IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: LILA, J.A., KITUSI, J.A. And FIKIRINI, J.A.)

CIVIL REFERNCE NO. 8 OF 2021

MWANAISHA KAPERA (Administratrix of the KAPERA KATUMBA).....APPLICANT

VERSUS

SALIM SULEIMAN HAMDU.....RESPONDENT

(Application for Reference from the Ruling of a Single Justice of the High Court of Tanzania at Tanga)

(Levira, JA.)

dated 25th day of September, 2020

in

Civil Application No. 304/12 of 2019

.....

RULING OF THE COURT

3rd May, & 1st June, 2023

LILA, J.A.:

Reversal of two orders of the Single Justice in Civil Application No. 304/12 of 2019 is the kernel of the applicant's prayers in this reference application. The orders are those refusing to grant a prayer for substitution of the name of the administrator of the estate from Mwanaisha Kapera, the applicant herein, to that of Hassan Kapera Mtumba and at the same time replace the name of the deponent of the supporting affidavit from that of Mwanaisha Kapera who claims to have

affirmed as administrator of the estate of late Hassan Kapera Mtumba, the new administrator. The applicant contends that the refusal amounted to abdication of duty. The application is preferred by way of a letter to the Registrar in terms of Rule 62(1)(b) of the Court of Appeal Rules, 2009 (the Rules).

The letter to the Registrar initiating the reference and the ruling of the learned Single Justice, present to us the following as the essence of this reference. The applicant was aggrieved by the decision of the High Court (Aboud, J.) in Miscellaneous Land Application No. 80 of 2016 and wished to appeal against it. In her capacity as administrator of the estate of Kapera Katumba she, in Civil Application No. 304/12 of 2019, applied to be granted extension of time within which to file an application for leave to appeal to the Court. At the hearing of the application the applicant was represented by Mr. Daimu Khalfani and Mr. Mashaka Ngole both learned advocates but it was Mr. Daimu who, in the course, took the floor and, in terms of Rule 4(2)(a) and 48(3)(a) of the Rules, he is recorded to have advanced these prayers: -

> *"...Mr. Khalfani prayed to substitute the name of the applicant to read* ***Hassan Kapera Katumba*** *instead of Mwanaisha Kapera for him to continue to prosecute the application on behalf of the estate of Kapera Mtumba. He also prayed for the*

affidavit of Mwanaisha Kapera (the applicant herein) to remain intact because the information contained therein is not personal, but was given for the same estate. According to Mr. Khalfani, names in affidavits in probate matters do not change when similar situation occurs, the Court acts on them the way they are. He cited a decision of the Court in a matter where the present parties were involved; the case of ***Hassan Kapera Mtumba (Administrator of the estate of the late Kapera mtumba) v. Salim Suleiman Hamdu****, Civil Application No. 505/12 of 2017."*

Mr. Obediodom Chanjarika, learned advocate acting for the respondent, took no issue with the prayers sought by Mr. Daimu and he is recorded to have had registered his non-objection.

Notwithstanding Mr. Chanjarika's non-objection, the learned Single Justice considered the two prayers and the decision cited to buttress the prayers. Drawing a distinction between the case before her and the cited one, she observed that, in the cited decision, the prayer to substitute the name of the applicant was made before the full Court not before the Single Justice, the parties in the two cases are different and in the cited case it was the newly appointed administrator who was a party as opposed to the parties in the application before her and, lastly, that in

the cited case, the application was not made in the course of hearing. She accordingly declined to deal with the prayers which were beyond what was placed before. The prayer for substitution of the name of the administrator was thereby refused.

As regards the issue whether the affidavit by Mwanaisha Kapera should remain intact, the learned Single Justice held that the same was sworn in her personal knowledge and not on behalf of Hassan Kapera Mtumba hence, in law, the names are not replaceable. Ultimately, Mr. Daimu's prayers were found untenable and dismissed but he was directed to follow the proper procedure to attain his desire.

At the hearing of the application before us the parties had the same representations as was before the Single Justice. Written submission in support of the reference was duly filed by the applicant whereas there was none from the respondent.

After adopting the contents of the letter applying for reference and the written submission, Mr. Ngole left it for the Court to determine the application. We shall refer to the lodged written submission in the course of the ruling as and when necessary, basically because it substantially recites the background of the matter as narrated above and also touches on the powers of the learned Single Justice allegedly abdicated.

Before the Court, Mr. Chanjarika's response was rather strange. If we may be allowed to say so, he blew cold and hot at the same time. As was the case before the learned Single Justice, at first, he did not oppose the substitution of the applicant's name with that of Hassan Kapera Mtumba who was appointed as administrator of the estate of Kapera Mtumba following the annulment of her letters of administration. But, later in his submission, he opposed the application on the ground that not being an administratrix, the applicant could not lodge the present application in that capacity. Elaborating, he submitted that the annulment occurred on 7/3/2018 and the present application was lodged on 9/7/2019. It was his argument that the anomaly rendered the application incompetent liable to be struck out. In the event the Court is to agree with him and strike out the application, he pressed to be paid costs.

In response to the issue raised by Mr. Chanjarika, Mr. Ngole had it that the appellant could not avoid presenting herself as an administratrix in the present application because the application before the learned Single Justice was a *second bite* hence the present application, being a continuation of the application, which was before the Single Justice, the names of the parties could not change. On that score, he implored the Court to allow the application.

Mr. Chanjarika's stand point not being certain and reliable though, we take note that his point of contention was that the application was lodged by Mwanaisha Kapera in the capacity as administrator of the estate of the late Kapera Mtumba which she did not have at the time of lodging the application. Along with that point, we shall consider the jurisdictional issue of the learned Single Justice raised in both written submission and orally before us. Lastly, we shall consider the issue whether the applicant's name in the affidavit sworn by the applicant supporting the application for extension of time can validly be replaced by the name of Hassan Kapera Mtumba. We consider these issues to be decisive in this reference.

We shall begin with the powers of the learned Single Justice. The question before us is whether the learned Single Justice was right to decline to consider and grant the prayer to replace the name of the applicant with that of Hassan Kapera Mtumba. In dealing with this issue, we would start by stating that the mandate of a judge to deal with a certain matter, as is the case with jurisdiction, is a creature of statute. In this case, as rightly stated in the written submission, the relevant provision is Rule 60(1)(2) of the Rules. It provides: -

> *"60.-(1) Every application other than an application included in sub rule (2), shall be heard by a single Justice*

save that application may be adjourned by the Justice for determination by the Court.

(2) The provision of sub-rule (1) shall not apply to –

(a) an application for leave to appeal: or

(b) an application for a stay of execution; or

(c) an application to strike out a notice of appeal or an appeal: or

(d) an application made as ancillary to an application under paragraph (a) or (b) or made informally in the course of hearing."

In our interpretation of this provision, we think it means that a Single Justice is precluded from hearing and determination of applications falling under subsection (2) of Rule 60 of the Rules which are a preserve of the Court comprising a panel of justices of the Court. As rightly observed by the learned Single Justice and not disputed by the parties' counsel, the prayer by Mr. Daimu was made in the course of hearing and was for substitution of the name of the administrator. A prayer to substitute the name of an administrator is not among the applications stipulated under Rule 60(2) of the Rules which does not fall within the realm of the mandate of the Single Justice to hear and determine. The more so, the application before the learned Single Justice was for extension of time within which to file an application for leave to appeal which, in terms of the provisions of Rule 60(2) above,

was neither one of the applications which are not within her mandate to hear and determine nor ancillary to any of them. As was rightly argued by Mr. Daimu, his prayer to substitute the name of an administrator is not among the applications or application ancillary to any of the applications stipulated under Rule 60(2) of the Rules which the learned Single Judge is barred by the Rules from adjudicating on them. In the circumstances, we hold that the Single Justice wrongly declined to determine the prayer by Mr. Daimu. After all, paragraph 2(a)(b)(c) of the Fifth Schedule to the Magistrates' Court Act which provides for the powers of primary courts in administration cases and sections 48, 49 and 82 of the Probate and Administration of Estates Act for District and High Court, permit grant, revocation and replacement of administrators in the event of death or annulment of letters of administration.

We, however, acknowledge the fact that the Rules do not provide for replacement of parties in applications even in cases where a party to it dies as is the case with appeals in which Rule 105 of the Rules permits a duly appointed legal representative, who includes an administrator, to apply to be joined in an appeal in lieu of the deceased party to the case at any stage of the proceedings. Even this Rule deals with replacement of a deceased party by a legal representative not replacement of a legal representative upon the former's appointment being annulled or upon

death. We entertain no doubt that the Rule was designed to ensure that the progress of the case is not stalled for reason of absence of the real party to the case for a reason that he is dead. In the same spirit, we hold the view that Rule 105 of the Rules applies even in situations where replacement of a legal representative or administrator is at issue either due to death or annulment of letters of administration. Borrowing leaf from this rule, we are convinced that a Single Justice exercising her mandate under Rule 60(1)(2) of the Rule can entertain applications seeking replacement of a deceased party to the applications by another dully appointed administrator or legal representative. And, we would add, for the interest of justice and speedy disposal of applications, such application may be made orally in the course of or during the hearing of the application as Mr. Daimu did. That said, we agree that the prayers by Mr. Daimu were well within the powers of the learned Single Justice for adjudication and her failure to consider it was an abdication of her duty. We accordingly uphold the complaint and reverse that order.

We turn to the second issue on the prayer to change the name in the applicant's affidavit to the name of Hassan Kapera Mtumba. The argument by Messrs Daimu and Ngole is principally that since the applicant swore that affidavit in her capacity as administrator and

according to the facts that became known to her in that capacity replacement of her name would have no effect on the affidavit as Mr. Hassan Kapera Mtumba, the successor administrator, would be privy to the same knowledge of the facts. We find this argument strange in the legal parlance. To our minds, the idea of swearing an affidavit is to commit oneself on the truthfulness of the facts deposed and to show readiness to be held responsible for the consequences arising from the facts averred in it. The definition of an affidavit, in our view, abundantly makes our point clear. We begin with the Black's Law, 8th Edition at page 62 where it defines an affidavit as: -

> *"A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public."*

Next is Academic **LEGAL DICTIONARY** by S. I. Silwan and U. Narang, 22ND Edition, 2012 at page 16 where an affidavit is defined to mean: -

> *"A written statement made or taken under oath before an officer of the court or a notary public."*

And, in https://legaldictionary.net/affidavit, the term is defined thus: -

> *"An affidavit is a voluntary, sworn statement made under oath, used as verification for various purposes. The statement is witnessed and signed by a notary public or other law official authorized to do so. Once signed, the document is legally binding and the person signing is subject to being charged with perjury if the affidavit contains false information."*

It will be noted that for an affidavit to be worth it, it should be made by the one deposing who should appear before the officer authorized to take the statement or a notary public. Depositions should be made before specified persons. Facts deposed in an affidavit are declarations by which a person tells the truth in relation to his or her knowledge of the matter under examination to which, if he lies, may be prosecuted for the crime of perjury. The fact remains therefore, as rightly held by the learned Single Justice, that an affidavit is personal to the maker and cannot be exchanged by a mere change of name as Mr. Daimu and Mr. Ngole suggest. The proposition is accordingly rejected and we see no reason to interfere with decision of the Single Justice. We would however quickly add that the practice is that a successor legal representative takes over the matter at the stage it has reached and acts on the documents and evidence earlier presented unless he finds it

necessary to amend the documents lodged by the predecessor. In the premises, Hassan Kapera Mtumba, upon replacing Mwanaisha Kapera, has to proceed with the case at the stage reached without a need to change names in the documents lodged by the applicant. So as to let the record be clear, for documents to be lodged thereafter, there must be averments indicating the change of the legal representative. This is in line with the guidance the Court gave in **Ramadhani Omari Mbuguni vs Ally Ramadhani and Asia Ramadhani**, Civil Application No. 173/12 of 2021 (unreported) that: -

> *"Letters of administration being an instrument through which the applicant traces his standing to commence the proceedings, was in our view an essential ingredient of the application in whose absence the Court cannot have any factual basis to imply the asserted representative capacity. It is now a settled law that, where, like the instant case, a party commences proceedings in representative capacity, the instrument constituting the appointment must be pleaded and attached. Failure to plead and attach the instrument is a fatal irregularity which renders the proceedings incompetent for want of the necessary standing. See for instance,* ***Ally Ahmed*** *Bauda (Administrator of the Estate of the Late Amina Hossein Senyange)* ***vs Raza***

Hussein Ladha Damji and Others, *Civil Application No. 525/17 of 2016 (unreported)"*

We lastly have to answer the question whether or not the application is competent for being preferred by Mwanaisha Kapera as administrator of the estate of the late Kapera Mtumba. The parties were in agreement that the annulment of Mwanaisha Kapera as administrator occurred on 7/3/2018 and the present application was lodged on 9/7/2019. It is trite that where a decision is not reversed or altered by a higher court, it remains intact (See **Serikali ya Mapinduzi ya Zanzibar v. Farid Abdallah** [1998] T.L.R. 355 and **Goyal v. Goyaj & Others** [2009] 2 EA 143. In the instant application the decision of the Primary Court to revoke the applicant's letters of administration was not reversed hence her capacity as administratrix ceased and therefore she could not act in that capacity any more including instituting and defending a matter in court.

Definitely, Mwanaisha Kapera had ceased to be an administrator at the time she lodged the present application. Counsel for applicant were insistent that it could not be proper to change the names of the parties in the application before the Single Justice as it was a *second bite* hence a continuation of the application that was denied by the High Court. They are not right. As it was Hassan Kapera Mtumba who had already

been appointed administrator of the estate of the late Kapera Mtumba replacing Mwanaisha Kapera, the application before the Single Justice and the present one ought to have been preferred in his name as applicant and the reason for the change of name be pleaded in the affidavit supporting the application and the documents justifying so be annexed to the affidavit. That could, in law, be sufficient. Without demur, we agree with Mr. Chanjarika that the present application and that before the learned Single Justice was wrongly preferred in the name of applicant in her former capacity. That was fatal rendering the application incompetent for want of *locus standi.*

The reference being successful in the first issue, we would have allowed it and ordered the record in Civil Application No. 304/12 of 2019 be amended by replacing the name of the applicant with that of Hassan Kapera Mtumba as administrator of the estate of Kapera Mtumba, but for the reason that it was lodged by Mwanaisha Kapera purporting to be an administrator of the estate of the late Kapera Mtumba while she was not and the prayer of substituting the name of the applicant with that of Hassan Kapera Mtumba in the affidavit in support of the application before the Single Justice not being permissible, the application is incompetent and it should suffer the usual wrath of being struck out. In principle, it was Hassan Kapera Mtumba as administrator of the estate of

the late Kapera Mtumba who ought to have preferred the application before the Single Justice and the present one. As was directed by the learned Single Justice, Messrs Daimu and Ngole, if they still wish, should abide to the law for them to succeed.

For the reasons stated above, the application is struck out with costs.

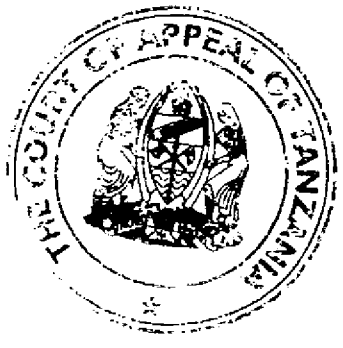
DATED at **DAR ES SALAAM** this 1st day of June, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling is delivered this 1st day of June, 2023 in the presence of the Mr. Mussa Daffa, learned counsel for the Applicant also holding brief for Mr. Obediodom Chanjarika, learned counsel for the respondent is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL