IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

MISCELLANEOUS CIVIL APPLICATION NO. 33 OF 2023

(C/F Probate and Administration Cause No. 05 of 2002 in the High Court of Tanzania at Moshi)

IN THE MATTER OF THE ESTATE OF THE LATE PAUL KYAUKA NJAU

AND

IN THE MATTER OF AN APPLICATION FOR REVOCATION OF LETTERS OF ADMINISTRATION GRANTED TO EMANOEL PAUL KYAUKA

BY

MONICA PAUL KYAUKA……………………………………..1ST APPLICANT

ROSE PAUL KYAUKA…………………………………………..2ND APPLICANT

VERSUS

EMANOEL PAUL KYAUKA…...…………………………………RESPONDENT

RULING

Date of Last Order: 30.04.2024
Date of Ruling : 21.05.2024

MONGELLA, J.

This is a ruling on preliminary objection raised by the respondent against the applicants' application. The applicants' application has been preferred under **Section 49 of the Probate and Administration of Estates Act** and **Rule 29 of Probate and Administration of Estates Rules** whereby they are seeking for two reliefs: **one**, revocation the letters of administration of the estate of

the late Paul Kyauka Njau that were granted to the respondent and; **two**, for this court to appoint Rose Paul Kyauka, the 2nd applicant, to hold the said position as an administratrix. The applicants' application was supported by the sworn affidavit of Mr. Patrick Paul, the applicants' counsel.

The respondent opposed this application through the sworn counter affidavit of Mr. Daniel Haule Ngudungi, the counsel representing him in this matter. His response was accompanied by a notice of preliminary objection on three legal points, to wit;

i. *The current application is Res Judicata to the decision of this court in Consolidated Probate and Administration Application No. 34 of 2010 and 14 of 2014 which remains intact and binding.*

ii. *The application is time barred as the complained fraud and misrepresentation if any happened before October 2003 as the grant was made on 27th October, 2003.*

iii. *The application is incompetent for being supported by an incurably defective affidavit which is sworn by an advocate representing the applicant on matters which are outside his knowledge as per the Court of Appeal's decision in* ***Lalago Cotton Ginnery and Oil Mills Company Ltd vs. The Loans and Advances Realization Trust (LART),*** *Civil Application No. 80 of 2002.*

The preliminary objection was argued by written submissions with both parties being represented by their respective counsels.

Addressing the 1st point of objection, Mr. Ngudungi contended that the application is *res judicata* to Consolidated Miscellaneous Civil Application No. 34 of 2010 and 14 of 2014. He alleged that the applicants are siblings to the deceased and other siblings of the deceased named Joseph Paul Kyauka Njau and Catherine Paul Kyauka Njau who filed the consolidated applications in respective years. That, in the respective applications, they sought for revocation of the respondent on allegations of being partial in distribution of the deceased's estate. To cement his argument, he referred to **Section 9 of the Civil Procedure Code** [Cap 33 R.E 2019]. He as well cited the case of **Yohana Dismas Nyakibari and another vs. Lushoto Company Ltd. and 2 Others**, Civil Appeal No. 90 of 2008 CAT (unreported). He further made reference to page 174 - 175 and 240-241 of **Mulla, the Code of Civil Procedure, 16th Edition Volume 1.**

Considering the alleged previous applications, Mr. Ngudungi contended that all ingredients of *res judicata* exist between the matter at hand and Consolidated Miscellaneous Civil Application No. 34 of 2010 and 14 of 2014. He expounded on his argument by pointing the factors rendering the matter at hand res judicata, saying that: **one**, the matter in issue in both applications was revocation of the respondent as administrator. **Two**, that the present applicants are privies to those in the former applications as they have common interest in the subject matter. He supported his

stance with the case of **Seven Seas Shipping Agency Ltd vs. Best Oceanair (T) Limited and Another**, Civil Case No. 15 of 2018 (unreported) and that of **Peniel Lota vs. Gabriel Tanaki and Others** [2003] TLR 312. **Three**, he submitted that the applicants are claiming under the same capacity as former applicants in consolidated applications. **Four**, that the former consolidated application was determined by this court while it possessed jurisdiction to do so according to **Section 3 of the Probate and Administration of Estates Act** [Cap 352 R.E 2002]. **Five**, that the former consolidated applications were determined on merit, thus the applicants have no room to re-litigate the same.

