

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CIVIL APPLICATION NO. 89/02 OF 2021

MELAU MAUNA	1ST APPLICANT
JOEL METIVAN (Legal Representative of MEITIVANI TENGESI)	2ND APPLICANT
FRANCIS MWOITA	3RD APPLICANT
JOHN MWOITA	4TH APPLICANT
RAYMOND PHILIPO (Legal Representative of PHILIPO LENGUTUTI)	5TH APPLICANT
EMMANUEL LENAHOONI	6TH APPLICANT
LOGALAA MAUNA	7TH APPLICANT
JACOB FRANCIS	8TH APPLICANT
RAYMOND PHILIPO	9TH APPLICANT
PAULO IKAYO	10TH APPLICANT
JOHN IKAYO	11TH APPLICANT
CHRISTOPHER MEGERAMI (Legal Representative of LOSUJAKI SANARE)	12 APPLICANT
DAUDI LOSUJAKI	13TH APPLICANT
JULIUS MWOITA	14TH APPLICANT
LONYAKWA MELAU	15TH APPLICANT
LOVOYO MELAU	16TH APPLICANT
CHRISTOPHER JOHN	17TH APPLICANT
MERIMAN MWOITA	18TH APPLICANT
KAKA FRANCIS	19TH APPLICANT
LOREU LOPAKWANI	20TH APPLICANT
SAMBOTI NGOSIO	21ST APPLICANT
TUBALAI PHILIPO	22ND APPLICANT
MAUNA LONGUTUTI	23RD APPLICANT
TUKAI MAUNA	24TH APPLICANT
MOITA TENGESI	25TH APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF

**EVANGELICAL LUTHERAN CHURCH IN TANZANIA (ELCT) ARUSHA
DIOCESE 1ST RESPONDENT**

ARUSHA DISTRICT COUNCIL 2ND RESPONDENT

**(Application for extension of time to file an appeal against the Judgment
and Decree of the High Court of Tanzania, Land Division at Arusha)**

(Nchimbi, J.)

dated the 5th day of September, 2013

in

Land Case No. 13 of 2004

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RULING

2nd & 8th December, 2022

MASHAKA, J.A.:

By notice of motion under rules 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicants are moving the Court for an order to extend time to file an appeal against the judgment and decree of the High Court of Tanzania (Land Division) at Arusha in Land Case No. 13 of 2004 dated 5th September, 2012. The notice of motion is supported by an affidavit jointly sworn by the above named 25 applicants.

Each of the respondents filed affidavit in reply. The applicants lodged their joint written submission.

The notice of motion is grounded on the following two grounds:

- 1. That, the delay in appealing was caused by the protracted proceedings at the High Court of Tanzania for leave to the Honourable Court and the changes in the law excluding appeals originating from the High Court to apply for leave to appeal to the Court.*
- 2. That, important points of law and fact are involved in the decision and decree intended to be appealed against that require due consideration and determination by the Court.*

The application is supported by the applicants' joint affidavit comprised of 23 paragraphs which gives account of the series of events which led to the delay to file the appeal. In addition, paragraph 25 of the same affidavit indicated another ground that the appeal has overwhelming chances of success. The first and second respondents through their learned counsels filed their respective affidavit in reply and vehemently challenged the grant of the application.

When this application was called on for hearing, the second and fourth applicants were present, represented by Ms. Sara Lawena, learned advocate while, Messrs. John Sikay Umbulla and Emmanuel Munga, learned advocates represented the first respondent. Mr. Muhidin Jonas, principal officer of the second respondent was present, represented by

Ms. Gloria Issangya and Mr. Mukama Musalama, both learned State Attorneys.

From the outset, Mr. Umbulla informed the Court on the validity of the jointly sworn affidavit by the applicants that, the 12th and 25th applicants have not signed it which affects the validity of the affidavit and renders it defective. He stressed that in their additional affidavit dated 26/5/2020, they averred that the said applicants had not signed it because they were deceased. Hence, the affidavit should not have included the deceased persons. He thus prayed for the application to be dismissed.

Mr. Musalama submitting for second respondent supporting the submission by Mr. Umbulla and further submitted that, the notice of motion and the affidavit are defective for want of signatures of the 12th and 25th applicants. He prayed to the Court to nullify the same as the named applicants were deceased. He relied on the case of **Exim Bank Tanzania Ltd v. Yahaya Hamisi Musa (As Administrator of the Estate of the Late Hamisi Musa Mohamed t/a Mapilau General Traders**, Civil Appeal No. 275 of 2019 (unreported). He therefore prayed the application to be struck out.

In reply, Ms. Lawena conceded to the submissions made by her learned friends for the first and second respondents and submitted that

at the time she was preparing the present application, the 12th and 25th applicants had passed away and there was no legal representative who were duly appointed to step into their shoes. She thus admitted that the notice of motion and the supporting joint affidavit is defective for want of the signatures of the said applicants and implored the Court to make necessary orders.

Having considered the submissions by the learned advocates for the respondents and Ms. Lawena, the issue for determination is whether the notice of motion is supported by a proper affidavit to move the Court. It is not disputed that the 12th and 25th applicants have not signed the joint affidavit supporting the notice of motion. Ms. Lawena further claimed that by the time she was preparing the present application, the said applicants had passed away, strange enough there is not even a single paragraph in the joint affidavit which averred to that fact, let alone the tendering of the death certificates. In absence of such averment in the joint affidavit, the submission by Ms. Lawena is a statement from the bar. In the case of **Ahmed Teja t/a Almas Auto parts Limited v. Commissioner General TRA**, Civil Appeal No. 283 of 2021 (unreported) the Court stressed on the importance of averments in the affidavit and had this to say:

"We need not remind the appellant that affidavits, which are statements made on oath, are the basis upon which applications are decided. Any statement not raised in affidavit is always disregarded as a mere statement from the bar."

On the strength of the above excerpt, the fact that the 12th and 25th applicants are deceased is a mere statement from the bar and since Ms. Lawena failed to tender the death certificate nor the burial permits, her assertion that the two applicants passed away has no evidential value and disregarded by the Court.

Be it as it may, the joint affidavit in support of the notice of motion is defective for want of deponents' signatures as correctly submitted by the learned advocates for the respondents. When the Court was faced with a similar situation in the case of **Director of Public Prosecutions v. Dodoli Kapufi and Another**, Criminal Application No. 11 of 2008 (unreported) it held thus:

"Fortunately, there is no dispute here on the fact that the affidavit in support of the notice of motion is defective for want of the deponent's signature thereon. In our respectful opinion, this defect renders the so-called affidavit of Mr. Edgar Luoga incurably defective, as correctly contended by Mr. Mushokorwa. This in turn renders the entire notice of motion incurably

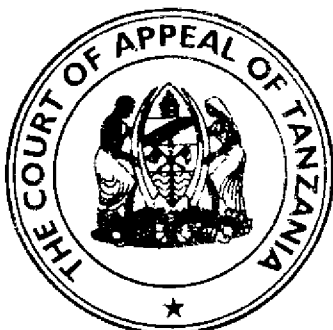
defective. We accordingly expunge it from the record. Once the notice of motion is expunged with all its annexures the application for review is left with no leg to stand on. The purported application becomes incompetent in law. It is only fit to be struck out as we hereby do."


In the present application, it is undeniable that the two applicants have not signed the joint affidavit and from the above excerpt, the omission renders the affidavit in support of the notice of motion incurably defective and the application is fit to be struck out. Consequently, the application for extension of time to file an appeal against the judgment and decree of the High Court in Land Case No. 13 of 2004 is hereby struck out.

DATED at ARUSHA this 8th day of December, 2022.

L. L. MASHAKA
JUSTICE OF APPEAL

The ruling delivered this 8th day of December, 2022 in the presence of Applicants, Mr. Mahidin Jonas Lesilwa, Senior State Attorney holding brief for Mr. John Umbulla, Advocate for the 1st Respondent and Mr. Muhidini Jonas Lesilwa, learned Senior State Attorney for the 2nd Respondent, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL