

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: NDIKA, J.A., KAIRO, J.A., And MURUKE, J.A.)

CIVIL REFERENCE NO. 6 OF 2022

SWALEHE MBARAKA SAID (As the Administrator
of the Estate of the late **MAHMOUD SAID ABDULRAHMAN**) **APPLICANT**

VERSUS

AHMED MOHAMED MTUNDU (As the Administrator
of the Estate of the late **MOHAMED MTUNDU**) **FIRST RESPONDENT**

THE HON. ATTORNEY GENERAL **SECOND RESPONDENT**

**(Application for reference from the ruling of the Court of Appeal of
Tanzania at Dar es Salaam)**

(Makungu, J.A.)

dated the 13th day of May, 2022

in

Civil Application No. 01/01 of 2020

.....

RULING OF THE COURT

31st October & 21st November, 2023

NDIKA, J.A.:

On 13th May, 2022, a single Justice of the Court (Makungu, J.A.) dismissed Civil Application No. 01/01 of 2020 in which the applicant was seeking extension of time in which to apply for review of the judgment of the Court (Kileo, Bwana and Mjasiri, JJ.A) in Consolidated Civil Appeals No. 75 and 79 of 2011 dated 25th August, 2014. By this reference predicated on rule 62 (1) (b) of the Tanzania Court of Appeal Rules (“the

Rules”), the applicant moves for the reversal of that decision essentially on two grounds, namely:

- 1. That the single Justice improperly exercised his discretion by failing to consider relevant matters, and that, instead, he considered irrelevant matters.*
- 2. That the single Justice failed to appreciate and consider the contention that the decision for which extension of time to apply for review was sought was not only a nullity but was also fraught with illegalities.*

It is notable that the decision of this Court now the subject of the intended review reversed the decision of the High Court of Tanzania at Dar es Salaam (Shangwa, J.) in Civil Case No. 296 of 1995 which had decreed the applicant herein the owner of the suit property. Dissatisfied, the applicant instituted Civil Application No. 165 of 2014 in this Court seeking a review of the aforesaid decision of the Court, but the effort went unrewarded as the application was struck out on 7th June, 2019 due to the applicant’s omission to serve a copy of the notice of motion on the second respondent.

Still undeterred, the applicant lodged Civil Application No. 01/01 of 2020 seeking extension of time to lodge a fresh application for review. In support of the application, he affirmed an affidavit. Opposing the application, the first respondent swore an affidavit in reply while the

second respondent had Mr. Deodatus Nyoni, learned Principal State Attorney, file a replying affidavit.

The applicant principally based his application for extension of time on the ground that the decision intended for review was a nullity due to the following:

- 1. The appeal was purportedly commenced and presented by one Mohamed Mtundu who passed away on 27th November, 2002.*
- 2. Even the decision of the High Court in Civil Case No. 296 of 1995 delivered on 4th November, 2011, which was the basis of Consolidated Civil Appeals No. 75 and 79 of 2011, was a nullity because it was purportedly prosecuted by Mohamed Mtundu who passed away in November, 2002.*
- 3. The consolidated appeals, which were determined on 25th August, 2014, were purportedly prosecuted against, and defended by the respondent Mahmoud Said Abdulrahman, who passed away on 12th June, 2012.*
- 4. By the time Civil Case No. 265 of 1995 was determined, that is, on 4th April, 2011, the Civil Registry of the High Court ceased to have jurisdiction to determine any land dispute as a Civil Case. Thus, the Court which determined Civil Case No. 265 of 1995, which was the basis of Consolidated Civil Appeals No. 75 and 79 of 2011, had no jurisdiction.*

At the hearing of the application before the single Justice, the applicant argued points 2, 3 and 4 above, but abandoned the first complaint.

Having scanned the notice of motion and affidavits on record, and keeping in mind the contending submissions of the parties, the single Justice, at the forefront, censured the applicant for dawdling for over seven months from 7th June, 2019, when his first application for review was struck out, to the moment he instituted Civil Application No. 01/01 of 2020 pursuing extension of time to institute an application for review afresh, that is, 2nd January, 2020. He was of the view that the said period of delay ought to have been accounted for, but it was not. Secondly, the single Justice reasoned that the application failed to show, explicitly or implicitly, which of the grounds under rule 66 (1) of the Rules the intended review would be predicated upon. Given the circumstances, he concluded that no good cause had been disclosed for him to exercise his discretion in the applicant's favour.

Mr. Samson E. Mbamba, learned counsel, prosecuted this matter before us on behalf of the applicant. On the other hand, Mr. Denis Maringo, learned advocate, stood for the first respondent while Mr. Gallus Lupogo, learned State Attorney, appeared for the second respondent.

Mr. Mbamba's essential submission was that the single Justice wrongly considered the fact that the applicant had not accounted for the delay involved in the case while it was clear that the extension of time sought was predicated on the claim that the judgment intended to be reviewed was fraught with illegalities. He particularly censured the single Justice for failing to consider and decide the matter based on the alleged illegalities, which, he said, were in themselves sufficient to warrant enlargement of time. Citing **Tanzania National Parks (TANAPA) v. Joseph K. Magombi**, Civil Application No. 471/18 of 2016 (unreported); **Mary Rwabizi t/a Amuga Enterprises v. National Microfinance PLC**, Civil Application 378/01 of 2019 [2020] TZCA 355 [15 July 2020; TanzLII]; and **Ezrom Magesa Maryogo v. Kassim Said & Mohamed & Another**, Civil Application No. 227 of 2015 [2016] TZCA 830 [12 July 2016; TanzLII], he contended that any complaint raising possible illegality of the decision intended to be challenged constitutes good cause for extending time.

Focusing on the allegation of impropriety of the trial proceedings in the High Court as well as the appellate proceedings in this Court, Mr. Mbamba relied on several decisions of the Court for the proposition that any proceedings instituted and prosecuted in the name of a dead person

(or mounted against a dead person) instead of his duly appointed administrator of estate as well as the decision thereon are a nullity. Two of the decisions were **Said Ibrahim (Legal Personal Representative of Ibrahim Ramadhan) v. Melembuki Kitasho**, Civil Application No. 5 of 2014 [2014] TZCA 182 [23 October 2014; TanzLII]; and **Sharifu Nuru Muswadiku v. Razaka Yasau & Another**, Civil Appeal No. 48 of 2019 [2020] TZCA 1914 [18 December 2020; TanzLII]. Further reference on the same proposition was made to **Abdallah Issa Kagile v. Abdallah Salum Said**, Civil Application No. 50 of 2007; **Dominico Pius v. Kasese @ John Lumoka**, Civil Appeal No. 93 of 2010; and **Abdullatif Mohamed Hamisi v. Mehboob Osman & Another**, Civil Revision No. 6 of 2017 (all unreported).

So far as the claim that the High Court had no jurisdiction to determine Civil Case No. 265 of 1995, from which Consolidated Civil Appeals No. 75 and 79 of 2011 arose, Mr. Mbamba argued that upon coming into force of the Land Disputes Courts' Act, Cap. 216 ("Cap. 216") on 1st October, 2003, the High Court sitting as the general or civil registry no longer had jurisdiction to hear and determine any land dispute as a civil case. He elaborated further that although all proceedings in the High Court's general or civil registry concerning land were to be conducted and

concluded not later than 30th September, 2005 when the prescribed two-year period from the date of commencement of the Act expired as per the Land Disputes Courts Act (Date of Commencement) Notice, 2003, Government Notice No. 223 of 2003 ("the GN No. 223 of 2003"), the case was concluded on 4th April, 2011, which was almost six years from the date of commencement. In conclusion, he urged us to find that the alleged illegalities constitute good cause for extension of time for the intended review.

In rebuttal, Mr. Maringo contended that since the alleged illegalities were not raised to this Court on appeal, they cannot be entertained in the intended review behind time. On being queried by the Court whether the single Justice considered and determined the claim of illegalities, Mr. Maringo answered in the negative, but urged us to step in and resolve the issue.

Mr. Lupogo weighed in supporting Mr. Maringo's submission while acknowledging that the single Justice did not deal with the claimed illegalities. He then referred us to the case of **Vicent Lucas & 6 Others v. Tanzania Zambia Railway Authority**, Civil Reference No. 13 of 2002 [2023] TZA 17499 [11 August 2023; TanzLII] for the definition of the term "illegality." In that case, the Court, having defined an illegality

as an act not authorized by law, stated that illegality would not include mere errors of law, but instances where the court acted illegally for want of jurisdiction or for denial of right to be heard or that the matter was time-barred. He was emphatic that the applicant's alleged illegalities were no more than errors of law. He finally distinguished the case of **Sharifu Nuru Muswadiku** (*supra*) on the ground that the errors involved were raised and dealt with by this Court on appeal, not on review. In that case, the Court held that the appellate proceedings before the District Land and Housing Tribunal and the subsequent proceedings before the High Court were a nullity due to being conducted in the absence of the administrator of the estate of the second respondent who had passed away.

Rejoining, Mr. Mbamba maintained that, upon death of a party to a case, proceedings cannot legally continue and that in the instant case it was wrong that the proceedings were conducted in the absence of the legal representatives. He reiterated his claim that the errors raised by the applicant amounted to illegalities constituting good cause for extension of time.

We have scrutinized the material on record and considered the submissions for and against the reference. At the outset, we would reiterate that extension of time under rule 10 of the Rules is a matter of

discretion on the part of the Court, exercisable judiciously and flexibly by considering the relevant facts of the case. Certainly, it has not been possible to lay down an invariable definition of good cause to guide the exercise of the Court's discretion. Nevertheless, the Court has consistently looked at a myriad of factors, one of which, so pertinent in this matter, is whether there is a point of law of sufficient importance such as the illegality of the decision sought to be challenged: see, for instance, **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 185; and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 [2011] TZCA 4 [3 October 2011; TanzLII].

It is significant to note that in **Devram Valambhia** (*supra*), at page 188, the Court, while acknowledging illegality as an acceptable ground for enlargement of time, stated so unmistakably that a claim of illegality must be intrinsic in the decision intended to be challenged:

*"... where, as here, **the point of law at issue is the illegality or otherwise of the decision being challenged**, that is of sufficient importance to constitute 'sufficient reason' within the meaning of rule 8 of the Rules [now rule 10 of*

the 2009 Rules] for extending time. [Emphasis added]

In addition, in **Lyamuya Construction Company Limited** (*supra*), a single Justice of the Court elaborated that:

*"Since every party intending to appeal seeks to challenge a decision either on point of law or fact, it cannot in my view, be said that in **VALAMBHIA's** case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should as of right be granted extension of time if he applies for one. The Court there emphasized that **such point of law must be that 'of sufficient importance' and, I would add that it must be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process.**"[Emphasis added]*

Furthermore, given that granting extension of time is discretionary, this Court has unswervingly stated on many occasions that it would normally refrain from interfering with the exercise of such discretion by a single Justice of the Court. In **Amada Batenga v. Francis Kataya**, Civil Reference No. 1 of 2006 (unreported), the Court, having revisited its

previous decisions on reference, summarized the principles upon which a decision of a single Justice can be examined on a reference as follows:

"a) On a reference, the full Court looks at the facts and submissions the basis of which the single Judge made the decision.

b) No new facts or evidence can be given by any party without prior leave of the Court; and

c) The single Judge's discretion is wide, unfettered and flexible; it can only be interfered with if there is a misinterpretation of the law."

In a subsequent decision in **G.A.B Swale v. Tanzania Zambia Railway Authority**, Civil Reference No. 5 of 2011 [2016] TZCA 863 [7 September 2016; TanzLII], the Court reaffirmed the applicable principles as follows:

*"(i) Only those issues which were raised and considered before the single Justice may be raised in a reference. (See **GEM AND ROCK VENTURES CO. LTD VS YONA HAMIS MVUTAH**, Civil Reference No. 1 of 2001 (unreported).*

And if the decision involves the exercise of judicial discretion:

- (ii) *If the single Justice has taken into account irrelevant factors or;*
- (iii) *If the single Justice has failed to take into account relevant matters or;*
- (iv) *If there is misapprehension or improper appreciation of the law or facts applicable to that issue or;*
- (v) *If, looked at in relation to the available evidence and law, the decision is plainly wrong. (see **KENYA CANNERS LTD VS TITUS MURIRI DOCTS** (1996) LLR 5434, a decision of the Court of Appeal of Kenya, which we find persuasive) (see also **MBOGO AND ANOTHER V SHAH** [1968] EA 93.)"*

To stress the above position, we excerpt a passage from **Mbogo & Another v. Shah** [1968] EA 93, at page 94, a decision of the erstwhile Court of Appeal for East Africa cited and applied in numerous decisions of the Court including **G.A.B. Swale** (*supra*):

*"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that the decision **is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it***

has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong decision. “[Emphasis added]

Surely, the principle in the above passage would apply with equal force to the exercise of discretion by a single Justice of this Court.

With the above exposition of the law in mind, we would, at first, express our agreement with the learned counsel that the single Justice did not consider and resolve the applicant’s claim of illegalities, which was the mainstay of the application. Given that the said claim was raised by the applicant in the notice of motion and canvassed by the parties in their respective submissions, and since it is settled that in appropriate circumstances such an allegation could constitute good cause for condonation of delay, the single Justice ought to have considered the claim and pronounced himself on it. With respect, we uphold Mr. Mbamba’s submission that the single Justice’s finding that the applicant failed to account for seven months’ delay from 7th June, 2019 to 2nd January, 2020 was beside the point because the application was anchored entirely on the claim of illegalities. On this basis, we are enjoined to step in and resolve the claim, the sticking issue being whether any of the alleged illegalities constitutes good cause.

We begin with the contention that the judgment intended for review is illegal on the ground that the decision of the High Court in Civil Case No. 296 of 1995 delivered on 4th November, 2011 from which it arose was a nullity because it was prosecuted by Mohamed Mtundu who passed away in November 2002.

Although we acknowledge the settled position that a legal action cannot be prosecuted in the name of a dead person but that of his duly appointed legal representative, we respectfully disagree with Mr. Mbamba that this Court's judgment would as well be tainted because of the omission to join the deceased's legal representative in the place of the deceased in the proceedings in the High Court. First and foremost, the absence of the late Mohamed Mtundu's legal representative in the trial proceedings, being a factual and legal question, was not brought to the attention of this Court on appeal. Had it been so raised to the Court, the Court would certainly have dealt with it as it did in the decisions relied upon by the applicant, notably, **Said Ibrahim (Legal Personal Representative of Ibrahim Ramadhan)** (*supra*) and **Sharifu Nuru Muswadiku** (*supra*). The alleged illegality is, in the circumstances, an afterthought.

Moreover, what the applicant ought to have pointed out was an illegality that is intrinsic in the judgment for which extension of time for review was sought, not the invalidity of the High Court's decision – see **Devram Valambhia** (*supra*). In our view, the alleged illegality of the High Court's judgment due to the omission of the legal representative of the late Mohamed Mtundu is not the same as illegality of the judgment of this Court.

The next contention, alleging illegality of the judgment on the consolidated appeals determined by this Court on 25th August, 2014 because they were purportedly prosecuted against and defended by the respondent, Mahmoud Said Abdulrahman, not his legal representative, is equally wide of the mark. In the first place, we are aware that in terms of rule 92 (2) of the Rules, an appeal shall not be incompetent by reason only that it was instituted against a dead respondent instead of his legal representative. The said provision stipulates:

"(2) An appeal shall not be incompetent by reason only that the respondent was dead at the time when it was instituted 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."[Emphasis added]

In the instant matter, it is apparent that the Court heard and determined the consolidated appeals without being apprised of the death of Mahmoud Said Abdulrahman and that no interested person applied for the legal representative of the deceased's estate to join the proceedings in the place of the deceased respondent. By dint of logic and in the spirit of rule 92 (2) above, the judgment of the Court would not necessarily be a nullity in the circumstances of this matter solely on account of the omission of the legal representative. It would certainly have been a different matter had it been suggested that an impostor cheated his way through and presented himself before this Court as the deceased respondent to the detriment of the deceased's estate.

Finally, we turn to the last argument, that the judgment of this Court intended for review is illegal as it emanated from the proceedings of the High Court in which it acted without authority.

In the first place, we hasten to say that this complaint is similarly hollow. We would repeat our reasoning on the previous complaints. That the jurisdictional question was never raised on appeal for this Court to take its cognizance and resolve it; and that the supposed exercise by the High Court without jurisdiction is not necessarily an intrinsic quality of this Court's judgment for it to be corrected by the Court in exercise of its

power of review. It is firmly established in our jurisprudence that the review jurisdiction is a residual power exercisable by the Court to correct its own errors manifest on the record.

The foregoing apart, we are also decidedly of the view that the complaint at hand is not an illegality that can be established without a long-drawn argument. We shall demonstrate.

It is common cause that the litigation in respect of Civil Case No. 265 of 1995 between the parties herein over the landed property was instituted in the High Court in 1995. It is also undoubted that the High Court heard evidence and handed down its judgment on the dispute on 4th April, 2011. Since the new land dispute resolution mechanism under Cap. 216 took effect on 1st October, 2003 in accordance with the GN No. 223 of 2003, the jurisdiction of the High Court in continuing to hear and conclude all pre-existing land disputes was governed by section 54 of Cap. 216 providing as follows:

"54.-(1) Notwithstanding the provisions of section 55, proceedings or appeals commenced in the High Court, the Magistrates' Courts, Regional Housing Tribunal, Housing Appeals Tribunal, Customary Land Tribunal and the Customary Land Appeals Tribunal which are pending on the date of

commencement of this Act shall be continued, concluded and decisions and orders made thereon shall be executed accordingly as if this Act had not been passed.

(2) Every decision or order of the High Court, the Magistrates' Court, Regional Housing Tribunal, Housing Appeals Tribunal, or Customary Land Tribunal or Customary Land Appeal Tribunal, which shall not have been fully executed or enforced before the date of commencement of this Act, may be executed and enforced after that day as if this Act had not been passed.

(3) All proceedings or appeals under this section shall be concluded within the period of two years from the date of commencement of this Act.

(4) Where the High Court or the Magistrates' Court fails to hear and conclude the proceedings or appeals within the period specified in subsection (3), the Chief Justice may, upon application by the Registrar extend the time to such other time as he may determine."

The following points are evident from the above provisions: first, that in pursuance of sub-section (1) above, the High Court, as well as the subordinate courts or tribunals mentioned therein, were vested, as a transitional measure, with residual jurisdiction to continue hearing and

determining all proceedings or appeals pending in their respective registries on the commencement date, that is, 1st October, 2003. Secondly, as rightly argued by Mr. Mbamba all pending proceedings or appeals had be heard and concluded in terms of subsection (3) within a two-year period, which ended on 30th September, 2005. Finally, subsection (4) authorizes the Chief Justice to extend the time to such other time as he may determine for hearing and determination of any proceeding or appeal where the High Court or a subordinate court failed to hear and conclude the proceeding or appeal within the two-year period specified in subsection (3). The Chief Justice's authority was to be exercised on a case-by-case basis upon application by the Registrar of the High Court.

In view of the foregoing, the applicant's contention that the High Court acted without jurisdiction simply because it rendered its decision on 4th April, 2011, almost six years after the two-year period alluded to above had elapsed, is manifestly inconclusive, if not fallacious. The applicant has ignored the possibility that the said limitation period might have been extended in terms of subsection (4) above by the Chief Justice's fiat. Since the question was neither raised at the trial before the High Court nor canvassed on appeal to this Court, it will most probably require the Court

to call for and examine evidence to establish the absence of any such extension. In any event, the intended review cannot be used as a forum for fishing for facts and evaluation of evidence.

In the final analysis, we find and hold that none of the alleged illegalities constitute good cause for extension of time sought. Consequently, the reference fails, and we dismiss it with costs.

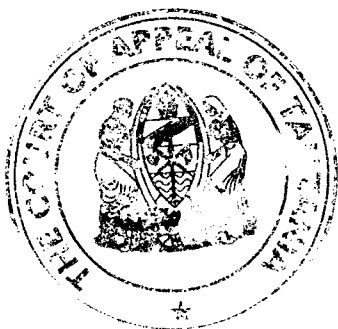
DATED at DAR ES SALAAM this 20th day of November, 2023


G. A. M. NDIKA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Ruling delivered this 21st day of November, 2023 in the presence of Mr. Denis Maringo, holdings brief for Mr. Samson Mbamba, learned advocate for the applicant also learned advocate for the 1st respondent and Mr. Gallus Lupogo, learned State Attorney for the 2nd respondent is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL