

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

(CORAM: LILA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CIVIL APPLICATION NO. 525/17 OF 2016

ALLY AHMAD BAUDA (Administrator of the
Estate of the Late **AMINA HUSSEIN SENYANGE**) **APPLICANT**

VERSUS

1. RAZA HUSSEIN LADHA DAMJI
2. SAID OMARY SAID **RESPONDENTS**
3. TAMBAZA AUCTION MART & GENERAL BROKERS

[Application for revision of the proceedings of the High Court of Tanzania,
Land Division at Dar es Salaam]

(Kalombola, J.)

dated the 5th day of August, 2013

in

Land Case No. 163 of 2013

RULING OF THE COURT

22nd July, & 2nd September, 2020

KWARIKO, J.A.:

This is an application for revision brought under section 4 (3) of the Appellate Jurisdiction Act [CAP 141 R.E. 2002] (now R.E. 2019) (the AJA and Rule 65 (1) and (2) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). The applicant is moving the Court to call for and examine the record of the proceedings of the High Court of Tanzania, Land Division at Dar es Salaam in Land Case No. 163 of 2013 dated 5th August, 2013 for the purpose of satisfying itself as to the

correctness, legality or propriety of any finding, order or any other decision made thereon.

The application is supported by the affidavit of Ally Ahmad Bauda, the applicant in his capacity as administrator of the estate of Amina Hussein Senyange (the deceased).

The first and second respondents filed their affidavits in reply opposing the application whilst the third respondent did not file any. Pursuant to Rule 106 (1) and (7) of the Rules, the applicant and the first respondent filed their respective written submission and reply written submission for and against the application.

At this juncture, we find it appropriate to state a brief background to this matter as follows: The deceased was said to be the owner of a house on Plot No. 8/17, Block 67 Kipande Street Ilala Municipality in Dar es Salaam (the suit premises). The first respondent herein was a long-time tenant in the suit premises from 1993. In the course of the tenancy, a dispute arose between the first respondent and the deceased. The first respondent claimed before the High Court that under the lease agreement, he agreed to complete the construction of the suit premises and to pay the deceased TZS 100,000.00 and retain TZS 300,000.00 on account of monthly rent as part of the costs of

construction. It was further alleged that the deceased collected TZS 72,145,100.00 from the first respondent over and above the normal rent payable to her from 1994 to 2009. Despite several demands, the deceased was alleged to have failed to remit the said amount.

With that background, the first respondent claimed against the deceased for an order restraining her from evicting him from the suit premises, payment of TZS 72, 145,100.00, interest at 20% on the principal sum from 2009 till judgment and costs of the suit. The deceased denied the claim and raised a counter-claim of TZS 110,400,000.00 being rent arrears from 1998 to 2011, mesne profits at TZS 8,000,000.00 per month from January, 2012 till the date of vacation from the suit premises.

The court record shows that before the trial could start, the parties decided to settle the dispute through a compromise of suit under Order XXIII rule 3 of the Civil Procedure Code [CAP 33 R.E. 2019] (the CPC). The terms of the settlement filed on 5/8/2013 read as follows:

*"1. That the Defendant shall pay the plaintiff a sum of Tshs.
44,385,100/=*

2. *The above- mentioned sum shall be paid at a rate of Tshs. 1,000,000/= per month commencing on 1st September, 2013.*
3. *The Plaintiff shall hand over the key for the suit premises to the Defendant on 10th August, 2013.*
4. *Each party shall bear its own costs.*
5. *This compromise records the full and final settlement of all disputes and controversies between the parties and neither party shall commence or initiate any future proceedings against the others in respect of the matters arising from or in controversy in this Suit."*

The High Court (Kalombola, J) recorded the agreement and marked the suit settled on 5/8/2013 on the terms reproduced above. The record further shows that upon the deceased failing to pay the agreed amount, the first respondent filed an application for execution by attachment and sale of the suit premises. However, in the course of the execution, it turned out that the deceased had already sold the suit premises and transferred ownership to a third party. The first respondent thus pointed another property of the defendant on Plot No. 84 Block 'M' Congo Street Ilala, Dar es Salaam for its attachment and sale. The sale was conducted on 17/1/2015 through the third respondent whereby the second

respondent emerged the successful buyer having offered payment of TZS 80,000,000.00.

Although the deceased died on 3/11/2013, it was not until 20/7/2016 when the applicant applied for extension of time to apply for revision of the proceedings of the High Court. That application was granted on 26/10/2016.

Through his affidavit annexed to the notice of motion, the applicant is challenging the compromise of suit on the grounds; one; it was made in the absence of the deceased at the time she was seriously ill attending treatment and two; it did not include the counter-claim raised by the deceased hence it remained unresolved. Further that the execution of the decree did not comply with the law.

The first respondent on his part refutes the applicant's averments contending that, although the deceased was ill at the time of the recording of the compromise of suit, she had all faculties and able to instruct her lawyers to act on her behalf. Further, the affidavit avers that there is no proof that the deceased's names were Amina Hussein Senyange or Amina Senyange. Finally, he avers that the applicant has not presented authority of his co-administrator to institute the present application. As for the counter-claim, he has countered that it was not

necessary to have an independent decision in that respect since the deed of compromise of suit provided that it was for the settlement of all disputes between the parties to the suit.

By and large, the second respondent's affidavit in reply repeats the first respondent's averments. He avers that he is a bonafide purchaser for value of the property described as Apartment No. 2B located on Plot No. 84 Block 'M' Kariakoo at TZS 80,000,000.00.

At the hearing of the application, Messrs. Daimu Halfani, Roman Selasin Lamwai and Cornelius Kariwa represented the applicant, first respondent and second respondent respectively. The third respondent was represented by its co-ordinator one Retired Lt. Colonel Manguli.

When he took the stage to argue the application, Mr. Halfani first adopted the contents of the notice of motion, affidavit and the written submission to be part of his oral arguments. In his oral address, Mr. Halfani argued that the applicant being one of the two administrators of the deceased's estate, has legal powers to exercise any function in respect of the estate as he has done in this application. To buttress his position, he made reference to section 104 of the Probate and Administration of Estates Act [CAP 352 R.E. 2002] and the decision of this Court in **Amani Mashaka** (*Applying as the Administrator of the*

Estate of Mwamvita Ahmed, deceased) v. **Mazoea Amani Mashaka and Two Others**, Civil Application No. 124 of 2015 (unreported).

Mr. Halfani submitted in relation to the grounds of revision that much as there was a compromise of suit, the counter-claim was not part of it and thus it remained undecided. He contended that it was an irregularity for the trial court to leave the counter-claim unresolved as it was a suit of its own kind. In support of this argument, the learned counsel referred us to our earlier decision in **The Honourable Attorney General v. Morogoro Auto Spares**, Civil Appeal No. 111 of 2004 (unreported). He also made reference to a persuasive decision in **Kenya Commercial Bank Ltd v. James Karanja** [1981] eKLR and Supreme Court of India in the case of **Sh. Jag Mohan Chawla and Another v. Dera Radha Swami Satsang and Others** (<https://indiankanoon.org/doc/73483/>).

As to how a suit can be disposed of by way of a compromise of suit, the learned advocate referred to Order XXIII rule 3 of the CPC and to a Kenyan case of **Specialised Engineering Company Ltd v. Kenya Commercial Bank Ltd** [1986-1989] EA 554 to buttress his argument.

Mr. Halfani continued to argue that the first respondent did not file any written statement of defence to the counter-claim which means he had admitted it according to Order VIII rule 11(1) of the CPC. Further to that, he submitted that the trial court ought to have ordered separate trials in respect of the suit and the counter-claim as per Order VIII rule 12 of the CPC.

The learned counsel argued that because the counter-claim was left unattended, the deceased was denied opportunity to prove her claims. As such, the trial court cannot validly reopen Land Case No. 163 of 2013 to determine the counter-claim because it is now *functus officio*. He fortified his contention by the East African Court of Appeal decision in **Kamundi v. Republic** [1973] EA 540.

Challenging the execution proceedings, Mr. Halfani argued that there was no application for execution filed before the trial court in respect of Land Case No. 163 of 2013 in which apartment No. 2B on the Second Floor Side B in House on Plot No. 84 Block 'M' Kariakoo Area Ilala Dar es Salaam was earmarked for sale. That was in contravention of Order XXI rules 10 (2) (j) (ii) read together with Order XXI rule 12(1) of the CPC. Instead, he argued, the first respondent had applied on 11/12/2013 for attachment and sale of the property on Plot No. 8 Block

67 Kariakoo Area Ilala Dar es Salaam. He was thus of the view that the mandatory procedures in execution of the decree were not followed. On the basis of the foregoing, he urged the Court to quash the proceedings of the trial court including the sale transaction and remit the case file to the trial court for determination of the claim and the counter-claim according to law.

Mr. Lamwai acting for the first respondent adopted the affidavit in reply and the submission in opposition to the application. Regarding the name of the deceased and the one appearing in this application, the learned counsel argued that annexure 'A' to the affidavit; the letters of administration shows that it was granted to Ally Ahmad Bauda to be the administrator of the estate of the deceased Amina Senyange Bauda. However, the learned advocate argued that the current application shows that Ally Ahmad Bauda is suing as administrator of the estate of the late Amina Hussein Senyange. He thus contended that annexure 'A' cannot support the application by the administrator of the estate of Amina Hussein Senyange. Further, the learned advocate argued that in the proceedings of Land Case No. 163 of 2013 which is annexure 'E' to the affidavit, there is nowhere in the written statement of defence where the deceased declared that she was also known by the name of

Amina Senyange Bauda. That being the case, Mr. Lamwai argued, the applicant is making an application for the revision of a decision in which he does not have any interest. He distinguished this case from the cited case of **Amani Mashaka** (supra) because in that case what was in issue was the estate of the late Mwamvita Ahmed therefore Amani Mashaka had interest to protect, whereas the applicant has not proved to be the administrator of the deceased. He contended that under the circumstances the application is not properly before the Court deserving to be dismissed.

Without prejudice to the foregoing, whilst conceding that a counter-claim is a cross-suit which is not dependent on the plaintiff's suit, he argued that the counter-claim was also disposed of in the compromise of suit as shown under clause 5 thereof. Under the circumstances, the counter-claim cannot be said to be unresolved, the learned advocate argued.

With regards to the execution process, Mr. Lamwai argued that when the first respondent failed to serve the deceased there was an amendment of the application for execution made *ex parte* at the instance of the first respondent's advocate by an oral application. The

learned advocate added that there is no law which bars an oral application for the amendment of an application.

To wind-up his submission, Mr. Lamwai argued that in any case the order for execution was made by the Registrar of the High Court which cannot be revised by the Court of Appeal. Instead, he argued, the applicant ought to have applied for extension of time within which to raise objections to the attachment before a Judge of the High Court in accordance with the provisions of Order XXI of the CPC. Finally, the learned counsel implored us to dismiss the application with costs personally on the applicant.

On his part, Mr. Kariwa who had not filed any written submissions, adopted the contents of the affidavit in reply of the second respondent to form part of his oral submissions. He concurred with the submission by Mr. Lamwai and added that this application for revision is misconceived and therefore not properly before the Court because the applicant has a right of appeal under section 5 (2) of the AJA which he ought to have utilised. He finally argued that the second respondent who is a bonafide purchaser for value of the property which was advertised for sale by the third respondent is not responsible for any costs. He urged us to dismiss the application.

The third respondent's representative briefly argued that the application has no merit since the third respondent was not a party to the original suit. He prayed for the same to be dismissed.

In his rejoinder, Mr. Halfani argued that the application is properly before the Court because Amina Senyange Bauda and Amina Hussein Senyange is one and the same person. He went on to submit that annexure 'B' to the plaint and the written statement of defence mentioned two names of the deceased Amina Hussein Senyange, whereas the affidavit in support of the application explain the names of the deceased which have not been disputed by the respondents.

As to whether the applicant has a right of appeal, Mr. Halfani argued that the applicant has preferred this revision for the Court to consider the irregularity hence could not have appealed against the trial court's decision because that right is not there. He went further to contend that once the execution proceedings are declared a nullity, nothing passes to another including titles to the property in dispute. The learned counsel argued that there was fraud in the sale transaction because there was no application for execution hence the second and third respondents must pay costs.

We have considered the notice of motion, the supporting affidavit, the affidavits in reply together with the learned counsels' submissions in support thereof. After hearing the submissions, we think the determination of the application turns on the question of *locus standi* raised by the first respondent. *Locus standi* is a common law principle which requires that a person bringing a matter to court should be able to show that his right or interest has been interfered with. This principle has been discussed by the Court in various decisions one of them being **Godbless Jonathan Lema v. Mussa Hamis Mkanga & Two Others**, Civil Appeal No. 47 of 2012 (unreported). See also the High Court of Tanzania decisions in **Lujuna Shubi Ballonzi, Senior v. Registered Trustees of Chama Cha Mapinduzi** [1996] T.L.R 203 and **Gervas Masome Kulwa v. The Returning Officer and Another** [1996] T.L.R 320.

The question which follows is whether the applicant has established his *locus standi* to bring this action before this Court. It is not disputed that the name of the defendant at the High Court is **Amina Hussein Senyange** as per annexure 'E' to the affidavit. This is the person who is said to be the deceased whom the applicant is purporting to represent through letters of administration of her estate. However,

the key documents proving the status of the applicant have glaring shortcomings. One, the death certificate (annexure C) of the said deceased bears a different name as **Amina Senyange** while the letters of administration (annexure A) granted to the applicant on 3/11/2013 indicate that the name of the deceased is **Amina Senyange Bauda**. Mr. Halfani tried to impress upon the Court that these three names belong to one and the same person but with respect, we do not agree with this proposition because we do not think that this is the right way to harmonise names. The harmonization of names ought to have been legally done before the applicant filed this matter in Court. In the circumstances, we agree with the learned advocate for first and second respondents that the deceased **Amina Senyange Bauda** or **Amina Senyange** has no interest in the estate of **Amina Hussein Senyange**. This means that the applicant has not proved that his right or interest has been interfered with. The authority in **Amani Mashaka** (supra) is thus distinguishable because in that case, Amani Mashaka was the administrator of the late Mwamvita Ahmed who had *locus standi* to sue under that capacity, whereas the applicant has not proved to be the administrator of the estate of the deceased.

For the reasons we have assigned, the applicant has therefore not established his *locus standi* to file this application and on this ground, the application is held to be incompetent before the Court which we hereby strike out with costs.

DATED at DAR ES SALAAM this 31st day of September, 2020.

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

Ruling delivered this 2nd day of September, 2020 in the presence of Ms. Lovenes Denis, learned counsel for the Applicant and Ms. Jacqueline Massawe, learned counsel for the 1st Respondent, Mr. Frenk Kilian, learned counsel for the 2nd Respondent and in the absence of the 3rd Respondent, is hereby certified as a true copy of the original.

The seal of the Court of Appeal of Tanzania is circular, featuring a central emblem with a scale of justice and a book, surrounded by the text 'COURT OF APPEAL OF TANZANIA'.

B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL