

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

MISC. CIVIL APPLICATION. 593 OF 2022

(Arising from Misc. Civil Application No. 156 of 2021 dated 20th December, 2022, before
Hon. A.S. Rwekiza.)

IAN JOHN KILEO (The administrator of the Estate of the late

PIUS MANYWELE SHANGAMA MWACHILO.....APPLICANT

VERSUS

GRATIA THADEO MUTASHOBYA (The administrator

of the Estate of the late Fred Edward).....1ST RESPONDENT

OBADIA LUPHINGO MTEWELE.....2ND RESPONDENT

NASM AUCTION MART, COURT BROKERS

AND PROCESS SERVERS LTD.....3RD RESPONDENT

SENSITIVE AUCTION MART.....4TH RESPONDENT

RULING

Date of Last Order: 17/08/2023

Date of Ruling: 25/08/2023

E.E. KAKOLAKI J.

By way of chamber summons taken out under section 79 (1) and section 95 of the Civil Procedure Code Cap 33 R.E 2019 and Section 43 (3) and 44(b) of the Magistrates Court Act Cap 11 R.E 2019, the applicant has moved this court to call for record and the decision of Hon. Rweikiza, RM dated 20th

December, 2022 in Misc. Civil Application No. 156 of 2021 from the District Court of Kinondoni, emanating from execution proceedings from Civil Case No. 134 of 2005, for the purposes of examining and satisfying itself on the correctness, legality or propriety of the said decision and orders therein. Other prayer advanced was for the costs of this application to be in cause.

The chamber summons is supported by the affidavit deposed by **Ian John Kileo** the applicant, stating the background of the matter that he is the administrator of the estate of the late **Pius Manywele Shangama Mwachilo**, who passed away leaving behind the testamentary disposition of his property on the 5th day of May, 1997 being survived by his wife one Victoria Pius Mwachilo and several children. And that, he took over the administration after death of the former administrator the late Joseph Mwakajinga advocate. That, the estate of the late Mwachilo includes the structures in plot No. 1050 and 1051 block 43 Kijitonyama area within Kinondoni District, the plots which are developed with four (4) tenants who are paying rent to the estate of the late Mwachilo. It appeared on 2nd August, 2021 the applicant received shocking news, that there is a horde of persons who had surrounded the said plot of land and were evicting the tenants and demolishing all the structures in the two above named plots, as all

beneficiaries to the estate and the tenants confirmed not to be aware of either Civil or criminal case involving the suit properties. In the course of making follow-up the applicant came across a copy of an order appointing Abdallah Makatta Mwinyimtwana t/a SENSITIVE AUCTION MART, to evict Mick Mwachilo and Samson Mwachilo from the suit premises and sell the said property by public auction, in a suit in which one **Fred Edward** was the decree holder in the said order and who later on the 1st day of June, 2021 applied for the certificate of sale that was issued accordingly.

It was further stated that, the court broker did not serve the order nor did he notify the addressees instead he left a photocopy in the office of the Ward Executive Officer and the latter did not serve the same, and further that the said order did not contain the name of the late **Pius Manywele Shangama Mwachilo**. The applicant noted further that, the money which is stated in the report of the court broker is yet to be deposited in the court's accounts to date. It was averred that, it came to the applicant's knowledge that, the court did not order the court broker to carry out demolition of the said structure in which its alleged sale amount as per the court broker's report has never been paid in Court's account to date, but was merely ordered to break the door locks, evict the occupants and sale the structure by public

auction though acted to the contrary when marshalled a horde of bouncers who pulled the whole complex down and handed the same to the 2nd respondent as successful bidder and purchaser. Following all those events applicant by way of objection proceeding challenged disposition of the said property in Misc. Civil Application No. 156 of 2021 before the District Court of Kinondoni, only to receive the counter affidavit from **Gratian Thadeo Rutashobya** who surfaced as administrator of the estate of Fred Edward. However, the said objection proceedings was not heard and determined on merit basing on several preliminary objections on points of law thus the application collapsed on the ground that it was filed outside its statutory limitation.

Aggrieved by that decision the applicant successfully appealed to this Court in Civil Appeal No. 400 of 2021, as it was decided that, the matter be remitted back to the trial court and be heard on merit as the same was filed timely. When the matter was set for hearing before the trial court, the respondents pointed out that they had appealed to the Court of Appeal and further protested its competence in that is was brought against the said Fred Edward who is deceased now as the applicant ought to have sought to amend the application to implead the administrator. According to the applicant, the trial

magistrate struck out the matter without considering the fact that, the alleged administrator had already filed his counter affidavit on the same application for and on behalf of the said Fred Edward (deceased) hence there was no room to amend the application.

It is therefore applicant's lamentation that, the said decision is contrary to the decision of the High Court and it has pre-empted the appellate proceedings which are in force at the Court of Appeal thus the same is illegal as if not reversed and set aside it is likely to cause substantial injustice and abuse court process.

The Respondents on their side resisted the application, among other things contending that, applicant is not the administrator of the deceased Pius Manywele Shangama Mwachilo as the administrator was one Samson Pius Mwachilo @ Samson Mwachilo, who obtained the letter of administration on 18th December 2009 and that the interest in the stated plots were already transferred to his sons Micky Mwachilo and Samson Mwachilo, who were receiving rent as owners of the said plots. That aside they averred that, after the applicant was made aware that Fred Edward has passed away and there is administrator for his estate, he was duty bound to seek leave of the court to amend the name of the 1st respondent to include his administrator, despite

the fact that in the High Court decision in Civil Appeal No. 400 of 2021, the name of the administrator was already replaced to represent Fred Edward.

Hearing of the application was conducted by way of written submission as all parties were represented, applicant was represented by Mr. Barnaba Luguwa, 1st respondent by Mr. Charles Lugaila, while the 2nd 3rd and 4th respondent hired the services of Mr. Armando Swenya, all learned advocates.

Kicking off the conversation was Mr. Luguwa whose services were enlisted by the applicant began by reminding the Court of the brief background that bred out this application. He then argued that Hon. Rwekiza instead of determining the application on merit as directed by this Court in Civil Appeal No. 400 of 2021, wrongly decided to strike it out merely because one of the four respondents was dead. According to him, that was grave irregularity due to the fact that the application was still valid in respect of other parties as per Order XXII Rule 2. He held the view that, the trial magistrate had to proceed to hear the rest of the respondents since the duty of making sure that he joined as a party lied with the administrator of the estate and not the applicant as it was him (administrator) who bore the onus of proving to the Court that he is the legal representative of the deceased as per the dictates of Order XXII Rule 5 of the CPC. In his view it was the trial court

which was duty bound to order the said 1st respondent as administrator to make proper application to be joined as a party to the proceedings as per Order XXII Rule 4(1) of the CPC. He also relied on section 99 and 100 of the Probate and administration Act.

Mr. Luguwa maintained that, since it is the name of Fred Edward which is appearing in the certificate of sale issued on 1st June, 2021 and since the said Fred died in March, 2021, three months passed before issue of the certificate of sale, whether the said document was sought and secured by Fred Edward or not is the question which need to be decided by the trial court in the said objection proceedings.

On whether it was proper to bring this matter by way of revision or appeal, it was his submission that, appeals against orders are governed by the provisions of Order XL rule 1 of the CPC. In the impugned decision he argued, the trial magistrate struck out the application for applicant's failure to implead the administrator of the estate as required under Order XXII Rule 3 (1) and (4) of the CPC the order which is not appealable, as the appealable orders under Order XXII are provided under item k and l of Order XL. He was therefore of the view that, an order under order XXII Rule 3 and 4 of the CPC is not appealable as the same is not listed under Order XL. Finally

the learned counsel implored the Court to allow the application, set aside the order dismissing the application and further order that, the file be sent back to the trial court to be heard on merit.

In his side Mr. Lugaila having adopted his affidavit to form part of the submission, challenged the submission in chief by the applicant for referring to different names from those appears in his pleadings, which in his view, it was meant to mislead the court. He then pointed out that, the decision under the present revision was struck out for non-joinder of necessary party (Gratian **Thadeo Mutashobya as the Administrator of the late Fredy Edward**). To him the issue for determination by this Court is whether the trial court Magistrate erred in law by striking out Misc. Civil Application No. 156 of 2021 on the ground of incompetence for non-joinder of Gratian Thadeo Mutashobya as the administrator of the late Fred Edward.

He took the view that, the trial magistrate was correct to strike out the matter for failure to join the administrator of the late Edward as firstly, when the matter was instituted by the appellant, he was immediately informed by the administrator that Mr. Fred Edward died since 27th March 2021. Secondly, when the applicant was aggrieved by the ruling of Hon. Jacob RM, he filed before this court Civil Appeal No. 400 of 2021 with the name of the 1st

respondent changed to include the name of his administrator, and thirdly, the decision of High Court in Civil Appeal No. 400 of 2021 which ordered the file be taken back to the trial court had the name of the administrator of the 1st respondent on the face of record. He said despite of all those information when the applicant appeared twice in front of Hon. Rwekiza -SRM and without informing the respondent prayed for general orders for filing pleadings including WSD by the respondent, instead of praying for amendment of his pleadings to include the name of the administrator of the 1st respondent. In his argument failure to amend the pleadings to that effect rendered the application incompetent and therefore liable to be struck out. The learned counsel fortified his stance by citing to the Court the case of **Abdullatif Mohamed Hamisi Vs. Mehboob Yusuf Osman & Another**, Civil Revision No. 6 of 2017 page 29-30, explaining the importance of joining administrator of the deceased in the proceedings, where the Court of Appeal faulted the plaintiff in that case before the High Court for failure to amend his pleadings and include the name of the administrator of the deceased.

Mr. Lugaila attacked applicant's submission in that, it was incumbent for the 1st respondent in the present application to apply before the trial court for amendment of the 1st respondent's name, terming it misconceived and

absurd considering the fact that, that was applicant's case and not the respondent's one. He maintained that, since Mr. Fred Edward was dead, it was applicant's duty to apply for amendment of his pleadings in order to include the name of the administrator of the 1st respondent.

Concerning the submission that the room for amendment was closed since the submission were already filed, he joined hands with that assertion and argued that is the reason why the trial Magistrate had to strike out the matter. Regarding the issue of fraud as raised in the counter affidavit, he submitted that the applicant ignored it but the real administrator of the estate of the late Pius Mwachilo is Samson Mwachilo who was appointed vide Kawe Primary Courts Shauri la Mirathi Na. 164 of 2009. He said to his understanding, there can only be one probate proceedings for one dead person. His question then was how the applicant could have obtained the letters of administration for the same person in 2021. To him therefore investigation was needed to establish validity of the applicant's administration of the estate of late Pius Mwachilo.

In concluding, it was his submission that, the present application lacks merit thus the same should be dismissed with cost and so prayed. He further

prayed that, criminal investigation to be opened up against the applicant for the alleged fraud.

In his side Mr. Swenya for the 2nd, 3rd and 4th respondent subscribed to the submission by his learned brother Mr. Lugaila and added that, applicant being aware of the death of Mr. Fred Edward had to apply under Order VI Rule 17 of the CPC for amendment of the pleadings by substituting the name of the deceased with that of the administrator. To him the application was improper thus correctly struck out from the point of law for touching jurisdiction of the court despite the fact that the matter was not adjudicated on its merit as directed by the High Court.

He further contended that, the ruling which resulted into this application is appealable and no any judicial process which broke that avenue to entitle the applicant to prefer the present application. To him, Order XL Rule k and l as cited by the applicant is not applicable in the circumstances of the case at hand as the those provisions refer to the dismissal order and refusal order for grant leave but the matter at hand concerns the order striking out the objection proceedings application. He stressed that, once the court lacks jurisdiction in any matter the only remedy is to struck out and not to dismiss it, in which the trial court in this matter rightly acted.

In further view of Mr. Swenya, the order is appealable under the provisions of section 74 of the CPC. He supported his stance by citing to the court the cases of **Registered Trustees of Social Action Trust Fund and Another vs Happy Sausages Ltd and Ten Others**, Civil Application No. 48 of 2000 CAT [2002] TLR 285, and **Olmeshuki Kisambu vs Christopher**, Civil Revision No. 1 of 2002 [2002] TLR 280 (CAT) at page 280. He was insistent that, the application is not properly before the court as revision is not an alternative to appeal.

In a short rejoinder, Mr. Luguwa argued that, the omission to cite the name of the administrator as appeared in the chamber summons is a slip of the pen, and the same did not prejudice the parties in any way. Concerning the case of **Abdulatif Mohamed Hamisi** (supra) cited by Mr. Lugaila he said, it was in the applicant's favour as the court was duty bound to order the 1st respondent to make a proper application for substitution of the deceased name with that of the administrator as per the requirement of Order XXII Rule 4 (1) of the CPC. Otherwise, he reiterated his submission in chief and the prayer there to.

I have given close eye both affidavit and counter affidavit as well as the record in the light of the submissions of the parties. I have further accorded

the deserving weight both parties contending submissions. The broad question to be resolved under the circumstances is whether the trial magistrate was justified in striking out the Misc. Civil Application No. 156 of 2021 on the ground of incompetence for non-joinder of Gratian Thadeo Mutashobya as the administrator of the late Fred Edward/1st respondent. However before resolving that question, I wish to determine first parties' controversy on whether this application is competently filed before this court for being brought by way of revision instead of appeal.

While Mr. Lugaila is of the view that, the order is not appealable as it is not listed under Order XL while Mr. Swenya holds contrary legal direction insisting that, the order is appealable under section 74 of the CPC and for that matter the preferred revision is not an alternative to appeal hence application should be struck out. It is true and I subscribe to Mr. Swenya's submission that, revision is not an alternative to appeal as that legal position is settled as underscored in numerous decisions of this Court and Court of Appeal including the cases of **Moses Mwakibete V. The Editor - Uhuru and two others [1995] TLR 134; Transport Equipnses Ltd V. D. P. Valambia [1995] TLR 161** and **Ramadhani Myolele vs Hamadi Ali Islam, Misc. Civil Application No. 40 of 2022**, to mention few.

Nevertheless I am far from being convinced with his proposition that the order is appealable for being implausible. The reasons I am taking that position is that, the appealable orders are listed under section 74 and Order XL of the CPC, in which the one under present application is none of them. It is settled law that, revision can be preferred where there is no right of appeal in the matter or the appeal is hopelessly time barred or where the appeal is blocked by judicial process. See the cases of **Halais Pro Chemie Industries Ltd Vs. A. G. Wella** (1996) TLR 269, **Kezia Violet Mato Vs. National Bank of Commerce & 3 Others**, Civil Application No. 127 of 2005 and **Felix Lendita Vs. Michael Long'utu**, Civil Application No. 312/17 of 2017 (both CAT unreported). In the present matter since the order of the District Court of Kinondoni in Misc. Civil Application No. 156 of 2021 dated 20th December, 2022, striking out the application for non-joinder of party is not appealable, I find the applicant had no any other remedy than resorting to revision. To be short of words I hold, the application is properly preferred before the Court.

Reverting to the merit of the application, it is trite that that, besides other adjudicatory powers, this Court under section 79 (1) of the CPC, read together with section 44 of the Magistrates' Courts Act, Cap. 11 R.E. 2019 is

also vested with powers to revise decisions made by courts subordinate thereto. Section 79(1) of the CPC provides thus:

"The High Court may call for the record of any case which has been decided by any court subordinate to it and in which no appeal lies thereto, and if such subordinate court appears-
(a) to have exercised jurisdiction not vested in it by law;
(b) to have failed to exercise jurisdiction so vested; or
(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it think fit."

What comes out from the cited provision is that proceedings and decision bred out of any illegal or irregular exercise of jurisdiction by subordinate courts to this Court constitutes basis for calling them into question for revisional purposes. The pertinent question to be investigated and determined by this Court is whether the impugned decision is tainted with any illegality or irregular procedure calling for the Court's intervention to exercise its revisional powers. In this Mr. Luguwa alleges that, the trial magistrate wrongly struck out the application for applicant's failure to join the administrator of the 1st respondent, as to him the duty of joining him rested on the trial court upon application by the said administrator. On the other side, Mr. Lugaila and Mr. Swenya are on the contrary view in that,

being aware of the 1st respondent's death, it was applicant's duty to move the court to amend his application and implead the administrator. Thus, to them the application was properly struck out.

I had time to peruse the courts records in Misc. Civil Application No.156 of 2021 as well as the impugned decision in search of truth regarding parties' submission. My fortified position is that Mr. Luguwa's argument has merit. The obvious fact is that, as per Order I Rule 9 of the CPC, the general rule is that no suit shall be defeated by reason of the misjoinder or non-joinder of parties. The provision of Order I Rule 9 of the CPC reads:

9. A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it.

The rationale behind the above provision in my considered view is in two folds. One, to enable the court deal with the matter controversy before it and determine parties rights and interests conclusively where possible. Secondly, avail parties with an opportunity to bring to justice the right and proper or necessary parties at any time during the trial in so far as their disputes are successful resolve or their rights are secure. In the present matter as rightly submitted by Mr. Lugaila, non-joinder of the legal

representative of the late Fred Edward is such a serious procedural irregularity that could breed injustice if not remedied. But the sub issue is what was the remedy under the circumstances. In my firm view, the only remedy was for the Court to invoke the provision of Order I Rule 10(2) of the CPC as it held in the case of **Abdullatif Mohamed Hamisi** (supra) and correctly submitted by Mr. Luguwa. For better reasoning and understanding it is imperative that I quote the said Order I Rule 10(2) of the CPC which reads:

*(2) The court may, **at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just**, order that the **name of any party improperly joined, whether as plaintiff or defendant, be struck out**, and that the name of **any person who ought to have been joined, whether as plaintiff or defendant**, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. (Emphasis supplied)*

In view of the above exposition of the law it is evident to this Court that, in this Court the trial court could on its own motion or upon a direction to the applicant order for the striking out of the name of Fred Edward in the pleadings and substitution thereof with the name of Gratian Thadeo

Mutashobya (As the Administrator of the Estate of the late Fred Edward). Similar position was taken by the Court of Appeal in the case of **Abdullatif Mohamed Hamisi** (supra) when faced with a situation akin to the present one where the Court had this to say:

*"Since, as we have just remarked, the legal representative of the deceased was a necessary party, her non-joinder was fatal and the trial court, **either on its own accord, or upon direction to the 1st respondent, was enjoined to strike out the name of the 1st respondent and substitute to it her name with the caption "As the legal representative of the deceased," during the initial stages of the trial.**" (Emphasis supplied).*

The argument by Mr. Lugaila that, the trial court was justified to struck out the application before it for want of joinder of the administrator as it was the case in **Abdullatif Mohamed Hamisi** (supra) with due respect to the learned counsel, I find is misplaced as in that case the Court of Appeal did what the High Court (trial court) ought to have done by striking out the name of 2nd respondent who was improperly joined. And having so done it appeared to the that the Court could not have gone further to order for substitution with the proper name with caption "As legal representative of the deceased" and remit back the case file to the lower court for

determination as the same was already determined on merit. So the resort was to invoke its revisional powers and proceed to nullify the whole proceedings and set aside the judgment on admission and the resultant decree thereto. In so doing the apex Court in the land voiced thus:

*"Unfortunately, that was not done, and indeed, the non-joinder of the legal representative in the suit under our consideration is a serious procedural in-exactitude which may, seemingly, breed injustice. **The question which presently confronts us is as to what need be done. To us, there can be no option for amendment of the plaint at this stage and the only viable option is to invoke the revisional jurisdictional of the court and do what ought to have been done by the trial court that is: strike out the name of the 2nd respondent who was improperly joined as the defendant in her personal capacity. Having done so the entire proceedings below crumble just as the judgment on admission and the resultant decree follow suit and are hereby set aside.** This matter is, accordingly, pushed back to where it was immediately before the institution of the suit. From there the 1st respondent may wish to reinstitute the suit". (Emphasis supplied)*

In the present matter since the application was not determined on merit and given the fact that the trial court was already made aware of the death

of Fred Edward and appointment of Gratian Thadeo Mutashobya (As the Administrator of the Estate of the late Fred Edward), I find in its own accord or upon application of either party and for the purposes of this case the applicant, ought to have known that no suit shall be defeated by reason of misjoinder or non-joinder of parties as per Order I Rule 9 of the CPC and comply with the mandatory terms of Order 10(2) of the CPC for striking out the name of the late Fred Edward in the pleadings and order for amendment of pleadings to reflect the name of Gratian Thadeo Mutashobya (As the Administrator of the Estate of the late Fred Edward) and not to struck out the application for non-joinder of that party. In view of the above it is the findings of this Court that, by striking out the application for non-joinder of party the trial court's decision was marred with procedural irregularity hence a call for intervention by this Court. The issue is therefore answered in affirmative.

In the premises I would invoke the revisional powers bestowed to this Court under section 79(1) of the CPC and proceed to quash and set aside the ruling in Misc. Civil Application No. 156 of 2021 dated 20th December, 2022. I remit the case file to the trial court for continuation with hearing of the application on merit before another competent magistrate upon compliance with the

provisions of Order I Rule 10(2) of the CPC for striking out the name of the late Fred Edward from the pleading and order the applicant to amend his application by impleading the administrator of his estate. The application is therefore allowed.

Given the nature of the case I order each party to bear its own costs.

It is so ordered.

Dated at Dar es Salaam this 25th August, 2023.



E. E. KAKOLAKI

JUDGE

25/08/2023.

The Ruling has been delivered at Dar es Salaam today 25th day of August, 2023 in the presence of Mr. Paul Elias, advocate for the applicant and Mr. Oscar Msaki, Court clerk and in the absence of all respondents.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

25/08/2023.

