IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

CIVIL REVISION NO 6 OF 2023

(Originating from Civil Revision No 1 of 2022 of the Dodoma District Court and Probate and Administration Cause No 34B of 2006 Chamwino Urban Primary Court)

MOSHI IDDI AWADHI..... APPLICANT

VERSUS

IMMANI JAMBO .....1ST RESPONDENT

SAID AWADH MTEZO.....2ND RESPONDENT

AWADHI KANNAH JAMBO.....3RD RESPONDENT

BARNABAS MSABI NYAMONGE.....4TH RESPONDENT

RULING

Date of the last Order: 30/05/2024

Date of the Ruling: 18/06/2024

LONGOPA, J.:

The matter before me originates from a Probate and Administration Cause regarding the estate of late Kannah Jambo Awadhi. The matter has been in court corridors since 2003 for different orders on the administration

of the estate. The current application for revision against the Ruling of the District Court of Dodoma in Civil Revision No. 1 of 2022.

The applicant filed an application under Section 31(1) of the Magistrates Courts Act, Cap 11 R.E. 2022 and any other enabling provision. The applicant sought the intervention of this Court for the following orders, namely:

> *1. That, this Honourable Court be pleased to call and examine the records of the proceedings in Civil Revision No. 1 of 2022 for sake of satisfying itself on the correctness, legality and propriety of the proceedings and orders thereto.*
> *2. That this Honourable Court be pleased to quash the proceedings and set aside all orders made thereto.*
> *3. Any other relief(s) that this Honourable court will deem fit and just to grant.*

The application is supported by an affidavit of Thomas Edward Nchimbi, the applicant's advocate. It is from this application that the 4th respondent filed a counter affidavit and notice of Preliminary Objection on three main grounds of objections namely, that: (a) the application is bad in law for want of jurisdiction; (b) the application is bad in law for being accompanied

by defective affidavit, and (c) the application is bad in law for being against the law.

On 30/05/2024, the parties were invited to submit on the preliminary objection. The 4th respondent enjoyed the legal services of Mr. Elias Machibya, learned advocate while the applicant was represented by Mr. Isaac Mwaipopo, learned advocate. The second respondent did appear in person.

The Counsel for 4th respondent commenced arguing on the Preliminary Objection. It was submitted that first Preliminary Point of Objection is on jurisdiction. The application is based on complaint of one house being subjected to inheritance for Plot Number 4 Block 4 Madukani, Dodoma City as revealed in Paragraph 4 of the Affidavit in support of the application. The applicant is lamenting that it was not correct to be part of the Administration/Probate Cause No 34B of 2016 that was determined by Chamwino Urban Primary Court. The reasons for this Preliminary Objection on jurisdiction are as follows:

First, the argument on which the property should be part of the administration of estate or probate is subject of the court that tried the matter i.e. the Primary Court. This is in accordance with the Primary Court (Administration of Estates) Rules GN No. 49 of 1971 especially Rule 8(d) of

the Rules. It gives the mandate to primary court to determine which properties are subject to administration of estates and which ones are not.

Second, the argument/laments were not part of the proceedings in the Primary Court nor the District Court. None was raised that the said house was not subjected to the administration of estates of the deceased. In the circumstances, the dispute is not subject of the provision of section 31(1) of the Magistrates Courts Act, Cap 11 R.E. 2022 that has been used to move the Court. That provision deals with matters that were dealt with by the lower court.

In the case of **Ally Omari Abdi versus Amina Halili** [2016] TLR 42- The Court of Appeal restates the need of adhering to the procedures of the Primary Court in probate/administration of estate. All the objections on whether the house was part of the administration should have been held or determined by the primary court.

There is opportunity to object anything that is not part of the estate in the court where the administration of estate cause is being handled. This court is invited to exercise its powers and apply the law as an appellate court thus, it is submitted that the appellate court cannot entertain the matters that were not taken or pleaded in the lower court.

In the case of **Hotel Travertine and 2 Others versus the National Bank of Commerce Limited** [2007] TLR 133 elucidated the limitation of the appellate court to entertain the matters not raised in trial and first appellate courts. Thus, this court lacks jurisdiction to entertain the matter that is before it on ground of jurisdiction.

On the second ground, it was submitted that supporting affidavit is defective as the applicant one Moshi Iddi Awadhi has not sworn/affirmed any affidavit. In the affidavit, the advocate states to be aware only for the first paragraph alone while all other eleven paragraphs are information from the applicant.

That being the case, first the affidavit contravened Order XIX Rule 3(1) of the Civil Procedure Code, Cap 33 R.E. 2019 that requires affidavit must contain facts within the knowledge of deponent. Thus, the whole affidavit is hearsay except Paragraph 1 of the affidavit.

The 4th respondent cited the case of **Said Salim Hamduni versus Attorney General**, Misc Civil Application No. 267/2022 High Court at Dar es Salaam, where Hon Judge Banzi held that affidavit was defective for containing hearsay. This was also a position in **Omari Ndolima and 120 Others versus Kilosa District Council and The Attorney General,**

Misc Land Application No 57 of 2022 – where it was observed that the application becomes incompetent for the defectiveness of the affidavit.

Second, Paragraph 4 mentions one Alfan Jambo Awadhi but in verification there is nowhere that such information was obtained from that person nor any affidavit supporting that fact. In **Omari Ndolima's** case - defectiveness of affidavit for mentioning persons who have not affirmed/an affidavit.

Third, the affidavit contains arguments, conclusions and extraneous matters. Paragraphs 10 nd 11 of the affidavit, are the ones containing extraneous matters, arguments and conclusion.

There is defectiveness verification in the affidavit. As we have mentioned that Paragraphs 4 and 5 information is not verified. There is false verification. The defect in verification of affidavit is incurable. Thus, the 4th respondent prayed for this Honourable Court to grant the Preliminary Objection with costs.

On the other hand, Mr. Isaac Mwaipopo, advocate for the applicant submitted against the Preliminary Point of Objection. On the first ground of the Preliminary Objection, it was submitted that the matter before this court is on section 31(1) of the MCA, Cap 11 R.E 2019. This section

empowers the Court to revise the proceedings of the lower courts at the appellate stage.

It was reiterated that the applicant noted/ has discovered that there is existing matter before this Court, thus was of the view that the matter is ongoing before this court in Civil Revision No. 54 of 2023.

In this application, the applicant came to court to inform that there existed an Administration Cause No 13 of 2003 where the applicant was the administratrix of the estate. This is evidenced by Annexure MI -1. The Court is empowered to call for record in the administration cause no 13/2003. The property that was in first administration cause ought not to be included in the second administration. That administration cause was closed in 06/10/2022 before G.K Gamba where it was stated that Plot No. 4 Block 4 Madukani was one of the properties that were administered.

The main argument was that Probate Cause No. 34B of 2006 is illegal though the counsel for applicant did not have any details regarding the same.

The applicant stated further that the application for revision caters for irregularities generally for interest of justice. The Probate/ Administration Cause No 13 of 2003, mentions/lists house at Plot No 4 Block 4 Madukani

in Dodoma. There were two probate /administration causes existed to administer a single property. This is a clear irregularity that this court ought to revise the same. On jurisdiction, therefore this Court is empowered to entertain the matter as probate/ administration cause no 34B of 2006 and the Civil Revision No. 1 of 2022 are the ones that this Court is invited to revised.

On defectiveness, it is submitted that the deponent knew the facts on his own because as an advocate of the High Court he perused all the available records of the court. It is not disputed that the first paragraph is on the advocate's own information and Paragraph 2 to 12 inclusive is information is from the applicant which he believed to be true.

The information that is contained in the affidavit have annexures that relate to the applicant. It is the applicant's submission that affidavit is not defective. Thus, the applicant prayed that affidavit is proper thus the application before this court is quite in order.

On the part of the second respondent, it was submitted that there are irregularities that have been committed thus this Court be pleased to determine the irregularities. The rights of the parties should be determined on merits. It was the second respondent's prayer to this Court

to determine appropriately on this Preliminary Objection after consideration the law.

The Counsel for the 4th respondent rejoined briefly by restating to maintain the submission in chief. It was reiterated that this Court has no jurisdiction to entertain the matter.

It was further added that the arguments by the Counsel for the applicant in respect of the house subject to the application for revision it was included in the list of properties of the estate of deceased Kannah Awadhi Jambo in the last order dated 02/12/2021 as revealed at Paragraph 6 of the affivavit and annexure MIA -3. That is the same date when the house was included in the assets of the deceased's assets as it was not throughout since 2003. This Court has no jurisdiction to entertain the application.

Having heard the rival submissions of the parties to this Preliminary Objection and perused available records, it is pertinent duty of this Court to decide whether there is merit or otherwise on this preliminary objection. This being preliminary objection, it is important to restate the meaning of the same and what is expected to be part of the preliminary objection.

The preliminary objection derives its definition in the celebrated case of Mukisa Biscuits. The Court of Appeal has reiterated it in plethora of authorities. In **Nyachiya vs Tanzania Union of Industrial & Commercial Workers** (Civil Appeal 79 of 2001) [2005] TZCA 66 (19 October 2005) (TANZLII), at pages 6-7, the Court reiterated the position in the case of **Mukisa Biscuit Manufacturing Company Ltd. v. West End Distributors Ltd** (1969) EA 696, whereby Sir Charles Newbod P. had this to say at page 701:-

> *preliminary objection is in the nature of what used to be a demurrer. it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion.*

In the same case, Law JA, at page 700 observed as following:-

> *So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection, may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of (time) limitation, or a submission that the*

parties are bound by the contract giving to the suit to refer the dispute to arbitration.

From the principle in this celebrated case, preliminary objection must be on point of law that can determine the matter to the finality. It may relate to jurisdiction of the court, the matter being timed barred as well as the presence of requirement to avail to arbitration by the parties agreement.

In the instant matter, the 4th respondent raised issues touching on jurisdiction of the court as well as incurable defectiveness of the affidavit in support of the application thus in law there is no application as the same lacks necessary supporting affidavit.

According to the provision of Order XIX Rule 3 (1) of the Civil Procedure Code, Cap 33 R.E. 2022 affidavits being evidence on oath the same must only be restricted to facts within the knowledge of the deponent. It states that:

3.-(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief

may be admitted: Provided that, the grounds thereof are stated.

The affidavit in support of the application categorically states that except for the averments in Paragraph 1 all other statements are not within personal knowledge of the deponent but are information from the applicant. The same contravenes the mandatory requirements of the Civil Procedure Code on the affidavit testimonies. The only exception is when the application relates to interlocutory application in which statement of belief may be accepted.

It should be noted that the application for revision is not an interlocutory application. It is an application that can determine rights and obligations of parties to the finality. It is not for some intervening events. Therefore, matters of belief in the affidavit in support of the application are not permissible.

In the case of **Bashir Ally vs Anyegile Andendekisye Mwamaluka & Others** (Civil Appeal No. 49 of 2021) [2024] TZCA 47 (16 February 2024) (TANZLII), pages 8-9, the Court of Appeal stated that:

Moreover, the consequential legal effect of making false depositions in an affidavit cannot be overstated than what

the Court did, about twenty- two years ago on 27/02/2002 in ***Ignazio Messina (supra)****. The Court has reiterated that proposition in a plethora of its decisions to that effect. The effect is to expunge that affidavit. And once the affidavit is gone, nothing would remain. It renders the entire purported affidavit inconsequential. For more clarity, in* ***Ignazio Messina (supra)*** *the Court held; "...An affidavit which is tainted with untruths is no affidavit at all and cannot be relied upon to support an application. False evidence cannot be acted upon to resolve any issue..."*

It is evident that the affidavit in support of the application is seriously defective for deponent has deponed on facts which are not within his knowledge rather information from another person. This has categorically deviated from mandatory provisions of the law that calls for facts within the knowledge of the deponent are the ones that must included in the affidavit.

The law in this jurisdiction allows that the offending provisions of the affidavit can be expunged for affidavit and leave non-violative paragraphs to stand in support of the matter before the Court. In the case of **MANTRAC Tanzania Limited vs Goodwill Ceramics Tanzania**

Limited (Civil Appeal No.269 of 2020) [2023] TZCA 17506 (21 August 2023) (TANZLII), the Court of Appeal at pages 11 and 12 stated that:

> *However, with respect, we do not agree with the course taken by the trial Judge in disregarding the witness statement without considering and determining if the remaining paragraphs of the affidavit could sustain the witness statement.* ***We say so because it is settled law that where the offensive paragraphs of the affidavit are inconsequential, they can be expunged leaving the substantive parts of the affidavit remaining intact.***

However, in the instant case, the affidavit cannot be saved from its defectiveness given that all paragraphs except the first paragraph are violative of the law. There is nothing to support the application before this Court. It is pertinent that the whole application must fall for being incompetent.

On the other hand, the issue of jurisdiction has been argued by both parties. Jurisdiction is fundamentally important to clothe this court with powers to determine the matter before it. The main aspect this court is being called upon to invoke its revisional jurisdiction is on administration of

a property subject of administration twice in administration two different administration causes.

There are two main limbs of the jurisdiction aspect. First, that the matter was not raised in the lower courts thus it cannot be raised at this stage. Second, that application is based on which property should be distributed which falls within mandate of the court that appointed the administrator. The applicant argued that this being revision, this court has prerequisite jurisdiction to entertain the legality and propriety of the decisions of the lower court.

I have carefully considered the first limb of the jurisdiction. It is true that the appellate court is precluded from entertaining a matter that was not pleaded nor raised in the lower court. This is in accordance with a principle in **Hotel Travertine Limited & Others vs National Bank of Commerce Limited** (Civil Appeal 82 of 2002) [2006] TZCA 16 (27 October 2006) (TANZLII) at page 14, the Court noted that:

> *As a matter of general principle, an appellate court cannot allow matters not taken or pleaded in the court below, to be raised on appeal (see:* ***Gandy v. Gaspar Air Charters Ltd****. (1956) 23 EACA 139;* ***James Funke Gwagilo v.***

Attorney General *(CAT) Civil Appeal No. 67 of 2001 (unreported).*

I am aware that section 31(1) of the Magistrates Courts Act, Cap 11 R.E. 2019 provides that the High Court in exercise of the revisional jurisdiction shall have all powers of the appellate court. In determination of the matter instituted under revisional jurisdiction that is where powers of appeal are invoked. That does not turn the revision into appeal thus I afraid that this limb is misconceived. Therefore, the principle in **Hotel Travertine Ltd (supra)** does not apply to instant case.

On the second limb, focus is on the properties subject of administration of estate. That limb importantly addresses which court is empowered to determine which properties are subject of administration in the estate of the deceased person and which ones are not.

The guiding principle on powers of the court in administration of estates regarding appointment or administration of assets can be found in **Hidaya Seleman & Others vs Moshi Salum** (Civil Appeal No. 490 of 2020) [2024] TZCA 425 (10 June 2024) (TANZLII), at page 7, where the Court of Appeal stated that:

From the above provisions, it may be clear to us that the primary court has powers, in probate and administration proceedings to, among others, revoke the appointment of an administrator or executor as the case may be, if it has good and sufficient cause so to do. That is in accordance with item (c) of Rule 2 of the Fifth Schedule. In this case, the respondents were not parties in the proceedings. However, they were aggrieved by the appointment of the respondent for the reason that, they were not made aware of the proceedings and that, the respondent illegally and fraudulently procured the WILL which was the subject of the appointment. The grounds in the revision, we have no doubt, would, if established, amount to "good and sufficient cause" within the meaning of the Rules. ***No doubt, therefore that, the proper avenue for the appellants to challenge the appointment at the first instance was by way of an application for revocation before the primary court****. It was, in our judgment, quite premature for them to initiate superior proceedings to the District Court to challenge the appointment without exhausting the remedies available at the primary court. That is a notorious principle of law we need not cite any authority.*

It is important to note that the probate and administration cause No 34B of 2016 that the applicant is seeking to challenge ought to have been challenged properly before the trial court that determined and granted the application for appointment of the administrator of the estate. It would have been objected at an appropriate court.

The Court has always insisted that jurisdiction on probate matters relating to appointment and assets amenable to administration instituted in the primary court remain with the primary court in accordance with the Fifth Schedule to the Magistrates Courts Act, Cap 11 R.E 2019. In the **Ally Omari Abdi vs Amina Khalil Ally Hildid** (Civil Appeal No. 103 of 2016) [2016] TZCA 906 (17 November 2016) (TANZLII), at pages 18-19, the Court of Appeal stated that:

> *There is no doubt in our minds that in the instant appeal before us, the pleadings and also issues for trial court's determination, were over probate matters which were opened in primary courts but had not been completed in accordance with the provisions of the Fifth Schedule to the Magistrates Courts Act, Cap. 11 (the MCA). Clause 11 of the fifth schedule to the MCA provides for the duty of an administrator of the deceased's estate who had earlier*

been appointed by primary courts, after completing the administration of the estate, to account to the primary court concerned for his or her administration of that estate.

This decision emphasizes on the need of the administrator of the estate to account on the properties collected and administered to the rightful heirs or otherwise in accordance with the applicable procedure in the appointing court. Inclusion or failure to include a particular property out to have been challenged in that court as the applicant claim to be one of the heirs.

Given the averments in the affidavit in support of the application in particular paragraphs 5 and 9 are based on the administration of the house located in Plot No 4 Block 4 Madukani Area within the City of Dodoma, it is my settled view that such aspect falls within the mandate of the appointing court that would have determined the same conclusively. The applicant challenging the administration of the same asset in the administration of estate of the late Kannah Jambo Awadhi ought to have done so in the court that appointed the administrator/administratrix of the estate. I concur with the submission of the counsel for the 4th respondent that such matters were a reserve of the appointing court as it relates to what properties of the estate of late Kannah Jambo Awadhi were collected and administered.

I therefore uphold the preliminary objection on point of jurisdiction that given the nature of the application before this court that the asset in question ought not to have been distributed twice, such determination would be appropriately made by the appointing court and not otherwise. As the jurisdiction is so fundamental aspect for determination of the matter, it is pertinent that having stated that determination on whether house in Plot No. 4 Block 4 Madukani area in Dodoma Municipality falls within the administrator's appointing court then this court lacks prerequisite jurisdiction to entertain the matter before it.

In totality of events, it is my settled view that in the circumstances of the case the application before this court is preferred in contravention of the law thus decline to hear the same for lack of prerequisite jurisdiction. I sustain the preliminary objection. The application is hereby struck out for being incompetent.

It is so ordered.

DATED at **DODOMA** this 18th day of June 2024.

E.E. LONGOPA
JUDGE
18/06/2024