

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 559 OF 2023

*(Arising from Bill of Costs No.127 of 2022 which originates from
Land Case No.320 of 2017)*

KCB BANK TANZANIA LIMITED.....APPLICANT

VERSUS

MARIAM OMARI ZAHORO..... 1ST RESPONDENT

HUDUMA GENNERS LIMITED 2ND REPENDENT

SADIKI RAMADHANI BWANGA..... 3RD RESPONDENT

MEM AUCTIONERS & GENERAL

BROCKERS LTD..... 4TH RESPONDENT

HASSAN ALLY MAWA.....5TH RESPONDENT

RULING

25th & 30th October, 2023

L. HEMED, J.

In Land Case No.320 of 2017, **MARIAM OMARI ZAHORO** (As Administratrix of the Estate of the Late OMARI ZAHORO) emerged the victorious against **KCB BANK TANZANIA LIMITED, HUDUMA GINNERS LIMITED, SADIKI RAMADHANI BWANGA, MEM AUCTIONEERS & GENERAL BROKERS LIMITED** and **HASSAN ALLY MAWA**. The defendants in the said case were condemned to costs of the suit.

Immediately, the Decree holder filed Bill of Costs No. 127 of 2022 claiming a total of Tshs. 22, 264,500/= as costs incurred in prosecuting Land Case No.320 of 2017. On 10th May, 2023, the Court, Hon. A.S. Chugulu –Taxing Officer, delivered Ruling awarding Tshs. 9,135,000/=.

It appears that **KCB BANK TANZANIA LIMITED**, was dissatisfied with the ruling. The fact that time had already been lapsed, it

had to apply for extension of time, the one at hand which is still pending in this court. While responding to the instantaneous application, the 1st Respondent, **MARIAM OMARI ZAHORO** through her advocate raised a preliminary objection on the point of law to wit-

"1. That, this Application is incompetent for offending the law by suing/impleading the 1st Respondent in her personal capacity rather than an administratrix."

The preliminary objection was argued *viva voce*. Mr. Elisa Msuya, learned advocate represented the applicant while the 1st Respondent enjoyed the service of Mr. Frank Chungu, learned Advocate. I must state at the outset that both learned counsel are at one that the 1st Respondent in the instant Application has been impleaded at personal capacity and not as administratrix of the estate. They are contesting on the consequences thereof. The counsel for the 1st respondent is of the view that the defect is fatal to warrant the application to be struck out, while the applicant's advocate is of the opinion that the defect is not fatal.

Mr. Chungu submitted that the consequence of suing a wrong party renders the matter incompetent and liable to be struck out. To bolster his argument, he cited the decision of the Court of Appeal of Tanzania in **Malietha Gabo vs. Adam Mtengu**, Civil Appeal No.485 of 2022 where it was held that making an administrator of estate a party to a matter in his personal capacity renders the matter incompetent. He prayed the matter to be struck out with costs.

In reply thereof, Mr. Msuya distinguished the case of **Malietha Gabo** (supra) that is irrelevant to the matter at hand as in the said case the appellant had instituted a case in his personal capacity while she was an administratrix of the deceased's estate. He was of the view that the defect in the instant case is curable because the application has not been heard.

It was also contended by the counsel for the applicant that, in view of the decision in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors** (1969)EA 696, the objection raised by the 1st respondent is not on point of law and thus it should not be considered. He insisted on the curability of the defect by referring to the decision of the Court of Appeal of Tanzania in **Christina Mrimi vs Cocacola Kwanza Bottlers Ltd**, Civil

Application No.113 of 2011, where it was observed that misspelling in the name of a party is not a fatal defect. The learned counsel also cited the cases of **CRDB Bank Plc (Formerly CRDB (1996) Ltd) vs George Mathew Kilindu**, Civil Appeal No.110 of 2017 and **Inter-Consult Ltd vs Mrs. Nora Kassanga & Another**, Civil Appeal No. 79 of 2015. In the said two decision the Court was of the view that citing new names of a party without the leave or order of the court is a fatal irregularity which affect the competence of the entire matter before the court.

In his brief rejoinder, Mr. Chungu reiterated his submissions in chief and stated further that the case of CRDB Bank (supra) cited by the counsel for the applicant is relevant to this matter as it relates to the effect where there is a completely change of a name of a party. He was of the view that, the wrong person referred in the said case is the same as in this case. He insisted for the application to be struck out.

Having heard the oral submissions and examined the records pertaining to this matter, the question is whether the failure to implead the 1st respondent as administratrix is fatal. As aforesaid, this application arises from Bill of Costs No. 127 of 2022 and Land Case No.320 of 2017. In the

said previous matters in which this application is rooted from, parties are Mariam Zahoro (as administratrix of the estate of the late Omari Zahoro) (the decree holder) against KCB Bank Limited, Huduma Ginnors Limited, Sadiki Ramadhani Bwanga, MEM Auctioneers & General Brokers Limited and Hassan Ally Mawa (the Judgment Debtors). **MARIAM OMARI ZAHOHORO**, the 1st respondent herein was never a party to the two original proceedings.

Of course, the instant application seeks for extension of time within which the applicant can lodge Refence to challenge the Ruling in Bill of Costs No.127 of 2022, worse still, the 1st respondent is not a party to the said ruling. The counsel for the Applicant argued that the defect is curable referring to the decisions of the Court of Appeal of Tanzania in **Christina Mrimi vs Coca Cola Kwanza Bottlers Ltd** (supra) and **Inter-Consult Limited vs Mrs. Nora Kassanga & Another** (supra). I have gone through the said decisions and found that they are distinguishable from the instant application because in the said two cases the errors involved the misspelling of the names of parties to the matter. The Court found the errors minor and not fatal. In the instant case, the discrepancy pointed out is not misspelling of the name of a party to the matter but completely

change of personality of a party done without the leave of the court.

Names of parties is central to their identification in litigation. If one changes his/her name, he/she becomes a different person, altogether. In the instant case, **Mariam Omari Zahoro** and **Mariam Omari Zahoro as Administratrix of the estate of the late Omari Zahoro** are two different persons with distinct legal capacity. The fact that Mariam Omari Zahoro was never a party to the impugned ruling, then the application at hand becomes incompetent.

I tend to take the position held by the Court of Appeal in **CRDB Bank Plc (Formerly CRDB (1996) LTD) vs George Mathew Kilindu** (supra) that total change in names of parties is an incurable discrepancy that renders the matter before the court defective. Additionally, the counsel for the applicant conceded that the 1st respondent has been impleaded in her personal capacity, he prayed to rectify the error by amendment. Principally, once a preliminary objection has been raised, a prayer to amend pleadings or legal documents, which is/are subject of the preliminary objection, cannot be entertained, as by so doing will amount to circumventing the preliminary objection. On top of that, if one opts to

concede to the preliminary objection, it is presumed that, such person is prepared for the consequences thereof. From the foregoing, I find that the room to amend the application to rectify the defect was closed on the date the court received the Notice of preliminary objection.

In the upshot, I find the application is incurably defective. It deserves the necessary treatment. The entire application is hereby struck out with costs. It is so ordered.

DATED at DAR ES SALAAM this 30th October, 2023.




L. HEMED
JUDGE