IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CIVIL REFERENCE NO. 07 OF 2023

(Arising from Taxation Cause No. 05 of 2023 of the High Court of Tanzania at Musoma)

BETWEEN

SARA YONA ..... APPLICANT

VERSUS

NG'AMBWA SARANGA ..... 1ST RESPONDENT

WEBI SAMWELI ..... 2ND RESPONDENT

GUMARI KISHERI ..... 3RD RESPONDENT

SAMSON JONAS ..... 4TH RESPONDENT

MAGIGI KISUNDA ..... 5TH RESPONDENT

RULING

02nd & 20th November, 2023

M. L. KOMBA, J.:

The applicant filed the present application before this court, seeking for the following orders;

1. That, this honorable court be pleased to make reference to the order of cost awarded by taxing officer and deduct the cost awarded to the respondent by the taxing officer.
2. The cost be provided for.
3. Any other relief/order (s) as the court may deem just and fit to grant.

The application was premised under rule 7 (1) and (2) of the Advocate Remuneration Orders, GN. No. 264 of 2015 and accompanied by an affidavit deponed by the applicant's advocate **Emmanuel Gervas.**

The respondents filed a counter affidavit to contest the applicant's application, but together with, they filed a notice of preliminary objection on five points which can be summarized as follows;

1. *That, this application is misconceived and improperly filed.*
2. *Application is wrongly filed for being attached with decree having two different dates of ruling.*
3. *Application has been filed against a wrong person who was not party to the former proceedings.*
4. *Application is defective for containing arguments and conclusions, lies and untrue statement.*

5. Application is misconceived and incompetent for defective jurat of attestation.

It is the position of law that, whatever there is a preliminary objection, the Court has to deal with it first before diving into the merit of the case. See the case of **Deonesia Onesmo Muyoga & 4 Others vs Emmanuel Jumanne Luhahula,** Civil Appeal No. 219 of 2020 CAT at Tabora. Therefore, as a custom I did the same by inviting the parties to address on the points of preliminary objection.

During the hearing of the preliminary objection the applicant was represented by Emmanuel Gervas while the respondents had the service of Ostack Mligo, both learned advocates.

When taking the floor, the respondents' counsel started with the 5th point of preliminary objection about the defective jurat. He submitted that, the law has put in place the format of jurat under section 10 of Oath and Statutory Declaration Act, Cap 34 R.E 2002 and its schedule has a form to be used that deponent must be known to advocate or introduced by a certain person. He proceeded that in abide to the cited law the deponent to the applicant's affidavit is not known his status contrary to the law as in

the case of **Bakari Abdul Mwakilachile vs The Republic (Misc. Criminal Application No. 38 of 2023) [2023] TZHC 20344 (24 August 2023).**

Mr. Mligo argued further that, it is not known how the advocate know the deponent, because it is the requirement of the law then the principle of Overriding Objective should not be applied.

As regard to the 3rd point, the respondents' counsel submitted that the matter originated from Land Appeal No. 2 of 2022 where Samson Jonas (the 4th respondent) appeared as administrator of the Estates of Sololo and the appeal ended up with costs. He argued that, the respondents filed the bill of costs which its ruling does not indicated whether Samson is administrator of the Estate. Citing the case of **Registered Trustee of SOS Children Villages Tanzania,** Civil Appeal No. 426/8 of 2018 the counsel was of the views that the applicant should have first applied for the rectification of the name in judgment.

As to the 4th point of preliminary objection, the respondents' counsel submission based on 4th, 5th, 6th and 7th paragraphs of the applicant's affidavit that has extraneous matter and carry more issues and conclusion.

Referred to Order XIX Rule 3 of the CPC which directs affidavit to be confirmed with facts that deponent is able to explain the counsel was of the views that the said paragraphs have narration contrary to the law. He bolstered his argument with the case of **Francis Eugen Polycarp vs Ms Panone and Co Ltd (Misc. Civil Application 2 of 2021) [2021] TZHC 6880 (28 October 2021).**

On the 2nd point about two different dates on the taxing officer's ruling the counsel was of the views that the same should be rectified as it is possible under section 96 of the CPC.

Regarding the 1st point of preliminary objection, the respondents' counsel submitted that the application is confusing as it was titled that the application arises from taxation cause which originated from Land Case No. 2 of 2022. Mr. Mligo argued that there have never been Land Case concerning the parties in this application rather than Land Appeal No. 2 of 2022. He contended that, these are two different cases which are filed from two different appeal. The matter is application by chamber summons and affidavit but after reding correctly he finds this is an appeal as filed by appellant.

Mr. Mligo was of the opinion that the application is contrary to GN No. 264 of 2015 and that the pointed irregularities make this application incompetent not worth to be amended rather than to struck it out.

Responding, the applicant's counsel responded on the 5th point that, he is the deponent and Commissioner for Oath is Mary Joakim, both are the advocates and are working under TLS Society. He proceeded that, he and Mary Joakim, they know each other. The oath was administered on 16th July, 2023 and that the Commissioner of Oath know the deponent that's why she did not indicate if she knows him or the deponent was introduced to her by another person. Referred to the case of **Samwel Kimaro vs Hidaya Didas,** Civil Application No. 20. Of 212 CAT at Mwanza at page 2, 5 and 6 explain in length the importance of jurat and the CAT decided if the person depone was known to the advocate there is no need to explain further.

On the 3rd point, the counsel argued that he finds Samson Jonas (4th respondent) is the part to the case as reflected in judgment. He argued that the mistake was done by the court and it should not be used as whip to the applicant. He added that this is among the issues that the court should apply section 3A of the CPC and order rectification of the error.

As to the 4th point of objection, the applicant's counsel was of the views that paragraph 4, 5, 6 and 7 are correct paragraphs basing on the nature of application. He contended that Order XIX Rule 3 was adhered. He submitted that Order 7 GN. No. 164 of 2015 which require reference to be accompanied by affidavit and that what was written was based on court record. Paragraphs deliver information from what happened to the taxing master. He argued that the case of **Panone** (supra) is distinguishable.

On the 2nd point of objection, Mr. Gervas argued that the objection failed to meet qualification. He submitted that the proceedings shows that the ruling was planned to be delivered on 21st June 2023 but the Deputy Registrar was not present and then the ruling was delivered on 27th June 2023. Mr. Gervas was of the views that the error was arithmetical which may be rectified by court but it does not affect the ruling.

And on the first point of objection the counsel insist that it was a typing error and section 3A should be applied. He then prayed the preliminary objection to be overruled with costs.

In rejoinder the respondents' counsel reiterated was he submitted in chief.

Having heard the dual submission by both parties and read the application records, the issue here is whether the preliminary objection raised by the respondents has merit.

Starting with 5th point of preliminary objection, about the defective jurat. It is respondents' counsel averment that section 10 of Oath and Statutory Declaration Act, Cap 34 R.E 2002 the law put format of jurat that a deponent must be known to the commissioner of oath if not known should be introduced by a certain person.

Mr. Mligo contended that the procedure is the requirement of the law that the Oxygen Principle should not be applicable.

The applicant's counsel who is the deponent in the said affidavit explained that he and Mary Joakim who attested his jurat are known to each other since they are both advocates performing their duties under the TLS that why she did not indicate if she know him or he was introduced by another person. Is this view of Mr. Gervas really logical? Is it true that the law dictates that if you know someone you should not make it clear? That is not true. It is a legal requirement that you must show that you know the person personally or have been introduced to you by someone else. Mr.

Gervas explains that they know each other with Ms. Mary Joakim because they are both advocates. Is it true that all people will realize that these people know each other because they are advocates? The law does not provide that.

As rightly submitted by respondents' counsel and upon read and carefully examine the affidavit deponed by the applicant's counsel, I have notice that the jurat of attestation does not indicate whether the Commissioner for Oaths knew the applicant personally or through the identification by another person and hence contravene the mandatory requirement of the provision of section 10 of Oath and Statutory Declaration Act, Cap 34 R.E 2019.

As it was determined in the case of **Bakari Abdul Mwakilachile Vs The Republic (Misc. Criminal Application No. 38 of 2023) [2023] TZHC 20344 (24 August 2023)** and **Thomas John Paizon vs Khalid A. Nongwa (Misc. Land Application 954 of 2017) [2018] TZHCLandD 554 (10 August 2018)** where the akin situation existed, I am at one with the respondents' counsel argument that since the procedure is the requirement of the law the principle of Overriding Objective does not apply. And that, the proper channel is to struck out the application.

From the above findings, I am of the view that there is no need to pursue and determine the other remaining points of objection since my holding on the 5th point suffices to dispose the application. In the circumstances, and for the foregoing reasons, I struck out the application with costs.

It is so ordered.

DATED at **MUSOMA** this 20th day of November 2023.

THE HIGH COURT OF TANZANIA
MUSOMA

M. L. KOMBA

JUDGE