

**IN THE HIGH COURT OF TANZANIA
(TEMEKE HIGH COURT SUB-REGISTRY)
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE**

PROBATE AND ADMINISTRATION CAUSE NO. 216 OF 2022

In the matter of the estate of the late

NAVJET BAINS.....DECEASED

AND

In the matter of an application for grant of probate by

APURVA BAINS1st PETITIONER

TEJ BAINS2nd PETITIONER

AND

In the matter of a Caveat by

ESME BAINS.....CAVEATOR

RULING

Date of last order: 02/10/2023

Date of Ruling: 27/10/2023

OMARI,J.

Esme Bains, the Caveator herein cited Apurva Bains and Tej Bains, the Petitioners herein to renounce executorship of the estate of the late Navtej Bains under Rule 27 of the Probate Rules, 1963 (the Rules). The Petitioners in turn decided to Petition for Grant of Probate for the said estate. When the said Petition was filed, Esme Bains lodged a Caveat and upon being cited she entered appearance as is the requirement of Rule 82 of the Rules. With



their Counter Affidavit, the Petitioners filed a Notice of Preliminary Objection. The said notice stipulated that they intend to raise an objection on a point of law that the Caveat is misconceived and incompetent on the grounds that the same is not supported by a valid or required Affidavit in line with Rule 82(4) of the Rules, Section 3(1)(b), 4 and 8 of the Notary Public and Commissioners for Oaths Act, CAP 12 R.E. 2019 (the NPCOA), decisions and the practice of the Court of Appeal as the Affidavit is attested by a person not qualified to practice as a commissioner for oaths in Mainland Tanzania.

The Petitioners had the services of Messrs. Seni Malimi and Jovinson Kagirwa both learned advocates while the Caveator had the services of Laurent Leonard also a learned advocate. The said preliminary objection was disposed by way of written submission the parties complied to the scheduling order of 11 August, 2023.

In their submission in support of the preliminary objection the Petitioners' advocates commenced with an introduction giving a background to the matter, they then went on to argue in support their objection stating that the Caveat filed on 08th May, 2023 is not supported by a valid or required Affidavit for being attested by a person unqualified to practice as a Commissioner of Oaths in Mainland Tanzania.

Counsels referred to section 3(1)(b), 4 and 7 of the NPCOA and Rule 82 (4) of the Rules as they were unpacking their objection. They argued that Rule 82 (4) requires a Caveat to be supported by an Affidavit stating that the Court of Appeal has articulated what an Affidavit is in the case of **Director of Public Prosecution v. Dodoli Kapufi and another**, Criminal Application No. 11 of 2008 where it was categorically stated that it needs to



have *inter alia*; the signatures of the deponent and the person who in law is authorized to either to administer the oath or accept the affirmation. Counsels went to state that in Tanzania "a person" who is recognized and allowed to administer oaths and accept affirmation are mentioned in section 3(1), 11 and 12 of the NPCOA. They then went on to state that a person authorized to administer the oath or accept affirmation means a person stipulated in the NCPOA which includes an advocate or a person entitled to practice as a Notary Public in England, Scotland, Northern Ireland or the Republic of Ireland.

According to counsels, the Notary Public, one Elaine L. Mitchel who accepted the Caveator's affirmation is not a person envisaged by section 3(1)(a) and (b) of the NPCOA and even if she were to be, she would still fall short of the requirements of section 4(1) of the NPCOA which require her to make an application to the Registrar of the High Court, pay a prescribed fee, sign the Roll of Advocates and be granted a certificate to practice in Mainland Tanzania. They fortified their argument with the decision of the Court of Appeal in **Millicom (Tanzania) N.V v. James Alan Russel Bell and 2 others**, Civil Application No. 44 of 2016 then went on to explain that affirmations that are taken outside of Tanzania fall within the ambit of section 11 of the NPCOA which gives powers to Foreign Service Officers to administer oaths. Counsel concluded their submission by praying that the Caveat and Affidavit be struck out for there is no Caveat before this court as the Affidavit was not attested pursuant to the legal requirements.

In his submission to oppose the preliminary objection the Caveator's advocate strongly objected the legal position stated in the Petitioners



advocates' submission. He stated that the Caveator has duly complied with the legal requirements of entering appearance for the Caveat in terms of section 59 of the Probate and Administration of Estates Act, CAP 352 R.E. 2019 (the PAEA) read together with Rule 82(4) of the Rules as both of these require the Caveator to enter appearance by filing an Affidavit in support of the Caveat, which is what the Caveator did on 12 July, 2023.

Counsel agreed with the Petitioners' advocates that, an Affidavit is what the Court of Appeal has explained in the case of **Director of Public Prosecution v. Dodoli Kapufi and another** (*supra*); stating that the four essential ingredients of a valid Affidavit as listed in that case are to be met for an Affidavit to be valid. He argued that his client's Affidavit was attested on 03 July, 2023 at Esher Surrey in England before a Public Notary who is authorized to practice in England. Thus, the said Affidavit meets the requirements stated in the **Director of Public Prosecution v. Dodoli Kapufi and another** (*supra*) case and has complied to the provisions of section 8 of the NPCOA. Therefore, according to counsel the Petitioners advocates' contention that the Caveator's Affidavit is not an Affidavit is misconceived and should be dismissed for want of merit.

He went on to aver that, arguing that Ms. Elaine L. Mitchel is not authorized to attest the Caveator's Affidavit for she lacks a certificate issued by the Registrar of the High Court as envisaged by section 4(1) of the NPCOA is an interpretation that leads to absurdity. Counsel argued that the gist of the provision is to prevent categories other than those stated in section 3(1) of the NPCOA to act as Commissioners for Oaths so the Petitioners advocates' argument cannot be tenable. He argued further that, in terms of section 3(1)



of the NPCOA, a person who is practicing as a Notary Public in England is entitled to practice as a Notary Public and Commissioner for Oaths in Mainland Tanzania. According to counsel, section 4(1) of the NPCOA does not extend to a person who does not actually practice in Mainland Tanzania. And, in this case, attesting or taking affirmation or oath outside Tanzania by a Notary Public practicing in England for an Affidavit to be used in Tanzania as per section 4(1) of the NPCOA is not practicing in Mainland Tanzania. He resisted that the cited **Millicom (Tanzania) N.V v. James Alan Russel Bell and 2 others** (*supra*) case is distinguishable in the current matter because the case is for a person who wants to practice in Mainland Tanzania while the case at hand is about attesting and affirming an oath outside Tanzania. Cementing his argument that the contention that a Notary Public who attests an Affidavit in England to be used in Tanzania amounts to him practicing in Tanzania is wrong and that it would be absurd to apply section 4(1) of the NPCOA to persons already entitled to practice as such in Mainland Tanzania. Counsel cited the case of **Tanzania Breweries Limited v. Mohamed Kazingumbe**, Civil Appeal No. 53 of 2008 to buttress his argument.

As regards section 11 of the NPCOA counsel argued that the same does not take away the powers of Notary Public and Commissioners for Oaths who are practicing in England from attesting Affidavits within their jurisdiction for use in Tanzania.

To conclude his submission counsel prayed for the preliminary objection to be dismissed with costs for want of merit and in the alternative should the court find merit in the said objection then the Caveator be allowed to file a



fresh Affidavit as it were held in **Sunyou Service Station Ltd V. BP Tanzania (Ltd) (Now Puma Energy (T) Ltd)** Civil Application No. 185/2017 of 2018.

In rejoinder the Petitioners' advocates reiterated their argument that the Caveat was not supported with an Affidavit as the same was not sworn before a Commissioner for Oaths as stated in the **Millicom (Tanzania) N.V v. James Alan Russel Bell and 2 others** (*supra*) case. They insisted that the person who attested the Affidavit has no license to administer an oath to be used in Tanzania and; as per the case of **Jumuiya ya Wafanyakazi Tanzania v. Kiwanda cha Uchapishaji cha Taifa** [1988] T.L.R 146 the **Millicom (Tanzania) N.V v. James Alan Russel Bell and 2 others** (*supra*) decision is binding to this court.

In the **Millicom (Tanzania) N.V v. James Alan Russel Bell and 2 others** (*supra*) case, a question was posed as to whether Affidavits sworn before a Commissioner of Oaths in England are valid for proceedings in Tanzania whereby it was held, it is not, as the Commissioner for Oaths had to obtain a certificate from Registrar of the High Court to practice in Tanzania. They concluded by reiterating their prayer that the Caveat be struck out.

Having heard the counsels' arguments for and against the preliminary objection which I have endeavoured to extensively narrate. The only issue for determination is whether the objection has merit and if so, what is the way forward.

A brief history of the matter as per the record is that on 31 October, 2022 the Caveator filed an Application pursuant to Rule 27 of the Rules calling for



the Petitioners to renounce executorship. On 02 November, 2022 a Citation was issued calling the Petitioners to accept or renounce executorship as is required by Rule 27(2) of the Rules. Both Petitioners made an appearance as is required by Rule 27(4) of the Rules on 17 November, 2022 upon which the court dispensed with Rule 27(7) of the Rules and ordered a Petition to be filed. Upon the Petition being filed on 19 April, 2023 and the requisite orders being made, a Caveat was filed pursuant to section 58 of the PAEA and Rule 82 of the Rules. Thereafter, on 29 May, 2023 the Petitioners applied for a Citation to the Caveator as per section 59 (2) of the PAEA and Rule 82 (2) of the Rules, which was duly issued in accordance with section 59 of the PAEA and Rule 82 (3) of the Rules. On 12 July, 2023 the Caveator entered appearance as was ordered and as per section 59 of the PAEA and Rule 82 (4) of the Rules. On 31 July 2023 the Petitioners through their counsel lodged a Notice of Preliminary Objection as already explained above.

In short, the Petitioners' counsels are arguing that the Caveator has not entered appearance since there is no Affidavit. That is, the Affidavit, that as per Rule 82(4) of the Rules was to have been the appearance by the Caveator is taken by a person unqualified to do so in Tanzania.

The record depicts that the said Affidavit is affirmed by Esme Bains at Esher before one Elaine L. Mitchel a Notary Public, whose seal and address are appearing on the Affidavit. The Caveator's advocate is not contesting that the said Affidavit was affirmed before the said Elaine L. Mitchel who both parties agree is not authorized to practice in Mainland Tanzania. The Petitioners' advocates contend that this being the case the said Affidavit contravenes section 3(1) of the NPCOA and in effect as per section 59 of the



PAEA and Rule 82 (4) of the Rules the Caveator has failed to enter appearance. The Caveator's advocate is contending that this is a wrong interpretation of the law.

Both parties also agree that an Affidavit is a document that is defined by the Black's Law Dictionary, 7th Edition, page 58 as containing a voluntary declaration of facts sworn to by the person making the declaration before an officer authorized to do so. And, for it to be valid it has to meet the requirements and qualities that were enunciated in **Director of Public Prosecutions v. Dodoli Kapufi and another**(*supra*) that is:

'(i) The statement of declaration of facts, etc, by the deponent; (ii) A verification clause; (iii) A jurat; and (iv) The signatures of the deponent and the person who in law is authorized either to administer the oath or accept the affirmation.'

In the instant matter, items (i) to (iii) above are not at issue. Item (iv) is what has consumed counsels for both sides and therefore needing this court to answer the question; whether the Affidavit of the Caveator is one that meets the fourth requirement as enunciated in the **Director of Public Prosecutions v. Dodoli Kapufi and another**(*supra*) case in order to determine the objection's merit.

At the heart of the objection is whether Eliane L. Mitchel as a person who holds office of a Public Notary in England can attest an Affidavit for use in Tanzania without first complying to the provisions of section 4(1) of the NPCOA. The Petitioners' advocates are saying no, the Affidavit is attested by an unqualified person, and, should have gone through the route of what is provided under section 8 of the NPCOA, which allows Foreign Service Officers



in Tanzanian missions abroad to attest such documents or the Notary Public needed to have complied with the provisions of section 4 (1) and get a license to practice in Mainland Tanzania. The Caveator's advocate is saying yes; as attesting an Affidavit cannot be interpreted to mean practicing in Mainland Tanzania and since the said Notary Public falls within the purview of section 3 (1) of the NPCOA as she is qualified to practice in England and that is where the said Affidavit was attested and that is what is needed.

When faced with a situation akin to the current matter, in the case of **Millicom (Tanzania) N.V v. James Alan Russel Bell and 2 others** (*supra*) the Court of Appeal in a bid to answer a question as to whether an application accompanied by an Affidavit attested in England is competent interpreted section 3 and 4 of the NPCOA and went onto state:

*'Reading from the provisions of section 4 Cap. 12 of the Tanzanian laws, much as Mr. Robert Scott Kerss is qualified to practice in England as Notary Public and Commissioner for Oath, **he has no reciprocal rights to practice automatically in that capacity in Tanzania. He has to comply first with the provisions of section 4(1) of Cap 12 by seeking a practicing certificate from the Registrar of the High Court and upon signing of the Roll of Advocates and payment of the required fees.***' (emphasis supplied)

This means, in the case at hand, for Elaine L. Mitchel as a person who is qualified to practice in England to be able to practice in Tanzania as per section 3(1) of the NPCOA they first have to comply with the provisions of section 4 (1) of the same law which requires them to apply to the Registrar



of the High Court, sign the Roll of Advocates and pay the requisite fees. When arguing against the objection counsel for the Caveator stated that this kind of interpretation is an absurdity for section 3(1) of the NPCOA already recognizes Elaine L. Mitchel as a person who can practice in Tanzania and additionally stating the said Affidavit was attested in England where the said Notary Public is licensed to practice and they are in no way seeking to practice in Tanzania as the Petitioners' counsels are arguing. In **Millicom (Tanzania) N.V v. James Alan Russel Bell and 2 others** (*supra*) the court also stated as follows:

'It is only after complying with that requirement of law that Mr. Robert Scott Kerrs will have the status to practice as Notary Public and Commissioner for Oaths under the Tanzania laws.' (emphasis supplied)

In the case at hand, if Elaine L. Mitchel is licensed to practice in England, she would then qualify under section 3(1) of the NPCOA to practice in Mainland Tanzania. However, since this is not an automatic right, the provisions of section 4 (1) of the NPCOA needed to have been complied with to allow her the said right, contrary to what the Caveator's advocate is arguing. This makes the Affidavit by Esme Bains defective as it has an invalid attestation for it is attested by a person not qualified to practice in Mainland Tanzania; see **Millicom (Tanzania) N.V v. James Alan Russel Bell and 2 others** (*supra*).

From the above discussion it is clear that the Caveat lodged by the Caveator, was not followed by an appearance under Rule 82 of the Rules. Consequently, I uphold the preliminary objection filed by the Petitioners.



However, pursuant to section 58 (5) and 59 of the PAEA and in consideration of the Caveator's prayer that she be allowed to file a fresh Affidavit in support of the appearance, I order that the same be filed within 14 days from the date of this Ruling, that is 10 November, 2023.

This being a probate matter I make no orders as to costs.

It is so ordered.




A.A. OMARI

JUDGE

27/10/2023

Ruling delivered and dated 27th day of October, 2023.


A.A. OMARI

JUDGE

27/10/2023