

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO.345 OF 2022**

*(Arising from Civil Case No.122 of 2016 High Court at Dar es Salaam District Registry)*

**RAMADHANI KIPENYA.....1<sup>ST</sup> APPLICANT**

**FAITH KYANDO.....2<sup>ND</sup> APPLICANT**

**OSWALD MWINUKA.....3<sup>RD</sup> APPLICANT**

**INNOCENT PETER.....4<sup>TH</sup> APPLICANT**

**VERSUS**

**ST. JOSEPH UNIVERSITY IN TANZANIA.....1<sup>ST</sup> RESPONDENT**

**TANZANIA COMMISSION FOR UNIVERSITIES.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

*16/05/2023 & 28/07/2023*

**POMO, J**

Under section 14(1) of the Law of Limitation Act, [Cap.89 R.E.2019]  
the Applicants are moving this court making the following prayers, and for  
easy of reference, I reproduce them verbatim: -

- 1. That Honourable court may be pleased to extend time for the applicants to file an application for Review against the **Judgment and orders of His Lordship Kulita, J dated 11<sup>th</sup> February, 2021***
- 2. Costs of this application be provided for*
- 3. Any other orders this Honourable Court may deem fit & equitable to grant*

The Application is supported by an affidavit deponed jointly by the Applicants on 2<sup>nd</sup> August, 2022.

The Application is contested. On 7<sup>th</sup> September, 2022 there was filed a counter affidavit termed "**2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS COUNTER AFFIDAVIT**" deponed by one **ROSERINE JOSEPH RUTTA**. The said deponent introducing herself, under the first paragraph of it to be the Principal Officer of the 2<sup>nd</sup> Respondent and stated nothing in respect of the 3<sup>rd</sup> Respondent. Yet, there is another counter affidavit filed in court on 15<sup>th</sup> September, 2022 which is deponed by **FLORENTINA NINAH** who didn't disclose her capacity on which she deponed the same, the counter affidavit which does not state to whom it belongs among the parties to the Application herein.

The background, albeit briefly, to the facts leading to the matter herein can be stated as follows. The Applicants, who were the 1<sup>st</sup> Respondent's students, filed in this court Civil Case No.122 of 2016 against the Respondents claiming, among others, for refund of Tshs.1,097,929,000/- being the payment they had already paid to the 1<sup>st</sup> Respondent for their study programs. Upon full trial, this court, on 21<sup>st</sup> February,2021 handed down its judgment by dismissing the Applicants' suit for want of merit.

Aggrieved, the Applicants on 9<sup>th</sup> March,2021 did lodge in the High Court a Notice of Appeal to the Court of Appeal together with a letter the Deputy Registrar of the High Court applying for necessary documents for record of appeal preparation to appeal to the court of appeal.

Again, on 27<sup>th</sup> October, 2021, the applicants lodged a notice of withdrawing the Notice of Appeal to the Court of Appeal. On 3<sup>rd</sup> November,2021 the Deputy Registrar of the Court of Appeal issued an Order withdrawing the Applicants' Notice of Appeal sought by them to be marked withdrawn. It is not known when the same was supplied to them.

Following the withdrawing of the Notice of Appeal, the Applicants, on 18<sup>th</sup> November, 2021 filed Miscellaneous Civil Application No.619 of 2021

before this court applying for extension of time to apply out of time for review of Civil Case No.122 of 2016. On 27<sup>th</sup> June, 2022 the Application was struck out by the court Hon. S.E. Kisanya, J the same having been found to be incompetent before the court.

That was not the end, the Applicants on 16<sup>th</sup> August, 2022 filed the herein Application for extension of time.

When the Application was called on for hearing on 3/05/2023, M/S Bernadeta Chacha, learned advocate appeared for the Applicants while Mr. Jerome Msemwa, learned advocate appeared for the 1<sup>st</sup> Respondent. M/S Roserine Rutha, State Attorney, appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. Before hearing could take off, this court observed and thereby raising two *suo motu* issues against the Applicants' Application as follows: -

**"Court:** *I have observed that the application is supported by a joint affidavit affirmed/sworn by both Muslims and Christians jointly, then, whether it is proper the affidavit to be sworn in that manner?*

*Again, the Application herein seeking for extension of time doesn't show as to where it originated, then, whether the same is a competent application.*

*Basing on the above, parties are invited to address the court on the competence or otherwise of the application".*

By consensus, it was agreed the above raised two issues and the merit of the Application be argued together and the same be by way of written submissions. Parties complied the schedules of filing written submissions. I am grateful to them for their job well done

Submitting on the first *suo motu* issues raised, while admitting on irregularities in the chamber summons on failure to indicate where the application originated from, Ms Bernadeta argued that the affidavit in support of the application shows the Application to have originated from Civil Case No.122 of 2016 before this court. That, the court be guided by article 107A(2)(e) of the Constitution of the United Republic of Tanzania to the effect that courts should not be tied up with technicalities in dispensation of justice.

Again, asked this court to be guided by the Principle of Overriding Objectives brought under Written Laws (Miscellaneous Amendments) No.3 Act of 2018 and the case of **Yakobo Magoiga Gichere versus Peninah Yusuph**, Civil Appeal No.55 of 2017 CAT at Mwanza (Unreported). Concluding on the above first issue, she prayed for amendment

Responding, Naringwa Sekimanga, learned state attorney for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent argued that the pointed irregularity is not fatal and

therefore cannot render the application incompetent as no one is prejudiced by it

The response by the 1<sup>st</sup> respondent is that, the Applicants' Application does not show where it originated. That, even in the body of chamber summons, the case intended to be reviewed is not indicated. That, such failure is against the law.

Having come across the decision of the Court of Appeal in **Samwel Sichone versus Bulebe Hamisi**, Civil Application No.8 of 2015 CAT at Mbeya (unreported), at page 4, referring the case of **The Principal Secretary, Ministry of Defence and National Service versus Devram Valambhia** [1992] TLR 387, which expounded the principle of complementarity stating thus: -

***"A notice of motion and the accompanying affidavit are in very nature of things complementary to each other, and it would be wrong and indeed unrealistic to look at them in isolation. The proper thing to do is to look at both of them and if on the basis of that it is clear what relief is being sought then the court should consider and determine the matter regard being had to the objection if any, raised by the opposite party".***

Guided by it, I am convinced and agree with both Ms. Bernadetha Chacha, learned counsel for the Applicants and the learned stated attorney for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that on this aspect, the Application is competent before the court

In regard to the second issue raised, it is the Applicants' submission that since in their joint affidavit have used the word **"DO HEREBY AFFIRM/SWEAR"** then, according to them, it meant those who are Muslims affirmed while Christians did swear hence their joint affidavit is not defective.

On this, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' reply is that it is a fatal irregularity which warrant this court to struck out the application. In support, cited the case of **Venceslaus Malasi Kimario versus Akilimali Abdallah Kambangwa**, Misc. Land Application No.199 of 2021 High Court Land Division at Dar es Salaam (Unreported) in which this court took that cause when it was faced with akin situation.

The 1<sup>st</sup> Respondent basically supports the stance taken by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents arguing that the Applicants ought to have filed separate affidavits.

From the parties' submissions, there is no denial that their affidavit supporting the application is a joint affidavit by both Muslims and Christians. While the Applicants are of the argument that, as long as the word "AFFIRM/SWORN" is used in their joint affidavit then the same is a proof that those who are Muslims did affirm and Christians did swear. If I am to agree with the Applicants' argument that the word "AFFIRM/SWORN" meant so, how about the jurat of attestation in that affidavit which is taken separately by each applicant and yet all the four applicants are indicated to have been **sworn** before the commissioner of oaths? In other words, the word "affirm" doesn't appear anywhere in all the jurats taken by each applicant.

Affidavit being evidence in a written form have to be administered under oath before the commissioner for oaths. Whereas Christians do swear; Muslims do affirm. In **Marko Patrick Nzumila and Another Versus The Republic**, Criminal Appeal No.141 of 2010 referred at page 7 - 8 in **Lazaro Daudi @ Manuel versus The Republic**, Criminal Appeal No.376 of 2015 CAT at Tabora (Unreported), considering section 4(a) and (b) of the Oaths and Statutory Declarations Acts, Cap.34 of the Revised Laws, the Court of Appeal had this to state: -

*"The effect of section 4 of the law, is that in all judicial proceedings, all witnesses who are **Christians must take oaths, and all others witnesses** (including those without religious beliefs) **have to be affirmed**".*

Therefore, guided by the court of appeal decision in **Lazaro Daudi** (supra) together with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' cited case of **Venceslaus Malasi Kimario** (supra), I hold that the Applicants' joint affidavit is incurably defective on the ground that while the same is by four Applicants who are of different denominations, Christians and Muslims for that matter, yet it is not known who affirmed and who is sworn. Consequently, I declare the Application to be incompetent before the court for being supported by and incurably defective affidavit.

In the upshot, I hereby struck out the Application with no order as to costs. It is so ordered

Right of Appeal fully explained

Dated at Dar es Salaam this 28<sup>th</sup> day of July, 2023




  
**MUSA K. POMO**

**JUDGE**

**28/07/2023**

Ruling is delivered on this 28<sup>th</sup> July, 2023 in presence of M/S Roserine Rutha, learned State Attorney for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents but in absence of the Applicants and the 1<sup>st</sup> Respondent



  
**MUSA K. POMO**

**JUDGE**

**28/07/2023**