

IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

MISC. CIVIL APPLICATION NO. 54 OF 2023

(Originating from the decision of Morogoro District Court in Civil Case No. 26 of 2016 delivered on 5th July, 2017 by Hon. E. Rwehumbiza, RM)

KADILI ZAHORO (1st Administrator of the Estate
of the Late Bahati Ramadhani Mponda) 1st APPLICANT
SAUDA BAHATI MPONDA (2nd Administrator of the Estate
of the Late Bahati Ramadhani Mponda) 2nd APPLICANT

VERSUS

MWANAHAWA SELEMANI RESPONDENT

RULING

26th Oct, 2023 & 16th Jan, 2024.

M.J. CHABA, J.

The Applicant, Kadili Zahoro and Sauda Bahati Mponda (Suing as Administrators of the Estate of the Late Bahati Ramadhani Mponda), preferred the instant application under certificate of utmost extremely urgent, beseeching this court among other things, to grant an extension of time for the applicants to file an application for Revision out of time against the decision of Morogoro District Court in Civil Case No. 26 of 2016 delivered on 5th July, 2017



The application has been preferred by way of chamber summons predicated under section 14 of the Law of Limitation Act [CAP. 89 R.E. 2019] and section 95 of the Civil Procedure Code [CAP. 33, R.E. 2019] (the CPC), and it is supported by an affidavit deposed by Mr. Michael Mantawelah Lucas, an advocate for the applicants.

As background, the applicants were the defendants in Civil Case No. 26 of 2016 at the District Court of Morogoro, at Morogoro which was delivered in favour of the respondent herein. For reasons better known by the applicants, they delayed to lodge an appeal against the said decision and hence having found themselves out the prescribed time to appeal. Afterwards, they unsuccessfully lodged in this Court (Hon. B.R. Mutungi, J., As she then was) an application for extension of time through Misc. Civil Application No. 795 of 2017 which was delivered on 23rd day of August, 2018.

Aggrieved, the applicants knocked to the doors of this Court (E.B. Luvanda, J.) through Misc. Civil Application No. 573 of 2018 beckoning upon the Court to grant them leave to appeal to the Court of Appeal of Tanzania against the said ruling. However, their application hit the rock after it was refused by the Court on the ground of being devoid of merits. Still determined to pursue their rights, the applicants have preferred the present Misc. Civil Application No. 54 of 2023 seeking for enlargement of time to file Revision Application against the decision



of the District Court of Morogoro, at Morogoro in Civil Case No. 26 of 2016 delivered on 5th July, 2017 as alluded to above.

At this juncture, I wish to state here that, on the basis of the information garnered from the first paragraph of the affidavit deposed by the Counsel for the applicants in support of the chamber summons, I took pain to travel through the entire affidavit and noted a serious contravention of the provision of the law under Order XIX, Rule 3 (1) and (2) of the CPC. This provision stipulates that: -

"Rule 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.

(2) The costs of every affidavit which unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall (unless the court otherwise directs) be paid by the party filing the same".

Times without a number the above provision have been amplified by this Court as well as the Court of Appeal of Tanzania where in most cases it has been emphasized that, an advocate is allowed to depone an affidavit on behalf of his



client on matters which are in his personal knowledge only and not those in the personal knowledge of his client. Additionally, according to the provision of law cited above, an advocate is limited to depose only on matters of his knowledge and which is able to prove, and where he believes on information supplied to him from other person or sources, he or she has to give the reasons for believing on the same. In the case of **Lalago Cotton Ginnery and Oil Mills Company Ltd vs. The Loans And Advances Realization Trust (LART)**, Civil Application No. 80 of 2002 (unreported), the CAT stressed 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 these proceedings. And that 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 the advocate can make an affidavit in proceedings on behalf of his client."



Corresponding observation was made by this Court in the case of **Ansbert Mugamba Ngurumo vs. Charles John Mwijage & Others (Misc. Civil Application 45 of 2015) [2015] TZHC 2 (14 December 2015)** (Extracted from www.tanzlii.go.tz), where it was stated that:

"O. XIX r. 3 was the subject of discussion in the case of Cordura Ltd Oysterbay Hotel V. Jubilee Insurance Company of Tanzania Ltd Miscellaneous Civil Case No. 21 of 2002 High Court (unreported), Nsekela, J., (as he then was) stated:

". . I agree with Mr. Kesaria that as the matter of prudence and practice an advocate should not swear/affirm an affidavit on behalf of his/her client if the latter is available."

In this application, as gleaned from the affidavit of the applicants deponed by the advocate, Mr. Michael Mantawellah Lucas, paragraphs 1, 2, 5, 6 and 7 is true and correct according to the advocate's own knowledge and belief, and what is stated from paragraphs 3 to 4 are true information supplied to him by the applicants. For easy of reference, I find it apt to reproduce an extract of the verification clause as hereunder:



"VERIFICATION:

I MICHAEL MANTAWELAH LUCAS, Advocate for the applicants herein do hereby verify that what is stated from paragraphs 1, 2, 5, 6 and 7 above is true and correct according to my knowledge and belief and what is stated from paragraphs 3 and 4 is true according to the information received from the applicants which I verily believe to be true.

Verified at Morogoro this 16th day of August 2023.

Signed by:

ADVOCATE FOR THE APPLICANTS

DULY AUTHORIZED AND ABLE TO DEPONE THE FACTS"

From the above extract, it goes without saying that, the applicants' advocate exceeded the boundaries set by the law by swearing contents which are not in his personal knowledge.

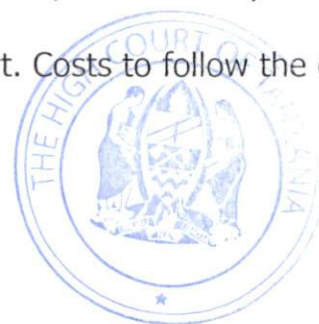
As to the way forward, I have decided to take inspiration from the persuasive authority of this Court in the case of **Chairman Pentecostal Church of Mbeya vs. Gabriel Bisangwa & Others (DC Civil Appeal No. 28 of 1999) [1999] TZHC 39 (29 November 1999)** (extracted from www.tanzlii.go.tz), in which this Court was confronted with akin situation in an application for extension of time. In its deliberation, the Court held: -



"It is a statutory requirement however, that an affidavit may be based on belief only in interlocutory applications. This is what sub-rule (1) of rule 3 of Order XIX provides. An application for extension of time is not one of an interlocutory nature. In that category fall applications for interlocutory orders, not for specific reliefs. And if an affidavit in an interlocutory application is based on the beliefs of the deponent the grounds for such beliefs must be disclosed...Since the application before me is not one of an interlocutory nature in as much as it seeks a permanent solution to the delay in filing the application for leave, an affidavit based on the belief of the deponent is not admissible in evidence. This then leaves the application without evidence that supports it. It follows that the application is untenable..."



On the basis of the above cited provisions of the law and the authority, and in view of what I have endeavoured to demonstrate hereinabove, I find and hold that, the affidavit of the applicants deposed by the advocate, Mr. Michael Mantawellah Lucas in support of the chamber summons is fatally defective.

In the premises, this application is devoid of merits, and I hereby struck out on the ground of being incompetent before this Court. Costs to follow the event.



It is so ordered.

DATED at **MOROGORO** this 16th day of January, 2024.

M. J. Chaba
JUDGE
16/01/2024

Court:

Ruling delivered under my Hand and the Seal of the Court in Chamber's this 16th day of January, 2024 in the presence of the Respondent who appeared in person, and unrepresented and in the absence of both Applicants.




SUSAN P. KIHAWA
DEPUTY REGISTRAR
16/01/2024

Court:

Rights of the parties to appeal to the Court of Appeal of Tanzania fully explained.


SUSAN P. KIHAWA
DEPUTY REGISTRAR

16/01/2024