

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 683 OF 2021

NAZARENO MAKILIKA1ST APPLICANT

AVELINA MAKILIKA.....2ND APPLICANT

VERSUS

HAMISA SALUM MOHSIN1ST RESPONDENT

NYANYA MOHAMED MOHSIN.....2ND RESPONDENT

NAJEEB YESLAM SAEED.....3RD RESPONDENT

RULING

01/12/2021 & 6/12/2021

Masoud, J.

There is no dispute that the applicants have in this present application brought the application against the first and second respondents in their personal capacities and not in their capacities as administratrixes of the Estate of the Late Salim Mohamed Hassan Mohamed Mohsin.

Preliminary points of objection were in the above respect raised by Mr. A.A. Mwita, the counsel for the first and second respondents, on one hand, and Mr. Abdul, Azizi counsel for the third respondent, whose brief was being held by Mr. A.A. Mwita on the other hand.

Mr. Mluge for the applicants urged the court to allow amendment of the record that will see addition of the administratrixes of the estate of the said deceased for interests of justice.

Mr. Mluge cited two decision in a bid to fortify his submissions and prayer. They included a Court of Appeal decision in **Charles S.Kimambo Vs Clement Leornard Kusudya and Another**, Civil Application No. 477/03 of 2019.

On the other hand, Mr. A.A. Mwita urged the court to struck out the application for being incompetent for reasons of joying the first and second respondent in their personal capacity and not in their capacity as administratrixes of the estate of the above mentioned deceased. To bolster his argument, Mr.Mwita told the court that this was the second time Mr. Mluge is reporting the same error. He attributed the error to lack of seriousness and negligence on the part of Mr.Mluge. He relied on two authorities. Of significance to mention is **Nyambarya Warati** (Administrator of estate of late Warati Nyamburya) Charles Kirenge Land Appeal No. 39 of 2020 in which this court relied on the Court of Appeal decision ie. **Abdukalis Mohamed Hamis V.Mehboob Yusuf Osman & Fatuma Mohamed**, (Civ. Rev., No.06 of 2017 where the Court of Appeal of Tanzania stated thus:-

"When all is said and applied to the situation at hand, as already mentioned, it is beyond question that the 2nd respondent was, at all material times, the administratrix of the deceased's estate. The life of her legal representation

with respect to the estate was still subsisting at the time of her transaction with the 1st respondent just as the suit land was vested in her in her capacity as the legal administratrix. But, as we have also hinted upon, the 2nd respondent was not sued in that capacity. Instead, the 1st respondent sued her in her personal capacity and, for that matter, no executable relief could be granted as against her personally with respect to the suit land which, as it turns out, was vested in her other capacity as the legal representative. (emphasis added)

Reasoning from the above, this court in **Nyambary Warati** (supra) stated."

*It should not escape our mind that if a property in dispute forms part of the deceased person's estate, it is the administrator who is competent to sue or be sued. See the case of **Ibrahimu Kusaga versus Emanuel Mweta** [1986] TLR 26 (at page 30) where the Court state that:-*

"I appreciate that there may be cases where the property of a deceased person may be in dispute. In such cases, all those interested in determination of the dispute or establishing ownership may institute proceedings against the Administrator or the Administrator may sue to establish claim of deceased's property."

Mr. Mluge while admitting that he was indeed supposed to bring the present application against the administratrixes of the said deceased, he continued to urge the court to allow amendment that will lead to adding the administratrixes names as the first and second respondents. And he told the court that this application had already been filed when the other applications which had similar errors were entertained by this court in his favour.

I have painstakingly considered the fact that indeed this is the second time the court is entertaining similar error from Mr. Mluge in other applications involving the same parties. I have also taken note that there is no dispute that the first and second respondents have erroneously been joined in their personal capacities instead of being joined as administratrixes of the estate of the above mentioned deceased. As I was making such consideration, I have had regard to the fact that this is the first time the matter is coming before me in the presence of all parties who are all duly represented by the learned counsel. I furthermore considered the authorities brought to my attention whilst mindful that the authorities cited by Mr. Mluge had no bearing to the circumstances of the present matter and can not as such assist the court to resolve the issue in his favour.

When all is thus said and considered, I am inclined to resolve the controversies in the favour of the respondents for reasons stated.

In the upshort, the application is incompetent and is hereby struck out with costs. The applicants, if they so wish, may refile the application subject to laws of limitations. It is so ordered.

Dated and Delivered at Dar es Salaam this 2nd day of December 2021.


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B. S. Masoud
Judge

