

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 16 OF 2021**

(Arising from the ruling of the High Court, Dar es salaam District Registry in  
Land Case No. 68 of 2015 dated 20/02/2020, **NGWALA J**)

**MASWANYA MOHAMED KULU (Legal**

**Representative Of the late ERICA MASWANYA).....APPLICANT**

**VERSUS**

**COMMERCIAL BANK OF AFRICA TANZANIA LIMITED.....RESPONDENT**

**RULING**

30<sup>th</sup> Sept 2021 & 15<sup>th</sup> Oct, 2021.

**E. E. KAKOLAKI J**

At the instance of **JBK ADVOCATES** and by way of chamber summons supported by affidavit of **Maswanya Mohamed Kulu**, the applicant, this Court is moved to set aside the abatement order of this Court, Ngwala J, in Land Case No. 68 of 2015 handed down on 20/02/2020, declaring the plaintiff's suit abated following lapse of ninety (90) days, time limitation for filing an application to join a plaintiff's legal representative following her demise on 10/05/2018. The application which is preferred under Order XXII Rule 9(2) of the Civil Procedure Act, [Cap. 33 R.E 2019] hereinto referred as CPC, has met resistance of the respondent who through her

principal officer one **Frida Shirima** filed a counter affidavit duly sworn for that purpose.

Briefly the before meeting her natural death the late ERICA MASWANYA before this court in Land Case No. 68 of 2015, had sued the respondent for a declaration that the mortgage created over her certificate of Title No. 53292 in respect of Plot No. 191/2/2 Vingunguti Industrial Area, Dar es salaam claiming to be unlawful and being tainted with forgery and fraud. When she passed away on 10/05/2018 and 90 days lapsed without any application being made for legal representation as provided under Order XXII Rule 3(2) of CPC read together with item 16 of Part III Schedule to the Law of Limitation Act, [Cap. 89 R.E 2002], the respondent successfully applied for an order of abatement of the suit which was granted by this court in its ruling on 20/02/2020. As the present applicant who was appointed administrator of estate of the late Erica Maswanga on 19/11/2019, was time barred to apply for setting aside the said abatement order when delivered applied for extension of time to this court to set aside the said abatement order in Misc. Land Application No. 15 of 2020 which he later on withdrew on 29/07/2020 before he successfully filed another one in Misc. Land Application No. 38 of 2020 that extended him time to file an application of setting aside the said abatement order, hence this application.

As noted above this application is contested and when the same was called for hearing parties who appeared represented by learned counsels sought leave of this court to have it disposed by way of written submission in which the provided filing schedule was religiously followed. The applicant

hired the services of Mr. Richard Madibi, learned advocate while the respondent enjoyed the representation of Mr. Gaspar Nyika and Ms. Samah Salah both learned advocates.

I have taken time to travel through both pleadings and rival submissions from both parties. In this ruling I am however intending not to reproduce the said submissions but rather consider them as I am analysing the deposed facts and evidence visa vice the fighting arguments as assigned by both parties in support and against the grant of application. It is the law under Order XXII Rule 9(2) of the CPC that, the court will grant the application for setting aside the abatement of suit upon being satisfied by the applicant that, he was prevented by any sufficient cause from continuing the suit. The said provision of Order XXII Rule 9(2) of CPC provides thus:

*(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and **if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall set aside the abatement** or dismissal upon such terms as to costs or otherwise as it thinks fit. (Emphasis supplied).*

This court in the case of **Salehe Said Nahdi Vs. National Microfinance Bank PLC and Another**, Commercial Case No. 1 of 2015 (HC-unreported) on the possibility of applicant reviving the abated suit and what the court should be satisfied with observed that:

*"..., the applicant can still revive the abated suit, if he can be able to satisfy the Court that he was prevented by any sufficient cause from continuing the suit and the Court, if satisfied, will set aside the abatement order upon such terms as to costs or otherwise as it thinks fit."*

With the above position of the law it is now evident to me that in this matter this court has discretion to grant the application but upon the applicant discharging his duty of advancing to this court sufficient cause that prevented him from continuing the suit he is seeking to have its abatement set aside. The applicant in paragraphs 3,4,5,6,7,14 and 15 of his affidavit has advanced three reasons that prevented him from continuing the suit as representative of the late Erica Maswanya, the reasons which I am prepared to address and determine in the course of this ruling. Mr. Madibi's submission on the first reason as deposed in paragraphs 4 and 14 of the affidavit is that, after demise of the late Erica Maswanya on 10/05/2018, it took time to for the clan members to convene the meeting that appointed him in December, 2018 as administrator of the estate of the deceased before he applied for letters of appointment in court. Mr. Mnyika and Ms. Salah for the respondent is challenging the reason submitting that, under section 110(1) of the Law of Evidence Act, [Cap. 6 R.E 2019] it is the applicant who was to prove through documentary evidence that, clan members were scattered and managed to meet in December to appoint him but he failed to attach minutes the said meeting to substantiate that the meeting was in fact held in December, 2018. In his rejoinder submission Mr. Madibi countered that it was impossible to attach the copy of the minutes of December, 2018 clan's

meeting as the same was submitted to the Primary Court of Buguruni in the probate cause. I agree with Mr. Nyika and Ms. Salah for the respondent that, as it is the applicant who alleges to have clan's meeting delayed due to scattering of its members and that the same was held on December, 2018, under section 110(1) of the Evidence Act, is duty bound to prove that the same was conducted on December, 2018 and not before. He can only do so by exhibiting through a copy of its minutes which duty he has failed to discharge. The defence that the said minutes were tendered or submitted at Buguruni Primary Court in my opinion is a lame excuse as he was not prevented from requesting its copy for the purposes of this application. Under section 110(1) and (2) and section 111 of Evidence Act, [cap. 6 R.E 2019], the burden of proof lies on the person who seeks the court to give judgment in his favour relying on existence of certain facts to prove to the court that, that fact exists. Section 110 of Evidence Act provides:

*110.-(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

And section 111 of the said Act reads:

*111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.*

In the light of the above provisions it was the respondent's burden of proof to prove to this court's satisfaction that the clan meeting was convened late on December, 2018. As there is no any evidence to so prove as submitted by respondent's counsel I find the reason advanced by the applicant does not constitute sufficient cause as required under Order XXI Rule 9(2) of the CPC.

Next for determination is the second reason as deposed in paragraphs 5, 6 and 7 of the applicant's affidavit that the applicant filed a probate cause at Buguruni Primary Court which its disposal was delayed until 19/11/2019 when he was granted the letters of Administration but by then the issue of abatement of the case due to absence of Legal Representative of the deceased after lapse of 90 days was already raised in court and finally determined on 20/02/2020. So he could not apply for legal representation within the said 90 days after demise of the late Erica Maswanya without first being appointed as administrator of estate. He added the law is not clear as to the time limitation for the suit to abate. This reason like the first one is contested by the respondent's counsel who submitted that the applicant is ignorant of the law as it is not true that the law does not provide for time limitation under which the suit abates after demise of the plaintiff. They argued the law under Order XXII Rule 3(1) of the CPC, read together with item 16 of Part III of the schedule to the Law of Limitation Act, provide for 90 days within which the applicant to apply to be made a party to the suit as a legal representative of the deceased party, time reckoned from the date of death of the plaintiff. As regard to the proof of commencement date of the probate cause in the Primary Court of Buguruni they contended there was no court proceedings to prove that applicant's

appointment as administrator of deceased's estate took long time up to 19/11/2018. Thus the reason is unjustifiable. In rejoinder Mr. Madibi said the demand by the respondent of attaching documentary evidence proving time of filing the probate cause is of no merit as the applicant was never issued with any document exhibiting his institution of the petition before the Primary Court of Buguruni.

To start with the issue of unclear time within which the applicant could have applied to be made a party to the suit after demise of the plaintiff I think the same need not detain me as it was clearly determined by this court in its ruling in Land Case No. 68 of 2015 dated 20/02/2020, in which its abatement order is sought to be set aside. In that ruling at page 2 and 3 my sister Ngwala, J (as she then was) had this to say on time limitation:

*"From my Reading and understanding of the provision of Order XXII Rule 3(1)(2) of the CPC reading together with Part III Schedule, Item No. 16 of the Law of Limitation Act, **it is plainly clear that the prescribed time of ninety days in which to make the application for legal representative to join in a suit is to be reckoned from the date when the plaintiff dies.** Suffice to say th long and short answer to it is that the computation of time should be reckoned from the date of death of plaintiff."* (Emphasis added)

From the above observation which position I subscribe to I am at one with respondent's counsel that time within which the applicant was supposed to file an application for representation of the deceased party is very clear that it is reckoned from the date of death of the plaintiff, thus I need not

add a word. As to the requirement of attachment of the document proving the date of institution of the probate proceeding in which the respondent submits there is no such document, it is my conviction that that submission is misconceived. I say so as when the suit or any petition or cause is instituted in court the party has to pay the filing fees and be issued with a receipt indicating the date and the case number as a proof that he actually filed it on specified date. In other words a document is deemed to have been filed on the date when the filing fees are paid. This position of the law was stated in the case of **John Chuwa Vs. Anthony Ciza** (1992) TLR 233 where the Court of Appeal held that:

*"...According to the learned judge, **the date of filing the application is the date of the payment of the fees and not that the receipt of the relevant documents in the registry.** Mr. Akaro, learned advocate for the appellant, conceded that before me and I cannot fault the learned judge there." (Ephasis supplied).*

Similar views was aired by this Court in the case of **Misungwi Shilumba Vs. Kanda Njile**, PC Civil Appeal No. 13 of 2019 (HC-unreported) where this court said:

*"...a document is deemed to be filed in court when payment of court fees is done and the proof is payment of fees exhibited by the exchequer receipt."*

In light of the above authorities which I subscribe to I am convinced that the applicant ought to have produced document be it filing fees receipt or any other proving the date in which the alleged probate cause was filed. I



find proof of the date of filing the alleged probate is material in this case in substantiating the applicant's claim that his grant of letters of administration by the Primary Court of Buguruni took him long to be concluded. In absence on such evidence I hold the reason of delay in appointment of the applicant as administrator of the estate of the late Erica Maswanya remains unjustified hence I discount it.

Lastly it the third reason as deposed under paragraphs 3 and 15 of the applicant's affidavit where Mr. Madibi submits there are issues of illegalities in which the court has to address as the mortgage created over the deceased's property without her information which is the central controversy in said suit is tainted with forgery and fraud which illegalities constitute sufficient cause warranting this court set aside the said abatement. Conversely the respondent's counsel are of contrary view contending that illegality if any in the mortgage does not constitute good cause as the same does not come from the decision but rather drawn from the mere document like the one at hand. In alternative they argued placing reliance on the case of **Lyamuya Construction Company Ltd Versus Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (CAT-unreported) that illegality is not only pleaded as the same must be apparent on the face of record and not a long drawn argument, in which in this matter they say the issue as to whether the deceased was aware of the mortgage or not is a matter of fact and requires tendering of evidence and assessment of its truthfulness. Thus it does not qualify to constitute illegality of the decision. In rejoinder Mr. Madibi argued whet is required under **Lyamuya's case** is that the point of illegality or point of law must

be of sufficient importance and not as interpreted by the respondent. To him in this matter illegality is drawn from the mortgage transaction in dispute which infringed the deceased right of owning the said property which if not interfered by the court will seriously affect the heirs right of inheritance of deceased estate and render them homeless. He therefore urged the court to allow the application by setting aside the said abatement order as the applicant has advanced sufficient cause to warrant the court exercise its discretion.

Having paid close attention to the fighting arguments of both parties in this reason, I am not convinced that the point of illegality has been sufficiently established by the applicant. I so conclude as the same has to be raised basing or establishing the illegality of the impugned proceedings or decision on the court and not the document which do not form part of the proceedings or decision like what is the case in this matter. in the case of **Transport Equipment Vs. Valambia and Attorney General** (1993) TLR 91 (CAT) when the point of illegality was pleaded the Court of Appeal held that:

***“When the point at issue is the illegality or otherwise of the decision being challenged, that is a point of law sufficient importance to constitute reason within rule 8 of the Court of Appeal Rules to overlook compliance with the requirement of rules and to enlarge time for such compliance.”***  
*(Emphasis added)*

Similarly in the case of **The Principal Secretary, Ministry of Defence and National Service Vs. Dervan P. Valambia** (1992) TLR 387 (CAT) the Court of Appeal 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 record straight."* (Emphasis added)

Basing on the two above cited case of the Court of Appeal which bind this court I have no hesitation in concluding that the point of illegality must be alleged from the decision sought to be challenged or proceedings and nothing else. In this case the applicant does not rely on any decision of this court to allege or establish the said pleaded point of illegality as none is neither mentioned nor attached to his affidavit for this court to consider and satisfy whether it raised any point of illegality constitute a reason for granting the application. Even when the same was to be successfully established still I would hold similar view that the same does not constitute sufficient cause for setting aside the abatement order within the meaning of Order XXII Rule 9(2) of the CPC. I so hold as point of illegality can never be one of the reason preventing the applicant to file the application of a legal representation of the dead plaintiff but rather the ground for extension of time which is not the subject of this application. For those reasons I would conclude the third reason falls short of merit and I dismiss it.

In the premises and for the fore reasons I am satisfied that the applicant has failed to advance sufficient cause that prevented him from continuing the suit as per the dictates of the provisions of Order XXI Rule 9(2) of the CPC. Consequently this application is devoid of merits and the same is hereby dismissed.

Given the nature of the case, each party has to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 15<sup>th</sup> day of October, 2021.



  
E. E. KAKOLAKI

**JUDGE**

15/10/2021

The ruling has been delivered at Dar es Salaam today on 15<sup>th</sup> day of October, 2021 in the presence of the Ms. Genoveva Kalolo, advocate for the Applicant, Ms. Fatma Mgunya, Advocate for the respondent and Ms. **Asha Livanga**, Court clerk.

Right of Appeal explained.



  
E. E. Kakolaki

**JUDGE**

15/10/2021