IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

CIVIL APPLICATION NO. 144/12 OF 2023

SAIDI OMARI MOHAMEDI (As administrator of the Estate of the Late Tarimu Mohamed) ..... APPLICANT

VERSUS

ABDALLAH MSELEM .....RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania at Tanga)

(Mruma, J.)

Dated the 21st day of May, 2019

in

Land Case No. 26 of 2016

RULING

8th & 26th May, 2023

LILA, J.A.:

The parties to this application litigated over ownership of a house in Land Case No. 26 of 2016 and the respondent emerged a winner. It was one Nuru Mohamed who instituted the case acting in his capacity as administrator of the estate of the late Tarimu Mohamed. He was aggrieved and proceeded to apply to be supplied documents for appeal purposes and also lodged a notice of appeal. Her conduct of the case ended at that stage as his appointment as administrator was revoked by Mwang'ombe Primary Court and Said Omari Mohamed, the present applicant, was appointed in his place. The applicant, acting in his capacity as

administrator, made a follow-up and was supplied with the documents which enabled him to lodge Civil Appeal No. 65 of 2022 which was, however, struck out on 5/5/2022 for what the Court described as being a stranger to the case, that is to say, he did not seek and was not permitted to appear in place of Nuru Mohamed, the former administrator. It was then when it came to his senses that he should prefer to the Court an application for revision instead of lodging an appeal. But, again, he realised that he was late to do so hence the present application which was filed on 3/6/2022.

The application is made under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) and the affidavit affirmed by Said Omari Mohamed, the applicant, supports it. In the notice of motion and the written submission which were adopted without more by the applicant, the applicant is moving the Court to grant extension of time to lodge an application for revision on the sole ground that the High Court's decision in Land Case No. 26 of 2016 is tainted with illegalities which need be corrected by the Court. He pointed out that the judgment and decree suffer from four substantial illegalities which may be paraphrased thus: -

1. The High Court had no jurisdiction to entertain and determine the Land dispute worth Tshs 100,000,000/=.

2. The High Court wrongly declared Probate Cause No. 102 of 1987 as being proper while the same had already been annulled by Tanga District Court in revision No. 2 of 2012.
3. The respondent secured the judgment fraudulently.
4. The High Court declared the respondent the owner of the suit house and at the same time ordered that the administrator can redeem or regain possession of the same.

The applicant who appeared in person and without legal representation, has, in the written submission, extensively elaborated the above alleged illegalities and has also asked the court to consider the application as being an exceptional entitling grant of extension of time. I do not consider it to be necessary to recite the details at this stage. I shall explain later in this ruling.

In response, Mr. Erick Akaro, learned advocate, who represented the respondent vehemently resisted the application bot in the affidavit in reply and written submission in reply which he duly adopted as part of his arguments. In addition, he urged the Court not to consider the rejoinder submissions lodged by the applicant, a procedure he said to be novel in the Court. I need not reserve this issue to a later stage for the Rules do not provide room for lodgement of rejoinder submission a practice

applicable in the High Court. Rule 61(1) of the Rules, in very clear terms, enjoins the single justice to hear an application in Chambers and is silent whether or not parties may file written submissions. However, over time parties' submissions have been considered by the court as part of the parties' arguments. I entertain no doubt that the court has acted so having been inspired by Rule 106(1) to (8) of the Rules which applies to appeals. Under that Rule, filing of a reply submission marks the end of it. In view of that position, rejoinder submission has no place under our Rules. Accordingly, I shall not have no glance on the rejoinder submission by the applicant.

Comprehensively considered, Mr. Erick has raised two substantive grounds for resisting the application. One, the application is incompetent for want of *locus standi* on the part of the applicant and two, that no good reason for grant of extension has been advanced by the applicant. For ground one, the argument is that the applicant did not comply with the Court's order of applying formerly to be joined in the case as was ordered when the former appeal (Civil Appeal No. 65 of 2022) was struck out. This argument need not detain me too much. Two reasons would crash into pieces Mr. Erick's contention. first, the record is crystal clear that the applicant instituted the present application and cited himself as

administrator of the estate of the late Tarimu Mohamed showing that acted in his capacity as administrator of the estate of the late Tarimu Mohamed. The documents establishing his capacity have been duly annexed to the affidavit in support of the notice of motion as annexture SOM 1. He did not join in the application which was already in Court. An administrator of the estate of a deceased, in terms of sections 99 and 100 of the Probate and Administration of Estates Act in case of a District Court and High Court and paragraphs 5 and 6 of Part II of the Fifth Schedule to the Magistrates' Court Act for Primary Courts, is a legal representative of the deceased with capacity to sue and be sued. No doubt, that power includes the power to lodge and defend applications and also preferring and defending an appeal, revision and review and any matter pending in Court to which the deceased is a party.

Second, in situations of this nature, there is no need to make a formal application to be joined in the case as there was no application in existence. The law requires the applicant to establish his capacity in his averments in the affidavit supporting or opposing an application something which the applicant did in paragraphs 1, 2 and 3 of the affidavit supporting the application. In those paragraphs the applicant stated that:-

> *"1. That, I am applicant herein hence conversant with the facts that I am about to depose hereunder: -*

2. *That, I am administrator of the Estate of the late Tarimu Mohamed duly appointed an 21st August 2020 vide probate cause No. 16 of 2012 after the previous administrator Nuru Mohamed letter of administration was revoked by the primary Court of Mwang'ombe by request of the family members. Copies of revoked letter of administration of previous administrator and letter of administration of current administrator and the decision of primary Court of Mwang'ombe which appointed me and revoked letter of Administration of Nuru Mohammed and death Certificate of Tarimu Mohamed are Annexed herewith and collectively marked as Annexture "SOM 1" leave are craved to form part of this Affidavit.*
3. *That, the Land case No. 26 of 2016 was initiated by my predecessor Nuru Mohamed and he lost the case but he filed notice of appeal on 14th June 2019 and a letter requesting for Judgment, Decree and proceedings and thereafter I Make follow up then on 9th August 2021 I got a letter from deputy Registrar of High Court informing that the documents applied for are ready for collection and I was given the documents plus certificate of delay, immediately I appealed to the Court of Appeal styled as Civil Appeal No. 65 of 2022 but on 5th May 22022 the Court of Appeal struck out the Appeal on the reason that I am a stranger to the appeal. Copy of the order of Court of Appeal are annexed herewith and marked as Annexture "SOM 2" leave are craved to form part of this affidavit."*

The above paragraphs vividly and sufficiently established the applicant's capacity as administrator that he was duly appointed on 21/8/2020 following annulment of the former administrator one Nuru Mohamed's letters of administration by Mwang'ombe Primary Court. Vested with such capacity, he was therefore mandated and had *locus standi* to institute the application. Such is the pronouncement of the Court in the Case of **Ramadhani Omari Mbuguni vs Ally Ramadhani and Asia Ramadhani**, Civil Application No. 173/12 of 2021 (unreported) that: -

> *"Letters of administration being an instrument through which the applicant traces his standing to commence the proceedings, was in our view an essential ingredient of the application in whose absence the Court cannot have any factual basis to imply the asserted representative capacity. It is now a settled law that, where, like the instant case, a party commences proceedings in representative capacity, the instrument constituting the appointment must be pleaded and attached. Failure to plead and attach the instrument is a fatal irregularity which renders the proceedings incompetent for want of the necessary standing. See for instance,* ***Ally Ahmed*** *Bauda (Administrator of the Estate of the*

Late Amina Hossein Senyange) ***vs Raza Hussein Ladha Damji and Others****, Civil Application No. 525/17 of 2016 (unreported)"*

The above holding to which I fully associate myself, no doubt, pre-empts and renders Mr. Erick's argument devoid of any merit. I would go further and add that, even in situations where there is a matter pending in Court, so as to expedite dispensation of justice and to avoid congestion of unnecessary applications in our registries, legal representatives should be permitted, upon oral application in Court and presentation of documents justifying being legal representatives, to be joined in a case in lieu of either the deceased party or as a successor of the former legal representative or administrator whose appointment has been revoked or passed away (died). Further to that, Rule 105(1)(2)(3) of the Rules which applies in appeals from which we may seek inspiration does not make it a mandatory requirement for a legal representative to lodge a formal application praying to be joined as a party to the case in place of a deceased party and the Court, without citing any authority, has occasionally permitted that. For those two reasons, I hold that the application is competently before the Court it having been initiated by a person with a legal mandate to do so.

In determining the second reason of resisting the application by Mr. Erick Akaro that the applicant has not advanced good cause warranting the Court to exercise its discretion to extend time, I noted that there was no serious contention from Mr. Erick on the settled legal position that an allegation of illegality in the decision sought to be challenged constitute good cause for extension of time. A plethora of this Court's decisions have consistently pronounced that stance. In **The Principal Secretary Ministry of Defence and Notional Service Vs. Devram Valambia** [1992] TLR 387, the Court held thus: -

> *"In our view, when the point at issue is one* ***alleging illegality of the decision being challenged****, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record straight."* (Emphasis added)

Plain as it is, the Court's duty, in this kind of applications is to examine if there is an allegation of illegality obtaining in the decision sought to be challenged. An applicant relying on that ground is dispensed with the duty to account for each day of delay. Here I shall provide answers to the issue earlier reserved to a later stage as to why there is

no need consider the arguments respecting account for the days delayed and the merits or otherwise of the alleged illegalities based on the arguments in the written submissions by both sides. To be fair to both parties, they both attempted to validate their respective views on whether such illegalities really exist and they supported their respective arguments with various Court's decisions which I need not cite. Their desire is definitely to have the merits of their arguments determined by this Court (single Justice). More so, Mr. Erick went further to question, bearing in mind the nature of the decision sought to be impugned, whether it is proper for the applicant to prefer a revision instead of an appeal in the event he is granted extension of time. With respect, determination of the issues arising from the parties' arguments, I think, is outside the precincts of the single justice's mandate. Rules 10 and 60 of the Rules restrict the mandate of a single and, in particular, Rule 10 of the Rules, which in very clear terms, empowers a single justice to only consider and determine whether or not there is good cause to grant extension of time. Determination of the alleged illegalities and competence of the matter to be lodged upon grant of extension of time are substantive matters which are a preserve of the Court (panel of justices) at the time of hearing the lodged matter whether it be an appeal, revision, reference and so on. The rationale is simple that determination of these substantive issues by a

single Justice will amount to prejudging the merits or otherwise of the matter to be lodged, in this case a revision application. That will also be usurpation of powers of a panel of justices. The two issues raised by Mr. Erick, I must hold, are substantive matters to be determined by the Court after the application for revision is lodged. He has, therefore to wait for that momentous opportunity. Cementing the above position, the Court, addressing an identical contention, cautioned Justices faced with similar arguments (issues) in applications of this nature from straying into that error in **The Regional Manager-TANROADS Lindi vs DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CA (unreported) in which it stated that: -

> *"It is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard..."*

The grounds for resisting the application having failed, the application stands uncontested. That notwithstanding, the Court is obligated by the Rules to ascertain from the record that good cause has been established. As demonstrated above, the application is centered on existence of illegalities and I have reflected them

above. In the circumstances, I find it justified to grant extension of time sought.

All said, I hereby grant the applicant extension of sixty (60) days from the delivery of this ruling within which to lodge an application for revision. Costs be in the main cause.

It is so ordered.

DATED at **TANGA** this 25th day of May, 2023.

S. A. LILA
JUSTICE OF APPEAL

The Judgment is delivered this 26th day of May, 2023 in the of Applicant in person vide video link – Tanga and Mr. Denis Malegesi, learned Counsel for the respondent is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL