature, qualification, and address of the person taking the declaration)"

I have read the jurat of attestation of the affidavit under attack. There is total compliance with s. 10 of the Act above. It needs no minuscular eyes to discover that all the deponents were introduced to the commissioner for oath by Benadeth Shayo. Though there is no cancelation of one of the options to show whether the commissioner was personally familiar with the deponed, or deponents were introduced to him by another person, the blank space in the jurat left for inserting the name of the person through whom the commissioner for oath knew the deponed were all filled in compliance with the law

The last issue is on the legality of the affidavits by Remmy Hamis Puka and Modesta Sebastian Tesha for not being a part of the application at hand. It is a rule well settled that "An affidavit which mentions another person is hearsay unless that person swears an affidavit as well. See for instance the decision in **Sabena Technics Dar Limited V. Michael J. Luwunzu,** Civil Application No. 451/18 of 2020, (Unreported). In **Benedict Kimwaga V. Principal Secretary, Ministry of Health**, Civil Application No. 31 of 2000, (Supra) it was held that: -

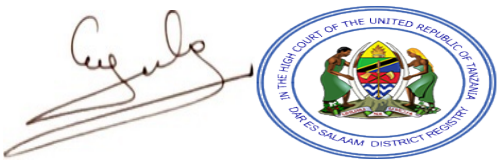
"If an affidavit mentions another person, then that other person has to swear an affidavit. However, I would add that that is so where the information of that other person is material evidence because, without the other affidavit, it would be hearsay. Where the information is unnecessary, as is the case here, or where it can be expunged, then there is no need to have the other affidavit or affidavits."

The general rule is an affidavit is a substitute for oral evidence and therefore must be sworn by a person accustomed to the facts deponed.

Here, the applicants are the ones accustomed to the facts of the case they have initiated. Their affidavits in support of the application identify with precision facts in their personal knowledge and information obtained from Remmy Hamis Puka but which they believe to be true. The applicant's affidavit has no mention of Modesta Sebastian Tesha and whether they had ever obtained information relating to the instant application from her. Had the applicants intended to use the information obtained from Modesta Sebastian, they would have acknowledged the facts obtained from her in their joint affidavit naming her as the source of the information before she affirmed the facts through an affidavit as required by the law. See **Benedict Kimwaga V. Principal Secretary, Ministry of Health (Supra**). It is obvious that the affidavit by Modesta Sebastian Tesha is not maintainable in this case. Her affidavit is not linked anyhow with the applicants and /or the application. It simply contains extraneous matters not related to the application at hand. This objection is thus legitimate, and the only viable option is to expunge the wrongly attached affidavit by Modesta Sebastian Tesha from the record as I hereby do with an order overruling the rest of the preliminary objections raised.

Since the chamber summons is still intact supported by a joint affidavit by the applicants and that of Remmy Hamis Puka, the application is ordered to proceed on merit. Order accordingly.

DATED at **DAR ES SALAAM** this **16th** day of **JUNE** 2023.



E.Y. MKWIZU
JUDGE
16/6/2023