

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**CIVIL REFERENCE NO. 4 OF 2022**

*(Original Execution No. 14 of 2019, arising from Land Case No. 19 of  
2016)*

**JOHN M. LITONDO (Administrator of the estate of the Late  
Amina Abel Litondo..... 1<sup>ST</sup> APPLICANT**

**HANNA H. LITONDO (Administratrix of the estate of the Late  
Amina Abel Litondo.....2<sup>ND</sup> APPLICANT**

**FRED P. SALAKANA (Administrator of the estate of the Late  
Amina Abel Litondo.....3<sup>RD</sup> APPLICANT**

**Versus**

**FATUMA AMRI MASIKA (Administratrix of the estate of the Late  
ZAITUNI AMRI MASIKA) ..... 1<sup>ST</sup> RESPONDENT**


**KBM-SONS & COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

*29/11/2022 & 24/01/2023*

**SIMFUKWE J.**

The applicants under the certificate of urgency filed a Chamber application under **section 79(1)(c), (3) and section 95 of the Civil Procedure**

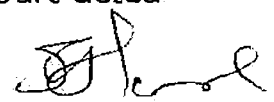
  
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**Code, Cap 33 R.E 2002** imploring the court to call and examine the record of the proceedings in Execution No. 14 of 2019 heard by Hon. O.H. KINGWELE, the Deputy Registrar and reverse his order dated 2<sup>nd</sup> June, 2022. The application was supported by the affidavit sworn by the learned counsel for the applicants one Mr. Almando Swenya. The respondents did not file counter affidavit.

The essence of this application is Land case No. 19 of 2016 which this court dismissed with the final order that the suit premises is the property of the late Hija Roweta and that all surviving heirs had the right over it. Following such order of this court, the respondents filed an application for execution praying the court to issue an eviction order so that the administrator could distribute the property to the rightful heirs. The court granted the execution order. Now, the applicants challenge the said execution order through this reference.

During the hearing, the applicants enjoyed the service of Mr. Almando Swenya learned counsel, while the respondents were unrepresented. The matter was ordered to proceed by way of written submissions.

In support of this application, the learned counsel for the applicants submitted that the order in the decree was to the effect that the surviving children of Hija Roweta have the right over the subject for distribution meaning that the house should be sold and the proceeds of the sale be divided to the grandchildren of the deceased. He was of the opinion that the impugned order in the execution was illegal as it was contrary to **Order XX Rule 6(1) of The Civil Procedure Code** (supra) since the respondent prayed for eviction order which was not even mentioned in the judgment as well as in the decree. Thus, the executing court acted




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illegally and contrary to **section 42(b) of the Civil Procedure Code** (supra).

Mr. Swenya insisted that, as deponed under paragraph 5, 6 and 7 of the Affidavit in support of application, nowhere the decree ordered eviction. He was of the view that the respondent sought prayers which contravened the provision of **Order XX rule 6 of the Civil Procedure Code** (supra) for making an application for eviction in an application for execution.

It was submitted further that the application for execution was defective as it sought prayers which were not executable and nowhere to be traced in the decree and in the judgment of this Court which the respondent purported to execute. He emphasized the point by the case of **The Registered Trustees of Tanzania Society for Prevention of Cruelty to Animals (TSPCA) vs Blue Horizon**, Miscellaneous Commercial Application No. 191 of 2018 (HC) which held that:

*"As highlighted hereinabove, the order sought to be executed is not clearly traceable from the decree, but the Joint Venture Agreement of the parties. That renders the purported order un-executable in terms of the above cited statutory and case law authorities. As correctly submitted by Mr. Mashaka Ngole learned advocate, the executing court can only give effect to what was decreed by the trial court and not otherwise. For the foregoing reasons, the decree holder is advised to ask assistance of the court to execute proper orders of the trial court or seek rectification of the decree if she believes the same was wrongly or improperly extracted."*



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Mr. Swenya prayed the court to call and examine the proceedings of the executing court and issue necessary orders as prayed in the chamber summons in this application. He added that for the interest of justice this application be granted with costs.

It was concluded by Mr. Swenya that if the decree was to be executed, the same should be executed by virtue of the provision of **section 42(b) of Civil Procedure Code** (supra) which direct that the decree can attach and sale without eviction to be safe and secure on their right which comes from the proceeds of sale of the property.

The learned counsel quoted the wording from the judgment of the trial court and argued that in the said proceedings, the respondent was not the administratrix of Hija Roweta. Thus, she had no locus standi and prayed for such orders as portrayed in the title of the case of the impugned decision.

Finally, he urged the court to intervene over the orders so as to maintain peace and harmony. He believed that this application has merit and should be granted with costs.

In reply, the 1<sup>st</sup> respondent who was assisted to draft the submissions by Mr. Charles Mwanganyi, learned counsel submitted to the effect that this application is purely misconceived, frivolous and baseless and unfounded or otherwise hopeless before this court. That the same applies to the applicants' submissions.


The 1<sup>st</sup> respondent drew attention of this court by stating that they are aware of the legal position that failure to file counter affidavit or affidavit in reply does not necessarily mean that one does not oppose an application as stated in the case of **Harith Rashid Shomvi vs Aziza**

**Juma Zomboko, Civil Application No. 496/01 of 2019 (CAT).** She raised the points of law as follows:

That the applicants lack locus standi to institute this application before this court since they are suing as administrators of the estate of the late Amina Abel Litondo but in their affidavit to support the application, nowhere the letters of administration show their appointment and capacity to sue on behalf of the deceased. Also, nowhere in the affidavit had they averred that they are administrators of the estate of the late Amina Abel Litondo. It was argued that failure to attach letters of administration in a pleading to prove the capacity to sue renders the application incompetent. The 1<sup>st</sup> Respondent made reference to the case of **Ramadhan Omary Mbuguni (as Legal Representative of late Rukia Ndaru) vs Asia Ramadhan, Civil Application No. 173/12 (CAT)** at Tanga in which it was held that:

*"Letter of administration being an instrument through which the applicant traces his standing to commence the proceeding, was in our view an essential ingredient of the application in whose absence the Court cannot have any factual basis to imply the asserted representative capacity, the instrument constituting the appointment must be pleaded and attached. Failure to plead and attach the instrument is a fatal irregularity which renders the proceeding incompetent for want of the necessary standing."*

Another raised point of law was that, this court lacks jurisdiction to deal with this application. Explaining this point of law, it was stated that the applicants are moving this court to call for and examine the record of the proceeding in the Execution No. 14 of 2019 which was determined by the

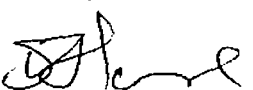


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Deputy Registrar of the High Court of Tanzania. From this prayer, the 1<sup>st</sup> respondent was of the opinion that the applicants are applying for revision against the proceedings, Ruling and order of execution delivered by the Deputy Registrar since they have moved the court under **section 79(1) (c) and (3) of Civil Procedure Code** (supra). He elaborated this provision to mean that the High court may call and examine the record of the subordinate court and it cannot in anyway call and examine its own record for the purpose of revision.

He continued to argue that the Ruling and Order in Execution No. 14 of 2019 was issued by the Hon. Deputy Registrar of the High Court of Tanzania. He said that it seems the applicant purports to have applied for reference but from the prayers and provision cited he is applying for revision, whereas the High Court lacks Jurisdiction to revise its own proceedings, Ruling and Order. It was opined that the applicants should have at least filed a review if at all; they wish the High Court to review its own order if there is error apparent on face of record. It was insisted that the High Court lacks jurisdiction to determine this application.

The 1<sup>st</sup> respondent also made reference to paragraph 3 of the affidavit in support of the application where the applicants averred that they have filed Civil Appeal No. 229 of 2020 before the Court of Appeal against the Judgment and decree of Land case No. 19 of 2016 which was delivered before this Court. It was contended that it is trite law that once a notice of appeal is filed against the decision of the High Court, the High Court ceases with Jurisdiction. She supported her argument with the case of **Exaud Gabriel Mmari (as**




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**Legal Representative of Late Gabriel Barnabas Mmari) vs Yona Seti Akyo and 9 others, Civil Appeal No. 91 of 2019 (CAT)** at Tanga (Unreported) and opined that the Applicants ought to have filed stay of Execution before the Court of Appeal.

Lastly, it was submitted that this application is incompetent for being supported by the affidavit which is sworn by the Advocate who represent the applicants as dully stipulated under paragraph 1 of the affidavit in support of the application. The assertion was cemented with the case of **Lalago Cotton Ginnery and Oil Mills Company Ltd vs. Loans and Advances Realization Trust (LART)**, Civil Application No. 80 of 2002 unreported which held that:

*"An advocate can swear and file an affidavit in proceedings in which he appears for his client, but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during proceedings." see also the case of **Tanzania Breweries Limited v Herman Biidad Minja, Civil Application No. 11/18 of 2019 CAT, DSM [Unreported].**"*

Submitting on the merits of the application, it was argued that the application itself is purely misconceived, frivolous and unfounded. He referred to the submissions made by the applicants' advocate and argued that the same is misconceived or otherwise missing point. He stated that throughout the application for execution and

  
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in the Execution Order, the respondent prayed the court to issue eviction order of all the tenants and agents of the applicants so that the same may be handed over to the respondents to distribute to the lawful heirs. That, the judgment of this court in Land Case No. 19 of 2016, nowhere said the same should be sold and the proceeds distributed to the heirs of the deceased as alleged by advocate for the applicants.

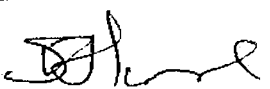
It was explained that the disputed house cannot be sold without eviction of tenants and whoever lived therein.

He concluded that this application is devoid of merit and he prayed the same to be dismissed with costs.

I have carefully considered the arguments put forward by the parties, the issue for determination is, ***whether this application has merit.***

In the cause of scrutinizing this issue, I have noted that the respondents did not file counter affidavit to contest the application. However, this is not a bar to them to contest the application in matters of law. This position was elaborated in the case of **William Getari Kegege vs Equity Bank & Another (Civil Application 24 of 2019) [2021] TZCA 185** where the Court of Appeal at page 10 to 11 had this to say:

*"We also feel apt to explain at this juncture why we restricted Mr. Muguli to address us on only points of law on account that the respondents did not file any affidavit in reply to contest the application. Our reason for doing so is purely legal. It is trite that a party who has not filed an affidavit to contest what has been deposed in an affidavit*



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*supporting an application may be entitled to an oral reply but only on matters of law; not on matters of fact."*


The above principle was in the mind of Mr. Mwanganyi for the 1<sup>st</sup> respondent who also referred the court to the case of **Harith Rashid Shomvi** (supra). In her reply submission, the first respondent through advocate Mwanganyi raised matters of law which I will scrutinize one after another.

First, she raised the issue of locus standi. That, the applicants had no locus standi to file this application as they failed to attach documents to establish that they are indeed the administrators of the estate of the late Amina Abel Litondo.

I have noted the said error. In their affidavit, the applicants did not state if at all they are administrators of the estate of the late Amina Abel Litondo neither did they attach letters of administration to that effect. It is a trite law that failure to attach letters of administration is fatal irregularity which renders the proceedings incompetent for want of the necessary standing as elaborated in the case of **Ramadhani Omary Mbuguni (as Legal representative of the late Rukia Ndarro)** (supra).

Therefore, since the applicants failed to attach documents to prove their representation as administrators of the late Amina Abel Litondo, I don't hesitate to conclude that this application is incompetent before this court. Consequently, I find no need of discussing the rest of the raised points of the law as this alone suffice to dispose of this application.

In the upshot, I hereby struck out this application for being




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incompetent before the court.

Considering the relationship between the parties, no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 24<sup>th</sup> day of January, 2023.



**S. H. SIMFUKWE**

**JUDGE**