Arguing on the 2nd point of objection Mr. Ngudungi averred that according to paragraph 6, 7, 8 and 9 of Mr. Paul's affidavit, the complained fraud was committed at the time of handling proceedings for granting letters of administration which were granted on 27.20.2003. Considering that the claimed facts happened 20 years ago, he contended that the same is time barred as the time limitation for instituting civil litigations on fraud is 3 years as per the **Law of Limitation Act** [Cap 89 R.E 2019]. In the circumstances, he called for the application to be dismissed as directed under **Section 3 of the Law of Limitation Act**.

With regard to the 3rd point of objection, he contended that an advocate can only swear an affidavit in place of his client on matters within his personal knowledge. Observing Mr. Paul's affidavit, he challenged that the same contains facts not within the counsel's knowledge, but on information as indicated in his

verification clause. Specifically, he referred the court to paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 of Mr. Paul's affidavit.

Further, Mr. Ngudungi challenged the applicants' supporting affidavit on the ground that Mr. Paul never deponed any fact to show if he represented the clients/applicants in the proceedings he deponed on nor shown that he received instructions to depone the facts in the affidavit. He was of the view that such act amounted to giving hearsay evidence. Further that, the applicants' counsel gave evidence on a matter he was involved which is contrary to **Regulation 61 of the Advocates (Professional Conduct and Etiquette) Regulations** GN. 118 of 2018.

He supported his averments on this point of objection with a number of decisions being; **Lalago Cotton Ginnery and Oil Mills Company Limited vs. The Loans and Advances Realization Trust (LART)**, Civil Application No. 80 of 2002 (unreported); **Tanzania Breweries Ltd & vs. Harman Bildad Minja** (Civil Application 11 of 2019) [2020] TZCA 63 (19 March 2020); **Martha George Kilimo vs. NCBA Bank Tanzania Limited & 2 Others** (Mics. Land Case Appl. 207 of 2022) [2022] TZHCLandD 548 (3 June 2022) and; **Zito Zuberi Kabwe (MP) vs. Board of Trustees Chama Cha Demokrasia na Maendeleo & Another** (Civil Case No. 270 of 2013) [2014] TZHC 2360 (3 January 2014). Mr. Ngundungi finalized his submissions by praying for the points of preliminary objection to be upheld and the matter for the matter to be struck out with costs.

On the other hand, Mr. Paul opposed all points of preliminary objection thereby advancing five reasons and urging the court to overrule them. **First**, he contended that an objection ought to be on a pure point of law and not facts as held in **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] EA 696. On those bases, he challenged the points of objection raised by Mr. Ngudungi adding that the same require facts or evidence which is contrary to the requirement of law. He further contended that the counsel was wrong to call upon the court to observe the evidence attached, which is the Judgement of Consolidated Misc. Probate and Administration Application No. 34 of 2020 and 14 of 2014.

Second, Mr. Paul challenged Mr. Ngudungi on the ground that he failed to show what were the issues in the referred Consolidated Applications and how the same were similar to the application at hand. He added that the learned counsel failed to show that the applicants in this matter were privies to the parties in the Consolidated Applications. He further argued that both, the consolidated applications and the present application, are not suits covered under the Civil Procedure Code.

Third, he argued that the application at hand is for revocation of letters of administration and not a suit on fraud. Referring to **Section 49 of the Probate and Administration of Estates Act**, he averred that the same provides for application for revocation where grant of letters of administration was defective in substance and the same can be made at any time before the administrator is discharged

from all administrative duties. In the matter at hand, he said, the applicants are challenging the grant of letters to the respondent for the same been obtained fraudulently under the impression that the respondent is one of the beneficiaries.

Arguing further, he said that the letters granted to the respondent are useless and inoperative as the respondent does not exist and has never met other beneficiaries, including the applicants. In the premises, he argued that it is unthinkable that the appointment is left to stand under pretence of some inapplicable limitation provision.

Fourth, he firmly defended the affidavit in support of the application considering the same to be proper. He argued so on the ground that the challenged supporting affidavit discloses the source of information rendering the same not hearsay as alleged by the respondent's counsel. On those grounds, found the decisions referred to by Mr. Ngudungi being inapplicable in the matter at hand.

Speaking about the remedies to a defective affidavit, he argued that the remedy is for the defective paragraphs to be expunged or for the court to grant leave for filing supplementary affidavit. He supported his argument with the case of **Phantom Modern Transport (1985) Limited vs. D. T. Dobie (Tanzania) Limited** (Civil Reference 15 of 2001 and 3 of 2002) [2002] TZCA 6 (10 December 2002). In addition, he referred to **Rule 18 of the Probate Rules** made under

Section 9 of Probate and Administration of Estates Act contending that this court could order proper affidavit to be filed with the Registrar not later than before the date for hearing.

Fifth, Mr. Paul tried to shelter under the overriding objective principle. He cited the case of **Jeremiah Mtobesya vs. Attorney General** [2006] TLS Law Reports 468 calling on this court to endeavour to do substantive justice and determine the matter before it instead of being bound by technicalities as advanced by Mr. Ngudungi. He pointed out that the holding in that case is now incorporated under the Overriding Objective Principle brought into existence by the **Written Laws (Miscellaneous Amendments) (No.3) Act**, No.8 of 2018).

After considering the rival submissions of the learned counsels for both parties, I shall resolve the points of preliminary objection in seriatim. Foremost, I wish to point out that it is well settled that preliminary objections must be on a pure point of law and not on a matter that requires evidence. This position was emphasized in the case of **Soitsambu Village Council vs. Tanzania Breweries Limited & Another** (Civil Appeal No. 105 of 2011) [2012] TZCA 255 (17 May 2012) TANZLII whereby the Court stated:

> "A preliminary objection must be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate such facts, such an issue cannot be raised as a preliminary objection on a point of law. The court must, therefore, insist on the adoption of

> the proper procedure for entertaining applications for preliminary objections. It will treat as a preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed points of fact or evidence. The objector should not condescend to the affidavits or other documents accompanying the pleadings to support the objection such as exhibits."

See also; **Mukisa Biscuits Manufacturing Co. Ltd. vs. West End Distributors Limited** (supra); **Gideon Wasonga & Others vs. The Attorney General & Others** (Civil Appeal No. 37 of 2018) [2021] TZCA 3534 and; **Salim O. Kabora vs. TANESCO Ltd & Others** (Civil Appeal No. 55 of 2014) [2020] TZCA 1812

It is also imperative to note that preliminary objections are based on the presumption that the facts pleaded are true. This position was well emphasized in **Safia Ahmed Okash (As Administratrix of the estate of the late AHMED OKASH) vs. Ms. Sikudhani Amir & Others** (Civil Appeal 138 of 2016) [2018] TZCA 30 (25 July 2018) whereby the Court of Appeal stated:

> "To discern and determine that point, the court must be satisfied that there is no proper contest as to the facts on the plaint. The facts pleaded by the party against whom the objection has been raised must be assumed to be correct and agreed as they are prima facie presented in the pleadings on record."

On the 1st objection, Mr. Ngudungi averred that this application is res judicata to Consolidated Probate and Administration

Application No. 34 of 2010 and 14 of 2014. He went further to elaborate that the factors in considering whether an application is a res judicata were all met. Mr. Paul, on the other hand, opposed this argument averring that Mr. Ndugungi failed to show that the issues in the Consolidated Applications are similar as in this application. He added that Mr. Ngudungi also failed to show that the applicants in this application are privies to the applicants in the Consolidated Applications. He as well challenged that all these applications are not suits.

It is well settled that courts are barred from determining matters that were once determined by the court. The conditions in determining whether a matter is a res judicata are well stated under **Section 9 of the Civil Procedure Code** which provides that:

> "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."

There is also plethora of cases in which these conditions have been interpreted. See, **Seven Seas Shipping Agency Ltd vs. M/S Express Freight** (supra) and; **Yohana Dismas Nyakibari and Another vs. Lushoto Company Ltd. and 2 Others** (supra). Elaborating on the elements to be considered in determining whether a matter is a *res*

judicata, the Court in **Peniel Lota vs. Gabriel Tanaki and Others** (supra) stated:

> "The scheme of section 9, therefore, contemplates five conditions which, when co-existent, will bar a subsequent suit. The conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the Court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit."

In the matter at hand, while Mr. Ngudungi claimed the matter to be res judicata, Mr. Paul, on the other hand, disputed the claim. He averred that the applicants were not privies to the mentioned previous applications and the issues address in the previous applications are different from the ones in the applicants' application. Considering these arguments, I am of the considered view that the same can only be well resolved upon proof by presentation of the decisions on the previous consolidated applications. Despite the fact that the said decisions were not attached in the respondent's counter affidavit contrary to what was asserted by Mr. Ngudungi, this court cannot dwell on them. This is due to the fact that courts are not to consider evidence in resolving preliminary objections. See, **Soitsambu Village Council vs. Tanzania Breweries Limited & Another** (supra). In the premises, this point of objection is hereby overruled.

With regard to the 2nd point of objection, Mr. Ngudungi alleged that the matter was time barred. He contended that the applicants pleaded fraud or misrepresentation in their supporting affidavit, but the alleged fraud dates back to 2003, which is 20 years before this matter was brought to court. On the other hand, Mr. Paul denied the allegation averring that this was an application for revocation and not a suit on fraud.

It appears on paragraphs 6, 7, and 8 that Mr. Paul deponed that the respondent was granted letters of administration fraudulently. That, the respondent misrepresented himself as among the beneficiaries of the late Paul Kyauka Njau. I find it pertinent to reproduce the said paragraphs for ease of reference:

> *6. The said grant was obtained fraudulently by making a false suggestion that EMANOEL PAULI KYAUKA is amongst the beneficiaries of the estate of the late PAULI KYAUKA NJAU while none of such name appears as amongst the beneficiaries.*
>
> *7. The said grant was obtained while concealing from the court that EMANOEL PAULI KYAIKA is not amongst the beneficiaries of the estate of the late PAULI KYAUKA NJAU something which is material to the case.*
>
> *8. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently.*

However, contrary to what was alleged by Mr. Ngudungi, there is no provision in the Law of Limitation Act that has set the time limitation for suits on fraud to be 3 years from occurrence of the act complained of. Instead, to the contrary, the Law of Limitation Act does provide for the effect of fraud and mistake on computation of time. The law provides for commencement of computation of time where such allegations are pleaded to be the date of discovery of such fraud or mistake. The provision explicitly states:

> "26. Where in the case of any proceeding for which a period of limitation is prescribed—
>
> (a) the proceeding is based on the fraud of the party against whom the proceeding is prosecuted or of his agent, or of any person through whom such party or agent claims;
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the proceeding is for relief from the consequences of a mistake,
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, or could, with reasonable diligence, have discovered…"

This provision is dependent on the actual time limitation set for specific matters; it is not an independent clause. Besides, in my view, it requires evidence in proving the time the applicants had knowledge of the alleged fraud. I thus find Mr. Ngudungi to have strayed into error in his averments.

Further, this being a probate application, it can be preferred at any time by any interested party in a probate matter in which there is an administrator or executor in office. It is not an independent suit, but rather a miscellaneous application. The essence is always to find whether just cause exists for terminating an executor or administrator from his position. As long as the probate matter remains open, an application for revocation can be preferred at any time. In addition, the applicants have pleaded other factors to be taken into account, such as, that the grant has become useless and inoperative and that there is failure to file inventory or statement of accounts. These facts are pleaded under paragraph 9 and 12, respectively. In the foregoing, the 2nd objection is also found without merit, thus overruled accordingly.

With respect to the 3rd point of objection, Mr. Ngudungi contended that Mr. Paul's affidavit was defective. Mr. Paul believed that his affidavit was proper and in any case of otherwise, this court can expunge the defective clauses or order for a proper affidavit to be filed.

It is well settled that an advocate may swear or affirm an affidavit on behalf of his or her client(s). The facts deponed however, must be confined to matters in his own personal knowledge by virtue of him acting as his representative in previous proceedings. The Court of Appeal in **Lalago Cotton Ginnery and Oil Mills Company Limited** (supra) stated:

> "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 these proceedings."

Emphasising on limits of such affidavit, in **Tanzania Breweries Ltd & vs Harman Bildad Minja** (supra) the Court also stated:

> "From the above, an advocate can swear and file an affidavit in proceedings in which he appears for his client but on matters which are within his personal knowledge. These are the only limits which an advocate can make an affidavit in proceedings on behalf of his client."

I have observed Mr. Paul's affidavit, as argued by Mr. Ngudungi, in his verification clause, Mr. Paul specifically pointed out the facts which were within his own knowledge, that is, under paragraph 1 and 23; and facts that he was informed by the applicants, that is, the rest of the paragraphs. Under the law, he was not embodied with the authority to depone facts other than those within his knowledge. This therefore means, it is only the facts deponed under paragraphs 1 and 23 that were correctly deponed by the advocate. For ease of reference, his verification clause states:

> *"VERIFICATION:-*
>
> *I, Patrick Paul, being the advocate for the Applicants herein do hereby verify that what is stated at paragraphs 1 and 23 inclusive above are true to the best of my own knowledge; AND that*

> *what is stated at paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22 inclusive above is according to information I received from Monica Paul Kyauka which I believe to be true; AND that what is stated at paragraphs 2, 3, 4, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 inclusive above is according to information I received from Rose Paul Kyauka which I believe to be true.*"

Indeed, as argued by Mr. Paul, the remedy for an affidavit containing offensive paragraphs is for the said paragraphs to be expunged. However, the court has to consider whether after expunging the offensive paragraphs, the remaining paragraphs are capable of carrying the application to final determination. See; **Phantom Modern Transport (1985) Limited vs. D.T. Dobie (Tanzania) Limited** (supra); and **Stanbic Bank Tanzania Limited vs. Kagera Sugar Limited**, Civil Application No. 57 of 2007.

Mr. Paul was of further view that the situation could be rescued under **Rule 18 of the Probate Rules** by allowing filing of a supplementary affidavi**t**. The provision states:

> "Every affidavit to be used in supporting or opposing any application shall, unless the Judge otherwise directs, be filed with the Registrar not later than the day before the day appointed for hearing."

As seen above, the provision does not provide for amendment of an affidavit. Rather that, every affidavit to be used should be filed with the Registrar not later than the day before hearing. I find Mr.

Paul to have misconceived the application of the provision. The provision, in fact, does not mean that a completely defective affidavit would simply be saved by filing a fresh one. Rather, it means that an affidavit will not be rendered late as far as it is filed within such period. The Probate Rules provide that an application for revocation of appointment must be made by chamber summons and supported by an affidavit. See, **Rule 29(1) of Probate Rules** which states:

> "29(1) An application for revocation or annulment of a grant under section 49 of the Act shall be made by chamber summons supported by an affidavit setting out the grounds for such application."

In present circumstances, save for the 1st and 23rd paragraphs, the rest of the paragraphs contain hearsay matters rendering the affidavit incurably defective. Considering the defective paragraphs, I find the same cannot be expunged and still leave the application standing intact. In the premises, the applicants' chamber summons is without a supporting affidavit rendering the whole application defective before this court.

This is, as well, is not a circumstance which the overriding objective principle can salvage. It is well settled that the overriding objective principle cannot be invoked to disregard mandatory procedures of the law. See; **Mondorosi Village Council & Others vs. Tanzania Breweries Ltd & Others** (Civil Appeal No. 66 of 2017) [2028] TZCA 303 (13th December 2018); **Njake Enterprises Ltd vs. Blue Rock Ltd &**

Another (Civil Appeal 69 of 2017) [2018] TZCA 304 (3 December 2018); **Martin D. Kumalija & Others vs. Iron & Steel Ltd**. (Civil Application 70 of 2018) [2019] TZCA; **Hamis Mdida & Another vs. The Registered Trustees of Islamic Foundation** (Civil Application No. 330/11 of 2022) [2023] TZCA 17721 (4 October 2023). In **Njake Enterprises Ltd vs. Blue Rock Ltd & Another** (supra)the Court of Appeal expounded that:

> "…the overriding objective principle cannot be applied blindly on the mandatory provisions of the procedural law which goes to the very foundation of the case. This can be gleaned from the objects and reasons of introducing the principle in the Act. According to the Bill it was said thus;
>
> > "The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms…."

In the foregoing, I sustain the 3rd point of objection and hereby strike out the application. Considering the relationship between the parties, I make no orders as to costs.

Dated and delivered at Moshi on this 21st day of May, 2024.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA