

**IN THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 519 OF 2017

(Originating from Probate Cause No. 273 of 2016 in Kawe Primary Court)

<p>1. THADEI PAUL KOMU 2. MARGERETH PAUL KOMU 3. LUCY PAUL KOMU</p>	} APPLICANTS
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VERSUS

MICHAEL PAUL KOMU.....RESPONDENT

RULING

Date of the last Order 24th November 2017

Date of Judgement 13th March 2018

R. K. SAMEJI, J.

The applicants in this Application are seeking for *ex parte orders* of this Court to transfer the proceedings of the *Probate Cause No 273 of 2016* from Kawe Primary Court to this Court and maintenance of the status quo pending the determination of the matter. The said applicants are as well praying the Court to issue the following orders inter-parties, to:-

(a) order for the transfer of the proceedings of the Probate Cause No. 273 of 2016 from the Kawe Primary Court to this Court;

- (b) *nullify the records of Probate Cause No. 273 of 2016 in the Kawe Primary Court;*
- (c) *order for the maintenance of the status quo; and*
- (d) *any other orders and relief(s) the honorable Court shall deem just and fit to grant.*

On the other hand, the respondent has filed a Counter Affidavit accompanied by the preliminary objection to the effect that the:-

- (a) *Application is incompetent for being preferred against the wrong party;*
- (b) *Application is incompetent before the Court as it bears wrong citation of the law;*
- (c) *supporting Affidavit is incurably defective for contravening mandatory provision of section 7 of the Notaries Public and Commissioners for oath Act, Cap. 12 R.E. 2002;*
- (d) *verification clause in the Affidavit is incurably defective for lack of signatures of all applicants;*

- (e) *jurat of attestation of the Affidavit is incurably defective for lack of signatures of all applicants;*
- (f) *Application has been overtaken by event since the proceedings of Probate Cause no. 273 of 2016 are closed and the properties are distributed to the beneficiaries; and*
- (g) *Application is improperly before this Court.*

At the hearing of the above points of preliminary objection the applicants were under the services of Ms. Highnessqueen Anande Kitteni, the learned Counsel, while Mr. Leocard W. Pendo Kipengele, the learned Counsel represented the respondent. By consent of the parties, the preliminary objection was argued by way of written submissions. This was adequately done and I am grateful to all Counsel for the parties for the energy and industrious research involved in canvassing issues herein. The said submissions are in the record and I feel it is not necessary to reproduce the same verbatim herein, but only the relevant section in respect of this analysis will be summarized.

It is important to point out right at the outset that in the course of perusing the points of preliminary objection raised by the respondent and submissions by the parties, *inter alia*, I have observed that, the Counsel for the applicants has since conceded to the 3rd point of objection. Since, the said point of objection is on the competence of the Application herein, I shall begin with that issue.

Arguing on the said issue, which is the 3rd ground of objection, Mr. Kipengele challenged the Affidavit in support of the Application that the same is incurably defective for contravening the mandatory requirement of section 7 of the *Notaries Public and Commissioners for oath Act, Cap. 12 [R.E. 2002]*. Mr. Kipengele argued that, the said Section provides in a mandatory terms that:-

"No commissioner for oaths shall exercise any of his powers as a commissioner for oaths in any proceedings or matter in which he is advocate to any of the parties or in which he is interested". [Emphasis supplied].

Mr. Kipengele said the word used in that section is "*shall*" which denote mandatory compliance. He said in the case at hand the very advocate for

the applicants one *Highnessqueen Anande Kitteni* is the same officer, who acted as a commissioner for oath and attested to the applicants' Affidavit, the thing which is contrary with the above provisions of the law. He finally said the act of the Counsel to act in the two positions had since rendered the Affidavit in support of this Application incurably defective and hence rendering the entire Application incompetent before the Court.

On the other side, Ms. Kitteni had since conceded to this point that the Affidavit herein is fatally defective. In order to verify what has been said herein, I have since perused the said Affidavit and verified that the Affidavit before this Court is fatally defective for contravening section 7 of the *Notaries Public and Commissioners for oath Act, (supra)*.

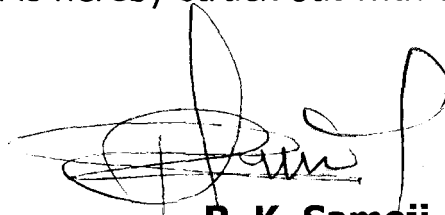
I should also emphasize that, once an Affidavit is termed to contain defects it renders the entire Application incompetent, as it has no legs to stand on. Therefore, the only remaining noble duty of this Court is to strike out the said Application for being accompanied by a defective Affidavit.

It is therefore my respectful view that, there is considerable merit in Mr. Kipengele's submission in that, the Affidavit in support of the Application before me is incurably defective. In my view, this point alone suffices to

dispose of the matter and I feel that, it is not necessary to dwell on discussing the remaining grounds of the preliminary objection.

In the event and for the foregoing reasons, I hereby uphold the 3rd point of the Preliminary Objection and proceed to declare that, the *Misc. Civil Application No. 519 of 2017* which is accompanied by a defective Affidavit is incompetent and is hereby struck out with costs.

It is so ordered.



R. K. Sameji
JUDGE
13/3/2018