

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO.03 OF 2022

*(Originating from the High Court of Tanzania Dar es Salaam District Registry at Dar es
Salaam Probate Cause No. 07 of 2016)*

THEOFRIDA MHAGAMAAPPLICANT

VERSUS

NJENGAFIMBILI MPO JOLI MWAIKUGILE.....1ST RESPONDENT

REUBEN JACKSON MWAIKINDA.....2ND RESPONDENT

LYNETTE GWANTWA MWAIKINDA3RD RESPONDENT

SEKELA RITA MWAIKINDA4TH RESPONDENT

RULING

MRUMA,J.

This matter was instituted against four Respondents. Mr. James Bwana has appeared before the court and informed it that previously he was representing the 1st Respondent Njengafilimbi Mponjol Mwaikugile who is no longer. He also take courtesy to inform the court that the 2nd Respondent is around but not served but the 3 and 4th Respondents are abroad. He prayed this court to struck out the matter because the 1st Respondent is died and there is no pending application for appointment of a legal representative is required by Order XXII Rule 4(1) if the CPC.

The learned counsel has also informed the court that in view of GN 638 and GN No. 640 both of 2021 which establishes special registry of

this court to deal with Probate matters, thisⁱ matter was wrongly filed in this court.

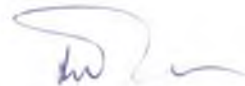
In her response, Ms. Rwechungura , learned advocate for the Applicant has contended that because Mr. James Bwana has informed court that his would be client has passed away, he cannot have right to submit on behalf of the 2nd Respondent.

I agree with Ms. Rwechengura. As the 1st Respondent is dead, and Mr. Bwana has no instructions to represent the 2nd Respondent his obligation as an officer of the court was limited to inform it about the death of his client. Since a deceased person cannot give instructions, and Mr James has no instructions from the 2nd Respondent or any other respondents he cannot have audience or right to make any prayer for them.

On the other hand counsel for the Applicant has made a prayer for service on the 2nd to 4th Respondent's by publication. I have considered this prayer visa viz procedures for substituted service as provided for under Order V Rule 16(1) of the CPC – Under that law there must be reasons to believe that the Defendant / Respondent is keeping out of the way for the purpose of avoiding service. There is no such evidence whatsoever, that the 2nd Respondent who is reported to be within the jurisdiction of this court is avoiding summons. Similarly there is no scintilla of evidence to the effect that the 3rd and or 4th Respondent too are avoiding service. The only explanation the court has heard is that they are residing abroad. Thus it will not be proper to order substitute service against all Respondents. Instead will make an order that the 2nd Respondent be served by ordinary service and the 3rd and 4th Respondent be served by post pursuant to Rule 26(a) (b) and (c) of Order V of the CPC [cap 33 RE2019].

Regarding a prayer for an order of maintenance of status quo, as there is no proof of service against any of the living Respondent's it will be unfair for the court to make an order which may affect their rights without being afforded the right to be heard.

All other issues raised hereinbefore shall be properly attended when we parties are served and/ or represented in court.



A. R. Mruma

Judge

16/2/2022

Order: Mention on 31.3.2022 at 9.00am serve Respondents as directed.



A. R. Mruma

Judge

16/2/2022