IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

MISCELLANEOUS LAND APPLICATION NO. 11 OF 2021

MWANAISHA ALLY MBALIKA ***(Administratrix of the Estate of Deceased CHRISTIAN ALLY MBALIKA @ CHRISTIAN MBALIKA HYERA)*** ..... **APPLICANT**

VERSUS

JUMA ALLY MBALIKA .....**1st RESPONDENT**

JOHN KASULUS KAPINGA ***(A legal representative of JOHN KALOS KAPINGA, deceased)*** .....**2ND RESPONDENT**

SONGEA MUNICIPAL COUNCIL ..... **3RD RESPONDENT**

COMMISSIONER FOR LAND, MINISTRY OF LAND..... **4TH RESPONDENT**

THE ATTORNEY GENERAL ..... **5TH RESPONDENT**

RULING

Date of last Order: *09/09/2022*
Date of Ruling: *04/10/2022*

MLYAMBINA, J.

This is another matter concerning with procedures which inevitably arise when one party to a case dies prior to the execution of the decree or filing of appeal or revision or reference. In an attempt to substantiate this supposition, I shall deliberately analyze the rehearsed submissions from parties on account of the following key issues: *One*, whether one can appeal or file revision or review or execution post judgement without changing the identity of the Defendant who died after judgement has been pronounced or, as the case may be, without significantly substituting the name with that of the probate administrator. *Two,* if the first issue is

answered in the negative, what is the proper procedure under the circumstances. *Three*, what is the remedy of a case filed against a deceased person. *Four*, whether a party can be allowed to amend a pleading after the Court has raised a legal objection *suo moto. Five*, whether costs should be granted as against the Applicant if such legal objection is sustained.

Nonetheless, brief facts linked to this case as unveiled in the record are that; through *Land Case No. 3 of 2015* before this Court, the parties herein were hotly contesting over disposition of Plot No. 26 Block K Central Area Songea Town around CCM Street. The Plaintiff (herein the Applicant), had filed a suit against the 1st Defendant for selling of the suit land which was later fraudulently and illegally approved by the 3rd Defendant. Upon fully trial, on the 23rd of February 2017 the suit was dismissed with costs. The Court decreed that the suit land belongs to the 1st Defendant.

Upon various follow up to the Land Office and legal consultations, on 22nd June, 2021, the Applicant herein filed *Miscellaneous Land Application No. 7 of 2021* before this Court seeking for extension of time to file an application for review of the decision of this Court. The application was supported with an affidavit of the Applicant containing a litany of evidences. It is in record that on 3rd August, 2021 Counsel Eliseus

pointed out that the 1st Defendant was dead and successfully prayed summons be issued to one Ally Juma Mbalika who appeared in the Court on the 22nd of July, 2021 but impersonated himself as the 1st Respondent. Unfortunate, on the 20th of October, 2021 the application was struck out for being supported with a defective affidavit.

On 19th November, 2021 the Applicant filed the instant application seeking for extension of time to file review out of time. Upon succeeding this matter, perusing the records and deliberating with both sides off record, I noted that the 1st Respondent was dead prior filing of this application. Consequently, On the 14th of June 2022, I ordered the parties to make preparations and address the Court on the propriety of the 1st Respondent (the deceased) being made a party to this application.

Verily, on the date set for hearing, Mr. Dickson Ndunguru, Learned Advocate represented the Applicant whilst Mr. Eliseus Ndunguru, Learned Advocate represented the 2nd Respondent accompanied by two learned State Attorneys Eggidy Mkolwe and Emmanuel Bakari who jointly represented the 3rd, 4th and 5th Respondent. Their submission thereof triggered determination of the five issues hinted above which shall be discussed hereafter in *seriatim*.

First issue*; whether one can appeal or file revision or review or execution post judgement without changing the identity of the Defendant*

who died after judgement has been pronounced or, as the case may be, without significantly substituting the name with that of the probate administrator.

Submitting in chief, little was forthcoming from Mr. Eliseus Ndunguru although he impliedly and admirably admitted that the law is not silent under such pretext. He referred the Court to the case of **Mabongolo Luma and Another v. Peter Mlanga,** Civil Appeal No.45 of 2019, Court of Appeal of Tanzania at Dar es Salaam (unreported) and asserted that, it was held, that, once a party passes away, a trial should not commence without replacing the deceased with a legal representative. On top of that, he cited *Order XXII Rule 4 of the Civil Procedure Code (supra)* which provides:

> *(1) Where one of two or more Defendants dies, the right to sue does not survive against the surviving Defendants alone or a Sole Defendant or a Sole Surviving Defendants dies and the right to sue survives, the Court, on any application made in that behalf shall cause the legal representative of the Deceased Defendant to be made a Party and shall proceed with the suit. (2) Any Person so made a Party may make any Defence appropriate to his Character as legal representative of the Defendants. (3) Where within the time limited by the law no application*

is made under sub rule (1), the suit shall abate as against the Deceased Defendant.

While replying Counsel Dickson conceded with Eliseus Ndunguru that there is a *lacuna* under the *provision of Order XXII* as it does not cover the situation in the current application but it was his view that such lacuna can be cured under *Section 97 and 95 of the Civil Procedure Code (supra).* He asserted that; even the cited High Court decision did not come across the provision of *Section 97 (supra).*

On the other hand, the Court is of the view that Mr. Eliseus is being mystified. At some point his submission suggested the law is not silent although on the totality of submission he insisted the law is silent. He contended that the procedure of making an administrator a party to the suit is reflected in the case **of Majura Isanda v. Jumapili Charanga Marumbo (Administrator of Estate of the Late Marumbo Nyamsary Mbasa),** Land Appeal No. 86 of 2020 High Court of Tanzania at Musoma District Registry at Musoma (unreported) at page 3 where my brethren Kisanya, J. interpreted the provision of *section 100 of the Probate and Administration of Estate Act [Cap 352 Revised Edition 2002]* as follows:

In terms of section 100 of the Probate and Administration of Estate Act [Cap. 352, R.E. 2002] the power to sue in

respect of a cause of action that survived by him is vested in the administrator appointed to administer his estates. The said provision reads: "An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same powers for the recovery of debts due to him at the time of his death, as the deceased had when living" .Reading from Order XXII, Rule 11 of the Civil Procedure Act [Cap. 33, R.E. 2019], I am of the view that, the power to sue stated in the above quoted provision extends to appeals in respect of a case survived by the deceased. Therefore, upon the demise of a party to the case, his interests including those related to appeal or defending the appeal arising from the case instituted by the deceased are taken care of by his administrator. The deceased cannot resurrect and file the required appeal.

Nevertheless, Mr. Eliseus went on submitting that *the Civil Procedure Code (supra)* is silent on the procedure of how to join an administrator of the estate as a party post decree or judgement. He emphasized; that the same is provided under *Order XXII of the Civil Procedure Code (supra)* in its total and *Schedule Part III item 16 of the Law of Limitation Act Cap 89 [Revised Edition 2019].* To back up his position, Mr. Eliseus beckoned this Court to make reference to the case of **Hamza Hatibu and 12 Others v. Salima Saidi Juma,** Land Appeal

No. 1 of 2020 High Court of Tanzania at Arusha District Registry (unreported) in which my brethren Robert, J at page 11 up to 12 stated:

> *However, under the circumstances of this case, I am inclined to rely on the submissions by the learned counsel for the Respondent, which is not disputed, that the 12th Appellant one Hadija Msambo died sometime in 2018 before this appeal was filed. This means Order XXII of the Civil Procedure Code is not applicable in this situation because the provision deals with the effect of death in pending cases not in cases where a party died before the matter is filed in the Court.*

Mr. Egidy S. Mkolwe on his part did not intend to counter the submission of Mr. Eliseus but he had a divergent opinion as regards the applicability of *Order XXII of the Civil Procedure Code (supra).* He asserted that; *Order XXII of the Civil Procedure Code (supra)* and its proviso applies in both circumstances. It was the firm view of Counsel Egidy that the only exception has been provided under *section 41 of the Civil Procedure Code (supra).* Under such premise, the circumstance of this case has been covered, hence there is no any *lacuna* in the law.

I have not found it easy to get to grips with the submissions of Counsel Eliseus and that of Egidy, in part because as per my findings, the law is not much clear on the procedure to file appeal or review or

reference against the probate administrator. In principle, however, I succinctly share a similar view as that of Counsel Egidy. That, the *Civil Procedure Code (supra)* is not silent on the procedure of how to join an administrator of the estate as the Respondent or Defendant post judgement or decree. On noting that, the Court finds that the argument by Counsel Eliseus, that *Order XXII Rule 4* of the *Civil Procedure Code (supra)* does not carter in the circumstances where a Defendant/Respondent dies post judgement or decree to be ill-conceived or misconstrued and it lacks credence. The reason being that: *Order XXII Rule 4 has to be read conjunctively with rule 11* of the same Order which is to the effect that:

> *In the application of this Order to appeals, so far as may be, the word "Plaintiff" shall be held to include an Appellant, the word "Defendant" a Respondent, and the word "suit" an appeal.*

In light of the afore provision and to give concreteness of the definitive part of the word "Plaintiff", it can be learnt that, by all necessary implications, the law intended the application of *Order XXII of the Civil Procedure Code (supra)* to extend in situations where a case is already concluded so is the logic of clarifying the terminologies therein. Henceforth, by reading *Order XXII of the Civil Procedure Code (supra)* as

a whole and not in pieces it can be grasped that it was meant to cover for both pending and concluded cases. Further light to support this construction can be gathered from *the Schedule Part III item 16* of the *Civil Procedure Code (supra)* which reads as follows:

> Under the Civil Procedure Code to have a legal representative of the Deceased Party, *whether in a suit or on appeal,* to be made a Party is...*ninety (90) days.* [Emphasis added]

Therefore, what is worth noting here is that *Order XXII of the Civil Procedure Code (supra)* is a bit illuminating on the procedure of how to join an administrator of the estate as the Respondent or Defendant post judgement or decree.

Having answered *the first issue partially in the affirmative,* the second issue is; *what is the applicable procedure to join the Administrator after judgement and decree is issued.* Mr. Ndunguru did not submit much on this point, nevertheless from his submission, he acknowledged that leave of the Court must first be obtained. He came clear that; such application should be within 90 days as per *Schedule Part III item 16 of the Civil Procedure Code (supra).* All the same, Mr. Eliseus rightly pointed out that; as per *Order XLIII Rule 2 of the Civil Procedure Code (supra),* all applications must be made by way of Chamber Summons supported

by an affidavit. He asserted that, the application must be formal as it gives a decree holder a *locus* to execute against an administrator.

Based on *section 41 of the Civil Procedure Code (supra),* Counsel Eliseus claimed that there should be guidance of the law on how a probate administrator may run a case as a Plaintiff/Applicant/Appellant/ Defendant or Respondent after judgement and decree are issued. However, he maintained that; if an administrator wants to file an appeal/review or reference post a decree and judgement, he must seek leave of the Court.

It was thus, Counsel Eliseus' argument that; for *section 95 of the Civil Procedure Code (supra)* to apply, the Applicant was supposed to seek leave for substitution of the deceased person with an administrator. Consequently, the administrator would have *locus* and that applies at execution stage too. He quoted *Section 41 of the Civil Procedure Code (supra)* which provides:

> *(1) Where a Judgement Debtor dies before the Decree has been fully satisfied, the holder of the Decree may apply to the Court which passed it to execute the same against the legal representative of the Deceased. (2) Where the Decree is executed against such legal representative, he shall be liable only to the extent of the property of the Deceased which come to his hands and has not been dully disposed of; and for the Purpose*

of ascertaining such liability, the Court executing the Decree may of its own motion or on the application of the Decree Holder, compel such legal representative to produce such accounts as it thinks fit.

Mr. Eliseus alleged that since the law lays procedure when a party dies while the case is pending, the same should have been the position during post judgement and decree when an aggrieved Party wants to file appeal or review or reference against a probate administrator. To elaborate his assertion, he cited *Order XXII Rule 3* and *Rule 4 of the Civil Procedure Code (supra)* which both explain that an application should be made to cause a legal representative replace the deceased and the application must be made subject to the Law of Limitation. By not doing so, the suit abates against the Plaintiff as per *Order XXII Rule 3 (1) and (2) of the Civil Procedure Code (supra).*

On the part of the Court, it is my observation that the procedure under this context is as cast listed through the submission of both parties. That, as per *Order XXII Rule 4 of the Civil Procedure Code (supra),* a probate administrator must seek leave of the Court to represent the deceased. Reference may be made to the case of **Majura Isanda** *(supra).* Further, under *Order XLIII Rule 2 of the Civil Procedure Code (supra),* the application must be made by way of Chamber Summons supported by

affidavit within 90 days as per *Schedule Part III item 16 of the Civil Procedure Code (supra).*

But as hinted earlier, the procedure appears unclear as to which Court should the party invoking the provisions of *Order XLIII of the Civil Procedure Code (supra)* file a chamber summons. Is it to the Court that pronounced the Judgement or to the Appellate Court upon which the appeal is to be preferred? On that note, I entirely agree with the supposition of Counsel Eliseus that there are should be guidance of the law on how a probate administrator may run a case as an Applicant /Appellant or Respondent after judgement and decree are issued. It is the view of this Court that the procedure to replace the Respondent legal representative of a deceased party who died after the decree or order appealed from can be captured by adding a Rule under *Order XXII of the Civil Procedure Code (supra)* subject to modification (if any) in the following wording:

> Subject to *the Law of Limitation* and to *section 25 (2) of the Magistrates Courts Act,* when a party to a decree or order, which is appealable, desires to appeal therefrom and to make as a Respondent to his appeal the legal representative of a person who, having been a party to such decree or order, has died after the date of such decree or order, and who, if alive, would be a party as a

Respondent to such appeal, and whose legal representative has not as such been made a party to the decree or order, or to subsequent proceedings there under or thereon the party so desiring to appeal may file a petition of appeal with the name of such legal representative mentioned therein along with an application by way of chamber summons supported with an affidavit stating such facts as may be necessary in support of his application for leave to make such legal representative as such a party as a Respondent to his appeal:

> Save that, the Court may, by an order, allow in its discretion a reasonable time in that behalf for the filing of such chamber application supported with an affidavit, if it appears to it that the Applicant had sufficient cause of not making the application within the prescribed period of time.

Again, *the Civil Procedure Code (supra)* is silent on the procedure for revision applications by persons other than parties to the decree or order whose either party has died. It is the view of the Court that this aspect can be captured by adding a rule under *Order XXII of the Civil Procedure Code (supra)* in the following wording:

> When by a decree or order which is appealable to the Court the interest of:
>
> > (a) a beneficiary in property which at the date of such decree or order was vested in or in the possession of a trustee, an executor, an administrator, or a receiver

or manager appointed by a Court who as such was a party to such decree or order; or procedure to make respondent the legal representative of a deceased party who died after the decree or order required to be revised from.

(b) a legal representative as such of a deceased party to such decree or order; or

(c) an assignee of a party to such decree or order by assignment subsequent to the date of such decree or order; or

(d) a person whose interest arose after the date of such decree or order by reason of any creation or devolution of interest, by, through, or from any party to such decree or order is affected; and such beneficiary, legal representative, assignee, or person was not or has not been made a party to such decree or order or to proceedings thereunder or thereon and desires to file to the Court a chamber summons supported with an affidavit for revision from such decree or order;

he may name himself therein as an Applicant if at the time when he files such application for revision supported with an affidavit stating such facts as may be necessary in support of his application.

Besides, *the Civil Procedure Code (supra)* is silent on the procedure to replace the Respondent as a legal representative of a party who died

before the decree or order appealed from but whose legal representative has not been brought on record. It is the view of this Court that to fill such *lacuna* an amendment can be effected by incorporating the following rule under *Order XXII of the Civil Procedure Code (supra):*

> Where in any suit or appeal from the decree or order, in which an appeal may be preferred to the Court, a party, before the appealable decree or order in such suit or appeal died, and the name of such deceased party appears in such decree or order as that of a party thereto, and his representative has not been brought upon the record and such deceased party would, if alive, be a party to the suit or an appeal to the Court, the legal representative of a party who died before the decree or order appealed from may file a Chamber application supported with an affidavit to be added as a party to the suit or appeal to replace the Respondent.

Apart from the afore *lacunae, the Civil Procedure Code (supra)* is silent on the procedure to be followed once a deceased person is made a party in ignorance of death. To fill such *lacuna*, the Court calls for an amendment of *the Civil Procedure Code (supra)* by inserting the following rule:

> Where after a petition of appeal has been filed to the Court, any Appellant or any party who informs the Court that a person, whose name appears in the memorandum of

appeal as that of a party to the appeal, and who, if alive, would be a party to such appeal, had died before the petition of appeal was filed to the Court, such Appellant may, subject to the law of limitation, apply for an order that the petition of appeal be amended by substituting a person, who has so died as aforesaid with his legal representative, if at the time when he files such application, along with such application to bring on record legal representative of a party to show date of death.

Ostensibly, *the Civil Procedure Code (supra)* is silent on the procedure to set aside an order of abatement or dismissal. It is the considered view of the Court that apart from the general rule of filing a chamber application under *Order XLII of the Civil Procedure Code (supra)* there can be a specific rule under the provision of *Order XXII of the Civil Procedure Code (supra)* to fill such a *lacuna*. If the proposition is accepted, and subject to modification, the rule may read:

> Except as hereinafter provided, the Applicant may file a Chamber summons supported with an affidavit showing that such application is made with all reasonable diligence after the fact of the death of such person first came to the knowledge of such Applicant or the agent, if any, acting on his behalf in the litigation seeking for setting aside the dismissal or abatement order, save that:
>
> > Every application under *Order XXII, Rule 4* read together with *Rule 11 of the Civil Procedure Code*

> *(supra),* by a person claiming to be the legal representative of a deceased or the assignee or the receiver of an insolvent Plaintiff or Appellant, for an order to set aside an order of abatement or dismissal, shall state the cause which prevented him from continuing the suit or appeal.

Notwithstanding the afore propositions, the fundamental issue here is; when does the 90 days' time limitation begin to run? Counsel Dickson correctly stated that; as per the *Schedule Part III item 16 of the Civil Procedure Code (supra)* time to make such an application is ninety (90) days. More so, Counsel Dickson contended that; *the Schedule Part* is made under *Section 3 of the Law of Limitation Act (supra)* which interprets when time begin to run under the circumstances of the case. He quoted the said *Section 3 (2) (c) of the Law of Limitation Act (supra)* which provides:

> *For the purposes of this section a proceeding is instituted. (c) In the case of an application when the application is made.*

Counsel Dickson illuminated that as per the above *Section 3 (2),* the 90 days begin to run from the day an application is instituted. Consequently, he concluded that under *Order XXII Rule 4 of the Civil Procedure Code (supra),* the 90 days to replace the deceased runs from

the date an application to join the probate administrator as a Defendant is made.

He further quoted *Section 3 (3) of the Law of Limitation (supra)* which provides:

> *Where after the institution of the proceedings a Person is made a Party thereto either as the Plaintiff, Defendant, Appellant, Applicant or Respondent, the proceeding, shall, as regards him, be deemed to have been instituted on the date in which he is made a Party.*

Counsel Emmanuel Bakari on his part submitted that the 90 days begin to run after discovery of when the Deceased died. He averred that; as per the records in *Miscellaneous Land Application No. 7 of 2021,* the Applicant had knowledge that the first Respondent was dead as early as on 20th October, 2021. Thus, his act of filing the present application is contrary to the law for the reason that since 20th October, 2021 up to date more than nine months have passed.

Later on, Mr. Emmanuel submitted that the application to join legal representative has to be made within ninety days (90) as per *the Law of Limitation Act under part III item 16 of the Schedule.* He cited the case of **Habibu Abdallah Sultan v. Ashura Said Makukula and Amina Said Makukula,** Miscellaneous Civil Reference No. 18 of 2019 High Court

of Tanzania at Dar es Salaam (unreported), where my brethren Mruma, J. at page 3 had this to say:

> *under the law (i.e Rule 4 (1) of Order XXII of the Civil Procedure Code, the person to whom the right to sue or right of action survives is the one who should have made the application to have legal representative to be made a party. The Applicant has not done so.*
>
> *Under sub – rule (3) of Rule 4 of Order XXII, where within time limited by law no application to join the legal representative is made under sub – rule (1) the suit abated. The time limited for applying to join legal representative is prescribed under item 16 of the Schedule to the Law of Limitation Act as 90 days. Thus, as far as the 2nd Respondent is concerned the suit or action abated long time ago, and in terms of Rule 9 of the same order XXII no fresh action could brought against the 2nd Respondent.*

I have carefully considered the submissions of both parties under this aspect. It is indisputable valid that *Order XXII Rule 1 of the Civil Procedure Code (supra)* deals with the question of abatement on the death of the Plaintiff or of the Defendant in civil suit. *Rule 2 (supra)* relates to procedure where one of several Plaintiffs or Defendants dies and the

right to sue survives. *Rule 3 (supra)* deals with the procedure in case of death of one of several Plaintiffs or of sole Plaintiff. *Rule 4 (supra)* deals with procedure in case of death of several Defendants or of sole Defendant.

The reading of the provisions of *Order XXII Rule 4 (3) of the Civil Procedure Code (supra)* gives a clear meaning that where within the time limited by law, no application is made under *sub rule 1 (supra),* the suit shall abate as against the deceased Defendant. It follows that on the death of the Defendant, the suit shall automatically abate after the 90 days prescribed by law. The 90 days starts to run automatically from the death of the Defendant or Respondent. The same position was reached by this Court in the case of **Sahel Said Nahdi v. National Microfinance Bank Pic & Another,** Commercial Case No. 1 of 2015, High Court Commercial Division at Dar es Salaam (unreported), whereby my Learned Sister, Honourable Judge Sahel (as she then was) had this to say:

> The application to which item 16 refers for the purpose of the matter at hand is the application to be made under Order XXII Rule 3 of the Civil Procedure Act, CAP 33 that is, where one of two or more Plaintiffs die. This means that where one of two or more Plaintiff die an application for

legal representative has to be made i.e. *the application has to be made upon the death of the deceased Plaintiff.* The Applicant has up to ninety days to make such application without assigning any reason. [Emphasis applied]

The same position is in consistence with the decision of my learned Sister, Honouarable Judge Makani in the case of **Dotto Abdallah Rashid** *(Administratix of the estate of the late* **Asha Jumanne**) **v. Ramadhani Kiholanzi,** Misc. Land Application No. 192 of 2019, High Court of Tanzania Land Division (unreported) in which at page 6 she reiterated that:

"It is apparent that time starts to run upon the death of the deceased Plaintiff."

Thus, it is the candid considered view of the Court that the essence of requiring presence of a legal representative is to ensure that litigation does not proceed in the absence of the appropriate Party. The contention by Counsel Dickson that 90 days to replace the deceased runs from the date an application to join the Probate administrator as a Defendant is made; and the contention by Counsel Bakari that the 90 days begin to run after discovery of when the Deceased died; are not valid in the eyes of the law.

Needless, the afore findings, there may be circumstances in which a decree may be obtained against the deceased Defendant or Respondent, in that circumstances, a person claiming to be his legal representative may apply for setting aside the decree against him and if it is proved that he was not aware of the suit or that he had not intentionally failed to make an application to bring himself on the record, the Court shall set aside the decree upon such terms as to costs or otherwise as it thinks fit.

More so, the combined reading of the provisions of *Order XXII Rule 4 (3) of the Civil Procedure Code (supra),* the *Schedule Part III item 16 of the Civil Procedure Code (supra)* and *Section 3 of the Law of Limitation Act (supra)* gives a meaning that a Plaintiff's ignorance about the death of the Defendant is a factor which should be weighed by the Court in deciding whether or not to permit a belated application for setting aside the abatement of a suit. Once an application for setting aside abatement has been filed, the Court has as per *Order XXII Rule 9 (2) of the Civil Procedure Code (supra),* to apply a liberal construction so as to advance substantial justice especially when no negligence or inaction or want of bona fides is imputable to a party. The overriding objective should be to determine the substantive matter on merits.

In the present case, However, it is legitimate, indeed appropriate, to consider the question; *when did Counsel Dickson become aware of the death of the 1st Respondent?* That question can be well answered while tackling the third issue. That is; *what is the remedy of the case filed against a deceased person.* While submitting in chief, Mr. Dickson had nothing substantial to state in respect of the proper remedy of this application apart from praying he be given leave to bring an application to substitute the deceased 1st Respondent with a proper party.

On his side, Mr. Eliseus stated that; since the 1st Respondent is a deceased, that means, the whole application is incompetent for want of proper parties. He asserted that; as per this application, Counsel Dickson has conceded that the first Respondent is deceased but he did not tell the Court when he died.

Counsel Elesius reminded this Court on what transpired in *Miscellaneous Land Application Number 7 of 2021* that was before this application. That, when the application came for mention before my learned Sister Honourable Moshi, J. Counsel Egidy reminded the Court that Counsel Dickson was earlier on ordered to bring his client to prove whether the first Respondent was dead or not. But he failed to do so. His client did not appear to date.

Mr. Eliseus further urged Counsel Dickson to state when he would bring the 1st Respondent (Juma Ally Mbalika) as he admitted that the application is incompetent. He went on arguing that; as per the information from his client, the 1st Respondent herein passed away in 2017. Thus, since this application was filed on 19th November, 2021 it is a nullity. To cement his assertion, Mr. Eliseus cited the case of **Juma Ally Zomboko and 42 Others v. Avic Coastal and Development Co. Limited and 4 Others**, Civil Application No. 576 of 2017, Court of Appeal of Tanzania at Dar es Salaam (unreported) at page 10 and 12, where the Court subscribed to the decision of the High Court of Tanganyika in the case of **Babubhai Dhanji v. Zainab Mrekwe** (1964) 1 East Africa Law Reports at p.24 in which my brethren Law, J (as he then was) held.

> *"a suit instituted in the name of a dead person is a nullity."*
>
> *On whether or not the irregularities had the effect of rendering the suit a nullity only as far as the deceased is concerned, we are with respect, unable to agree with Mr. Chuwa's argument. His reliance on the commentary by* ***Mulla, The Code of Civil Procedure,*** *is in our view, misconceived because the cited passage relates to the situation where a Plaintiff was alive at the time of the institution of the suit. In the particular circumstances of this case however, we agree with both*

Messrs Kusalika and Hoseah that the whole suit was rendered a nullity. We similarly do not agree with Mr. Chuwa's argument that the Court may invoke the overriding objective principle to order amendment of the plaint. That argument is, with respect, untenable. This is because the suit was not filed in the name of a wrong party but a dead person as one of the Plaintiffs. It cannot therefore be amended by way of substituting or striking out a party in terms of O.1 r.10 of the Civil Procedure Code. We are supported in that view by the commentary by ***Mulla, The Code Procedure Abridged,*** *15th Ed., 2012. The learned author comments as follows on the scope of O.1 r. 10 (1) of the Indian Code of Civil Procedure which is in parimateria with the same Order of our Civil Procedure Code.*

> *"The rule presupposes that the institution of the suit, that is the presentation of the plaint, was proper. Thus, where a suit was instituted in the name of A and B had died 3 days before the date of the presentation of the plaint, the suit cannot be taken to have been instituted by B as he was dead at that time. If A could have instituted the suit alone, it was properly instituted and on his application B's legal representative could be added under this rule"*

Counsel Bakari on his part supported the submissions of Eliseus. He told the Court that; the fact whether the first Respondent is alive or not was an issue already into the knowledge of the Applicant. However, she refiled the application inclusive the deceased. He argued that, for such reason, the Applicant failed to comply with the requirement of the law. That, as per *Order XXII Rule 4 (1) and (3) of the Civil Procedure Code (supra),* she was supposed to seek leave within 90 days.

It was therefore, Counsel Bakari's stern view that, as regards the consequences of this application, the suit has to abate because they sued a dead person. That, once the matter abates as per *Order XXII Rule 4 (3) Civil Procedure Code (supra),* the consequence is under *Order XXII Rule 9 of the Civil Procedure Code (supra).* He therefore insisted that the prayer to substitute the first Respondent not be granted as it is against the law, rather the Court be pleased to dismiss the matter.

Counsel Emmanuel Bakari went on submitting that, as a general rule, where any party dies, the right to sue survives to a legal representative. He added that in Latin the Maxim *"action personalis monitor cum personal"* means; a person right of action dies with a person. The test of whether the right to sue survives, depends on whether such a right is connected with or referable to the individuality of the deceased.

Basing on the above reason, Counsel Bakari submitted that, in this case, the right to sue for the first Respondent survives to the legal representative. He cited the case of **Mahusiano Limited v. Lucky John Bosco,** Land Appeal No. 15 of 2018 High Court of Tanzania at Dar es Salaam (unreported) at paragraph 6, where my learned Sister Honourable Judge Masabo quoted the decision in the case of **Saidi Kibwana and General Tyre East Africa Limited v. Rose Jumbe (1993)** TLR 175 in which it was held:

> *The death of the Plaintiff or Defendant shall not cause the suit to abate because as the general rule all rights of action and all demands existing in favour or against a person at the time of his death survives to and against his representative except those rights which are tied to individual of the deceased.*

It was Counsel Bakari further submission's that, although the right to sue survives against legal representative, it is not automatic. That, there must be an application as per *Order XXII Rules (1) and (3) of the Civil Procedure Code (supra).* The surviving party has to make application to be joined in the proceedings contrary to that will cause the suit to abate. He also cited the case of **Sharifu Nuru Muswadiku v. Razaka Yasau and Mswadiku Chamani,** Civil Appeal No. 48 of 2019 Court of Appeal of Tanzania at Bukoba (unreported) at page 4 held:

Having heard those brief submissions by the parties, we start by pointing out that, as a general rule, civil actions survive death of the parties where the right or duty survives. In our Civil Procedure, it is Order XXII of the Civil Procedure Code, Cap. 33 R.E. 2002 (the Civil Procedure Code) which provides for what should be done. Under Order XXII rule 4(3) of the Civil Procedure Code the surviving party is requires to make an application for a legal surviving of a deceased party to be joined in the proceeding, failure of which may lead to the suit to abate.

While rejoining, Counsel Dickson pointed out that; it came into his knowledge with certainty on 25th July, 2022 that the first Respondent is dead. Counsel Dickson submitted that; he has now come to the Court to ascertain whether Juma Ally Mbalika is truly dead. That, he got such information a single day before arguing this application. Thus, he questioned his client as to why somebody Juma Ally Mbalika appeared to the Court? The client informed him that such person was the son of Juma Ally Mbalika. His name was Ally Juma Mbalika. The later was even given Power of Attorney in *Land Case No. 3 of 2015 High Court of Tanzania at Songea.*

According to Counsel Dickson, his client went further to inform him that Ally Juma Mbalika was appointed the Probate administrator of the

estate of Juma Ally Mbalika. However, Counsel Dickson contended that he was not told as to when he was appointed. Thus, he had nothing in his own rather just representing his client. Counsel Dickson contended that; he is an innocent messenger entrusted to litigate this application as per the instruction. He therefore prayed the application be struck out with no costs or he be allowed to amend the application. He cited the case of **Joseph Chamba and Another v. Ramson Mlay,** Civil Appeal No. 107 of 1998 (unreported) as cited in the case of **Sharifu Nuru Muswadiku** *(supra)* at page 5 where the Court stated:

> *"We were of the consideration opinion that all that the Court is required to do upon being informed of the death of a party is to adjourn and give sufficient time within which an interested person could make an application which could entitle a legal representative of deceased to step into the shoes of the deceased".*

It was further the view of Counsel Dickson that the only thing the Court can do under the circumstances is to adjourn the application, give him sufficient time (three months) to make an application which would entitle the legal representative of the deceased to step into the shoes of the deceased. That, the Court can do so by invoking the provisions of *Section 97 of the Civil Procedure Code (supra)* since the real question here

is on extension of time. He claimed that, even if the Applicant will make amendment, none of the Parties will be prejudiced. It will serve the Court from multiple applications on the same issue. According to Counsel Dickson, under *Section 95 (supra),* the order to amend will achieve end of justice.

In the light of the foregoing, the Court is constrained to enter into a discussion as to when Counsel Dickson acquired knowledge regarding the death of the first Respondent.

Without beating around the bush, it is not appealing to the Court to easily accept the submissions of Counsel Dickson that it came into his knowledge with certainty on 25th July, 2022 that the first Respondent is dead. I have four reasons of not been persuaded by the submission of Counsel Dickson.

First, the Applicant herein and the first Respondent are related. In African culture, it seems pretty far-fetched for the Applicant herein to have not notified her Counsel on the death of his brother (first Respondent).

Second, as submitted by Counsel Eliseus and supported by both Counsel Egidy and Bakari, it is in record that; on 3rd August, 2021 Counsel Eliseus pointed out that the 1st Defendant was dead and successfully prayed summons be issued to one Ally Juma Mbalika.

Third, it is not disputed by Counsel Dickson that the said Ally Juma Mbalika appeared before this Court on the 22nd of July, 2021 and impersonated himself as the 1st Respondent. It follows therefore that on the 20th of October, 2021 when *Misc. Application No. 7 of 2021* was struck out for being supported with a defective affidavit, Counsel Dickson had knowledge or had a duty to inquire from his client on the death of the first Respondent. Had Counsel Dickson exercised such his legal duty, he could not have filed this application on 19th November, 2021 seeking for extension of time to file review out of time against the deceased (first Respondent). It may not be out of place to underscore that Advocates are Officers of the Court, thus they should observe candour, courtesy and respect hence assist the Court in reaching just decision. Reference can be made to *Regulation 92 (1) (2) (a), (b), (c) and (e) (iv) of the Advocates professional (Conduct and Etiquette) Regulations, GN No. 118 of 2018* which provides:

> *92 (1) As an officer of the Court, an advocate shall treat the Court with candour, courtesy and respect.*
> *(2) An advocate shall not-*
> *(a) abuse the process of the Court by instituting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring another party.*

(b) knowingly assist or permit the client to do anything that the advocate considers to be dishonest or dishonourable;

(e) deceive, attempt to deceive or participate in the deception of the Court or influence the course of justice by-

(i) N/A

(ii) N/A

(iii) N/A

(iv) suppressing what ought to be disclosed;

The role of an advocate as an officer of the Court was emphasized by the Court of Appeal in the case of **Mohamed Iqbal v. Esrom Maryogo**, Civil Application No. 141/01 of 2017, Court of Appeal of Tanzania at Dar es Salaam (unreported) in which the Court stated at page 10-11 of its decision:

> ...we wish to emphasize that a party or an advocate to the proceedings before the Court has a duty to assist the Court to make a fair decision by disclosing all relevant facts concerning the case to facilitate the just resolution of the dispute. This is consistent with the overriding objective of the Appellate Jurisdiction Act and the Rules of the Court which among others aim at just determination of proceedings. Besides, the Court administers justice fairly and justly with the participation and assistance of parties and counsel.
>
> We must emphasize that an advocate, in addition to being a professional, is also an officer of the Court and prays a vital role in the administration of justice. An advocate is

therefore expected to assist the Court in an appropriate manner in the administration of justice. Indeed, one of the important characteristics of an advocate is openness in different ways to share to the Court the relevant information or message which comes to his attention either from his client or his colleagues concerning the handling of the case regardless of whether he has been requested by the Court to do so or not...

Unlike in the cited case of **Joseph Chamba and Another**, the Court in this case was informed of the death of the first Respondent as early as on 3rd August, 2021. Unfortunately, *Miscellaneous Land Application No. 7 of 2021* was struck out on technical grounds. Counsel Dickson, therefore, had ample time to make an application which would entitle the legal representative of the deceased to step into the shoes of the deceased. It was not proper for him and his client to institute this application against the deceased first Respondent and wait for the Court or the other party to raise the same issue and start beseeching the Court to adjourn the application by giving him sufficient time (three months) under the provisions of *Section 97 of the Civil Procedure Code (supra).*

It is the further considered view of this Court that every advocate appearing in a case who becomes aware of death of a party to the litigation in which he appears for him or her or against him or her, must

give information about the death of that party to the Court and issue a notice to other parties therein (if any), otherwise, concealing such information would be regarded as an act contrary *Regulations 92 (1) (2) (a), (b), (c) and (e) (iv) of the Advocates professional (Conduct and Etiquette) Regulations, (supra).* It is the said knowledge of death of the party will dawn that such party has not only died, but also the time for substitution has run out and the matter has abated.

I readily accept the force of the submissions made by Counsel Bakari that the old common rule maxim "*actio personal is moritur cum personal*" means a personal right of action of a person dies with the death of that person. A good example of such cases is on divorce which is purely statutory. *The Law of Marriage Act [Cap 29 R.E. 2019]* contains no provision under which the personal representatives would be made parties to the suit. However, under common law, in divorce proceedings, in order that the cause of action should subsist at the death, the right under the order must itself have accrued at the time of death. That was the position in the case of **Sugden v. Sugden** [1957] P 120 at 135, cf [1957] 1 All ER 300 at 302. In **Maconochie v. Maconochie** [1916] P 326 at 328, Shearman J (as he then was) came up with an exception of funds already deposited in Court. He observed:

> The result then is that where one of these parties dies the action abates: it comes to an end, it is dead and done with. These personal actions then having abated, no one can come to the Court and make an application in these actions. There is one exception to this rule, and that is where there are already funds in Court.

It follows therefore that though as a general rule personal right of action of a person in divorce cases dies with the death of that person, there is an exception in the situations where at the death of either of the spouse there are funds in Court. In that situation, the Court has jurisdiction in rem over the fund in Court. The overriding test, however, is that there are must be an enforceable claim.

Needless, the afore considerations, the instant application is not on divorce. It is not among the cases of which personal right of action of a person dies with the death of that person. It is a claim on land. In such circumstances, where either party dies during the process of hearing and the pronouncement of judgement, on enforceable actions or rights like the one at hand, the solution is covered under *Rule 1 and 3 of the Order XXII of the Civil Procedure Code (supra).* In that situation, the surviving party has to make application to be joined in the proceedings, contrary to that will cause the suit to abate. That was the position of the Court in the cited case of **Sharifu Nuru Muswadiku** *(supra).*

The cumulative effect of the foregoing discussion is a finding that the remedy of the case filed against a deceased person (as it is in this case) is to struck out such application for being incompetent before the Court. That takes the Court to the next issue.

The fourth issue is; *whether a party can be allowed to amend pleading after the Court has raised a preliminary objection suo moto.* Counsel Dickson submitted that; as per the nature of this application (an extension of time to file a review against parties who were four), the same can be granted. He requested that the first Respondent (the deceased Juma Ally Mbalika) be substituted with his legal representative under *Order XXII Rule 4(1) of the Civil Procedure Code(supra).*

And when probed by the Court on whether it is proper to pre – empty the Court's preliminary objection with such prayer, Counsel Dickson responded in the affirmative relying on three reasons: *First,* that the remedy under the law is provided under *Order XXII Rule 4 (1) of the Civil Procedure Code (supra). Second,* even if it was an error, as per *Section 97 of the Civil Procedure Code (supra),* the Court may amend any defect or error in any proceeding in a suit, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceedings. *Third,* under *Section 95 of the Civil*

Procedure Code (supra) this Court is given inherent power to make such order for the end of justice as it may be necessary or to prevent abuse of the Court. Hence, he argued that the defects raised by the Court are curable under the law.

Addressing the Court on this issue, Counsel Eliseus alleged that the Court of Appeal has refused such practice. He requested the Court to make reference to the case of **Juma A. Zomboko and 42 Others** *(supra)* specifically from the last paragraph of page 11 to 12 of the decision. As regards *section 95 (supra),* Mr Eliseus stated that the section could be invoked if there was a proper application before the Court.

In countering this issue, Counsel Bakari objected the prayer to make a substitute of the legal representative on the following reasons: *Section 97 of the Civil Procedure Code (supra),* is inapplicable because there is a proper procedure *under Order XXII Rule 4.* Equally, *Section 95 of the Civil Procedure Code (supra)* cannot apply.

Principally, in the light of the foregoing submissions relating to the fourth issue, the Court is of the findings that once a preliminary objection is raised, the same must be disposed off before the case or an application proceeds. The same is stated under *Order XIV Rule 2 of the Civil Procedure Code (supra)* as follows:

Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

Also, I have observed that once a preliminary objection is raised, one cannot apply for amendment of pleadings. Such view is fortified by several decisions of the Court of Appeal. For instance, in **Thabit Ramadhan Maziku and Another v. Amina Khamis Tyela and Another**, Civil Appeal No 98 of 2011, the Court of Appeal of Tanzania at Zanzibar (unreported) held that:

Once an objection is raised one cannot apply to amend otherwise it will amount to pre-empting Respondents Preliminary Objection already raised. It is a trite law that, under Order VI Rule 17 of the CPC the Applicant had a right to amend pleadings at any stage of the suit. However, that right ceased when the Preliminary Objection was taken against her by the Respondent.

Similarly, in the case of **Job Mlama and 2 Others v. Republic**, Criminal Application No 18 of 2013, Court of Appeal of Tanzania at Mwanza (unreported) the Court was of the findings that:

Respondent raised a Preliminary Objection, And the Applicant admitted but prayed to withdraw the Application so that they may refile afresh. The Court had this to say; On the basis of the above stated reasons, we uphold the Preliminary Objection and find the application incompetent. The Applicants had prayed to withdraw their application with the view to refile a competent one. The prayer is not tenable. It is now trite law that, a prayer which has the intention of rectifying a defect in matter cannot be sustained after a preliminary objection has been raised. This is so because, to do so would amount to pre-empting the raised objection.

Additionally, in **Godfrey Enock Mkocha v. Twiga Paper Products Limited and 2 Others,** Civil Application No. 193 of 2013 (unreported) the Court of Appeal of Tanzania had this to say:

We have considered the rival arguments by the learned counsel for the parties from their submission, it is apparent that they agree that it is fairly settled law in this jurisdiction that, once a Preliminary Objection has been lodged any course of action that would amount to its being pre-empted would not be allowed.

Deducing from the above four expositions, it is crystal clear that no party can be allowed to amend a pleading subsequent to a preliminary objection raised *suo moto.*

The fifth issue is; *whether costs should be granted as against the Plaintiff if the legal objection raised by the Court is sustained.* Counsel Eliseus prayed the application be dismissed with costs either by the Applicant or his Counsel due to the following reasons: *Firstly,* the Applicant has been represented by a very competent and Senior Counsel, taking into account that he knew the first Respondent is dead. And that in *Miscellaneous Land Application No. 7 of 2021* they made efforts to notify the Court and the Counsel knew that the first Respondent was no more. Despite of such knowledge, Counsel Dickson filed the application against the deceased. *Second,* the case has been pending in this Court for more than eight months wherein their client paid them filing fees. Thus, there is no dispute that the Respondents have incurred costs. *Third,* costs are aimed at making Court business serious especially when the parties are fully represented. *Fourth,* this application was purposely filed and not out of human error.

Similarly, Counsel Egidy Mkolwe prayed for costs be paid by the Applicant due to the following reasons: *First,* both parties in this application are fully represented from the beginning. Advocates know or ought to know what they were supposed to do. *Second,* Counsel Egidy and Eliseus took action and informed the Court together with the Applicant's Counsel that the person who appeared as Juma Ally Mbalika

had impersonated himself, as such he was not Juma Ally Mbalika. Thus, they had full knowledge that Juma Ally Mbalika (1stRespondnet) was dead. On top of that, the person who impersonated himself as Juma Ally Mbalika did not object the application. Thus, the Court ordered Juma Ally Mbalika be brought to the Court, unfortunately he could no more be traced.

The Counsel insisted that under such circumstances, one would expect the instant application to bear proper parties. Counsel Egidy submitted that; suing the deceased again was an intentional act which should not be pardoned at the loss of the Respondent. Hence, the Applicant has to bear his own consequences.

Third, the State Attorneys are public employees who handles matters using government funds which are public money solicited from tax of Tanzanian who in large are poor. Therefore, spending much time by a State Attorney who is paid out of tax payers is using Tanzanian taxes improperly because the State Attorneys left other important works for National Development and invested more time in this matter.

Additionally, Counsel Egidy claimed that there are other costs spent in preparing documents, gathering evidences, typing, printing and photocopying. He stressed that such burden/costs cannot be at the peril of Tanzanians.

Rejoining on the issue of costs, Counsel Dickson valiantly objected the prayer for costs to be granted as against himself or his client due to the following reasons: *First,* the legal point was raised by the Court *suo motto.* If costs are for the Court, the Applicant already paid filing fees to determine this suit up to the end. If the matter aborts at the preliminary stage, it will have served time of the Court. Further, at the Commercial Court, the rules require refund of fees if the matter is terminated at early stages.

Second, Counsel Dickson denied the contention that he acted negligent in pursuing this matter. That, none of the Parties raised a preliminary objection. They waited till this Court raised it and began alleging that they suffered loss due to his negligence. It was his argument that, if he at all acted negligent, then such negligence concerns both sides. Let them be punished by not benefiting from their own wrongs of not raising errors in the Court to condone irregularities *"Kufumbia dosari Mahakamani."*

Third, the nature of the issue in dispute raises a *lacuna.* That, there is no provision which directs on what should be done in this circumstance. Therefore, weakness of the law should not operate at the peril of the litigant.

Fourth, that the point raised by Counsel Egidy that they are aware that the first Respondent is dead, prompted him to go and research on whether the first Respondent exists or not. That, on 14th December, 2021 Counsel Eliseus informed the Court that the first Respondent was dead. However, Counsel Denis whom they worked in the same firm told the Court that he was not aware of such facts. He therefore prayed to ascertain the facts.

In the light of the afore submissions of the parties, I should observe outrightly that, as a general principle, awarding of cost is solely the discretion of the Court. Such discretion must, however, be exercised, independently, judiciously based on sound and well-established legal principles and not misapprehension of fact or law.

It is also the findings of this Court that in cases of partial success and failure, the Court can apportion costs. In so observing, I agree with Counsel Dickson that when both parties condone illegality, an order to suffer costs may be a proper exercise of discretion by denying costs to either of them. Indeed, denial of costs can be exercised when the law is not settled or it is settled for the first time.

More so, the Court is of the findings that when a party seeks waiver of costs, the Court has to carry out a balancing exercise, balancing the legitimate interests of the one who seeks such relief and the legitimate

interests of the other party. The metaphor I intend to employ here, for want of a better, is that of scales and weights. While it is true that both parties spent costs in preparing documents, gathering evidences, typing, printing and photocopying, it must also be taken into account that it is the Applicant who unnecessary occasioned the other Respondents to incur such costs.

Further, the Court makes a general *dictum* that discretion of awarding or disallowing costs extends even to the successful party paying the costs of the losing party. The circumstances to be considered when awarding costs involves *inter alia;* length of trial, complexity of questions involved and the conduct of parties before the Court, the claim or defence must be false or vexatious, the objection must be taken that the claim or defence is false or vexatious to the knowledge of the party raising it, the claims or defence must have been disallowed or withdrawn or abandoned in whole or in part. Indeed, the object of awarding costs should be of recompensing the costs spent by the other party and not aiming to put the other party out of pocket.

Costs can also be awarded if the conduct of the Applicant subsequent to the suit reveals that the Applicant has been getting adjournments of the suit on one pretext or the other or one of the parties is a wrong party or deceased while the Applicant had such knowledge. In

such circumstances, the Court should satisfy itself the claim was false or vexatious to the knowledge of the Applicant and that the interest of justice requires costs to be awarded.

In this application, it is the holdings of the Court that the 2nd, 3rd and 4th Respondents in this application did not condone illegality because they even raised the same point in *Misc. application No. 7 of 2021* which was struck out by this Court. Even if the objection was raised by the Court, the reading of *section 30 (1) and (2) of the Civil Procedure Code (supra)* gives a meaning that the Court has discretion to award costs by directing a successful party in a litigation to pay the costs of unsuccessful party especially the Court fees. The circumstances to be considered when awarding costs are those stated herein above including the conduct of parties before Court. In this application, the Court is satisfied on balance of preponderance that Counsel Dickson and his client were aware of the death of the 1st Respondent prior instituting this application but for reasons best known to them they ignored such fact and opted to sue the dead person. *Section 30 (1) and (2) of the Civil Procedure Code (supra)* provides:

> (1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law from the time being in force, the costs of, and incidental to, all

suits shall be in the discretion of the Court and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.

It is impeccable that the controlling factor for awarding costs in any litigation is not as to who raises the legal objection. It seems to me that the substratum of the Court's discretion power to determine by whom between the parties or out of what property and to what extent such costs are to be paid is not limited. That principle is founded on justice and common sense, and is acted upon by Courts so that justice is not only done but seen done.

Admittedly, I also agree with Counsel Dickson that the Applicant already paid filing fees to determine this suit up to the end. Indeed, if the matter aborts at the preliminary stage, it will have served time of the Court. I further agree with him that at the Commercial Court, the rules require refund of fees if the matter is terminated at early stages. For the

sake of clarity, I have endeavored to reproduce *Rule 7 of the High Court of Tanzania (Commercial Division Fees) Rules GN No. 249 of 2012* which provides:

> Where a suit is successfully mediated or settled out of Court within six months from the date of filling and upon a party who wish to apply for refund shall submit a request in writing within two weeks from the date of mediation or order, and a Judge or a Registrar may, make an order of refund of one quarter of the filing fees to that party

However, I remain unpersuaded by Counsel Dickson on *applying Rule 7 of the Commercial Court Fees Rules (supra)* for four reasons. *One,* the *Commercial Court Rules (supra)* are not applicable to this Court. *Two,* even if the said Rules are applicable to this Court, one of the requisite conditions of refunding costs at the Commercial Court is that the matter must be successfully mediated or settled out of Court. The parties in the instant application are not mediated and they have not settled the application out of Court. *Three,* even if the parties could have settled the matter, in order to be refunded under *Rule 7 (supra),* the settlement must be done within six months from the date of filing. The instant application apart from not been settled, it has been pending in this Court for not less than nine months. As such, *Rule 7 (supra)* cannot be applied to the advantage of the Applicant even if it was applicable to this Court. *Four,*

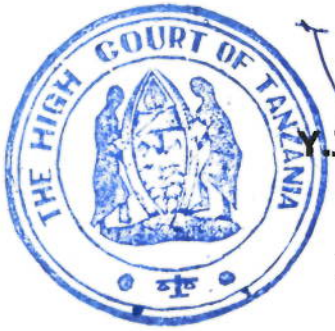
Rule 7 (supra) requires the party to apply for refund in writing within two weeks from the date of mediation or order. The Applicant in this matter has not applied for such refund. Even though he could not apply because that procedure is not found in normal Courts like this Court. That statement of principle is predicated on the need of the party to apply for refund. A party cannot wait till the preliminary objection is raised against him/her.

Again, awareness of Counsel Egidy that the first Respondent is dead, prompted Counsel Dickson to go and research on whether the first Respondent exists or not is an extremely clumsy submission and specularly of no merits. The reason being that on 20th October, 2021 Counsel Dickson told the Court that there was a dispute on a party to be brought. That means, Counsel Dickson was alerted that the 1st Respondent is dead as early as on 20th October, 2021. He had enough time to make his research prior filing this application.

Needless, this Court in the case of **Juma Mganga Lukobora and 7 Others v. Tanzania Medicine and Medical Devices Authority (TMDA) and 3 Others**, Miscellaneous Civil Application No. 642 of 2020 High Court of Tanzania at Dar es Salaam (unreported), stated thirteen reasons justifying awarding costs to the Government as a party to the case. To mention three; *One*, the Tax payers' money paid to the State

Attorneys need to be accounted for. Denying costs to the matters involving the Government is like allowing unfounded flood gate litigation against the Government. *Two*, though under *"costs fundamental rule"*, Costs must be fairly attributed to a winning party regardless of status, whether is a Government or artificial person or natural person. *Three*, cost serves the purposes of deterrence, since potential litigants should be encouraged to think carefully before engaging in a civil justice system and should be encouraged to refrain from taking unnecessary steps within that system.

With the above findings, the objection raised by the Court is sustained and disposed of accordingly. Considering the circumstances of the case and the nature of question of law involved in this application, it is ordered that the respective costs of this application be paid by the Applicant.



Y.J. MLYAMBINA
JUDGE
04/10/2022

Ruling delivered and dated 4th October, 2022 in the presence of learned State Attorney Emmanuel Bakari holding brief of Counsel Dickson Ndunguru for the Applicant, and in the absence of the 2nd Respondent; and in the presence of learned State Attorneys Emmanuel Bakari and Theresia Mbawala for the 3rd, 4th and 5th Respondent. Right of Appeal fully explained.

Y.J. MLYAMBINA

JUDGE

04/10/2022