

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO.211 OF 2022

*(Arising from Misc. Land Application No. 788 of 2017 originating from
Land Case No. 123 of 2013)*

UTHMAAN MADATI (Administrator of the

Estate of the late **JUMA POSANYI MADATI** **APPLICANT**

VERSUS

TATU O. FARAHAANI **1ST RESPONDENT**

SALIM MADATI **2ND RESPONDENT**

RULING

Date of last Order: 25.10.2022

Date of Ruling: 28.10.2022

A.Z MGEYEKWA, J

This is an application to set aside an abatement order of the High Court of Tanzania, Land Division at Dar es Salaam dated 22nd March, 2019 in Misc. Land Application No. 788 of 2017. The application has been preferred under Order XXII Rule 9 (2) and section 95 of the Civil

Procedure Code Act, Cap.33 [R.E 2019]. The application is supported by an affidavit affirmed by Uthmaan Madati, the applicant, setting out grounds on which prayers are sought. The applicant's application was contested by a counter affidavit of Alfred David Shanyangi, the 1st respondent.

At the hearing of the application, the applicant was represented by Mr. Halfani, learned advocate, while Swai, learned counsel advocated for the respondent, and the 2nd respondent appeared in person, unrepresented. The 2nd respondent did not object the application. By the consent of this court, the parties argued the application by way of written submissions whereas, the applicant filed his submission in chief on 3th October, 2022, and the 1st respondent filed his reply on 13th October, 2022. The applicant filed his rejoinder on 17th October, 2022. While seeking to adopt the contents of the affidavit affirmed support of the application, Mr. Alfred submission was brief and straight to the point.

He contended that the applicant is applying to set aside an abatement order of this Court delivered by Hon. Masabo, J on 22ND March. 2019 in Misc. Land Application No. 788 of 2017. He urged this court to adopt the counter affidavit to form part of his submission. The counsel submitted that Order XXII Rule 9 (2) of Civil Procedure Code Cap. 33 refers to the

suit but it applies also to the application. He submitted that this court referred the same provision and marked the Misc. Land Application No. 788 of 2017 abated. He submitted in the matter at hand where the sole applicant dies, the court has been given the power to the legal representative to represent the deceased. He submitted that the late Juma Posanyi Madati who was the applicant in Misc. Land Application No. 788 of 2017 passed away on 11th July, 2018, he added that the applicant has to show good cause why he did not apply to be a party in substitution of the deceased within 90 days as provided by the law.

It was his view that he could not apply within time because he was not appointed to administer the estate since he was appointed on 16th August, 2019. To support his submission he referred this court to sections 71 and 99 of Probate and Administration of Estate Act, paragraph 6 of the Fifth Schedule to the Magistrate Courts Act, Cap.11 and the case of **Omary Yusuph v Albert Munuo**, Civil Appeal No. 12 of 2018.

The learned counsel went on to submit that Juma Posanyi Madati was the owner of the suit property, thus, he wants the *ex parte* Judgment be set aside and Land Case No. 123 of 2013 be determined interparties. To support his submission he cited the case of **Vijay Mandal v Rajinder**

Kamar Mandal [2021] eKLR. He added that the late Juma Posanyi Madati was denied the right to be heard and was deprived his rights on Plot No. 810 Block 'E' Mbezi Beach within Dar es Salaam and the said decision was tainted with irregularities and illegalities.

On the strength of the above submission, the applicant's counsel beckoned upon this court to allow the application with costs.

Mr. Swai strongly opposed the applicant's contention. He hastened to conclude that there is no sufficient cause exists in the intended application. The learned counsel urged this court to adopt the counter affidavit sworn by Alfred David Shanyangi to form part of his submission. He submitted that the applicant in his submission cited Order XXII Rule 9 (2) of the Civil Procedure Code Cap.33. He stated that the question to ask is whether the applicant has adduced sufficient cause which prevented the applicant from continuing with the suit.

Mr. Swai spiritedly contended that there is no any sufficient cause that prevented the applicant from continuing with the suit hence the court should not set aside the abatement order. He submitted that from Order XXII Rule 9 (2) of the Civil Procedure Code Cap.33 the law gives power to the Plaintiff or the person who claims to be a legal representative of

the deceased or assignee or the receiver as the individuals who can apply to set aside abatement order.

The learned counsel went on to argue that section 3 of the Civil Procedure Code Cap.33 defines a legal representative as a person who in law represents the estate of the deceased person and includes any person who intermeddles with the estate of the deceased. It was his submission that as per the wording of section 3 of the Act, the applicant could still apply and join the suit immediately after the death of the original applicant, there was no need to wait for the formal appointment by the court. Fortifying his position Mr. Swai referred this Court to the case of **Lilian Kiame Magembe v Josephine Kiame**, PC Civil Appeal No. 169 of 2020.

He continued to argue that the applicant in his affidavit stated that the former applicant passed away on 11th July, 2016 and they informed the court on 6th September, 2016 after a lapse of 58 days. He added that the court made several adjournments to give the applicant chance to join the proceedings and on 20th March, 2019 the matter was scheduled for hearing the applicant was absent.

In his view, Mr. Swai stated that the applicant was negligent which cannot be termed as a good cause for this court to grant his application.

He stressed that the applicant the applicant's and counsel's negligence cannot warrant the grant of the application for an extension of time for the days.

With regard to the commentary in **Omary's** case, Mr. Swai submitted that the stated position is distinguishable because the person who instituted the case was not appointed as a legal representative, it was dealing with instituting a fresh case while in the case at hand there was an existing application at the court and it needed a legal representative who was supposed to join.

In conclusion, the counsel for the 1st respondent insisted that the applicant has failed to adduce sufficient cause which warrants the grant of this application he urged this Court to dismiss the application with costs.

In rejoinder, Mr. Halfan opposed the argument by Mr. Swai that the cited case of **Lilian Kiame** is distinguishable because under Order XXII Rule 3 (1) and Order XXII Rule 9 (2) of the Civil Procedure Code Cap. 33, the position of the law requires only administrators of the deceased's estate or executors duly appointed by the Court can apply. To support her assentation Mr. Halfani referred this court to the Probate and Administration of Estate Act. He maintained his contention that the

applicant has adduced sufficient reasons to set aside the abatement order. Concluding, he beckoned this Court to allow the application with costs.

I have considered the learned counsel for the respondent submission. From the outset, respondents. The ball is now in on the side of the Court. The parties' rival submissions raise one key question. This is as to *whether the application is meritorious*.

I wish to start by underscoring, first, that it is settled law that applications of this nature will only succeed upon the applicant showing reasonable or sufficient cause. This Court in Misc. Civil Application No. 788 of 2017 found that the statutory days of 90 days to substitute the legal representative lapsed hence it had no option rather than to mark the application abated. The requirement of Order XXII Rule 9 (2) of the Civil Procedure Code is clear that when the matter is ongoing

“ 9.-(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action. (2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient

cause from continuing the suit, the court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

Applying the above provision of the law in the matter at hand, it is clear that the legal representative of the deceased is required to apply to set aside an abatement order upon adducing sufficient cause. Reading Order XXII Rule 3 (1) and (2) of the Civil Procedure Code, Cap. 33 [R.E 2019] which reads together with item 16 of the First Schedule to the Law of Limitation Act which state that:-

“ Under the Civil Procedure Code to have a legal representative of a deceased party, whether in a suit or appeal, to be made a party within ninety days.”

It is clear from the wording of Order XXII Rule 3 (1) and (2) of the Civil Procedure Code that the provision applies where a deceased was a party to the suit before his death, that is to say; he passed away after instituted the suit. It is apparent that time starts to run upon the death of the original applicant and as already said hereinabove two years has elapsed since the death of Juma Posanyi Madati and no legal representation was sought within the 90 days. Therefore, in accordance with Order XXII Rule 3 (2) of the Civil Procedure Code Cap.33, the applicant was required to apply for the legal representative to be made as a party to the proceedings even before he was formally appointed by the court. And

where within the time limited by law no application is made under Order XXII Rule 3 (1) of the Civil Procedure Code Cap.33 [R.E 2019] the suit abates.

For the sake of clarity, the case of **Omary Yusuph** (supra), the issue for discussion was suing a legal representative of the deceased on behalf of the deceased in accordance to the provision of section 71 of the Probate and Administration Act Cap. 352. In my view, **Omary's** case is distinguishable from the instant case. In the case at hand the issue for discussion is based on the legal representative who was supposed to join the suit after the death of the party as per Order XXII Rule 3 (2) of the Civil Procedure Code Cap.33 [R.E 2019].

In consequence, thereto, I find that the applicants have failed to advance sufficient reasons to warrant this court to restore the Misc. Land Application No. 788 of 2017. Therefore, I proceed to dismiss the application without costs.

Order accordingly.

Dated at Dar es Salaam this date 28th October, 2022.




A.Z.MGEYEKWA

JUDGE

28.10.2022

Ruling delivered on 28th October, 2022 via video conferencing whereas both counsels were remotely present.




A.Z.MGEYEKWA
JUDGE
28.10.2022