

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 275OF 2016

THE REGISTERED TRUSTEES OF SHADHILY.....APPLICANT

VS

SALIM OMARY.....RESPONDENT

**(Application for extension of time from the decision of the
Court of Appeal of Tanzania at Dar es Salaam)**

(Massati, Oriyo, Mwarija, JJJ,A.)

dated the 10th day of February, 2016

in

Civil Appeal No. 89 of 2010

RULING

23rd & 28th November, 2016

JUMA, J.A.:

By a notice of motion filed on 15thSeptember, 2016 under a Certificate of Urgency, the Applicant, REGISTERED TRUSTEES OF SHADHILY, acting under Rule 10 of the Tanzania Court of Appeal Rules 2009 (the Rules); is seeking an order of the Court to extend time to enable the Applicant trustee to apply for a review the Order of this Court dated 10th day of February, 2016 wherein the Court dismissed the Applicant's

CIVIL APPEAL NO. 89 OF 2010 on ground of laxity and loss of interest to prosecute that appeal.

Before the hearing date, Mr. Jethro Turyamwesiga, learned Advocate filed a notice of Preliminary Objection challenging the competence of the application. He specifically demanded that the application should be struck out with costs because it is preferred against the Respondent SALIM OMARY, who is now deceased.

When the application came up for hearing before me on 23/11/2016, Mr. Edward Peter Chuwa learned Advocate appeared for the Applicant. At the very outset, Mr. Turyamwesiga maintained that he does not represent the Respondent who is deceased. He only appears as an officer of the Court in response to the summons.

On the sole ground of preliminary objection Mr. Turyamwesiga submitted that he could not file an affidavit in reply because he had no formal instructions. At any rate, he added, the Respondent having passed away on 13th July, 2016, he could not issue instructions to the learned counsel to file an affidavit in reply to an application that was filed later on 15th September, 2016. He asserted that because the Respondent was

already dead when this application was filed, Rule 57 (3) of the Rules which saves applications on death of parties does not apply to Respondent who had died well before the application was filed. Rule 57 (3) states:

"(3) A civil application shall not abate on the death of the applicant or the respondent but the Court shall, on the application of any interested person, cause the legal representative of the deceased to be made a party in place of the deceased."

Mr. Turyamwesiga insisted that Rule 57 (3) would only have come into play if the Respondent was alive when the applicant filed this application. In the end result, he urged me to strike out the application. He did not press for costs.

When his turn came to respond on the preliminary point of objection, Mr. Chuwa took issue with the way Mr. Turyamwesiga raised preliminary point of objection over a matter which requires proof by evidence and therefore fell outside the threshold of raising pure points of law. He submitted that he did not represent the Applicant during the hearing of the CIVIL APPEAL NO. 89 OF 2010. He came into the frame to represent the Applicant when RK RWEYONGEZA & CO. ADVOCATES withdrew their legal services. Apart from urging me to refrain from believing the

assertion by Mr. Turyamwesiga that the Respondent is now deceased, Mr. Chuwa submitted that at the time when he lodged this application on 15th September, 2016 he was not aware that the Respondent had already passed on. He urged me to adjourn the hearing to allow him verify whether the Respondent is indeed deceased and to plead his legal representative.

In his rejoinder, Mr. Turyamwesiga reiterated his earlier line submissions. And as an officer of the Court, he showed me a copy of the Burial Permit No. **0000003050** issued by the Office of the Registrar of Births and Deaths showing that one ABDALLAH SALIM OMAR died on 13th July, 2016.

From submissions of the two learned Counsel on preliminary point of objection, my decision shall revolve around the question whether the objection brought by Mr. Turyamwesiga raises a pure point of law sufficient to dispose of the application without going into its merits. The settled position of the law in Tanzania was reiterated by the Court in **Hezron M. Nyachiya vs. 1. Tanzania Union of Industrial and Commercial Workers, 2. Organisation of Tanzania Workers Union**, Civil Appeal No. 79 of 2001(unreported) to the effect that there

can be no pure point of law where there are certain facts central in the objection that require proof by evidence. The rationale underlying the settled legal principle that a preliminary objection must raise pure point of law became obvious when Mr. Turyamwesiga, without so much as filing an affidavit, attempted to convince me from the bar that the Respondent was deceased.

As rightly submitted by Mr. Chuwa, on the basis of documents annexed to the Notice of Motion, the question whether the Respondent SALIM OMARY is deceased is a question of fact which required proof and cannot be disposed of under a preliminary objection.

There is no doubt from the documents annexed to the notice of motion that on 10th February, 2016 when the Court dismissed the CIVIL APPEAL NO. 89 OF 2010, Mr. Turyamwesiga appeared for the Respondent therein who was referred to as SALIM OMARY. Yet, today, when the instant application which cited the same SALIM OMARY as the Respondent came up for hearing before me, Mr. Turyamwesiga contended that the application should be struck out because the Respondent is deceased. It is significant to note that even the burial certificate which the learned Counsel presented, does not offer the

missing proof of death of the Respondent referred to as SALIM OMARY. Instead of referring to SALIM OMARY (the Respondent herein), the burial certificate but refers to ABDALLAH SALIM OMAR, who could be another person altogether.

It is therefore my settled position and I hold that for raising matters pertaining to the death of the Respondent which require further proof, the preliminary objection should be and is hereby dismissed.

With the dismissal of the preliminary objection, I need to determine the fate of this application. On several previous occasions the Court has been called upon to determine the fate of applications where the Respondent is reportedly deceased. In **Kepha Steven Makanga vs. John Mponeja**, Civil Application No.16 of 2015 (unreported), the Court was informed that the Respondent therein was dead and an administrator of the deceased of that Respondent's estate had yet to be appointed. The Court adjourned the hearing of the application pointing out that under Rule 57 (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules) a civil application to the Court does not abate on the death of the Respondent. The Court added that his legal representative can be substituted to answer the Applicant's claims.

In the upshot, I shall take a similar way forward as the Court did in **Kepha Steven Makanga vs. John Mponeja** (supra). I am inclined to adjourn the hearing of this application to enable the Applicant to establish whether SALIM OMARY he cited as the Respondent is indeed deceased and if so; for a legal representative of the Respondent to be made a party to this application.

Otherwise, the hearing of the application is adjourned to another date to be fixed by the Registrar to allow the Applicant to plead the Respondent or his legal representative depending on established facts. It is so ordered.

DATED at **DAR ES SALAAM** this 23rd day of November, 2016.

I.H. JUMA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


B.R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL