

**IN THE COURT OF APPEAL OF TANZANIA
AT TANGA
(CORAM: LILA, J.A., SEHEL, J.A., AND KITUSI, J.A.,)**

CIVIL APPLICATION NO. 336/12 OF 2020

HASSANI NG'ANZI KHALFAN.....APPLICANT

VERSUS

**1. NJAMA JUMA MBEGA (Legal Personal..... 1ST RESPONDENT
Representative of the Late MWANAHAMISI NJAMA**

2. JAMBIA NG'ANZI KHALIFAN..... 2ND RESPONDENT

**(Application for review of the decision of the Court of Appeal of
Tanzania at Tanga)**

(Mziray, Mwambegele and Kerefu, JJ.A.)

dated the 20th day of February, 2020

in

Civil Application No. 218/12 of 2018

RULING OF THE COURT

21st September, 2020 & 18th May, 2021

LILA, J.A.:

The applicant, Hassan Ng'anzi Khalfan, seeks to review the ruling of this Court dated 20th February, 2020 in Civil Application No. 218/12 of 2018. In that ruling the Court struck out the applicant's application for revision on account of being incompetent because the applicant preferred a revision instead of appeal. The applicant's application for revision emanated from the applicant's application for extension of time to file an

application for leave which was found misconceived by the High Court. The present application is made by way of a notice of motion and is predicated under Rule 66(1) (a) and (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and is supported by the affidavit of the applicant. On the other side, the 1st respondent resisted the application by filing an affidavit in reply. The 2nd respondent did not file a reply affidavit.

The grounds upon which the present application is founded are as hereunder reproduced: -

- "1. That the first respondent has illegally included in the Civil Application No. 218/12 of 2018 as per Civil Revision No. 9 of 2011 which gave rise to PC Civil Appeal No. 13 of 2011 and Misc. Civil Application No. 82 of 2016 and Civil Application No. 218/12 of 2018 in this Court of Appeal*
- 2. That, the Justices of the Court of Appeal erred for not considering the fact that the application was filed purely under exceptional circumstances as per decision of Halais Pro- Chemi vs Wella AG (1996) TLR 269 and SGS Societe General De Surveillances vs VIP Engineering and Marketing Ltd, Civil Application No. 84 of 2000*

3. That, the Justices of the Court of Appeal erred in law by disregarding the illegalities and irregularities of the Probate Cause No. 240 of 2007 which is apparent in the face of the record.”

A brief background of the matter may be useful in appreciating the essence of the present application. It all started by the death of one Ng'anzi Khalfan. That occurrence called for a need to have someone to manage his estate. In that accord, the 2nd respondent accessed the Urban Primary Court of Tanga and petitioned to be so appointed. He instituted Probate Cause No. 240 of 2007 seeking to be appointed administrator of the estates of the late Ng'anzi Khalfan. However, his appointment did not last long for, on 29th July, 2011, his appointment was annulled and, in lieu thereof, Mwanahamis Njama who, initially, was the 1st respondent before the Court in Civil Revision No. 218/12 of 2018 and Jupiter Auction Mart were appointed to administer the estate of the late Ng'anzi Khalfani.

Parallel with what was happening before the Urban Primary Court, vide Probate Cause No. 4 of 2011 at Mwang'ombe Primary Court, the applicant also petitioned for letters of administration of the estate of the late Ng'anzi Khalfani and was subsequently duly appointed. However on 8th

November 2011 his appointment was revoked vide Civil Revision No. 9 of 2011 and the appointment of Mwanahamis Njama (then the 1st respondent) and Jupiter Auction Mart was confirmed. Dissatisfied, the applicant appealed to the High Court in PC Civil Appeal No. 13 of 2011. The High Court quashed the appointment of Jupiter Auction Mart and replaced it with the 2nd respondent. That meant Mwanahamis Njama and Jambia Ng'anzi remained to be co-administrators of the estate of the late Ng'anzi Khalfan. Still unhappy, the applicant wished to appeal to the Court but as time for doing so had already elapsed the applicant lodged, in the High Court, Misc. Civil Application No. 82 of 2016 seeking for extension of time to file an application for leave to appeal to this Court. As intimated above, that application was dismissed for being misconceived. Aggrieved by the finding of the High Court, the applicant preferred an application for revision in Civil Application No. 218/12 of 2018.

It is noteworthy that before the hearing of the application for revision could take off, the Court was informed by Mr. Chanjarika, learned advocate who acted for the 1st respondent, that Mwanahamis Njama had passed away and that one Njama Juma Mbega (the 1st respondent) had been appointed the administrator of her estate. He prayed that Njama Juma

Mbega be substituted in lieu of Mwanahamis Njama in the proceedings. As the prayer was not opposed by both the applicant and 2nd respondent, the Court acceded to it and substituted Njama Juma Mbega in lieu of Mwanahamis Njama. That way, the present 1st respondent became a party in Civil Application No. 218/12 of 2018.

The application for revision was heard by the Court and, as bad luck would have it, the said application was, on 20th February, 2020, struck out by the Court for the reason that the applicant ought to have appealed instead of seeking for revision. The Court reasoned that the impugned High Court decision was appealable. Even that finding could not quench the applicant's thirst to seek justice. He is now before us seeking for review of the Court's decision.

Before we dwell onto the determination of this application we find it apposite that we, first, lay down the principles governing the Court's power to review its decision. We wish, in the first place, to point out that powers of the Court to review its decision constitutes an exception to the general rule that once a decision is composed, signed and pronounced by the Court, the Court becomes *functus officio* in that it ceases to have control

over the matter and has no jurisdiction to alter or change it. Needless to overemphasize that a review is called for only where there is a glaring and patent mistake or grave error which has crept in the earlier decision by judicial fallibility. Simply stated, the finality of the decision should not be reopened or reconsidered so as to let the aggrieved party fight over again the same battle which has been fought and lost. It is obvious therefore that the court's power of review is limited.

A review and an appeal are quite distinct. While we find our explanation above on what a review entails sufficient, such power should not be confused with appellate power. The latter enables an appellate court to correct all errors committed by the subordinate court. That said, we find it not out of context to outline, at least, these distinctions which come to the fore: -

1. An appeal lies to the superior court, while review lies to the same court.
2. Review of a judgment involves reconsideration of the same subject matter by, where practicable, the same judge, while an appeal is heard by a different judge.
3. The grounds of appeal are wider than the grounds of review.

(See the book **CIVIL PROCEDURE** by C. K. Takwani, Fifth edition at page 400)

A similar position is consistently being observed by our Court in various decisions. For instance, in the unreported case of **Rizali Rajabu vs Republic**, Criminal Application No. 4 of 2011, the Court stated that:-

"First, we wish to point out that the purpose of review is to re-examine the judgment with a view to amending or correcting an error which had been inadvertently committed which if it is not reconsidered will result into a miscarriage of justice.

*We are alive to a well-known principle that a review is by no means an appeal in disguise. To put it differently, in a review the Court should not sit on appeal against its own judgment in the same proceedings. We are also mindful of the fact that as a matter of public policy litigation must come to an end hence the Latin Maxim – **Interest rei publicae ut finis litium**. (See **Chandrakant Joshubai Patel v R** [2004] TLR. 218; **Karim Karia VR**, Criminal Appeal No. 4 of 2007 CAT (unreported)."*

We are bound by the above stated canon rules governing review applications. Not surprising, in tandem with the above principles Rule 66(1) (a) to (e) of the Rules lays down specific grounds upon which the application may be based. And, the applicant has, in this application, confined his grievances under rule 66(1) (a) and (c) of the Rules which read as: -

"The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds:

- a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice; or*
- c) the Courts decision is a nullity;"*

From the applicant's notice of motion, the supporting affidavit and the submission in support of the application, it is plain that his grievance in respect of the first ground of the application is that the first respondent, Njama Juma Mbega, was illegally included as a party by the Court in Civil Application No. 218/12 of 2018. It is his submission that the first respondent being the administrator of the estate of Mwanahamis Njama, could not step into the shoes of Mwanahamis Njama in her capacity as the administrator of the

estate of the late Ng'anzi Khalfan. Instead, in his view, a person desiring to be so appointed should petition before a competent primary court to be appointed as another administrator in lieu of her. To that extent, he contended that the Court strayed into error to allow Njama Juma Mbega an administrator of the estate of Mwanahamis Njama to step into the latter's shoes and be the administrator of the estate of Ng'anzi Khalfan. On the rival side, Mr. Chanjarika who was, initially, firm that no error was committed by the Court, on reflection, he conceded that, to the extent complained, the Court manifestly erred. The 2nd respondent, on his part, was at one with the applicant as he fully supported the application.

In order to appreciate the substance of the applicant's arguments, prudence dictates that we should reproduce the relevant excerpt in the Court's decision as under: -

*"Before we could go into the hearing of the application in earnest, Mr. Chanjarika intimated to the Court that **the first respondent was no more**. He added that **an administrator of her estates, one Njama Juma Mbega, who was also present in Court, had been appointed**. He produced the relevant certificate of death and **the letters of appointment of Njama Juma Mbega***

as administrator of the estate of the late Mwanahamis Njama. In the circumstances, he fronted a prayer to have the said Njama Juma Mbega step into the shoes of the late Mwanahamis Njama who passed away on 29.04.2019. That prayer was predicated on the provisions of rule 57(3) of the Rules. To that prayer, the applicant and second respondent, had no objection. We thus granted the prayer and, in terms of rule 57(3) of the Rules, made Njama Juma Mbega a party to the application in place of Mwanahamis Njama, now deceased."

(Emphasis added)

Before we advance any further in the determination of this application, it is not insignificant to note at least two crucial things. **One;** that Mr. Chanjarika represented the 1st respondent (Njama Juma mbega) in Civil Application No. 218/12 of 2018 and, upon inclusion of Njama Juma Mbega in the proceedings, took the floor to argue the application on that behalf. **Two;** the Court had, when narrating the background of the matter, already stated that Mwanahamis Njama was among the administrators of the estate of the late Ng'anzi Khalfan, because her appointment was

affirmed by the High court when it quashed the appointment of Jupiter Auction Mart and appointed the second respondent, in its stead.

The bolded part of the above excerpt from the Court's ruling, in very clear terms reveals that the late Mwanahamis Njama, in both PC Civil Appeal No. 13 of the High Court and Civil Application No. 218/12 of 2018 of the Court, was impleaded as an administrator of the estate of the late Ng'anzi Khalfan. She was not impleaded in her personal capacity. It is also evident that Njama Juma Mbega, the 1st respondent in the present application, was appointed to administrater the estate of the late Mwanahamis Njama. He was not appointed to administer the estate of the late Ng'anzi Khalfan.

Now, the issue to be addressed is whether Njama Juma Mbega, the administrator of the estate of Mwanahamis Njama could step into the shoes of Mwanahamis Njama in her capacity as administrator of the estate of the late Ng'anzi Khalfan?

According to the record, when including Njama Juma Mbega in the application, the Court invoked the provisions of Rule 57(3) of the Rules. That rule 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."

Based on the above exposition of the law, it is plain that a legal representative of the deceased may be joined as a party in the proceedings in lieu of the deceased person. The issue that stems out is whether such a legal representative of a deceased person may be joined in the proceedings in lieu of the deceased who was an administrator of the estate of another deceased person? To resolve this, we need to know what is meant by a legal representative. We, again, resort to the book **CIVIL PROCEDURE** (supra) at page 23 to 24 where it states: -

"Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party suing or sued..."(Emphasis supplied)

The above observation makes it clear that a legal representative is a person who is appointed to take care of the deceased person's estate. It does not extend to taking care of the estate of a person for whom the appointment does not apply. Stated otherwise, a legal representative is appointed to administer the estate of a person stated in the letters of appointment (letter of administration) only. That spirit is inherent in our laws for, the Probate and Administration of Estates Act, Cap. 352 R. E. 2002 (applicable in the High court, Resident and District Magistrates' courts) and the Fifth Schedule to the Magistrates' Courts Act, Cap. 11 R. E. 2002 (applicable in the primary courts) enacted provisions on the procedure for appointment of administrators where the deceased died intestate as is the case herein depending on where the application is filed. In short, in the event an administrator of a certain estate dies, another process of appointing another person to administrator that very estate should be commenced. That capacity is not replaceable by appointment of a legal representative of the deceased administrator.

In the instant case, Mwanahamis Njama was the administrator of the estate of the late Ng'anzi Khalfan. Upon her death, a new process of appointing another administrator of the estate of the late Ng'anzi Khalfan

ought to have been commenced. Njama Juma Mbega, being the administrator of the estate of the late Mwanahamisi Njama could not legally step into the shoes of Mwanahamis Njama and administer the estate of Ng'anzi Khalfan. His (Njama Juma Mbega) appointment is restricted to the administration of the estate of his late mother, the late Mwanahamis Njama, only. He could not step into the shoes of Mwanahamis Njama in her capacity as administrator of the estate of the late Ng'anzi Khalfan. That said, we agree with the applicant that inclusion of Njama Juma Mbega in Civil Application No. 281/12 of 2018 as first respondent in lieu of Mwanahamis Njama was legally improper. That was an error and is apparent on the face of the ruling and occasioned injustice.

In the circumstances, we are entitled to correct the error. We hereby order the name of Njama Juma Mbega (Legal Representative of the late Mwanahamis Njama) appearing as the first respondent be removed. The name of Mwanahamis Njama (legal representative of the estate of Ng'anzi Khalfan) is hereby retained.

Further to the above, it is instructive to note here that, as the matters now stand, the surviving administrator of the estate of the late

Ng'anzi Khalfan is the second respondent, Jambia Ng'anzi Khalfan. The rightful heirs are at liberty to let Jambia Ng'anzi Khalfan to proceed with the administration of the estate as sole administrator. In the event, they would wish to have another administrator in place of the late Mwanahamis Njama, as already stated, they are obligated to follow the law in getting one. A willing person has to petition to be appointed as such.

We now turn to consider the validity of Mr. Chanjarika's appearance. Since Mr. Chanjarika appeared and was heard by the Court while representing Njama Juma Mbega who was wrongly included in the application, the decision arrived at in Civil Application No. 218/12 of 2018 cannot be left to stand. We accordingly quash and set aside that decision. The matter reverts to a position that obtained before it was heard. It follows, as day follows the night, that the application for revision is to be heard afresh with the original parties, that is to say, with the first respondent being Mwanahamis Njama (administrator of the estate of the late Ng'anzi khalfan) unless another administrator in lieu of her is appointed as explained above or her name is removed or withdrawn from the case.

We think, this ground sufficiently disposes of the application. We see no good cause to consider the remaining two grounds for two main reasons. **One**; their determination, definitely, will amount to an academic exercise with no effect to the decision we have already arrived at. And, **two**; the two grounds, by any standard, are not grounds of review. They qualify to be grounds of appeal to this Court against the High Court decision because they invite the Court to go beyond the Court's ruling and consider the reasons why the applicant's application was struck out by the High Court. Just as a way of reminding the applicant herein, his application before the High Court was not determined on merit. This disentitles him the right to raise issues (grounds) touching on the merits of that application.

We finally wish, although in the passing, but with a serious note, to remind the parties to always indicate the names of the parties and their respective capacities in the application so as to avoid unnecessary confusion. This is crucial in the determination whether a certain party is sued in his personal capacity or not. We are compelled to do so because while it was plain that the second respondent was co-administrator of the estate of the late Ng'anzi Khalfan, it was not so indicated in the notice of

motion. We hope that the applicant will take necessary steps to correct this anomaly before the hearing of the application (Civil Application No. 218/12 of 2018).

In fine, the application is granted. The name of Njama Juma Mbega (administrator of the estate of the late Mwanahamis Njama) is removed from being a party in Civil Application No. 218/12 of 2018 and the name of Mwanahamis Njama is retained. The application is to be heard afresh. Each party shall bear its own costs.


DATED at TANGA this 12th day May, 2021.

S. A. LILA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Ruling delivered on this 18th day May, 2021, via video conference in the presence of applicant unrepresented –Present in person, and Mr. Chanjarika, learned counsel appeared for the 1st and 2nd Respondents is hereby certified as a true copy of the original.


G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL