TANZANIA / JUDGMENT

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I I IN THE COURT OF APf>EAL OF TANZANIA AT DAR ES SALAAM (CORAM: MUNUO, J. A., MSOFFE, JJ A. And KILEO, J,. A.) ' CIVIL APPLICATION NO. 165 OF 2006 i I SALi MA HUSSEIN ..... 1 •••••••••••••••••••••••••••••• ••• APPLICANT I 'VERSUS I HUSSEIN IBRAHIM SADIK! & SONS ..... RESPONDENTS (Application for review from the d~cision of the Court of Appeal of Tanzania at Dar es Salaam) I (Ramadhani, J.A,Munuo, l.A. And Kileo, l.A.) I i dated the 16th day of November, 2006 inl Civil Appeal N6. 55 of 2000 I

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1 RULING OF THE COURT 13 th & 30th September, 2010 I MSOFFE, J.A. I I In this application the Court is being asked to review its I decision in Civil Appeal No. 55 of 2000 in which the respondents were I confirmed to be the legal owners df House No. 28 on Plot No. 27 I Block 20, Kipata Street, Kariakoo, Ilala, Dar es Salaam. This Court I upheld Bubeshi, J. in Civil case No. 251 of 1994 of the High Court at l j Dar es Salaam whereby the respondents successfully sued the I applicant in a claim of the house in q~estion. I Since the application turns on alleged errors of law and fact, it seems desirable to revisit the facts, albeit briefly. This matter started as Probate and Administration Cause No. 95 of 1983 at Kariakoo Primary Court in Dar es Salaam for the estate of Fatma Sefu who died intestate. That court appointed Said Mohamed Hariz the administrator of the estate of Fatma Sefu and ordered the auction of the assets, one of which was the above mentioned house. On 8th March 1987 the premises were bought by the respondents in a public auction. The consent for transfer was given on 28/4/1987. As the respondents were awaiting the grant of a long term right of occupancy, two prospective claimants, Sofia Said and Yusuf Mohamed Musa, went to court to challenge the distribution of that estate. The dispute finally came to this Court as Civil Appeal No. 25 of 1991 whereby it was decided, inter a/ia, that Sofia was not an heir. Despite that judgment, on 30/5/1992 Sofia Said executed a deed transferring the premises to the applicant. In Civil Appeal No. 55 of 2000 this Court quoted with approval a passage by Bubeshi, J. in Civil case No. 251 of 1994 thus:- 2 • On the evidence and particularly the decision of the Court of Appeal, Sofia Said was not the direct heir and could not, therefore~ have title to pass to the defendant This fact is clearly spelt out in the decision of the Court of Appeal. Now between the two who has a better tittle to the suit premises? I think the answer is not far to find In my considered view, the plaintiff's tittle which has remained unrevoked by the Ministry of Lands remains valid This Court went on to reiterate its decision in Civil Appeal No. 25 of 1991 in which it pointed out three principal classes of heirs in Islamic Law thus:- The first principal class

is called "sharers" of Koranic heirs" of which as started above, there is only one in this case, i. _e. Mgeni Hemed. The second is called "Residuaries" or "Asabah" and looking at the Table of Residuaries in Mu/la's Principles of Mohamed Law, 14h edition at 3 • page 69A, there is only one such heir among the claimants in this case i.e. the second appellant, Yusuf Mohamed Musa, he being an agnate nephew of the deceased. The third cla$s is commonly referred to as "Distant Kindred" and this is the class to which the rest of the claimants including the first appellant, Sofia Saidi, belong. So, from the above background, it occurs to us that three things are discerned from the decision of this Court in Civil Appeal No. 55 of 2000 which is the subject of this application. One, the appointment of Said Mohamed Hariz as the administrator of the estate of Fatma Sefu was never, and has never, been revoked by any court todate. Two, as an administrator, Said Mohamed Hariz, sold the premises to the respondents. Three, Sofia Saidi had no right to the estate of Fatma Sefu and she could not, therefore, pass any tittle to the applicant. 4 • The crucial question in this application is whether there are I grounds upon which we could revie\'.V this Court's decision in Civil Appeal No. 55 of 2000. I The exercise of review powers, by this Court is fairly recent. i Indeed, the Appellat~ Jurisdiction Act No.15 of 1979 has no I provision for such powers. In similaf vein, the Tanzania Court of ' I Appeal Rules, 1979 did not make 1Provision for such powers. As I far as can be ascertained, the Court'. for the first time stumbled on I review in the case of Felix Bwogi J Registrar of Buildings, Civil 1 I Application No. 26 of 1989 (unreported), an application to rectify a I 1 judgment of the Court which had been based on a wrong record. I I Subsequently, the Court's inherent powers of review were concretized in other decision·s of the Court, notably Transport Equipment Ltd. v Devram P. Valambhia, Civil Application No. 18 I of 1993, Chandrakant Joshubhai Patel v Republic, Criminal Application No. 8 of 2002 and Tanganyika Land Agency Limited I and Others v Manohar Lal Aggrwal, Civil Application No. 17 of ! 2008 (all unreported). The Court ,through the above, and other, 5 . decisions developed circumstances in r'hich it can inv~ke its review 11 jurisdiction. These are:- /: , ' I I

1. Where a party was not given an opportunity to be I, ' 11 heard; I I, Ii
2. Where the Judgmentl,was obtained b';{ fraud; I, . ' I, '
3. Where there is an eliror manifest on the face of the "
i. : I ' record which resulteq in the miscarriage ofJustice; I, ;
4. Where the court actJd without Jurisdiction. (1 ' The above circumstances have since /then been tran~lated into law, 1, I, or rather provided for, in the newi Tanzania Court of Appeal I, . Rules, 2009, under Rule 66 ther~of, which came into effect on 1/2/2010 by virtue of Governmen~ Notice No. 36 published on I 11 29/1/2010. Ir 1, 1, 11 !1 i, The applicant invoked Rule 34(2) and (3) of :the new Court !, ; I I Rules and accordingly filed written /submissions. At the hearing of I, the application she appeared in perdon and essential;ly repeated and . r . I, emphasized on what she had said ih the written submissions. The I' ' 6 I I 'I I written submissions are fairly long but it is evident therefrom that this application is based on two grounds:-

(i) That in considering the applicant's appeal against the High Court decision in Civil case No. 251 of 1994, this honourable court did not sufficiently address its mind on legal effects and essence of this court's Judgment in Civil Appeal No. 25 of 1991 dated 2dh day of February, 1992. (ii) That this honourable court did not consider the errors of law concerning the administration of the estate of the late Fatma Sefu and the sale to the respondent by public auction of the suit property that are apparent on the face of the·court record In elaboration on ground (i) the applicant is of the view that in Civil Appeal No. 25 of 1991 this Court:- ...pronounced that the rightful owner of the deceased estate according to Islamic Laws is one Yusuph Mohame_d Mussa in exclusion of 7 ... all others. Therefore it goes that any disposition whatsoever done . by any person other than Yusuph Mohamed Mussa is a nullity... (Emphasis supplied) With respect, the above ground has no basis for on~ main reason. As this Court stated in Civil Appeal No. 55 of 2000, the thrust of this Court's decision in Civil Appeal No. 25 of 1991 was o:n who was the heir to the deceased's estate and not :who was to be an administrator or an administratix. The decision, read in its proper context, had nothing to do with the disposition made by the court broker. Indeed, on the aspect of disposition this Court was loud and dear that:- ...So, this court was well aware of the sale but neither annulled it nor revoked the appointment of Said Mohamed Hariz as the administrator. In support of ground (ii) the applicant had this to say:- 8 The Auction purportedly transferred the ownership of the house in dispute to the respondent was a nullity taking into consideration that the decision of the Primary Court at Kariakoo was challenged by the parties aggrieved •by that decision and it reached to this court which pronounced its decision in favour of Yusuph Mohamed Mussa in Civil Appeal No. 25 of 1991. The effect of that decision was nullifying all the process which was carried out by the subordinate courts in essence that the administration of the estate of the late Fatuma d/o Sefu •was not properly done hence the respondent herein cannot have a· legal and rightful ownership of house No. 28... Yet again, with respect, the above ground has no basis. As already stated, in Civil Appeal No. 25 of 1991 this Court merely upheld the High Court in its assertion that Yusuph Mohamed Mussa (the second 9 ,IJ appellant in the High Court decision) was an heir. The Court did not nullify all the process that had been carried out by the lower courts. In this sense, it did not annul or revoke the appointment of Said Mohamed Hariz as the administrator of the estate of Fatma Sefu. Mr. Mustafa Chandoo, learned advocate, represented the respondents in Civil Appeal No. 55 of 2000 and in this application. In his brief but focused submission before us, he was of the view that there is nothing in the notice of motion and the accompanying affidavit to warrant the exercise by this Court of its review powers. For reasons stated in our response to grounds (i) and (ii) above, we agree with him and we will not add anything else on his general assertion. When all is said and done, we are of the considered opinion that in this application the applicant is actually asking the Court to rehear Civil Appeal No. 55 of 2000. With respect, that cannot be done. In its true spirit, a review is not a rehearing of an appeal. The reason for saying so is not far fetched. In a review it is not expected 10 " or envisaged that the Court will sit n judgment over a decision it made on an appeal. Before the coming into effect of the new Court Rules the Court could only invoke its inherent jurisdiction of review under the circumstances

stipulated above by case law. We wish to state here by way of emphasis that, now that the new Court Rules I I are in place the power can only be exercised in terms of the dictates spelt out under Rule 66 thereof. In the event, for the foregoing ~easons, we hereby dismiss the application with costs. DATED at DAR ES SALAAM this 23 rd day of September, 2010. E.N. MUNUO JUSTICE OF APPEAL J.H. MSOFFE JUSTICE OF APPEAL E.A. KILEO JUSTICE OF APPEAL I certify that this is a true copy of the original. E.Y. MKWIZU DEPUTY REGISTRAR 11

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