

**IN THE COURT OF APPEAL OF TANZANIA  
AT MWANZA**

**(CORAM: LILA, J. A., SEHEL, J. A., And LEVIRA, J. A.)**

**CIVIL APPLICATION NO. 354/08 OF 2023**

**JONAS SAMSON NDAWAVYA..... APPLICANT**

**VERSUS**

**THERESIA THOMAS MADAHA..... RESPONDENT**

**(Application arising from the Decision of the Court of Appeal of Tanzania  
sitting at Mwanza)**

**(Mugasha, Mwandambo and Levira, JJ.A.)**

**dated the 11<sup>th</sup> day of December, 2019**

**in**

**Civil Appeal No. 45 of 2017**

.....

**RULING OF THE COURT**

31<sup>st</sup> Oct. & 8<sup>th</sup> Nov., 2023

**SEHEL, J.A.:**

The applicant in this application seeks for an order to be made a party to the Civil Application No. 31/08 of 2023 in place of the late Paulina Samson Ndawavya, now the deceased. The application is made by notice of motion taken out under Rule 57 (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and supported by an affidavit sworn to by the applicant. It is deposed that Paulina Samson Ndawavya was the respondent in Civil Application No. 31/08 of 2023. Following death of the said Paulina Samson Ndawavya on 3<sup>rd</sup> May, 2017, the applicant petitioned for and was granted letters of administration to administer

the deceased's estate by Mwanza Urban Primary Court on 19<sup>th</sup> September, 2018. On the other hand, the respondent did not file any affidavit in reply.

It is instructive that we give a brief history giving rise to the present application. Paulina Samson Ndawavya sued the respondent before the High Court of Tanzania at Mwanza (the High Court) over a sale transaction in relation to a landed property situate on Plot No. 202, Block "U", Rwegesore Street in Mwanza City. Having heard the case on merits, the High Court dismissed the suit for want of merits on 22<sup>nd</sup> August, 2014. Aggrieved, Paulina Samson Ndawavya preferred an appeal to the Court which was allowed by the Court on 11<sup>th</sup> December, 2019. The Court declared sale of the disputed property by Theresia Thomas Madaha to the late Paulina Samson Ndawavya lawful and ordered transfer of the certificate of title into the names of the deceased Paulina Samson Ndawavya upon payment of TZS. 10,000,000.00. Upon an extension of time, the respondent lodged an application for review of the Court's decision in Civil Appeal No. 45 of 2017 dated 11<sup>th</sup> December, 2019 vide Civil Application No. 31/08 of 2023 hence the present application.

When the application was called on for hearing, Mr. Steven Makwega, learned advocate, appeared for the applicant, whereas, Ms.

Regina Anthony Kiumba, learned advocate, appeared for the respondent.

Arguing the application, Mr. Makwega contended that, Paulina Samson Ndawavya (the deceased) who was the appellant in Civil Appeal No. 45 of 2017 passed away on 3<sup>rd</sup> May, 2017. That, after her death, the applicant applied for and on 19<sup>th</sup> September, 2018 was granted letters of administration to administer the deceased's estate. He added that on 21<sup>st</sup> December, 2022, the respondent filed Civil Application No. 31/08 of 2022 seeking an order for review of the Court's decision in Civil Appeal No. 45 of 2017. The learned counsel contended that, since the application for review touches the interests of the deceased person whom the applicant had been appointed to administer, it is in the interest of justice for the Court to grant the present application so that he could defend the deceased's interest. In that regard, Mr. Makwega urged the Court to grant the prayers sought in the notice of motion.

Resisting the application on a point of law, Ms. Kiumba contended that the applicant has no *locus standi* to bring the present application. Elaborating on her argument, she argued that all documents pertaining to the grant of the letters of administration showed that the deceased is Paulina Ngagamba and not Paulina Samson Ndawavya. She fortified

her contention by referring us to the documents annexed to the affidavit in support of the application which are; the decision of the Mwanza Urban Primary Court at Nyamagana which appointed the applicant to be administrator of the estate of the late Paulina Ngagamba (annexure JCLI (a)), letters of administration granted to administer the estate of the late Paulina Ngagamba, dated 19<sup>th</sup> September, 2018 (annexure JCL1 (b)) and death certificate of Paulina Ngagamba (annexure JCL1 (d)).

Ms. Kiumba also took issue with annexure JCLI (c) to the affidavit in support of the application by arguing that the applicant not being an administrator of the estate of the late Paulina Samson Ndawavya had no power to swear the affidavit which attempted to verify the names of Paulina Samson Ndawavya and Paulina Ngagamba as these are two different persons. She further argued that this affidavit was sworn after the death of Paulina Ngagamba in 2017 for the purposes of this application.

Further, Ms. Kiumba submitted that there is a recent decision of the High Court in Execution Application No. 2 of 2023 dated 22<sup>nd</sup> June, 2023 whereby, after revisiting the documents regarding the grant of letters of administration, the Deputy Registrar of the High Court refused to recognize the applicant as a legally appointed administrator

of the deceased person as he noted that the ruling of the Primary Court and the letters of administration related to the estate of the late Paulina Ngagamba and not Paulina Samson Ndawavya. It was her submission that the decision of the High Court still stands and has not been reversed by any superior court. In that respect, she beseeched us to find that the applicant has failed to establish his *locus standi* in Civil Application No. 31/08 of 2023.

When probed by the Court on whether the respondent disputed the status of the applicant in Civil Application No. 31/08 of 2023, Ms. Kiumba admitted that the respondent acknowledged the status of the applicant as a legally appointed administrator of the deceased's estate. She further conceded that the two decisions of this Court dated 23<sup>rd</sup> November, 2021 and 6<sup>th</sup> December, 2022 recognized the applicant as a legally appointed administrator of the estate of the late Paulina Samson Ndawavya. Nonetheless, she contended that, at the time the Court made the observation and the respondent filed the application for review, the decision of the High Court refusing to recognize the applicant as administrator of Paulina Samson Ndawavya was not in place.

The learned counsel for the applicant briefly rejoined that the respondent filed Civil Application No. 31/08 of 2023 which is attached

to the affidavit as annexure JLC2, which application gave rise to this application. He added that, in the Civil Application No. 31/08 of 2023, there is an affidavit of Mr. Elisa Abel Msuya, learned advocate for the respondent, who recognized the applicant as a legally appointed administrator of the estate of the late Paulina Samson Ndawavya. Responding to the allegation that the Deputy Registrar of the High Court refused to recognize the applicant as a legally appointed administrator of the estate of the late Paulina Samson Ndawavya, he argued that the said decision cannot overrule the two previous decisions of this Court that recognized the applicant as a duly appointed administrator of the estate of the late Paulina Samson Ndawavya. He added that annexure JCL1 (c) established without doubt that the late Paulina Samson Ndawavya was also known as Paulina Ngagamba, and that, there is no any other evidence to contradict such fact.

We have anxiously considered the rival submissions of the advocates for the parties who are at one that Paulina Samson Ndawavya is no more. They are also in agreement that the late Paulina Samson Ndawavya was all along a party in the case that gave rise to Civil Appeal No. 45 of 2017. They are further of the same position that the late Paulina Samson Ndawavya was a party in Civil Application No.

171/08 of 2020 in which the respondent sought, and was granted, an extension of time to lodge an application for review of the judgment of the Court in Civil Appeal No. 45 of 2017.

It suffices to point out here that when Civil Application No. 171/08 of 2020 was first called on for hearing, on 23<sup>rd</sup> November, 2021, the Court was informed that Paulina Samson Ndawavya is dead; that, Jonas Samson Ndawavya has been appointed as an administrator of her estate but has not yet been joined as a party in the application. As such, the Court adjourned hearing of the application to enable Jonas Samson Ndawavya as the administrator of the deceased's estate, to apply for an order to be made a party in the application. The order of the Court reads:

*"Given the circumstances of the matter that **Jonas Samson Ndawavya is yet to be joined as a legal representative of the deceased respondent** [Paulina Samson Ndawavya], I accede to the prayer for adjournment. Hence, in terms of Rule 59 of the Rules, I hereby adjourn the hearing of this application to another convenient session to be scheduled by the Registrar so as **to enable the said administrator of the deceased's estate finalize the process of being joined***

***in this matter as a legal representative.”***

[Emphasis added].

Further, when the application was called on for hearing on 6<sup>th</sup> December, 2022, the Court observed that Jonas Samson Ndawavya was appointed as administrator of the estate of the late Paulina Samson Ndawavya in 2018, as per the copy of the letters of administration, but failed to apply to be joined as a party in the application within the twelve months period prescribed by the law.

Nonetheless, the parties hold a different view on the status of the applicant. The learned counsel for the respondent contended that the applicant was granted letters of administration to administer the estate of the late Paulina Ngagamba and not Paulina Samson Ndawavya. On the other hand, learned counsel for the applicant maintained that the names Paulina Ngagamba and Paulina Samson Ndawavya refer to one and the same person hence the applicant is entitled to be joined as a party in the application for review. Therefore, the issue for our determination is whether the applicant is a legally appointed administrator of the estate of the late Paulina Samson Ndawavya for the Court to cause him to be made a party in Civil Application No. 31/08 of 2023.



Rule 57 (3) (4) and (5) of the Rules guide the Court when faced with the demise of one of the parties in civil applications. The Rule provides:

*"(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.*

*(4) Where no application is made by the legal representative under subrule (2) or interested party under subrule (3) within twelve months, the application shall abate.*

*(5) Any person claiming to be the legal representative of a deceased party or any other interested person, may apply to revive the application; and, if it is proved that he was prevented by good cause from continuing the application, the Court shall revive the application upon such terms as to costs or otherwise as it deems fit."*

From the above provision of the law, it is clear that, when one of the parties to a civil application dies, survival of the said application depends on successful application by an interested person to be made a party to the application – see: the case of **Simon Nchangwa v.**

**Majaliwa Banda & Another**, Civil Appeal No. 293 of 2017 [2018] TZCA 287 (28 September, 2018; TANZLII). Such an application has to be made within twelve months from the date when the interested person was appointed as the legal representative of the estate of deceased party. If no application is made within twelve (12) months, the application abates. Nonetheless, if the legal representative of the deceased person or any other interested person can satisfy the Court that he was prevented by good cause from filing the application and the Court, if satisfied, will set aside the abatement order, upon such terms as to costs or otherwise, as it thinks fit.

In the present application, the applicant deposed in paragraph 2 of the affidavit that, on 19<sup>th</sup> September, 2018, he was appointed as administrator of the estate of the late Paulina Samson Ndawavya who passed away on 3<sup>rd</sup> May, 2017. In support thereof, he attached a death certificate, a decision of the primary court and the letters of administration. The learned counsel for the respondent strongly opposed the assertion by arguing that all annexures attached to the affidavit bear the names of a person called Paulina Ngagamba while the respondent in Civil Application No. 31/08 of 2023 is Paulina Samson Ndawavya, the deceased.

It is true that the documents which the applicant submitted bear the names of Paulina Ngagamba. That apart, we gathered from the record of the application that the applicant's *locus standi* was never questioned by the respondent. Throughout in the previous proceedings, the respondent recognized the applicant as a lawfully appointed administrator of the estate of the late Paulina Samson Ndawavya. For instance, in annexure JLC2 which is the affidavit of Mr. Elisa Abel Msuya, learned counsel for the respondent, he deposed, under oath, that:

*"9. That, I know to be the position of the law that once appellant in a pending appeal dies the appointed legal representative has to apply to be made a party within twelve (12) months immediately following his appointment; otherwise, the appeal shall abate automatically by operation of law.*

*10. In that regard therefore, **since Mr. Jonas Samson Ndawavya was appointed as administrator of the estate of Paulina Samson Ndawavya who was confirmed to have died on 3<sup>d</sup> May, 2018**, the said Jonas Samson Ndawavya was bound to apply to be made a party to the then pending appeal latest 19<sup>th</sup> September, 2019. Since he never applied, Civil Appeal No. 45 of 2017 abated as from this date.*

*11. Further that, **although Jonas Samson Ndawavya, the appointed administrator of the estate of Paulina Samson Ndawavya knew that the appellant was deceased**, he concealed this information to the Court. The advocate handling the case also proceeded to hear and determine the appeal on 4<sup>th</sup> December, 2019 and issued judgment in favour of a dead person. Judgment was delivered on 11<sup>th</sup> December, 2019. I shall refer the decision of the Court attached and marked as annex "TMA-2".*

*12. Mr. Jonas Samson Ndawavya is one who conducted the case of the respondent at the High Court and had introduced her as his mother and had power of attorney. I shall refer to the judgment of the High Court attached as annex "TMA-1". He was aware and had full knowledge of the pending appeal."*[Emphasis added].

It follows from the above extracted paragraphs that the respondent has been recognizing the applicant as a legally appointed administrator of the estate of the late Paulina Samson Ndawavya. Besides, the documents which Ms. Kiumba relied on in raising the objection were the same documents used by Mr. Elisa Abel Msuya in the application for review to support the averment that the applicant is a legally appointed administrator of the late Paulina Samson Ndawavya. One such document is an affidavit sworn by the applicant averring that

the two names, Paulina Samson Ndawavya and Paulina Ngagamba, refers to one and the same person. In view of these naked facts, we entertain no doubt that Paulina Ngagamba and Paulina Samson Ndawavya is one and the same person whose estate is administered by the applicant.

We are alive of the argument fronted by Ms. Kiumba that there is a recent decision of the High Court which declined to entertain an application for execution filed by the applicant on account that he was not an appointed administrator of the estate of the late Paulina Samson Ndawavya. Here, we wish to state the obvious that, indeed, the decision is recent as it was delivered on 22<sup>nd</sup> June, 2023. Upon reading the reasoning in that decision, we noted that the Deputy Registrar declined to entertain the application for execution because the applicant was granted letters of administration in respect of the estate of the late Paulina Ngagamba and not Paulina Samson Ndawavya.

The question that follows is whether the Deputy Registrar of the High Court while exercising powers of execution can vary the decision of this Court. The answer to that question is no. We have earlier on shown that, this Court has declared, not once but twice, the status of the applicant. In Civil Application No. 171/08 of 2020, this Court on two different occasions, that is, on 23<sup>rd</sup> November, 2021 and on 6<sup>th</sup>

December, 2022, recognized the applicant as the duly appointed administrator of the estate of the late Paulina Samson Ndawavya. Taking into consideration the Court's decision and the fact that the counsel for the respondent while under oath recognized status of the applicant, we hold it firmly that the applicant is the legally appointed administrator of the estate of the late Paulina Samson Ndawavya who died on 3<sup>rd</sup> May, 2017. With regard to the effect of the decision of the Deputy Registrar, we cannot, at this stage, say anything because we are not sitting on its appeal.

Lastly, we wish to briefly say a word on the submission made to us by Ms. Kiumba that, the learned counsel for the respondent discovered the status of the applicant after the appeal was determined and the application for review was filed. With due respect to such submission, one of the duties of an advocate is to make due diligence on the status of the opposite party before filing any document to the Court. Unfortunately, it appears that this was not done by the learned counsel for the respondent and cannot be entertained by the Court in this application.

All said, we are satisfied that the applicant is the legally appointed administrator of the estate of the late Paulina Samson Ndawavya and thus he has *locus standi* to apply to be joined in Civil

Application No. 31/08 of 2023. In the circumstance, the objection raised by the learned counsel for the respondent is overruled. Accordingly, we allow the application, and order that, the applicant, as administrator of the estate of the late Paulina Samson Ndawavya, be, and he is hereby, joined as a party in Civil Application No. 31/08 of 2023 in lieu of Paulina Samson Ndawavya. Costs shall abide to the outcome of the main application, Civil Application No. 31/08 of 2023.

**DATED** at **MWANZA** this 7<sup>th</sup> day of November, 2023.

S. A. LILA  
**JUSTICE OF APPEAL**

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

The Ruling delivered this 8<sup>th</sup> day of November, 2023 in the presence of Mr. Steven Makwega, learned counsel for the Applicant, and Mr. Constantine Mutalemwa holding brief for Ms. Regina Anthony Kiumba, learned counsel for the respondent; is hereby certified as a true copy of the original.



  
C. M. MAGESA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**