

TANZANIA / JUDGMENT

# Probate No

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1 January 2024

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA TEMEKE SUB-REGISTRY (ONE STOP CENTRE) AT TEMEKE PROBATE AND DMINISTRATION CAUSE NO. 26900 OF 2024 IN THE MATTER FOR APPLICATION FOR LETTERS OF ADMINISTRATION BY ZAINABU WALII ALI..... PETITIONER And IN THE MATTER OF OBJECTION By SALUM MUHIDIN NDOLANGA..... CAVEATOR

## RULING

3rd & 23th September, 2024 BARTHY, J.: This ruling arises from the preliminary objection raised by the advocate for the petitioner, who contended that the affidavit filed by the caveator in this matter is defective for lacking a verification clause. The court ordered that the preliminary objection be disposed of by way of written submissions, which were duly filed by the learned advocates for both parties. i In support of the preliminary objection, Mr. Abraham Hamza Senguji, learned advocate for the petitioner, argued that affidavits are governed by law, specifically Order XIX of the Civil Procedure Code, Cap 33 R.E. 2019 (the CPC). He asserted that affidavits must be verified to authenticate the facts deposed. Verification is crucial because an affidavit is equivalent to oral evidence, and its verification ensures the truth and authenticity of the statements made by the deponent. To bolster his argument, Mr. Senguji cited the case of Sanyou Service Station Ltd vs. B.P. Tanzania Ltd (Now Puma Energy (T) Ltd, Civil ■» Application No. 185/17 of 2018 (unreported), where the court emphasized the importance of verification in affidavits. The court held that verification assists in establishing facts agreed upon by the parties and ensures the genuineness of the allegations made. Without verification, the affidavit cannot be admitted as evidence. Mr. Senguji argued that the affidavit of the caveator in the present case lacks a verification clause, rendering it defective. He maintained that in the absence of a valid affidavit, the court cannot determine the caveat entered by the caveator. He, therefore, prayed for the court to dismiss the caveat entered by the caveator. 2 In response, Mr. Felix C. Bruder, learned advocate for the caveator, submitted that the preliminary objection raised by the petitioner's counsel was based on Order XIX of the Civil Procedure Code, Cap 33 R.E. 2019. He contended that this ground had not been previously disclosed to the caveator or the court. In this regard, he cited the case of Registered Trustees of the Baptist Convention of Tanzania (Jumuiya Kuu Ya Wabatisti) vs. James Kasomi and Others (Misc. Civil Application No. 35 of 2021) [2021] TZHC 6014 (13 August 2021), where the court criticized the introduction of new grounds of objection during submissions without prior notice. Mr. Bruder further argued that a valid preliminary objection

must raise a pure point of law, not facts, as established in the case of *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd* [1969] EA 296. He emphasized that the petitioner's counsel introduced a new objection without prior notice, violating the requirement for clear notice of a legal point, which deprived the opposing party of the opportunity to prepare an adequate defence. He supported his argument by citing additional cases, including *Shose Sinare vs. Stanbic Bank Tanzania Ltd* and *Gabinus Singano vs. St. Timothy Pre and Primary School* (Labour Revision No. 8 of 2019) [2020] TZHC 4221 (9 July 2020).<sup>3</sup> Consequently, Mr. Bruder prayed for the dismissal of the preliminary objection with costs, emphasizing that the petitioner's conduct was improper. In rejoinder, Mr. Senguji briefly responded by stating that the caveator's counsel had misconstrued his submission. He clarified that the preliminary objection was aligned with the legal requirement regarding the verification of affidavits. Mr. Senguji reiterated his earlier arguments, emphasizing that the law mandates that affidavits be verified, and the caveator's affidavit lacked verification. He maintained that this omission was a critical defect and argued<sup>4</sup> that the caveator's arguments were without merit. In light of the submissions from both parties, the court must now determine the validity of the preliminary objection raised and whether the affidavit is incurably defective due to the omission of the verification clause. Having carefully considered the submissions, it is a well-established legal principle, as stated in *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd* (supra), that a preliminary objection must raise a pure point of law. It should not require the court to investigate facts or call for evidence, and it must be raised in advance, giving the opposing party sufficient notice, rather than being introduced unexpectedly during submissions. This principle was also emphasized in *Registered Trustees of the Baptist Convention of Tanzania vs. James Kasomi and Others* (supra), where the court criticized the introduction of new grounds of objection during submissions without prior notice. In the present matter, the petitioner's counsel raised an objection based on the assertion that the affidavit filed by the caveator is defective for lacking a verification clause. For this objection to have legal standing, the requirement to have verification clause on the affidavits is clearly provided for in the law. Mr. Senguji, argued that the requirement for verification is found under Order XIX of the Civil Procedure Code (CPC), Cap 33 R.E. 2019. However, Mr. Bruder, refuted this argument, claiming that citing this provision introduced a new objection that had not been raised earlier, thus failing to notify the opponent or the court properly. The party raising a preliminary objection must demonstrate that it is based purely on a point of law by citing the specific legal provision. It is an established practice, widely accepted by the courts, that during the hearing of the objection, the party must substantiate their claim by referencing the relevant legal provision. This ensures that the objection is not based on facts or extraneous matters but grounded in clear legal principles. Regarding this matter, the law provision cited by Mr. Senguji was stated in the submission to substantiate the existing objection, not to raise a new objection. Therefore, the argument that the preliminary objection was introduced unexpectedly is unfounded. The caveator had been duly notified of the objection, in accordance with the court's order. Now turning to the objection raised, it is a fundamental rule that an affidavit must be verified by the deponent, who must attest to the truth of » the facts within their personal knowledge. This ensures the authenticity and genuineness of the statements made in the affidavit. As highlighted in *Lisa E. Peter vs. Al-hushoom Investment* (Civil

Application No. 147 of 2016), the Court of Appeal held that: "...it is imperative for a deponent to append his/her signature below the verification clause so as to affirm the genuineness and authenticity of the deposed allegations as well as to make the deponent assume responsibility for the allegations." In the present case, it is undisputed that the caveator did not verify the facts deposed in the affidavit, rendering the affidavit incurably defective. 6 This position was reaffirmed in *Anatory Peter Rwechungura v. Principal Secretary Ministry of Defence and Another* (Civil Application No. 548/4 of 2018), where the Court of Appeal held that a defective affidavit cannot support an application or legal process. In conclusion, I find that the preliminary objection has merit. The affidavit in question is incurably defective due to the lack of a verification clause. A defective affidavit cannot support the caveat entered, and therefore, the caveat is incompetent and is hereby struck out. It is so ordered. Dated at Temeke this 23rd day of September, 2024. N. BART JUDGE Delivered in the presence of Petitioner in person, Mr. Abraham Senguji Learned Advocate for the Petitioner, Caveator in person, Mr. Felix Bruder Learned Advocate for the Caveator and Ms. Bernadina Tayari, RMA. 7

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Prepared on 14 October 2026 · Esheria