

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

(CORAM: MASSATI, J.A., ORIYO, J.A. And MUGASHA, J.A.)

CIVIL APPLICATION NO 124 OF 2015

AMANI MASHAKA (applying as the Administrator  
of the estate of MWAMVITA AHMED deceased) ..... APPLICANT

VERSUS

1. MAZOE A AMANI MASHAKA
2. MWAMVITA MOHAMED MATUWILA
3. SALEH MOHAMED ABOUD ..... RESPONDENTS

(Application for revision of the ruling and order of the High Court  
Land Division, at Dar-es-salaam)

(Ndika, J.)

dated the 24<sup>th</sup> day of April, 2015

in

Land Case No. 198 of 2010

.....

**RULING OF THE COURT**

23<sup>rd</sup> February & 18<sup>th</sup> March, 2016

**MUGASHA, J.A.:**

This is an application for revision by notice of motion brought under section 4 (3) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002. The applicant is seeking revision on two grounds of motion as follows:-

- a) That, the decision of the High Court refusing to correct errors in the ruling was not justified taking into account that the suit was dismissed well informed that the plaintiff was dead.
- b) That, the Ruling complained of was preceded by other rulings were problematic that is to say the purported review made on 21<sup>st</sup> June, 2013.

The affidavit of **AMANI MASHAKA** is in support of the application. To buttress the motion the applicant has filed written submissions. The application has been challenged by the respondents through the joint affidavit of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

The applicant was represented by Mr. Jethro Turyamwesiga learned counsel and the respondent was represented by Mr. Francis Mgare learned counsel.

The respondents have raised preliminary points of objection on the following:-

- (a) The applicant has no *locus standi* to apply for revision of the trial decision dated 24.4.2015.

- (b) There is nothing to revise as far as the 21.6.2013 decision is concerned.
- (c) The notice of motion contravenes rule 48 (2) of the Tanzania Court of Appeal Rules, 2009.

At the hearing of the preliminary objection, the respondent abandoned the two grounds (b) and (c) and argued only ground (a). He adopted the written submission filed and urged the Court to dismiss the application because the suit which is a subject of the application has abated.

On the other hand, Mr. Turyamwesiga for the applicant, asked the Court to dismiss the preliminary objection arguing that, it is illogical to say that the Administrator of estate has no *locus standi* in the case which involved the deceased **MWAMVITA MOHAMED MATUWILA** who was a party in Land Case 198 of 2010. Moreover, in the event the trial court dismissed the case for want of prosecution with costs, such costs are on deceased's estate under the applicant's administration. He reiterated that the applicant has *locus standi* in the application and urged us to dismiss the preliminary objection with costs.

In rejoinder, Mr. Mgare argued that, mere appointment of the applicant as an administrator did not give him an automatic right as a party in Land Case No. 198 of 2010 which was pending. He added that, the applicant must have applied to be joined as party in terms of Order XXII rule 3 (1) of the Civil Procedure Code Act, [CAP 33 R.E. 2002]. As the applicant was not joined as a party in Land Case No. 198/2010, he does not qualify to seek revision in the application at hand. He further added that, there is nothing to be revised because the suit abated following applicant's failure to be joined as legal representative.

The question to be answered is, does the applicant who was not a party in the trial **has locus standi** in this application. There is a chain of case law in which the Court has reiterated on how a third party can invoke the revisional jurisdiction of the Court. In **MGENI SEIF VS MOHAMED YAHAYA KHALIFANI, CIVIL APPLICATION NO.104 OF 2008** (Unreported), the court held:-

*"...because she was not a party to the said suit, but is contesting ownership of the house in dispute, not*

*having a right of appeal, the only venue for the applicant would be revision."*

Furthermore, in **DOMINIC NKYA AND ANOTHER VS CECILIA MVUNGI AND OTHERS**, Civil Application No. 3 "A" of 2006, this Court adopted what was decided in the cases of **AUGUSTINO LYATONGA MREMA VS R**, Criminal Appeal No. 61 of 1999 and **HALIMA HASSAN MAREALLE VS PARASTATAL SECTOR REFORM COMMISSION AND ANOTHER**, Civil Application No. 84 of 1999 (Unreported). The Court stated:-

*"It is apparent that the provision of section 4 (3) of AJA, seeks to ensure that this court has power to rectify any errors, illegalities or improprieties in decisions or proceedings of the High Court which come, or are brought to its attention. Thus, this court may be moved in revision by a third party who say, has an interest in the matter..."*

There is no dispute that the applicant is the administrator of the estate of **MWAMVITA MOHAMED MATUWILA**. If he was not a party in the

original suit contended Mr. Mgare, therefore, the applicant has no other remedy rather than seeking a revision against the decision of the trial court because the applicant, has interest in the matter being the administrator of estate of Mwamvita who was a party in Land Case No. 198/2010. Moreover, since the respondent is contending that the applicant was not a party in the suit which is a subject of this application, he has no right of appeal, so he can seek revision as a third party to challenge Land Case No. 198 of 2010. In the premises, the applicant has *locus standi* in this application and the preliminary objection is without merit and it is hereby dismissed.

Arguing the main application, Mr. Turyamwesiga started by addressing the first ground of motion regarding the refusal by the judge to correct the Ruling dated 7/9/2013 pursuant to the application sought under section 96 of the Civil Procedure Code. According to Mr. Turyamwesiga, the application was sought moving the judge to correct the dismissal of the ruling and replace it with the striking it out.

However, Judge Ndika's (the successor Judge) refusal was proceeded by a review and reversal of a decision by Judge Ngwala (the predecessor judge), who had earlier on entertained an oral application to join **SAID HASSAN AMANZI** as the administrator of estate of the plaintiff. Mr. Turyamwesiga submitted that, the successor Judge should not have reviewed the decision of predecessor Judge because: **One**, the application for review was not before the court and **Two**, if it was an application for review, in any case it was delayed because a year had expired ever since the predecessor Judge made the order.

Mr. Turyamwesiga also submitted that, the application for leave and notice to appeal were blocked by the judicial process, thus necessitating this application. He urged the court to find that there is plenty on record constituting good ground to revise the proceedings of the High Court and accordingly allow the application.

When asked by the Court on the limitation of section 96 of the Civil Procedure Code Cap 33 [RE: 2002] vis a vis the propriety of correction order sought before the successor Judge, on reflection Mr. Turyamwesiga

conceded that, the respective application was not proper before the High Court.

On the other hand, Mr. Mgare challenged the application arguing that the applicant has not advanced good grounds. He submitted that the High Court was justified to refuse correcting the dismissal order which was proper as there was no plaintiff. When asked by the court on justification of the reversal of the predecessor Judge's order by the successor Judge, he replied that it was appropriate in the circumstances because the case was assigned to a successor Judge who had inherent powers under section 95 read together with Order XLII rule 5 (1) of the CPC read together with section 2 (2) of the Judicature and Application of Laws Act [CAP 358 RE, 2002].

He added that, seeking revision is an afterthought because the applicant was not blocked to pursue an appeal. In rejoinder, Mr. Turyamwesiga reiterated that, the application for leave was struck out after the notice of appeal was withdrawn. He added that, because review is made under Order XLII, then section 95 of the CPC and section 2(2) of JALA are not applicable. He reiterated that, the successor Judge did not



cite any law which he invoked in reversing the decision of predecessor Judge.

It is settled that, the applicant could not have pursued an appeal because he was not a party at the trial which addresses the concern by Mr. Mgare who argued that, seeking revision is an afterthought because the applicant was not blocked to pursue an appeal.

We also wish to point out that, a dismissal order of the suit could not be replaced by striking out pursuant to an application for correction because section 96 categorically states as follows:

*"Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may, at any time, be corrected by the court either of its own motion or on the application by any of the parties"*

The cited provision is based on two important principles: (i) an act of court should not prejudice any party (**BISHNU CHARAN DAS V DHANI BISWAL, AIR 1977 ORI 68 (69)**) and (ii) it is the duty of courts to see that their records are true and they represent a correct state of affairs (**SAMARENDRA V KRISHNA KUMAR, AIR (1967) 2 SCR 18.**)

Therefore, the scope of application of section 96 of the Civil Procedure is strictly limited to correction of arithmetic and clerical errors in any decision. A dismissal of a suit is not by any stretch of imagination a clerical or arithmetical error sufficing to be cured under section 96 of the Civil Procedure Code (Supra). As such, though conceded by the applicant, the refusal by the judge to invoke section 96 of the CPC was to such extent justified and appropriate in the circumstances.

The remaining complaint hinges on the successor Judge's review and reversal of the decision of the predecessor Judge which is in our view a jurisdictional issue which requires our keen address.

Before the trial court, the record shows that following the death **MWAMVITA MOHAMMED MATUWILA** who was the plaintiff, on 16/2/2012, her advocate made an oral application to implead the administrator and this is what transpired:

*" Mr. Lebba: Madame Judge, we pray for leave to amend the plaint so as to join the Administrator who has been appointed one Mr. Said Hassan Amanzi."*

The predecessor Judge allowed the oral application and ordered as follows:

*Order: Leave to amend the plaint in the sense that the particulars and the contents of the plaint should remain the same but the name of the legal representative of the plaintiff who is now the deceased should be amended to that extent"*

In terms of the above the predecessor Judge allowed an oral application to join the administrator as legal representative of the deceased plaintiff. Following the transfer of the predecessor Judge, the Judge In charge re-assigned the case file to the successor Judge and on 5<sup>th</sup> June, 2013 Mr. Mgare addressed the court as follows:

*" My Lord, it is on record the plaintiff was appointed to be the administrator of the deceased's estate on 29/04/2011 and made an oral application to be made a party to the present proceedings on 16/02/2012. That was after the lapse of ten months after his appointment. In terms of part II Of the schedule to the Law of Limitation Act Cap 89, item 16, the limitation time in which the administrator is required to be made a party to the suit is 90 days. That time limitation when the administrator made his application to*

*be joined, he was already time barred although the court granted the application. I submit that it was a total misdirection. Consequently the plaintiff has no locus standi to sue defendants. Since there is such a defect on the record, I pray for court's direction on the matter because I believe that the administrator has no locus to sue as representative of the estate of the deceased..."*

This complaint was objected to by advocate Manyanga learned counsel for the plaintiff on the ground that it was aimed at dragging the trial. In rejoinder, Mr. Mgare reiterated that, predecessor judge's order was based on a misdirection. The successor Judge reserved the matter for a ruling on 21/06/2013 but the gist of what he decided on the aforesaid submission is found in another Ruling dated 2<sup>nd</sup> September, 2013 as follows:

*"This ruling is on a matter that has arisen following this court's ruling delivered on 21<sup>st</sup> June, 2013 and a consequential order made shortly thereafter. In that ruling, I reviewed and vacated this court's order made on 16<sup>th</sup> February, 2012 that allowed Mr. Saidi Hassan Amanzi to be impleaded by the amended plaint and therefore joined as the legal representative of the estate of the deceased plaintiff. I did so*

*having found that the oral application for joining Mr. Amanzi was made and granted in violation of the provisions of Item 16, Part III of the Schedule to the Limitation Act Cap 89 RE 2002, which enacts ninety days as the limitation period for applying the Civil Procedure Code to have legal representative of a deceased party, whether in a suit or on an appeal, to be made a part. The oral application was made on 16<sup>th</sup> February 2012 when the ninety days period of limitation had elapsed on or about 29<sup>th</sup> July 2011, Mr. Amanzi having been appointed by a subordinate court to be the administrator of the deceased's estate on 29<sup>th</sup> April 2011. No prayer for extension of the limitation period had been sought and obtained prior to the presentation of the oral application by Mr. Amanzi.....*

In aforesaid portion of the ruling, the successor Judge reviewed and reversed the decision of the predecessor judge on the ground that the oral application to implead the legal representative which was granted by the predecessor Judge was in contravention of the law.

The Issue which arises here is whether the successor Judge had jurisdiction to review the decision of the predecessor Judge.

Mr. Mgare tried to impress on us that he made an oral application for review on 5/6/2013, seeking the directions of the court after realizing the shortfall. This contention is not backed by the record which indicates that Mr. Mgare did not make an informal application for review. Besides, seeking the direction of the court was not an informal application for review as asserted by Mr. Mgare.

Review is governed by the Civil Procedure Code. Order XLII (1) (a) of the Civil Procedure Code requires:

*"Any person considering himself aggrieved—*

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred;..... desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order."*

The time within which a review can be sought is thirty days. This is in terms item 3 of Part III to the Schedule of the Law of Limitation Act CAP 89 RE, 2002.

Civil Procedure by C.K Takwani (supra) at page 390 commenting on the Indian Civil Procedure Code which is similar to our CPC states as follows with regard to a review:

*"It is well settled that the power of review is not an inherent power. It must be conferred by law either expressly or by necessary implication. If there is no such power of review, the order cannot be reviewed. In such cases, the question whether the order is correct or valid in law does not arise for consideration"*

Initially, we agree with Mr. Turyamwesiga that, there is a specific provision which governs review and as such, the successor Judge could not have invoked section 95 of the CPC or section 2(2) of the JALA which are provisions of general application because there is no gap in the law relating to the matter relating to a review.

Secondly, the court cannot embark on a review without being moved by a party to the case. As such, a court cannot on its own motion make a review of its decision. In the case under scrutiny, the successor Judge was not moved by any of the parties to make a review on the ground that, the application to implead the administrator was time barred necessitating the

dismissal for want of prosecution because the plaintiff was dead. Such review was improper in terms of the requirements of the law because it was not the duty of the successor judge to determine the correctness or validity of the order of the predecessor judge. Even if it had such powers then it was time barred because it was effected beyond thirty days from the date of the decision as the record is silent as to whether time was enlarged to apply for review.

We are of the view that, the successor judge should not have reviewed and reversed the decision of the predecessor judge who granted leave to the late said **SAID HASSANI AMANZI** to be joined as a legal representative of the late **MWAMVITA MOHAMED MATUWILA** , plaintiff. In this regard we wish to repeat what we stated in the case of **MOHAMED ENTERPRISES (T) LIMITED vs. MASOUD MOHAMED NASSER**, Civil Application No. 33 of 2012 (Unreported).

*"We do so bearing in mind that there should be no room open to the High Court and courts subordinate whereby one judge would enter judgment and draw up a decree in one case (thus bring such case to a finality) only to finding another judge of the High Court soon*



*thereafter setting aside the said judgment and decree and substituting therefor with a contrary judgment and decree in subsequent application. To do so in our considered opinion, amounts to gross abuse of the court process. Such abuse should not be allowed to win ground in this jurisdiction. Once judgment and decree are issued by a given court, judges (or magistrates) of that court become "functus officio" in so far as that matter is concerned. Should a new fact arise which should have been brought to the attention of the court during trial, then CAP 33 provides for procedures for Review (Order XLII) and where appropriate, Revision before a higher court, i.e. this Court ( Section 4 of Cap 141)....."*

In the premises, the successor judge embarked on a nullity to review and reverse the predecessor judge's order which allowed **SAID HASSANI AMANZI** to be joined as a legal representative of the late **MWAMVITA MOHAMED MATUWILA**, plaintiff. As such, we quash and set aside all proceedings, ruling and subsequent orders by Judge Ndika which reviewed and reversed the order by Ngwala, J. to implead **HASSANI AMANZI** to be a legal representative of the late **MWAMVITA MOHAMED MATUWILA**, plaintiff.

We restore the order dated 16/2/2012 by Ngwala, J. to join the **SAID HASSANI AMANZI** as legal and Personal Representative in terms of the Civil Procedure Code. The applicant may now proceed to take the necessary steps to pursue the matter.

The file should be remitted to the trial court and placed before another judge. The application is allowed with costs.

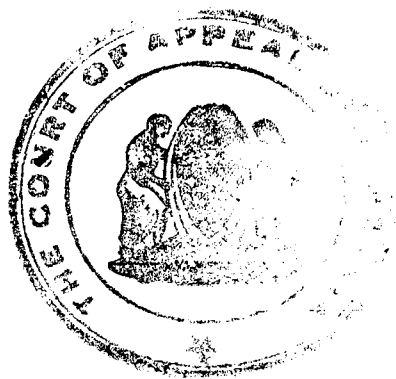
**DATED at DAR ES SALAAM** this 3<sup>rd</sup> day of February, 2016.

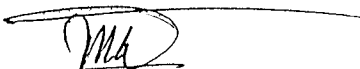
S. A. MASSATI  
**JUSTICE OF APPEAL**

K. K. ORIYO  
**JUSTICE OF APPEAL**

S.E.A. MUGASHA  
**JUSTICE OF APPEAL**

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



  
P.W. BAMPIKYA  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**