

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND REVIEW NO. 651 OF 2020**

*(Originating from the decision of Land case No.67 of 2004 dated 27/05/2014*

*High Court of Tanzania delivered on 11/06/2014)*

**KHAMIS ALLY KHAMIS ..... APPLICANT**

**VERSUS**

**SAIDI A. MBAGA ..... 1<sup>ST</sup> RESPONDENT**

**VERONICA KIBWANA as the Administratrix of the Estate**

**Of the late JACOB KIBWANA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

Date of last order: 24.08.2021

Date of Ruling: 30.08.2021

**A.Z.MGEYEKWA, J**

The Applicant was aggrieved with the whole decision of this court in Land Case No. 67 of 2004 before Hon. Mwaimu Judge (as he then was) dated 27<sup>th</sup> May, 2014. On 16<sup>th</sup> November, 2011 the applicant lodged the instant application for review before this court. The application is brought

under sections 78, 95, 96 and 97, Order XL Rule 1 (a) , (b) and 2 Rule 2 and 3 of the Civil Procedure Code, Cap. 33 [R.E. 2019] and sections 2 and 5 on PART II of The Application of Laws Act, Cap. 358 [R.E. 2019].

When the application was called for hearing on 29<sup>th</sup> July, 2021, the applicant appeared in person, unrepresented and the respondent enjoyed the service of Ms. Melania Mashauri, learned counsel. By the court order, the parties argued the appeal by way of written submissions. The appellant filed his submission in chief on 12<sup>th</sup> August, 2021. The respondent's Advocate filed a reply on 19<sup>th</sup> August, 2021 and the appellant's Advocate filed a rejoinder on 24<sup>th</sup> August, 2021. The appellant has come to this Court for review of the decision in Land Case No. 67 of 2004. He raised ten grounds of review as follows:-

- 1. That the Honorable court mistakenly and apparently erred in law and facts on the face of records, proceedings, and pleadings and indeed misdirected in its decision in proceeding to entertain and grant orders with wrong and defective parties or wrong names of parties in the citation for adjudication.*
- 2. The Honorable court mistakenly and apparently on the face of records erred in law and facts in delivering a fatal and defective decision with two defective decisions with two different dates and*

*titles contrary to the law and legal practice. Alternatively, or in other words, the honorable Court mistakenly erred in law and facts on the face of records in not discovering that the decision or Judgment and decree have two different dates and separate titles dated 27/05/2014 and 11/06/2014.*

- 3. The Honorable court mistakenly and apparently of the face of records erred in law and facts in proceedings with the case and composing a judgment or decision without discovering that the alleged Attorney PW1 SEBASTIAN JACOB KIBWANA was not made or joined as a party to sue or stand on behalf of the plaintiffs (respondents) and no application was made or granted to that effect contrary to the law requirements.*
- 4. The Honorable Court mistakenly and apparently erred in law and facts in proceeding with the case without amendments and delivering a fatal decision incapable of appeal and implementation in law.*
- 5. The Honorable court mistakenly and apparently and apparently on face of records erred in law and facts in not discovering that the plaintiffs did not testify in court personally or did not prosecute their case and consequently they did not have locus standi or cause of action to sue were not entitled to any relief of the claim.*

6. *The honorable court mistakenly and apparently on the face of records erred in law and facts in not discovering that the decision entered or delivered is fatal and incurably null and avoid by virtue of the nature of dispute and omission to be sued and include MAWAZO V. CHAMWITWI or the seller of the property in dispute as a co-defendant in a suit for recovery of ownership.*
7. *The Honorable Court apparently on the face of records and proceedings erred in law and facts in deregistering plot No.459 Jangwani Beach and declaring the applicant (defendant) to be a trespasser to plot No. 345 Jangwani Beach incapable of execution or operating in a vacuum.*
8. *The honorable court mistakenly and erred in law and facts and indeed misdirected in its decision in proceeding to grant illegal orders with a dead person and wrong person without the amendment of pleadings or inclusion of Attorney and administrator. Alternatively, the honorable Court erred in law and facts in not discovering that the suit abated in law due to time limitation and remedy was dismissal.*
9. *The Honorable Court mistakenly and erred in law and facts in not discovering that the decision in Land Case No. 67 of 2004 is*

*ambiguous, defective, contradictory, unlawful, and incapable of appeal and implementation in law by virtue of deregistration, wrong parties, and fatality of the decision and citation of parties.*

*10. The Honorable Court mistakenly erred in law and facts in determining Land Cas No.67 of 2004 in total disregard or forgetfulness of the law and procedure applicable of the law and procedure applicable in legal practice.*

In his submission, the applicant pointed out that Land Case No.67 of 2004 contain fatal defects on the names of the parties, as appeared in the judgment. The first plaintiff is SAIDI A. MBAGA and the second plaintiff is JACOB KIBWANA. It was his view that Jacob Kibwana passed away on 14<sup>th</sup> June, 2008, however, his name was not substituted to that of his administrator until to the finality of the case which was delivered on 27<sup>th</sup> May, 2014 contrary to the law. He added that the deceased was incapable of suing the respondent.

It was his view that he deceased name was not required not appeared in the Judgment. The applicant further contended that the dates appearing in the Judgment dated 27<sup>th</sup> May, 2014 is different from the date appearing in the Decree. He added that the Decree is dated 14<sup>th</sup> June, 2014. The applicant valiantly submitted that the difference of dates is a

fatal defective since the aggrieved party cannot file an appeal before the Court of Appeal without correcting the same.

The respondent did not end there, he submitted that the administrator of the deceased Jacob Kibwana was appointed to take over from where he had ended. He went on to state that in accordance to section 3 of the Law of Limitation Act, Cap. 89 [R.E. 2019], the legal representative is required to be appointed to take over from the deceased within 90 days. It was his view that failure to appoint the administrator means the matter was abated, thus, Veronica Kibwana was not legally joined in Land Case No.67 of 2004 as an Administratrix of the estate of the deceased.

He further stated that also Sebastian Jacob did not apply for joining the case as an Attorney for both plaintiffs who did not come to testify in this court. Insisting, the applicant argued that the plaintiffs abandoned their case. To bolster his position he referred this court to the case of **Kulwa Daudi v Rebeca Spephene** (1985) T.L.R 116. He went on to submit that Order 1 Rule 3 and 10 of the Civil Procedure Code, Cap. 33 [R.E. 2019] was violated for non-joinder of parties in which buyer and seller were to be joined. It was his view that one Mawazo V. Chamwitwi was required to join the case failure to that lead to the nullity of the entire

proceedings and Judgment of the Court. Fortifying his submission he cited the case of **Juma B. Kadala v Laurent Mkande** (1983) TLR 103.

On the strength of the above submission, he beckoned upon this court to set aside the decision of this court for the reason that the law was violated.

In response, Ms. Chihoma, the learned counsel for the respondent contended and disagreed with the applicant on the 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, and 10<sup>th</sup> grounds for review on the basis that the mentioned grounds should not be regarded in this application as they contain issues of evidence that have to be determined in appeal. The learned counsel submitted that the applicant is trying to mislead this court by raising grounds of appeal as if this court is an appellate court to decide on its own decision. Shooting from the hip, Ms. Chihoma contended that the applicant is trying to abuse court processes.

The learned counsel for the respondent conceded to the 1<sup>st</sup> and 2<sup>nd</sup> grounds for review by admitting the defects on the Judgment in Land Case No.67 of 2004. For ease of reference, I find it apposite to reproduce the excerpt as hereunder:-

*"We are of the belief that the name of the second Respondent herein who was the 2<sup>nd</sup> plaintiff in the original suit, ought to have been substituted with the name of his Administratrix Veronica Kibwana".*

Ms. Chihoma continued to submit that the records reveal that on 17<sup>th</sup> June, 2010 before Hon. Mziray, J (as he then was) specifically on page 47 of the proceedings, allowedn Veronica Kibwana to join as an Administratrix/legal personal representative of the Estate of the late Jacob Kibwana, in Land Case No. 67 of 2004. She added that the changes were not made up to the finality of the suit. As the result, the name of the late Jacob Kibwana appeared in the judgment.

She continued to submit that the above error does not vitiate the decisions since it was human error and oversight, Ms. Chihoma added that this court is empowered to amend its proceedings under sections 95 and 96 of the Civil Procedure Code, Cap.33 [R.E. 2019]. The learned counsel for the respondent was of the view that the Judgment and Decree ought to have appeared as hereunder follows:-

SAID A. MBAGA ..... 1<sup>ST</sup> PLAINTIFF

VERONICA KIBWANA (As the Administratrix

of the Estate of the Late JACOB KIBWANA..... 2<sup>ND</sup> PLAINTIFF

VERSUS



KHAMIS ALLY KHAMIS ..... DEFENDANT

Regarding the differences of the dates appearing in the Judgment and Decree, the learned counsel for the respondent submitted that the defects are minor, the same can be corrected by this court. Ms. Chihoma strongly contended that the applicant in the remaining grounds for review is trying to apply for review as the back door to an appeal. Fortifying her submission she referred this court to the case of **Vitatu & Another v Bayay & Others**, Civil Application No. 16 of 2013, Court of Appeal of Tanzania at Arusha (unreported) which ruled out that a review is not to challenge the merits of the decision.

The learned counsel for the respondents went on to submit that a review is intended to address the irregularities of a decision or proceedings, which have caused injustice to a party. Insisting, she argued that a review is not an appeal. To back up her argumentation she cited the case of **Expedito Ngakongwa & Another v Oryx Oil Company Limited** (Labour Review Application No. 01 Of 2019 High Court of Tanzania, Labour Division at Moshi Registry).

On the strength of the above submission, Ms. Chihoma beckoned upon this court to grant only the 1<sup>st</sup> and 2<sup>nd</sup> grounds of review and dismiss the

remaining grounds for review since the same are not for grounds for review. She also prayed for costs of the case.

Having heard the submissions of both learned counsels, I should state at the outset that, the issue for determination is *whether the applicant's application for review is meritorious*. I should state from the outset that I am in accord with the learned counsel for the respondent that some of the grounds of review raised by the applicant are not grounds of review. For an application for review to stand, it has to squarely fall within the circumstances encompassed under Order XLII Rule 1 of the Civil Procedure Code Cap.33 which reads:-

*" 1 (1) Any person considering himself aggrieved-*

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is allowed, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, **may***

*apply for a review of judgment to the court which passed the decree or made the order."*

The law requires that where an application for review is based on the ground that there is an error on the face of the record, the error complained about must be apparent, eye-striking, or self-evident and not one which needs to detain a person through a long process of reasoning on points where there may be two opinions. This was held in the cases of **East African Development Bank v Blueline Enterprises Tanzania Ltd**, Civil Appl. No.47 of 2010, (unreported), the Court of Appeal of Tanzania cited with approval the case of **Chandrakant Joshubhai ' Patel v Republic [2004] TLR 218**, the Court held that:-

*"An error apparent on the face of record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points which may conceivably be two opinions... A mere error of law is not a ground of review.... That a decision is erroneous in law, is no ground for ordering review.... It can be said of an error that is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established."*

Additionally, the error apparent on the face of record must also have occasioned an injustice, and the applicant must prove, very clearly, that, such manifest error occasioned an injustice to him. The learned counsel for the applicant did not prove how the delay in receiving the typing of the impugned Judgment, decree, and proceedings and supply affected the applicants. In the case of **Tanzania Transcontinental Co. Ltd v Design Partnership Ltd**, Civil Application. No.762 of 1996 (unreported), the Court of Appeal of Tanzania observed that:-

*"... the Court's power of review ought to be exercised sparingly and only in the most deserving cases, bearing in mind the demand of the public policy for the finality of litigation and for the certainty of the law as declared by the highest court of the land."*

Guided by the above authorities, I find that the applicant's grounds except the first and second grounds are inviting this court to reopen the determination of the case. It is noteworthy that a review is not an appeal in disguise whereby an erroneous decision can be reheard and corrected. Thus, the purported grounds for review that appear in the Memorandum of Appeal may be taken up in an appeal. The applicant should not turn this Court to an appellate court where he can seek a rehearing of the already heard and determined facts. In the case of **Halais Pro-Chemic v Wella AG** [1996] TLR 269, the Court held that:-

*“The principle of revisional powers conferred on the court is not meant to be used as an alternative to the appellate jurisdiction of the court.”*

Applying the above holding of the court, I am certain that this court is not moved to use its revisional jurisdiction where the applicant may invoke her rights of appeal to the court. Consequently, the applicant's third, fourth, fifth, sixth, seventh, eighth, ninth and tenth grounds for review are devoid of merits. The same need to be determined by the appellate court.

On the other hand, I have noted that second, grounds of review are related to an error or mistake discovered by the parties. However, the remaining grounds third, fourth, fifth, sixth seventh, eighth, ninth, and tenth grounds requires this court to re-determine the evidence in the record while this court has already gone through court records, analysed the evidence, and came up with a decision.

As to the first grounds, I am in accord with the applicant that the name of the applicant appearing in the plaint was not correct. However the records reveals that the applicant's name Khamis Alhaji appearing in the plaint was already been amended to read Khamis Ally Khamis. As rightly pointed by the learned counsel for the respondent the said errors does

not vitiate the decisions taking to account that this court already corrected the applicant's name to read Khamis Ally Khamis instead of Khamis Alhaji.

With respect to the second ground for review, is related to the name of the second plaintiff appearing in the judgment of this court in Land Case No.67 of 2004. The defects is noticeable and I am in accord with the learned counsel for the respondent that this error cannot vitiate the decision of this court, the same can be corrected. Section 3 of the Civil Procedure Code, Cap.33 [R.E. 2019] provides that:-

*"3.-(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the court, on an application made in that behalf, **shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit**". [Emphasis added].*

It is indisputable fact that in Land Case No. 67 of 2004, Veronica Kibwana, the Administratrix of the late Jacob Kibwana was not included as a party, and the law requires that the administrator who takes over to handle the matter in court. Reading the Judgment and Decree I have

noted that the said changes were not reflected. Thus the same errors which are suitable for review to enable the court to make necessary corrections. As it was well argued by the counsel for the respondent's Advocate that in Land Case No. 67 of 2004 the names of the parties ought to have appeared as follows:-

*"SAID A. MBAGA ..... 1<sup>ST</sup> PLAINTIFF*  
*VERONICA KIBWANA (As the Administratrix*  
*of the Estate of the Late JACOB KIBWANA..... 2<sup>ND</sup> PLAINTIFF*  
*VERSUS*  
*KHAMIS ALLY KHAMIS ..... DEFENDANT"*

And not as it appears in Land Case No. 67 of 2004 as follows:-

*"SAIDI A. MBAGA.....1<sup>ST</sup> PLAINTIFF*  
*JACOB KIBWANA ..... 2<sup>ND</sup> PLAINTIFF*  
*VERSUS*  
*KHAMIS ALLY KHAMIS..... DEFENDANT"*

I have scrutinized the names of the parties, as shown above, it is very clear that the defect on the names of the parties is fatal that needs to be

reviewed otherwise the case will remain dormant with prejudices. Order XX Rule 7 of the Civil Procedure Code, Cap.33 [R.E.2019] provides that:-

*"7. The decree shall bear the date of the day on which the judgment was pronounced and when the Judge or Magistrate has satisfied himself that the decree has been drawn up in accordance with the judgment he shall sign the decree."*

Applying the above provision, it is clear that the Judgement and Decree have to bear the same date though may not necessarily be issued on the same day and date but must bear the same date of when the Judgement was pronounced. In Land Case No. 67 of 2004, the Judgment and Decree bears two different dates. The Judgement is dated 27<sup>th</sup> May, 2014 and the Decree is dated 11<sup>th</sup> June, 2014. However, the Decree contains such a line of which the Judgment was pronounced.

I think for the wave of doubt both the Decree and the Judgement must contain the line that will indicate as to when it was delivered and the date must be the same. As rightly stated by Ms. Chihoma, learned counsel for the respondent that such defects can be corrected by this Court under sections 95 and 96 of the Civil Procedure Code, Cap.33 [R.E. 2019]. Therefore, I proceed to correct the same as follows; the Judgment in Land Case No. 67 of 2004 is hereby corrected by deleting the name of Jacob



Kibwana appearing as the 2<sup>nd</sup> Plaintiff after his demise and the parties to the suit will appear as follows:-

SAID A. MBAGA ..... 1<sup>ST</sup> PLAINTIFF

VERONICA KIBWANA (*As the Administratrix*

*of the Estate of the Late JACOB KIBWANA* ..... 2<sup>ND</sup> PLAINTIFF

VERSUS

KHAMIS ALLY KHAMIS ..... DEFENDANT

Also, I proceed to correct the date appearing on the Decree dated 11<sup>th</sup> June, 2014. The date 11<sup>th</sup> June, 2014 is hereby deleted and the same is hereby replaced by a date of 27<sup>th</sup> May, 2014 appearing on the Judgment in Land Case No. 67 of 2004.

In the upshot, the application is partly allowed to the extent that the first and second grounds for review have merit and the remaining grounds for review are dismissed. No order as to the costs.

Order accordingly.

DATED at Dar es Salaam this 30<sup>th</sup> August, 2021



A.Z.MGEYEKWA

**JUDGE**

30.08.2021

Ruling delivered on 30<sup>th</sup> August, 2021 in the presence of the applicant and Ms. Melania, learned counsel for respondents.



A.Z.MGEYEKWA

**JUDGE**

30.08.2021