

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI**

MISCELLANEOUS CIVIL APPLICATION NO. 30 OF 2022

(Arising from the Judgment of the High Court of Tanzania at Moshi dated 25/10/2022 in PC Probate and Administration Appeal No.6/2022, which arose decision of District Court of Moshi at Moshi in PC Probate and Administration Appeal No. 3/2022, which originated from Moshi Urban Primary Court Probate in Administration Cause No.169/2021)

JULIUS ALBERT MWASE.....APPLICANT

Versus

HAMIS OMARY MOSE.....RESPONDENT

RULING

10th & 31st August, 2023

A.P.KILIMI, J.:

The applicant hereinabove, has moved this court under rule 46 (1) of Tanzania Court of Appeal Rules 2019 by way of chamber summons supported his affidavit praying for the following orders;

- a) That the Court be pleased to certify that there is a point of law arising from the judgement of the Court by Honorable Simfukwe J. delivered on the 25th day of October, 2022 and the Applicant be allowed to Appeal to the Court of Appeal.
- b) Any, other order(s) or relief(s) this Honorable Court may deem fit and just to grant for.

When this information was communicated to the respondent, the respondent through the service of Elikunda Kipoko learned advocate replied by counter affidavit together with the notice of preliminary objections on point of law as follows;

1. It is filed out of time;
2. It is based on fatally defective affidavit; and
3. It has failed to cite the law.

Therefore, this is the ruling in respect to above objections. When the matter came for hearing, as said Mr. Kipoko appeared for respondent while the applicant enjoyed the service of Mr. George Mroso learned advocate. Both counsels proposed the application be argued by way of written submission, the court acceded to their prayer and they duly submitted as per schedule ordered. I will refer to them when the need arises.

Submitting in support of the preliminary objection Mr. Kipoko learned advocate decided to drop the first point and remained two points objections. Arguing in respect to the second point of objection, Mr. Kipoko submitted that the affidavit supporting the application contain a defective jurat of attestation as it contravenes the provision of section 10 of the Oaths and Statutory Declaration Act, [Cap 34 R.E. 2019]. This is because it was not

clear indicated in the jurat of attestation regarding whether the deponent was introduced, or was personally known to the attesting officer.

The counsel for respondent argued further that, this is a fatal defect which goes to the root of the application, since the jurat of attestation failed to follow the procedures lay down by the law, so the affidavit should be struck out as well as the application. To bolster this stance, the counsel referred the case of **DB Shaprya & Co. Ltd vs. Bish International BV**, [2002]¹ EA 47 and **Capital Drilling (T) Limited and 4 others vs. Sirili Ileti Mushi**, Misc. Commercial Appl. No. 16 of 2019 HC (Commercial Division) at Mwanza.

In respect to third point, Mr. Kipoko submitted that this application has been brought under "Rule 46 (1) of the Tanzania Court of Appeal Rules, 2019 and any other law, since the case originated from the primary court then the jurisdiction of this court was not properly obtained, the counsel insisted the proper law to cloth this court with jurisdiction to grant certificate on point of law, the applicant should have cited Section 5(2)(c) of the Appellate Jurisdiction Act Cap. 141 R.E. 2019 as well as Rule 45 (a) of the Tanzania Court of Appeal Rules (supra). Thus, this court is improperly moved. To buttress his view, the counsel referred the case of **Petro Andrea**

vs. Mwishehe Abdallah, Misc. Civil Application No 58 of 2008 HC at Dar es Salaam (unreported).

Responding to the above, applicant's counsel contended that the affidavit of the Applicant has clear certification of a person signed therein, also he did so in the presence of an authorized officer, further it shows that, the deponent appeared before him on the date and at the place indicated thereon, and lastly that he administered an oath to the signer, who sworn to the contents of the document.

In respect to the provision of section 10 of the Oaths and Statutory Declaration Act, (supra) and the case referred by respondent of **DB Shaprya & Co. Ltd vs. Bish International BV** (supra) and **Capital Drilling (T) Limited and 4 others vs. Sirili Ileti Mushi** (supra). The learned counsel of the applicant contended that the Affidavit of one Julius Albert Mwase followed all the requirement of the cited law and other laws governing conduct and practices of an Affidavit. He contended further that the cited case was distinguishable and inapplicable to the case at hand since in the cited case a party in a jurat did not insert neither his name nor a place and date when the oath was taken while in the case at hand it is clear that, the name of the Deponent is clearly indicated 'JULIUS ALBERT MWASE' a

place being Arusha Region and a date when it was taken being 24th November, 2022. Further he submitted that it was clear that the Deponent was personally known to the Commissioner for oaths who administered the oath.

Furthermore, the learned counsel submitted on the issue of interest of justice and the doctrine of overriding objective which requires the courts to deal with cases justly, and to have regard to substantive justice so as to cut back on over-reliance on procedural technicalities. Hence, he urged this court to choose the path of substantive justice and hear the matter on merit as it will not in any way prejudice the Respondent's rights rather will solve once and for all the Probate and Administration of Estate of the late Fatuma Selemani Hamza and pave the way for beneficiaries to get their rightfully shares.

In respect to allegation that the application has cited improper law, the learned counsel for applicant contended that, the cited provision was proper, but added it is now a position in our jurisdiction that, wrong citation of the enabling provision is not fatal in as long as the Court has jurisdiction to entertain the matter. He contended further that the court's jurisdiction to entertain this application has not been ousted as the law is settled, whenever

such omission occurs the Court has power to order parties to insert the omitted provision (if there is an omission). To substantiate his argument the learned counsel referred to the case of **Amani Girls Home vs. Isack Charles Kanela**, Civil Application No. 325 /08 of 2019 CAT at Mwanza (unreported).

In his brief rejoinder Mr. Kipoko submitted that jurisdiction is a creature of law, therefore the applicant ought to have cited the law which confers the court with jurisdiction to grant the relief sought, short of that the jurisdiction can't be said to exist without pointing out the law conferring jurisdiction. He urged this court to find inspiration in the case of **Antipas Romani Tairo vs. Sikudhan Jafari**, Misc Land Application No. 531 of 2020. HC (Land Division) at Dar-es-Salaam.

Mr. Kipoko's further distinguished the case of **Amani Girls Home** (supra) that the same was before the Court of Appeal of Tanzania where the law and practice governing applications is different from this court. He argued that Rule 48(1) of the Rules does confer jurisdiction to the Court of Appeal of Tanzania to insert provision which was omitted in the application while in the application at hand there is no such law empowering this court to that effect. He also added that the requirement to cite the enabling

provision was not a mere technicality which can be overridden by oxygen principle, thus urged this court, the only remedy is to struck out this application.

Now, having gone through both counsels' submissions for and against the preliminary objection, I will therefore proceed to examine the points of objection raised. It was Mr. Kipoko's submission that the present application was incompetent as it was based on a fatally defective affidavit because on the jurat of attestation where it was not stated whether the deponent was introduced or was personally known to the attesting officer. In my perusal of appellant's affidavit, I am in agreement with the defect pointed out by Mr. Kipoko, but the only question I have asked myself is whether the defect is curable. It is my considered view, since the deponent signed and the commissioner for oath signed, that omission does not affect the substance of the affidavit and does not occasion failure of justice to the respondent. It is therefore my considered opinion this defect deserves to be pardoned and cured under the principle of overriding objective in order to pave way for substantive justice. (See the case of **Yakobo Magoiga Gichere vs. Peninah Yusuph**, [2018] TZCA 222 TANZLII).

On the third point of objection Mr. Kipoko has faulted the applicant for not citing a relevant provision of the law. This application was preferred under Rule 46(1) of the Tanzania Court Appeal Rules and for easy reference I reproduce hereunder;

*"Where an application for a certificate or for leave is necessary, it shall be **made after the notice of appeal is lodged**"*

[Emphasis added]

Mr. Kipoko further urged this court that the proper provision ought to be used by the applicant is Section 5(2)(c) of the Appellate Jurisdiction Act Cap. 141 R.E. 2019 as well as Rule 45 (a) of the Tanzania Court of Appeal Rules (supra). For purpose of this objection, I wish also to reproduce the provision of Section 5(2)(c) of the Appellate Jurisdiction Act (supra) which provides;

*"5(2)(c) **no appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrates' Courts Act unless the High Court certifies that a point of law is involved in the decision or order;**"*

[Emphasis added]

From the excerpt of the above provisions. The point of consideration is whether the defect alleged is fatal as to render the application incompetent. In my interpretation of the above laws, the later provision above gives this court mandatory power to certify on the point of law, while the rule quoted earlier provides for procedure of filing the application at the court that notice of appeal must be lodged first. This in my opinion does not procure jurisdiction of this court, but the later do. Therefore, I am settled as rightly submitted by Mr. Kipoko this court jurisdiction was not properly obtained by using the said rule of the Court of Appeal.

It is a trite of law that wrong citation or failure to cite proper provisions of law it renders the application incompetent. This was held by the Court of Appeal in **China Henan International Co-Operation Group vs. Salvand Rwegasira** [2006] TLR 220. The court had the same view in **Majura Magafu and Peter Swai vs. The Managing Editor, Majira Newspaper and Another**, Civil Application No. 203 of 2013, CAT at DSM (unreported). As well in the case of **Jimmy Lugendo vs. CRDB Bank Ltd. Civil**, Application No. 171 of 2017, CAT at DSM (unreported). In all these cases the Court of Appeal had the same view that wrong or non-citation

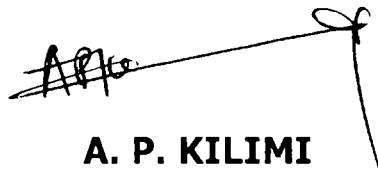
renders the application incompetent as the court is not able to grant what is prayed.

I also subscribe with the contention of Mr. Kipoko that the case relied by the applicant of **Amani Girls Home** (supra) is distinguishable because the same was in the Court of Appeal of Tanzania where the law and practice governing applications therein under Rule 48(1) of the Rules allow the court to insert provision which happened to be omitted in the application. However, I am mindful with introduction of the "Overriding Objective" (oxygen principle) under Section 3 A (1) and (2) of the Civil Procedure Code Cap.33 R.E. 2019 which was enacted through section 6 of the Written Laws (Miscellaneous Amendments) (Act No. 8 of 2018) courts need to focus on substantive justice in making decisions instead of dwelling on technicalities. But this in my view applies when the defects do not go to the root of the case. In the matter at hand, by citing the said provision this court is not moved, thus lacks legs to stand. See **Mondorosi Village Council & 2 Others vs. Tanzania Breweries limited & 4 Others**, Civil Appeal No. 66 of 2017 CAT at Arusha, and **SGS Societe Generale De Surveillance Sa & Another vs. VIP Engineering & Marketing Ltd & Another**, Civil Appeal No. 124 of 2017 CAT at Dar-es-Salaam. (Both unreported).

For the aforesaid reasons, I am satisfied that the third Preliminary Objection raised above is meritorious, and I hold that the application is defective for wrong citation of the enabling provision of the law, and consequently I proceed to struck out this application with costs forthwith.

It is so ordered.

DATED at **MOSHI** this day of 31st August 2023.

A handwritten signature in black ink, appearing to read 'A.P. Kilimi', is written over a horizontal line. A long, thin vertical line extends downwards from the right side of the signature.

A. P. KILIMI

JUDGE

31/8/2023

Court: Ruling delivered today on 31st day of August 2023 in the presence of the respondent. Applicant and Mr. Kipoko learned counsel for respondent absent.

Sgd: A. P. KILIMI

JUDGE

31/8/2023