

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM  
MISC. LAND APPLICATION NO. 3246 OF 2024**

**JOHN MALISA** (Administrator of the Estate of Elias Malisa)..... **APPLICANT**

***VERSUS***

**HYASINTA PAULO OKAMA** ..... **1<sup>ST</sup> RESPONDENT**

**THE REGISTRAR OF TITLES** ..... **2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL OF THE**

**UNITED REPUBLIC OF TANZANIA** ..... **3<sup>RD</sup> RESPONDENT**

**RULING**

**31/05/2024 & 28/06/2024**

**GWAE, J**

The applicant, John Malisa and the 1<sup>st</sup> respondent, Hyasinta Paul Okama are joint administrators of the estate of the late Professor Elias Paulsen Malisa (hereinafter the deceased) who was the father to the applicant and the 1<sup>st</sup> respondent's husband. On 20<sup>th</sup> November 2018, the applicant alone filed an inventory to the Court regarding distribution of the estate of the deceased including the property registered as Plot No. 396 Block "B" Mikocheni, Dar es salaam registered in the name of "Elias Jeremiah Malisa".

The applicant sometimes on 19<sup>th</sup> August 2021 applied for being registered as a legal representative of the Right of Occupancy of the Plot No. 396 Block "B" Mikocheni, Dar es salaam City with CT No. 35080. However, the Registrar of Titles now the 2<sup>nd</sup> respondent declined the applicant's request via his letter dated 26<sup>th</sup> October 2021. The reasons for his refusal were; **one**, that, both administrators must apply for the sought registration of the property in the legal representative capacity. **Two**, that, the name of the registered owner (Elias Paulsen Malisa) and the one stated in the letters of administration (Elias Jeremia Malisa) are names of two different persons and **three**, that, the 1<sup>st</sup> respondent had entered a caveat. Thereafter, the applicant issued notice of intention to sue to the 2<sup>nd</sup> respondent dated 30<sup>th</sup> August 2023 and the same was received on 1<sup>st</sup> September 2023.

Aggrieved by acts of both the 1<sup>st</sup> and 2<sup>nd</sup> respondent herein, the applicant has brought this application under section 78 (8) of the Land Registration Act, Cap, 334 Revised Edition, 2019 and section 2 (3) of the Judicature and Application of Laws Act, Cap 358 Revised Edition, 2019 and any other enabling provision of the law. He is thus praying for the following reliefs;

1. That this honourable court be pleased to grant an order to the 2<sup>nd</sup> Respondent to remove the caveat entered by the 1<sup>st</sup>

respondent against the property registered as Plot No. 396 CT 35080 Block B, Mikocheni, Dar es Salaam, registered in the name of Elias Jeremiah Malisa

2. That, the 1<sup>st</sup> Respondent has no interest to safeguard in respect of Plot No. 396, CT 35080 Block "B" Mikocheni, Dar es Salaam after the decision of the High Court, in Misc. Civil Application No. 219 of 2019, Hon Kulita, Judge.

The application was taken at the instance of the applicant, and it is supported by the applicant's sworn affidavit. On the other hand, the 1<sup>st</sup> respondent contested the application by filing her counter affidavit and on the 13<sup>th</sup> May 2024, he filed a notice of preliminary objection on the following grounds:-

1. As far as the Applicant is not the registered owner of the Title No. 35080 against which the caveat is registered, he has no locus to make the above Application.
2. This Land Court has no jurisdiction to pronounce on any issue regarding the probate and administration of the estate of the late Elias Malisa.
3. In so far as the Applicant is seeking to interfere with the powers of the Registrar under section 67 of the Land Registration Act [Cap 334, R.E 2019] the application herein is misconceived and incompetent.
4. In so far as there is pending in the Tanzania Court of Appeal Civil Reference No. 7 of 2023 a copy of which is attached for

this Court to take notice this Court is precluded by the rule of sub-judice from adjudicating this Application on the basis of the decision the of Kulita J.

On 16<sup>th</sup> May 2024, when the matter was called on for hearing, Mr. Moses Gumbah and Mr. Sylvester Eusebu Shayo, the learned advocates represented the applicant and 1<sup>st</sup> respondent respectively whilst Ms. Lightness Msuya, the learned state attorney appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> respondent. Nonetheless, the 1<sup>st</sup> respondent's Preliminary objection and application were simultaneously argued.

It is common practice of our courts that, whenever the preliminary objection is canvassed, the courts will have to determine it first before embarking into hearing and determination of the matter on merit. Due to the reasons that will be shortly demonstrated herein under, I will begin with the 4<sup>th</sup> point of objection herein.

In support with the 4<sup>th</sup> point of objection, the counsel for the 1<sup>st</sup> respondent submitted that, this court may take a judicial notice that, the decision of the Court of Appeal of Tanzania (**Hon. Sehel, JA**) in Civil Application No. 167/01 of 2021, did not conclude the parties' matter. He went on arguing that since there is now a Civil Reference No. 7 of 2023 pending before the Court of Appeal. He thus urged this court to take

Judicial Notice of the said Civil Reference whose copy is attached to the Notice of the preliminary objection.

In reply, thereof, the counsel for the applicant submitted that, the respondent's objection on this particular point of law is nothing but an afterthought because the 1<sup>st</sup> respondent in her counter affidavit averred nothing about pendency of Civil Reference in any court. He stated further that, if at all the 1<sup>st</sup> respondent was depending on the Civil Reference pending before the Court of Appeal, she should have expressed in the counter affidavit filed. He submitted that, the objection is an afterthought and misleading.

Having carefully gone through the rival submissions of both parties' advocates, the issue for the court's determination is, whether this court has jurisdiction to determine the application or not.

I have noted that on 15<sup>th</sup> May 2023, the first respondent lodged in the Court of Appeal Reference No. 7 of 2023 against the applicant as submitted by the 1<sup>st</sup> respondent's counsel. In the said application, the 1<sup>st</sup> respondent is aggrieved by the ruling of the single Justice of the Court of Appeal dated 10<sup>th</sup> day of May 2023, in Civil Application No. 167/01 of 2021. Principally, the applicant in his submission did not object the

alleged existence of the said civil reference in the Court of Appeal of Tanzania.

It is a cardinal principle of law that, in the Court of Appeal, a proceeding commences by either lodging an appeal or an application. In **Pendo Flugence Nkwenge vs. Dr. Wahida Shangali**, Misc. Land Application No. 51 of 2020, it was stated that;-

*"While appeals in the Court of Appeal are initiated by Notice of Appeal, the applications are initiated by a Notice of Motion. "*

In the present parties' matter, it is plainly clear that, before the Court of Appeal, there is a notice of motion duly filed by the 1<sup>st</sup> respondent, which was followed by the said application for reference. It is a settled principle that, once the proceedings are initiated in the Court of Appeal, this court ceases to have jurisdiction. In **Farida F. Mbaraka & Another vs. Domina Kagaruki & Another**, Misc. Land Application No. 683 of 2023, it was observed that:-

*"I am at one with the findings and position taken by this court in **William Mugunisi** (supra) that once proceedings have commenced in the Court of Appeal, the High Court ceases to apply the Civil Procedure Code.....The applicants through Notice of motion commenced Civil Application No. 705/17 of 2023 seeking to review the decision of the Court of Appeal in Civil*

*Appeal No, 293 of 2022. The commencement and pending proceedings in the Court of Appeal makes this Court powerless in evoking the provision of the Civil Procedure Code (supra).*

See also **AERO Helicopter Ltd vs. FN Jansen** (1990) TLR B142, it was observed that:-

As accentuated in the above-cited judicial precedents and taking into account that, the applicant's notable desire for applying to the 2<sup>nd</sup> respondent to have his name registered as a personal representative in order to eventually distribute the deceased's estate as per this Court ruling (**Kulita, J**), I therefore find the court to lacked jurisdiction. I am of that view for the reason that, immediately after the respondent's act filing of the Notice of Motion to the Court of Appeal and her subsequent application for reference; render the court powerless to hear the same parties over the same subject matter.

Similarly, this court being the Division of the High Court dealing with land related matters should not have power to adjudicate the issue on Probate and Administration Cause especially to enforce the order issued by this court (**Kulita, J**) on the distribution of the estate of the deceased, subject of the 1<sup>st</sup> respondent's reference to the Court of Appeal.

I have also observed that, even if this court would have been clothed with jurisdiction to entertain the applicant's application under consideration, yet it was not proper for the applicant to join the 2<sup>nd</sup> respondent in this application. The reason being that, if the applicant was aggrieved by a decision or order or an act of the Registrar of Titles vide his letter of 26<sup>th</sup> day of October 2021, he would have a remedy of appealing to this Court against the Registrar in terms of section 102 of the Land Registration Act, Cap 334, Revised Edition, 2019. Section 102 (1) of the Act reads;

*"102.(1) Any person aggrieved by a decision, order or act of the Registrar may appeal to the High Court within three months from the date of such decision, order or act."*

Had it been no pendency if the parties' main case that is Probate and Administration Cause No. 57 of 2012 before the High Court, Dar es salaam sub-registry, the applicant would have challenged the decision of the Registrar of Titles to this Court by way of an appeal. However, as there is Probate and Administration Cause has not been closed and the fact that, his endeavour to have his name registered as a legal representative



In the upshot, I find the application to be incompetent before the Court. As the result, it is hereby struck out. Given the nature of the parties' relationship, I do not make orders for costs.

**DATED at DAR ESALAAM this 28<sup>th</sup> June 2024**



  
**M. R. GWAE**  
**JUDGE**