

**IN THE HIGH COURT OF TANZANIA  
IN THE SUB-REGISTRY OF MWANZA**

**AT MWANZA**

**MISC. CIVIL APPLICATION CASE NO. 120 OF 2021**

*(Arising from Misc. Land Appeal No. 19 of 2020 of the High Court of Tanzania at Mwanza,*

**JUMA OMARY ..... APPLICANT**

**VERSUS**

**JUSTUS LUTATINA ..... RESPONDENT**

**RULING**

*28<sup>th</sup> & 14<sup>th</sup> March, 2022*

***Kahyoza, J.:***

Juma Omary and Justus Lutatina had a Land dispute in the Ward Tribunal. Juma Omary won the day. Aggrieved, Justus Lutatina appeal to the District Land and Housing Tribunal. The appeal was heard and decided *ex parte* in favour of Justus Lutatina. Juma Omary sought to set aside the *ex parte* judgment in vain before the **DLHT**.

Dissatisfied still, Juma Omary appeal to the High Court against the decision of the DLHT refusing to set aside the *ex parte* judgment where he lost again. He filed an application for extension of time to apply for a certificate on point of law and an applied to this court to certify that there are points of law.

Before the application was heard on merit, it became obvious that the respondent was not present in court. A person who appeared in court for the respondent was Ms. Suzan Marco Ello, the respondent wife. Ms. Suzan

Marco Ello, informed the court that the respondent died on 31/08/2016. She stated that she was the administratrix of the deceased's estate.

Upon discovering that Juma Omary instituted an application against a deceased person, I invited the parties to address this court on the propriety of the application.

Mr. Regan the applicant's advocate submitted that statutory law and court decisions provided an administrator of the deceased's estate is required to be made a party and not only to appear and prosecute a case in the deceased's name. He submitted that if a party to a suit dies and a cause of action survives him, a legal representative of that party has to apply to be joined to that suit within 90 days from the date that party passed away. To buttress his submission, he cited rule 3(1) and (2) of **Order XXII** of the Civil Procedure Code, (the **CPC**) [Cap. 33 R.E. 2019]. He added that the Law of Limitation provides for time within which a legal representative may apply to be joined. He also referred to **Maswaya Mohamed V Kuluu (Legal Representative of the late Erica Maswaya) V Commercial Banking of Arica (T) Limited**, Misc. Civil Application No. 16 of 2021 High Court (unreported), **Sharifu Nuru Muswadiku V Razaki Yasan** (Mswadiku Chairman) Civil Appeal No. 48 of 2019 (CAT-unreported). He submitted that in **Sharifu's** case, Sharifu died when the suit was still pending, the Court of Appeal of Tanzania could not entertain the appeal it dismissed the proceedings.

He also cited the case of **Said Ibrahim (the Legal Personal Representative of Ibrahim Ramadhan) V Malembuki Kitasho** Civil Appeal No. 5 of 2014(CAT-unreported), where Court of Appeal of Tanzania of Appeal held that- "*I wish to point out that to be appointed as an administrator of*

*the deceased estate is not enough to represent the deceased in this Court. The administrator must make a formal application in this court so that he is made a party to the proceedings in place of the deceased as provided under Rule 57(3) of the Court of Appeal Rules, 2009'.*

He concluded that, courts have taken the issue a legal representative to apply to prosecute seriously and discouraged a person to appear and prosecute a case in the name of the deceased. He prayed time to be extended and a certificate granted to the applicant so that the Court of Appeal of Tanzania consider the matter as this court cannot revise its own decision.

Mrs. Suzan Marco, submitted that the deceased had a suit before the District Land and Housing Tribunal. He passed away and the District Land and Housing Tribunal stopped the proceedings until a legal representative was appointed. She submitted that she was appointed to administer the estate. She contended that she submitted it was after she submitted proof of her appointment when hearing of the appeal resumed.

In his short rejoinder, the applicant's advocate argued that the case was in the deceased's name Justus Lutatina and the proceedings of the District Land and Housing Tribunal did not indicate that the legal representative was joined as a legal representative.

Undeniably, Justus Lutatina passed away on 31/08/2016 when was the dispute was pending before the Ward Tribunal. The appeal before the District Land and Housing Tribunal was lodged after Justus Lutatina was no longer alive. The appeal was lodged in December, 2017, whereas Justus Lutatina died on 31/08/2016, according to Mrs. Suzan. The appeal was instituted to the **DLHT** over one year from the respondent's death. It is unequivocal that

despite Justus Lutatina's death Mrs. Suzan, his wife, lodged and prosecuted an appeal in deceased's name. Not only that but also the applicant lodges an appeal to this court from the decision of this District Land and Housing Tribunal against Justus Lutatina, the deceased.

Mrs. Suzan, appeared in District Land and Housing Tribunal and was referred as the appellant, while the appellant was Justus Lutatina, the deceased person. It is also on record that Justus Lutatina, the deceased person appeared and defended the appeal before this court vide Mrs Suzan.

Mrs. Suzan submitted that following her husband's death, she applied for letters to administration of her husband's estate. She was appointed and notified the District Land and Housing Tribunal. She contended that the DLHT stopped hearing after her husband died and resumed the hearing after she was appointed. I examined the proceedings to find out if Mrs. Suzan made an oral or formal application to be joined as the administratrix of the late Justus Lutatina in Land Appeal before the District Land and Housing Tribunal in vain. The record of the DLHT do not support Mr. Suzan's contention.

Given what I have pointed out, it is undisputed that the Respondent, Justus Lutatina met his demise when the land dispute was still pending before the Ward Tribunal or at least before an appeal was lodged to the **DLHT**. It is on record that after the ward tribunal decided against the deceased, Land Appeal No. 77 of 2017 was lodged to the DLHT and decided in the deceased's name. The appeal was lodged to this court against the decision of the **DLHT** refusing to set aside its *ex parte* judgment in the deceased's name. It was on record that Mrs. Suzan was all that time appearing and posing as Justus Lutatina.

It is settled as submitted by the applicant's advocate that if a cause of action survives the deceased person, a legal representative has to apply to be made a party under Rule 3(1) and (2) of Order XXII of the CPC or as held in the case of **Said Ibrahim V Malembuki Kitasho** (Supra). I am a live of the position of the Law that the Ward Tribunal was not bound by and legal procedures while hearing land dispute. However, the issue who sues what for what was basic for the Ward Tribunal to be able to determine land dispute and between real parties. Not only that but also after the District Land and Housing Tribunal found that the respondent was man but a person appearing before it was a women. It ought to have made inquiry and the procedural mishap rectified.

I, therefore, find that the District Land and Housing Tribunal and this court may have gone astray to allow an appeal to be conducted in the deceased name and to let Mrs. Suzan appear in the deceased's name. I concur with the applicant's advocate that at this stage my hands are tired. I cannot revise this court's decision for want of jurisdiction or the District Land and Housing Tribunal's judgment as it is not before this court. It is the Court of Appeal of Tanzania, which can examine this court's record. For that reason, I extend time for the applicant to apply for certificate on point of law.

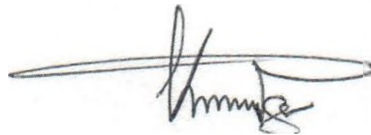
As the applicant applied for certificate on point of law in the instant application, I certify that there is point of law to be considered by the Court of Appeal of Tanzania that is-

- (1) Whether it was proper for the appeal before the District Land and Housing Tribunal to be instituted and prosecuted in the deceased's name; an application to be further instituted and prosecuted in the

deceased's name and appeal lodged to this court in the deceased's name.

The applicant's advocate invited me to hear the application on merit. I decline an invitation to hear the current application against the deceased and resolve to invite the Court of Appeal of Tanzania to consider the matter by way of an appeal. I make no order as to costs.

It is ordered accordingly.



**J.R. Kahyoza**  
**Judge**  
**14/03/2022**

**Court:** Ruling delivered in the presence of the applicant's advocate Mr. Regan Charles and Mrs. Suzan Marco Ello, the Respondent's legal representative. B/C Ms. Jackline (RMA) present.



**J.R. Kahyoza**  
**JUDGE**  
**14/03/2022**

