

**IN THE HIGH COURT OF TANZANIA
(TEMEKE HIGH COURT SUB-REGISTRY)
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE
CIVIL REVISION NO. 3 OF 2023**

(Originating from the Ruling of the Court of District Delegate of Temeke at One Stop Judicial Centre at Temeke in Probate and Administration Cause No. 387 of 2022)

CONSTANTINE GABUSA MTUTWAAPPLICANT

VERSUS

KELVIN CONSTATINE MTUTWA1ST RESPONDENT

HAPPINIESS CONSTANTINE MTUTWA2ND RESPONDENT

RULING

Date of last order: 05.01.2024

Date of Ruling: 07.02.2024

OMARI, J.

Costantine Gabusa Mtutwa, the Applicant in this matter has approached this court vide section 44 of the Magistrates Courts Act, CAP 11 RE 2019 seeking for orders that:

1. This honourable temple of justice be pleased to invoke and exercise its revisionary jurisdiction to call for examination and revise the proceedings, records and decisions/ruling and nullify the proceedings, quash and set aside the impugned ruling arising therefrom in Probate and Administration Cause No. 387 of 2022 delivered by Hon. Jacob,



H.M.M. in respect of District Delegate Court of Temeke on 20 July, 2023 on grounds that the honourable trial court had no jurisdiction to try and determine the same and that the honourable trial magistrate exercised his jurisdiction illegally and with material irregularities, hence injustice was occasioned on the part of the Applicant.

2. Any other further relief(s) that this honourable court may deem fit, just and equitable to grant.

The application is made by way of a Chamber Summons that is supported by an Affidavit of the Applicant. In the said Affidavit the Applicant states the grounds and reasons for his Application.

The Respondents, Kelvin Constantine Mututwa and Happiness Constantine Mututwa filed a Counter Affidavit as ordered by this court, with it they filed a Notice of a Preliminary Objection that the Application is incompetent and should be dismissed with costs. They gave two grounds to wit:

1. The Application is unmaintainable for offending the provisions of section 72 of the Probate and Administration of Estates Act; CAP 358 RE 2022 (*sic*)



2. The Affidavit in support of the Application is incurably defective for containing extraneous matters by way of arguments, opinions and conclusion in some of the paragraphs including paragraphs 6(ix),9,10,11,12,14,15,19,20,22,23,24,29,30 and 32.

On the date set for hearing, it was ordered the preliminary objection be disposed by way of written submission. A scheduling order was entered and the parties complied. The Respondents' submission was drawn and filled by Hussein Mlinga, an advocate while that of the Applicant was drawn and filed by Keregero Keregero also an advocate.

The Respondents' advocate began his submission with the first limb of the objection; that the Application offends the provisions of section 72 of the Probate and Administration of Estates Act, CAP 352, R.E 2022 (the PAEA). Counsel argued that the decision that the Applicant is seeking the court to revise is appealable under section 72 of the PAEA. This is the decision in Probate and Administration Cause No. 387 of 2022 in which the Applicant herein filed a Caveat against the appointment of the Respondents as Administrators of the estate of their late mother. The Court of the District Delegate held the said Caveat is inoperative for being filed after the grant of letters of administration. This, in Mr. Mlinga's view, means the decision is



appealable under section 72 of the PAEA. He goes on to submit that the court's jurisdiction as regards Revision is limited to instances where the right of appeal is either not available or there exists peculiar circumstances to warrant revisional jurisdiction. Counsel argued that save for the two reasons, Revision cannot be an alternative to appeal. To buttress his argument counsel referred to section 79 of the Civil Procedure Code, CAP 33 RE 2022 (the CPC) and the case of **Bashir Fenal Abdi Ali Awale v. DPP and Another** (Misc. Criminal Application 99 of 2022) [2022] TZHC 13226.

On to the second limb of the objection; that is the Affidavit in support of the Application is incurably defective for containing arguments, opinions and conclusions. This, according to counsel offends order XIX Rule 3(1) of the CPC which provides that an Affidavit must confine itself to facts. Counsel argued further that for that reason, the Application should fail since if the paragraphs that he has enumerated in this limb are expunged the remaining paragraphs cannot support the Application. He augmented his contention with a reference to the case of **Rustamali Shivji Karim Merani v. Kamal Bhushan Joshi** (Civil Application No. 80 of 2009) [2012] TZCA 237. Mr. Mlinga then concluded his submission by praying that the Application be dismissed with costs for being defective.



When it was his turn, counsel for the Applicant began his submission by stating that the decision of Probate and Administration Cause No. 387 of 2022 is both substantially and procedurally defective and impugned for want of merit. He went on to state that, it is not the position of law that a Caveat is inoperative once filed after the grant of letters of administration but after a full inventory and accounts of the estate have been entered. Counsel then went on to attack the Respondents counsel's preliminary objection for lacking precision, being omnibus and running counter to the requisite law. He explained that since counsel quoted a nonexistence provision of law and statute that is, section 72 of the Probate and Administration of Estates Act, CAP 358 RE 2022 then the Notice of Preliminary Objection is incurably defective making the submission legless. Counsel also pointed out two things; first being that there is no revised edition of the law for 2022. Secondly, the court under section 72 of the PAEA has both revisionary and appellate powers; that is why the Applicant sought to invoke the revisionary powers by instituting Civil Revision No. 3 of 2023. To buttress his argument, Mr. Keregero referred to the cases of **The Board of Trustees of the National Social Security Fund (NSSF) v. Leornad Mtepa** (Civil Application No. 140 of 2005) [2006] TZCA 37 and **Hasmukh Bagwaji**



Masrani vs v. Dodsai Hydrocarbons and Power (Tanzania) PVT Limited and 3 others (Civil Application No.100 of 2013) [2013] TZCA 489.

He further submitted that the impugned Ruling is shrouded in serious and exceptional peculiar circumstances therefore revision is to be regarded as another available legal avenue and not just an alternative relief to appeal. He went on to submit that in the case of **Moses J. Mwakibete v. The Editor Uhuru, Shirika la Magazeti ya Chama and National Printing Co. Ltd** (1955) TLR 134 the Court of Appeal held the view that revisional powers are not to be used as alternative to the appellate jurisdiction unless reasons for so doing are stated by the Applicant as to why they prefer revision. The Applicant herein has stated his reasons and grounds for preferring revision. This, according to counsel, means the first ground of the objection is baseless and should be over ruled with costs. Further, counsel contended that section 72 of the PAEA does not compel one to appeal where there are alternative remedies, this does not make an appeal automatic.

On the second limb of the preliminary objection Mr. Keregero argued that it is also bereft of merit and should be overruled. In his contention, counsel submits that the accompanying Affidavit contains nothing but facts as enumerated in the paragraphs. He referred to the case of **Mantrac**



Tanzania Limited v. Raymond Costa, Civil Application No. 11 of 2010.

He further submitted that the section of law and authority cited by counsel for the Respondents constitutes a poignant fallacy. He submitted that the arguments are too general to constitute any meaningful and acceptable legal argument. Counsel faulted the Respondent's counsel for not precisely stating which paragraph contains an argument opinion or conclusion thus making omnibus and erroneous assertions. He argued that in the circumstances the Affidavit is not defective and has confined itself to facts as is required by order XIX Rule 3(1) of the CPC. He then concluded his submission by praying that this court overrule the Respondents' preliminary points in *limine* with costs.

In his rejoinder the Respondents' counsel reiterated his contention that in order to seek Revision there must be special circumstances to warrant the same. Counsel argued that in the instant Application, the Applicant being party he was to appeal the decision and not his preferred revision. He reiterated the effect of section 72 of PAEA stating that the jurisdiction of this court to entertain revision is limited to circumstances in which appeal is either not available or there are peculiar circumstances to warrant revision jurisdiction to be invoked. In support of his rejoinder he cited the case of



Mrs. RafikiHawa Mohamed Sadick v. Ahmed Mabrouk and 2 others

(Civil Application No. 250/01 of 2019) [2023] TZCA 17766. On the second limb counsel reiterated that the paragraphs he has enumerated offend order XIX Rule 3(1) of the CPC thus the Application is liable to be struck out as was held in the case of **Jacqueline Ntuyabaliwe Mengi and 2 Others v. Abdiel Reginald Mengi and 5 Others** (Civil Application No. 332/01 of 2021) [2022] TZCA 748 and went on to pray that the Application be dismissed with the deserving costs against the Applicant.

Having gone through the submission by both counsel for and against the preliminary objection there is only one issue for the determination of this court, that is whether the grounds of the preliminary objection by the Respondents' counsel is meritorious and the way forward.

However, before proceeding to the two grounds of the Respondents' preliminary objection I find it necessary to commence with Mr. Keregero's contentions that the Respondents counsel's Notice of Preliminary Objection quoted a non-existent provision of law and statute that is, section 72 of the Probate and Administration of Estates Act, CAP 358 RE 2022 (*sic*) and that there is no revised edition of the law for the year 20022 then Notice is incurably defective making the submission legless. In essence the Applicant's



counsel is faulting Mr. Mlinga's Notice of Preliminary Objection and later the submission for citing the PAEA as CAP 358 of 2002 instead of CAP 352 RE 2002 and later in the submission counsel referred to the said law as CAP 352 RE 20022. While I am inclined to agree with Mr. Keregero that the PAEA is neither CAP 358 of the 2002 nor have we yet been blessed with the advent of the year 20022 in which the revised edition of the law was published as Mr. Mlinga's error in citation seems to suggest. Nevertheless, in the circumstances the error is in the CAP number and year of the revised edition leaving intact the section, section 72 and the name of the law, the Probate and Administration of Estates Act which in itself would have sufficed in citing the law. These particular errors in citation cannot be fatal since the same do not rid this court of jurisdiction, see **Dangote Cement Ltd v. NSK Oil Gas Ltd**, (Misc. Commercial Application No.08 of 2020) [2020] TZHC COMD 2052.

Having discussed as above, I now move on to consider the Respondents' grounds of preliminary objection. Briefly the parties are before this court following the death of one Helena Sebastian Mtutwa on 4 January, 2022. After the said death, two of the deceased's children (the Respondents) herein filed a Petition for Letters of Administration at the Court of the District



Delegate of Temeke at the One Stop Judicial Centre at Temeke. They were appointed on 21 June 2022, the Applicant lodged his Caveat on 12, November, 2023 intending to object their appointment. After the requisite legal procedures and proceedings, the District Delegate dismissed the Caveat for being brought out of time. This is what catapulted the Applicant to knock on the doors of this court with an Application for Revision. The Respondents' counsel is contending the same is bad in law for two reasons; it contravenes the provision of section 72 and that the Affidavit is defective. I shall start on the first limb. To make it simple; I shall first reproduce section 72 of the PAEA, it states:

'(1) An appeal shall lie from an order granting or refusing probate or letters of administration made in contentious cases as if such order were a decree, and from any other order made in such cases if an appeal would lie therefrom in a suit according to the provisions of the Civil Procedure Code vii or any enactment replacing the same.(2) The provisions of Civil Procedure Code viii, shall apply, mutatis mutandis, in respect of proceedings before a District Delegate under this Act.'

This means the Applicant being aggrieved by the decision of the District Delegate to dismiss his Caveat should have appealed as is stipulated above. The Applicant is contending that the said section does not compel on to



appeal it rather provides for both that is one may either appeal or bring an application for revision. He has not however pointed out where in the provision of section 72 of the PAEA it is stipulated that revision may be used as an alternative for an appeal.

This court as well as the highest court of the land have decided on countless times that Revision should not be used an alternative to an Appeal where a party has *locus* to appeal then they should do so. It is thus, and as rightly argued by both counsel, trite law that Revisional jurisdiction is only exercisable in exceptional circumstances. The Court of Appeal elucidated on this principle in the cases of **Said Ali Yakut and 4 others v. Feisal Ahmed Abdul** (Civil Application No. 4 of 2011) [2011] TZCA 145, **Fatma Hussein Sheriff v. Alikhan Abdallah (As the Administrator of the Estate of Sauda Abdallah and 3 Others** (Civil Application No. 536/17 of 2017) [2021] TZCA 47, **NIC Bank Tanzania Limited v. Hirji Abdallah Kapikulila** (Civil Application No.561/16 of 2018)[2020] TZCA 5 and **Hassan Ng'azi Khalfan v. Njama Juma Mbegu (As the Administrator of the Late Mwanahamisi Njama) & Another**, Civil Application No. 218/12 of 2018 [2020] TZCA 32.



The Applicant's counsel argued that the impugned Ruling is "shrouded in serious and exceptional peculiar circumstances" that should warrant the invocation of this court's powers of revision. This according to counsel, means that revision "cannot and must not be regarded as an alternative relief to appeal but also another available legal avenue." In the above cited cases of **Said Ali Yakut and 4 others v. Feisal Ahmed Abdul** (*supra*), **Fatma Hussein Sheriff v. Alikhan Abdallah (As the Administrator of the Estate of Sauda Abdallah and 3 Others** (*supra*) and **NIC Bank Tanzania Limited v. Hirji Abdallah Kapikulila** (*supra*) the parties were challenging material irregularity, illegality, invalidity and irregularity of the proceedings, yet the Court of Appeal ruled that since they had a right to appeal, revision cannot be used in alternative to the right to appeal.

Likewise, in this case, the Applicant being aggrieved by the Ruling of the Court of District Delegate of Temeke District at the One Stop Judicial Centre in Probate and Administration Cause No. 387 of 2022 that dismissed the Caveat he filed against the Respondents he should have, as per the provisions of section 72 of the PAEA. See also the case of **Isdore Leka Shirima and Another v. The Public Service Social Security Fund** (as



a successor of PSPF, PPF, LAPF and GEPF) and 3 Others (Civil Application 151 of 2016) [2021] TZCA 761 wherein the Court of Appeal also held that Revision should not be an alternative to an appeal. Thus, the Applicant herein cannot invoke revisional jurisdiction of this court in alternative to an appeal on the basis section 72 of the PAEA does not compel one to appeal where there are alternative remedies, which as already stated that is not the import of the said section. The serious and exceptional peculiar circumstances which the Applicant's counsel claimed and in all earnest the Applicant's Affidavit and submission do not aver what are the exceptional circumstances and how they were precluded from appealing do not trump the fact that the Applicant had the right of appeal as was held by the Court of Appeal in **Kempinski Hotels S. A v. Zamani Resorts Limited & Another** (Civil Application No.94/14 of 2018) [2019] TZCA 507. It is for the above reasons that I find the first limb of the objection is meritorious. Accordingly, the first ground of the preliminary objection is upheld.

As this ground of objection is enough to dispose the preliminary objection, I find no need to deal with the remaining ground. The Application is therefore struck out.



This being a probate matter that involves members of the same family I order that each party bear their own costs. It is accordingly ordered.



A handwritten signature in blue ink, appearing to read "A.A. Omari".

A.A. OMARI

JUDGE

07/02/2024

Ruling delivered and dated 07th day of February, 2024 in the presence of the first Respondent appearing in person and one William Costantine Mtutwa who was in attendance on behalf of the Applicant.

A handwritten signature in blue ink, appearing to read "A.A. Omari".

A.A. OMARI

JUDGE

07/02/2024