

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

**MISC. CIVIL APPLICATION NO. 30 OF 2023**

*(Arising from PC Probate and Administration appeal No. 6 of 2022 at the High Court of Tanzania at Moshi and PC Probate Appeal No. 3/2022 at District Court of Moshi at Moshi which originated from Probate and Administration Cause no 169/2021 at Moshi Urban Primary Court)*

**JULIAS ALBERT MWASE.....APPLICANT**

**VERSUS**

**HAMIS OMARY MOSE.....RESPONDENT**

**RULING**

13<sup>th</sup> & 25<sup>th</sup> March, 2024.

**A.P. KILIMI, J.:**

The applicant herein has brought this application seeking for orders of extension of time to bring an application seeking a certificate that there is a point of law worth of consideration by the Court of Appeal of Tanzania in the decision of the High Court in PC Probate and Administration Appeal No. 5 of 2022 and the extension of time to bring application for leave to appeal to the Court of Appeal of Tanzania. The application which was supported by the applicant counsel affidavit was brought under section 11(1) of Cap 141 R.E 2019 and any other enabling provision of the law.

Before the matter proceeded on merits, the respondent through his advocate Mr. Kipoko raised a Preliminary Objection that the application was incompetent and be dismissed with costs on the following grounds;

- a. That, it is based on fatally defective affidavit.
- b. That, it has failed to cite the law.
- c. That, the affidavit is fatally defective as deponed by incompetent person.
- d. That, application has different parties from the previous proceedings.

During hearing of the raised Preliminary Objections, both parties enjoyed the legal representation of the learned advocates as Mr. Kipoko appeared for the respondent while Mr. Asubuhi John Yoyo appeared for the applicant and with a leave of the court the objection were argued by way written submissions.

In support of the first point on preliminary objection that the affidavit was fatally defective, Mr. Kipoko learned advocate submitted that the affidavit was drawn and filed by one Asubuhi John Yoyo who deposed to be the applicant counsel and no where he stated where he got the information he deposed. Further the counsel submitted that in a verification clause of the affidavit, the said advocate deponed that all the information were deposed in his own personal knowledge hence the affidavit was defective as he was not the applicant. The counsel to support this point relied the



decisions of **Lalago Cotton Ginnery and Oil Mills Company Ltd vs. The Loans and Advance Realization Trust (LART)**, Civil Application No. 80 of 2002 and the case of **Joseph Peter Daudi Zulfa Seif Mtulia & Another vs. Attorney General & Three Others**, High Court of the United Republic of Tanzania (Land Division) at Dar es salaam Misc. Land Application No 447 of 2020(both unreported).

In submission to the second point of preliminary objection that the applicant failed to cite the law, the counsel submitted that in the applicant application in a chamber summons, the applicant cited 'Appellant Jurisdiction Act Cap 141 RE 2002 which the counsel submitted that such law did not exist in our jurisdiction and submitted that the proper law ought to be cited were section 11(1) and (5) (c) of the Appellate Jurisdiction Act, CAP 141 RE 2019(The Appellate Jurisdiction Act) and Rules 45(a) and 47 of the Tanzania Court of Appeal Rules of 2009.

On the raised PO that the application had different parties from the previous proceedings, the counsel submitted that the applicant names **Julias** Albert Mwase were different from the previous proceedings which

the applicant was named **Julius** Albert Mwase and such difference in names was fatal for the application.

In reply to the first Preliminary Objection that the counsel verified information while he was not part of the proceedings, Mr. Yoyo responded that paragraph 1 and 2 of the affidavit were a deponent personal information were stated and other paragraphs information were attained from the previous court judgment since court judgment were accessible in public domain. Further he stated that facts were also obtained from the attached affidavits named JULIMOJA and JULIMBILI of the said judgment, while other facts in paragraph 6,7 and 8 the counsel stated that were deponed due to his personal knowledge. The counsel further replied that the referred decisions of the case as cited by the respondent counsel were distinguishable with the present matter at hand.

In response to the PO on the wrongly cited provision, Mr. Yoyo the counsel for the applicant responded that, the application at hand was about the extension of time to bring an application for certificate that there was a point of law and not for leave to appeal to the court of appeal hence the referred section 45(a) and 47 as cited by the respondent counsel was



misconceived in both law and specific facts. He stated that a cited section 5(1) as cited by the respondent counsel was not a proper section as the whole provision of section 5(1) of the Appellant jurisdiction Act was already replaced and repealed by legal sector laws Misc Amendment Act No. 11 of 2023. The counsel submitted that the he made an application with a proper section.

In reply to the objection that the names of the parties were different in the proceedings, the counsel replied that such objection was not based on pure point of law but rather a typographical error which were curable by section 95 and 96 of the CPC that can also be cured by an overriding objective principle and prayed for the application to be allowed and the said objection be dismissed so as for the main application to proceed.

The issue for determination herein is whether the Preliminary objections raised has merits to dismiss the suit.

I wish to start with the second and fourth objections as I see resemblance in them. In respect to objection that the applicant failed to cite law, the applicant application in his chamber summons cited that the application was made under section 11(1) of the **Appellant Jurisdiction**

**Act** Cap 141 R.E 2002. From that it is clearly the applicant cited the words 'appellant jurisdiction' which is a base for the respondent counsel objection that there are no such laws in our jurisdiction. In my considered view the applicant meant to cite the Appellate Jurisdiction Act and instead he referred such law as the Appellant Jurisdiction Act. By the rule of overriding principle introduced in the Civil Procedure Code Cap 33 in section 3(A) and (B) by the Written Laws Amendment Act No. 3 of 2018 where courts were emphasized to avoid technicalities to act justly as well as what was held in the decision of **Yakobo Magoiga Kichele vs. Penina Yusuph**, Civil Appeal No. 55 of 2017 CAT (unreported) where the court held that regard should be on substantive justice. In my considered view the applicant naming the cited law as the 'appellant jurisdiction Act Cap 141 does not amount to irregularity to dismiss the case at hand. Therefore, in that regard I find it is proper for this court to order the same be rectified. The same goes with the fourth objection that the names of the applicant appeared different in this case and at the proceedings as there is **Julius** and **Julias** which I order the same to be rectified by the applicant by inserting a proper name.



In respect to the Preliminary Objection that the affidavit was fatally defective as it was deposed by incompetent person. The counsel submitted that the advocate for the applicant deposed the facts in the affidavit but nowhere he showed where he got those facts. In reply Mr. Yoyo submitted that he was dully instructed by the applicant and that facts deposed in paragraphs 6, 7 and 8 it was his personal knowledge and other facts he got from the court judgment as the record of the court were the public domain. He further stated that he obtained such facts from the attached document marked JULIMOJA and JULIMBILI.

It is the basic principle that affidavits are evidence and affidavit are governed by order X1X and order XXXLIII rule 2 of the of the Civil Procedure Code Cap 33 R.E 2019 "The CPC". Therefore, facts deposed therein are to be deposed by the one who is expected to present her case before the court whom in the case at hand is the applicant. In other hand advocate are not barred completely from swearing an affidavit, they can do so on affidavit they appear for their clients and has knowledge on what transpires at the proceedings as it was held in the case of **Lalago Cotton Ginnery and Oil Mills Co. Ltd(supra)** as correctly referred by the respondent counsel which held that;

*"An Advocate can swear and file an affidavit in proceedings in which he appears for his client, but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during those proceedings".*

(See also **Tanzania Breweries Ltd & vs Harman Bildad Minja** [2020] TZCA 63 ( TANZLII).

Upon my perusal, the applicant's application in paragraph 2 it stated that the counsel for the applicant has been authorized by the applicant to take an affidavit on behalf of the applicant. Further in the verification clause the counsel verified that what he stated in paragraph 1,2,3,4,5,6,7 and 8 of the affidavit were true based on his own knowledge which was not true as some of the paragraphs the counsel stated that he obtained information from the court judgment and the attached affidavit.

Further, the learned counsel gave explanation that he deposed facts in his personal capacity knowledge example in paragraph 5, 6,7 and 8 and other paragraphs the counsel stated that he obtained information from the



court judgment and the attached affidavit of JULIMOJA and JULIMBILI and since the advocate was required to source where he obtained such information like citing the judgment where he sourced the facts as it was held in the case of **Salima Vuai Foun vs. Registrar of Cooperative Society & 3 Others** [1995] TLR 75 where the court said;

*"Where an affidavit is made on information, it should not be acted upon by any court unless the sources of information are specified".*

Thus, for instance, in paragraph 4 of affidavit avers that the applicant knocked the door of this court through Misc. Civil application no. 30 of 2022 but was struck out on technical grounds and attached in its ruling as marked JULIMBILI. I concede with counsel for the applicant that the same is on public domain, but according to the instant application for extension of time, I have thought whether finding the above information on public domain relate with the applicant himself failure to file in time even after the date the said ruling was struck out which was on 31/8/2023. In my opinion these documents found on public domain cannot substitute facts which are in personal knowledge of the applicant himself in relation to the request this application sought.

Also, as it is reflected in paragraph 7 of the affidavit which shows the counsel for the applicant steps into the shoes of the applicant and said deponed that the applicant has been so diligent in court corridors all along thus his delay is rather technical delay, these were not in a judgment is alleging to be in public domain since are acts of the applicant after the decision was delivered. In my view the counsel for applicant deposed on exclusive acts of his client which in my opinion are only within the knowledge of the applicant and not within the advocate's personal knowledge. Therefore, the same could have been proper to be supported by an affidavit of the applicant himself.

In reference to above I have endeavored to analyze the authority cited and I am settled the deponed facts the said affidavit supporting this application remains as a hearsay, thus, the affidavit attached is incurably defective. Further, the respondent through his advocate prayed for a dismissal of this application which in my view and by referring to an overriding objective principle and the circumstances above, I find the need to struck out this application instead of dismissing it in order for the court to be able to enter the realm of dispensing substantive justice aimed at



Having so held and observed, I find myself constrained to uphold the preliminary objection in above respect. The application is accordingly hereby struck out with costs.

It is so ordered.

**DATED** at **MOSHI** this 25<sup>st</sup> day of March, 2024.



A handwritten signature in blue ink, consisting of stylized initials and a long horizontal stroke with a loop at the end.

**A. P. KILIMI  
JUDGE**

**Court:** Ruling delivered today on 25<sup>th</sup> day of March, 2024 in the presence Lilian Philimon Mushi holding brief of Mr. Kipoko for the respondent and also holding brief of Mr. Asubuhi John Joyo for the applicant.

Sgd: **A. P. KILIMI  
JUDGE  
25/03/2024**