

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., KOROSSO, J.A., And MAKUNGU, J.A.)

CIVIL APPLICATION NO. 403/17 OF 2021

DORICE KENETH RWAKATARE APPLICANT

VERSUS

NURDIN ABDALLAH MUSHI 1ST RESPONDENT

MUTTA ROBERT RWAKATARE 2ND RESPONDENT

ROSE RWAKATARE 3RD RESPONDENT

HAULILA HUMPHREY RWAKATARE 4TH RESPONDENT

TIBE RWAKATARE 5TH RESPONDENT

**(Application for Revision against the decision of the High Court of
Tanzania (Land Division) at Dar es Salaam)**

(Wambura, J.)

Dated the 18th day of June, 2018

In

Land Case No. 314 of 2016

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RULING OF THE COURT

27th March & 8th September, 2023

KOROSSO, J.A.:

The background to the matter giving rise to the application for revision before the Court is that on 19/9/2016, Nurdin Abdalla Mushi, the 1st respondent filed Land Case No. 314 of 2016 under summary procedure Order XXXV Rule 1(f) of the Civil Procedure Code, Cap 133 (the CPC) against Mutta Robert Rwakatare and Tibe Rwakatare, the 2nd and 5th

respondents respectively, claiming for a declaration of ownership and vacant possession of the property on Plot No. 347, Block 43, Mwenge area, Kinondoni District, within Dar es Salaam Region (suit property).

The claims advanced by the 1st respondent were founded on the fact that he had purchased the suit property from the 2nd and 5th respondents. It is on record that Keneth Rwakatare (deceased father) was the owner of the suit property and died intestate on 29/3/2013 and was allegedly the father of the applicant, 2nd, 3rd, 4th and 5th respondents. The case proceeded *ex parte* and the 1st respondent was declared the lawful owner of the suit property and granted vacant possession. The applicant averred in the affidavit supporting the notice of motion that at the time of the death of the deceased father, she was one of the occupants of the suit property, claims which have been categorically denied by the respondents in their counter affidavit. The applicant was not part of a suit filed by the 1st respondent in Land Case No. 314 of 2016 whose claims related to the suit property. According to the applicant, she became aware of Land Case No. 314 of 2016 during the execution process, after an eviction notice was affixed on the suit property. Thereafter, she lodged Land Case No. 312 of 2016, which was dismissed on 19/2/2018 for want of prosecution. The applicant then decided to seek recourse through

objection proceedings against the execution process arising from Land Case No. 314 of 2016 and lodged Misc. Land Application No. 300 of 2019. The said application was dismissed due to technical problems and efforts to restore it ran futile, hence the instant application for revision.

The application was filed by way of notice of motion under section 4(3) of the Appellate Jurisdiction Act, Cap 141 (the AJA) and rule 65(1), (2) and (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The notice of motion is supported by an affidavit deponed by the applicant. The application seeks the Court to revise the proceedings and decision in Land Case No. 314 of 2016 premised on five grounds which for reasons to come out later we shall not reproduce.

On the other side, the respondents resisted the application through a joint affidavit in reply deponed by Laurent Ntanga, an advocate instructed by the respondents.

On the day the application was placed before us for hearing, the applicant enjoyed the services of Mr. Makanja Manono and Mr. Pongolela David, learned Advocates, while the respondents were represented by Mr. Japhet Mmuru and Mr. Laurent Ntanga, learned advocates.

At this juncture we find it apposite to draw up matters we find not to be disputed by the parties: one, that Kenneth Ford John Rwakatare

(deceased father) died intestate on 29/3/2013 and left behind various assets including plot No. 347 Mwenge Area, within Kinondoni Municipality, Dar es Salaam (suit or disputed house). Two, that the 2nd respondent was appointed the administrator of the estate of the deceased father. Three, the 2nd respondent together with the 3rd, 4th and 5th respondents on 20/6/2013 sold the suit house which was part of the estate of the deceased father to Nurdin Abdallah Mushi (1st respondent). Four, on 18/11/2013, the 2nd respondent voluntarily sought revocation of his appointment as the administrator of the estate of the deceased father and thus left the estate of the deceased father without an administrator, a status pertaining to date, there being no one appointed to take the position yet. Five, the applicant unsuccessfully filed Land Case No. 312 of 2016 against all the respondents seeking a declaration that the sale of the suit house be declared null and void.

In addition, she also filed Misc. Land Application No. 773 of 2016 against the same respondents seeking an injunctive order against the occupation of the disputed house pending hearing and determination of the main suit, both were unsuccessful and dismissed for want of prosecution. Six, the applicant lodged Misc. Land Application No. 551 of 2018 seeking an extension of time to apply for restoration of Land Case

No. 312 of 2016 which ended in dismissal for want of prosecution. Seven, the 1st respondent filed Land Case No. 314 of 2016 on 19/11/2016 and after a full trial on 18/6/2018, the trial court declared the 1st respondent as the lawful owner of the disputed house. Subsequently, the 1st respondent filed an application for execution in Execution No. 50 of 2018 where on 3/4/2019 and the 2nd and 5th respondents were ordered to give vacant possession to the 1st respondent, an order which was duly implemented by the 2nd and 5th respondents. Eight, upon being served with the order for execution, the applicant proceeded to file various applications including Misc. Land application No. 305 of 2019 for review, which ended in dismissal for want of merit. In the same vein, Misc. Land application No. 306 of 2019 for stay of execution and Misc. Land Application No. 300 of 2019 for objection proceedings were filed and thereafter dismissed for lack of merit.

At the commencement of the hearing, we invited the counsel for the parties when submitting on the grounds of the application to also address us on the competency of the application for revision in terms of section 4(3) of the AJA. On the issue of competency of the application, the applicant's counsel did not have much to say leaving it to the Court to decide whether the interest of the applicant in the suit has been

established to warrant her to proceed with this application since she was not a party in Land Case No. 314 of 2016 whose decision she seeks the Court to call the records and revise for reasons stated therein. Mr. Manono, who at the inception of his submission had adopted the written submissions lodged for the applicant, decided to refrain from elaborating any of the grounds any further imploring the Court to grant the prayers sought.

The applicant's counsel contended that by the act of the respondents not to join her in Land Case No. 314 of 2016, the applicant was denied the right to be heard citing various decisions of the Court alluding to the sanctity of the said right including; **Shaibu Salim Hoza v. Helena Mhacha (As legal representative of Amerina Mhacha deceased)**, Civil Appeal No. 7 of 2012 and **Abbas Sherally and Another v. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 (both unreported).

Regarding the applicant's claimed interest in Land Case No. 314 of 2016, Mr. Manono argued that considering that the applicant and her siblings were at the time occupying the suit property before their eviction and that the suit house was part of her deceased father's estate and she was one of the heirs of her late father's estate and had proprietary interest

over the disputed property and should have been joined in the suit. The learned counsel contended further that failure to join the applicant in the said suit was improper and vitiated the said proceedings because she was denied the right to be heard and cited the cases of **Abdi M. Kipoto v. Chief Arther Mtoi**, Civil Appeal No. 75 of 2017 and **Tanga Gas Distributors Limited v. Mohamed Salim Said and 2 Others**, Civil Revision No. 68 of 2011 (both unreported) to cement his argument. According to the learned counsel for the applicant, it was the respondent's failure to join the applicant in Land Case No. 314 of 2016 that incited the instant application for revision in a bid by the applicant to claim her rights to the suit property since her right to be heard in that case was denied.

The learned counsel for the applicant further challenged the arguments by the respondents in paragraph 14 of their affidavit in reply stating that they did not find the need to join the applicant in Land Case No. 314 of 2016 because there was no cause of action against her. He argued that the said contention is false because Land Case No. 314 of 2016 was filed on 19/9/2016, just three days after the applicant lodged Land Case No. 312 of 2016 against the respondents over the same property in the same court and that essentially the two cases were prosecuted concurrently. He argued that even if the respondents had

believed there was no cause of action against the applicant to join her, the existence of Land Case No. 312 of 2016 against them was sufficient notification of the applicant's interest in the suit property since the suit related to the same subject matter. The applicant's counsel believed that the respondents intentionally avoided joining the applicant in Land Case No. 314 of 2016, in contravention of the law and that such failure to join an interested party should be seen as a serious irregularity citing **Mathias Said Mfumya and 16 Others v. Christopher M. Nyirabu and 3 Others**, Civil Application No. 520/17 of 2016 (unreported). He concluded by imploring us to grant the prayers sought.

In reply, Mr. Mmuru who had commenced his submission by adopting the affidavit in reply and written submissions filed by the respondent contended that there were no illegalities or irregularities occasioned in the process since all the proceedings were done openly. He argued that in Land Case No. 314 of 2016, the applicant was not a party to that case and there was no obligation on the part of the respondents to inform her of what transpired in court since as per Order V, Rule 1(1) of the CPC, it is only a party to a suit who can be summoned.

Arguing further, the learned counsel stated that although the right to be heard is compulsory, it is not public and it is for the parties to a case

only and that in that suit filed by 1st respondent, the defendants, having been served with the pleadings had however, opted not to defend the suit implying having no objection to the claims. Mr. Mmuru contended further that having filed Land Case No. 312 of 2016 the applicant had essentially abandoned the right to be heard in that case. He contended further that the applicant cannot claim interest at this point in the present application since the probate which gives rise to the subject matter in the present application is still pending before Kinondoni District Court in Probate No. 30 of 2013, not yet closed.

According to Mr. Mmuru, it is the principle of law that, an interested party can only claim the property that originated from a probate case if that property is still under the probate process and if the probate is not closed, and cited the case of **Mgeni Seifu v. Mohamed Yahaya Khalfan**, Civil Application No. 1 of 2009 (unreported) to augment his stance. It was thus the contention of the learned counsel for the respondents that under the obtaining circumstances, the instant application was filed prematurely.

There was no rejoinder from the applicant's counsel.

Having heard the rival submissions from the counsel for the parties, the first issue before us is essentially, the competence of the application.

While the counsel for the applicant left the issue to be determined by the Court as it deems fit, the respondents' counsel raised concerns on whether the application for revision was the appropriate remedy for the applicant under the circumstances in light of Probate No. 30 of 2013 related to the deceased father's estate still pending at the District Court of Kinondoni, where the subject matter of the application arises.

We are aware of the fact that since the applicant was not a party to Land Case No. 314 of 2016 and being dissatisfied with the decision, having claimed an interest in the subject matter therein, was entitled to proceed by way of revision under section 4(3) of the AJA. There are various decisions of this Court that have provided such direction. In **Ahmed Ally Salum v. Ritha Bajwali and Another**, Civil Application No. 21 of 1999 (unreported), it was held that, as the applicant who was not a party to the proceedings below could not have appealed, the revision was his only remedy. Again, in **Khalifa Selemani Saddot v. Yahya Juma and Four Others**, Civil Application No. 20 of 2003 (unreported) it was held that:

"Here, the applicant could not have appealed because he was not a party to Miscellaneous Civil Application No. 16 of 2000. Hence, he rightly brought the application for revision under section 4(3) of the Appellate Jurisdiction Act, 1979 as

amended by Act No. 17 of 1993. That being the case this application for revision is properly before us.”

(See also, **Halima Hassan Marealle v. Parastatal Sector Reform Commission and Another**, Civil Application No. 84 of 1999 (unreported)).

In the present application, the grounds found in the notice of motion, and what is averred in the supporting affidavit evidently, the applicant is prompted by an interest to claim rights to the late Kenneth Rwakatare’s estate, who she claims was her father. This was further alluded to by the learned counsel for the applicant in his written submission stating that it was failure to be joined in Land Case No. 314 of 2016 that incited this application. That notwithstanding, taking into account that the applicant has fronted claims in the deceased estate and not having been a party in Land Case No. 314 of 2016 before the High Court, and thus without the right to appeal, certainly, the doors to come to this Court by way of revision are open under section 4(3) of the AJA as alluded to earlier above.

Nevertheless, what has tasked our minds is the fact that despite advancing her claims and interest in the deceased estate, her interest as an heir or with the right to inherit has not been advanced in a proper

forum nor has it been determined. This is because claims of right or interest in the deceased estate are determined in a probate and administration cause. In the case of **Mgeni Seifu** (supra), where the application for revision was filed before the Court which had parties with competing claims who had failed to timely file an administration and probate case, it was held:

“It seems clear to us that there are competing claims between the applicant and the respondent, over the deceased person’s estate. In the circumstances, only a probate and administration court can explain how the deceased person’s had passed on to a beneficiary or a bona fide purchaser of the estate for value. In other words, a person claiming any interest in the estate of the deceased must trace the root of title back to letters of administration, where the deceased died intestate or probate, where the deceased passed away testate.”

Plainly, what the above decision informs us is that any party with a vested interest in the estate of the deceased must go back to the court which is seized with an application for administration of the estate of the deceased.

The learned counsel for the respondents argued that taking into account the settled position on the matter as the one restated above, the instant application is premature since the applicant's interest in the estate of the deceased father has not been established, and that can only happen in the pending probate case at Kinondoni District.

Evidently, the prayers in this application are for the Court to call and examine the records of the High Court in Land Case No. 314 of 2016 in order to satisfy itself on the correctness, legality, and propriety of the proceedings and decision thereon dated 18/6/2018, quash the said proceedings and the judgment, costs and any other relief the Court may deem fit. The proceedings and judgment in Land Case No. 314 of 2016 whose legality is being challenged, did address and determined the following reliefs sought by the 1st respondent:

- i. A declaration that the plaintiff is the rightful owner of the suit premises comprising plot No. 347, Block 43, Mwenge Area, Kinondoni Municipality.
- ii. An order that the defendant should immediately vacate the suit premises and hand over the same to the plaintiff.
- iii. Payment of specific damages to the tune of Tshs. 20,000,000/= from each defendant.
- iv. Costs and any other orders and reliefs as granted by the court.

Certainly, it was a case dealing with claims of right to property that arises from the deceased father's estate. An estate whose administration is still in the ambit of the Kinondoni District Court by virtue of Probate Case No. 30 of 2013.

Having carefully scrutinized the grounds of the notice of motion undoubtedly the applicant seeks this Court to interfere by way of revision due to alleged serious irregularities in the proceedings of the impugned judgment in Land Case No. 314 of 2016. As rightly argued by the learned counsel for the respondents, without the interests of the applicant in the estate of the deceased having been determined in the Probate Case No. 30 of 2013 pending at Kinondoni District Court, no claims related to proprietary rights of the deceased estate can be dealt with. We are of the firm view that considering that the purported claims of right of the applicant in the estate of the deceased father have not been fully determined, proceeding in the determination of this revision application is an exercise enfolded in futility. The applicant has an available remedy if she so wishes, to seek for determination of her claim of right as heir in the estate of the deceased father through Probate Case No. 30 of 2013, which is still pending at Kinondoni District Court under section 58(1) of

the Probate and Administration of Estates Act. Thus the application is misconceived and untenable.

For the foregoing reasons, we are of the view that this application was filed prematurely and therefore, we shall refrain from deliberating with the remaining grounds raised by the applicant. In the end, we strike out the application. Under the circumstances, each party shall bear its own costs.

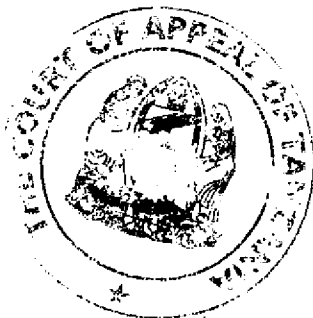
DATED at **DAR ES SALAAM** this 7th day of September, 2023.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 8th day of September, 2023 in the presence of Mr. Pongolela David, learned advocate for the applicant and Mr. Japhet Mmuru, learned advocate for the respondents is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to be "A. L. Kalegeya".

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL