



## Assessing Procedural Rigidities and Suit Abatement in Tanzania: Lessons from Indian Civil Justice

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### Abstract

This article assesses the procedural rigidities surrounding suit abatement in Tanzanian civil litigation where a party dies during the pendency of civil proceedings. Under the Civil Procedure Code, the suit abates if no legal representative is appointed within ninety days, while the Tanzania Court of Appeal Rules offer a more flexible twelve-month period for substitution of a legal representative. The Civil Procedure Code gives a shorter period for the legal representative to be joined, which at times amounts to a denial of access to justice. In both laws, courts lack the discretionary power to appoint an administrator general where no legal representative is appointed. This omission leaves surviving litigants without redress despite having valid claims or a defence. Guided by access to justice theory and using a doctrinal methodology, the article argues that procedural rules should promote justice. Lessons from Indian civil procedure support the need for reform in Tanzania.

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## 1. INTRODUCTION

The civil justice system, like any complicated legal framework, has been the subject of its fair share of critique, as no aspect of the procedural system is beyond scrutiny.<sup>1</sup> While procedural rules seek to promote justice in the adjudication process, they may end up doing the opposite of what is intended, especially when procedural rules are strictly applied.<sup>2</sup> The tension between procedural rules and access to justice is evidenced in the procedure relating to the abatement of a civil suit upon the death of one of the parties. Despite the good intention of the laws, which intend to expedite the litigation process for the parties to act diligently, it poses a high risk of denying fundamental claims or defences when the suit abates for failure to appoint a legal representative. This article is guided by access to justice theory<sup>3</sup>, which requires that justice must be accessible in the real world, not merely in theory. Access to justice, apart from being a constitutional right, is also a reflection of a society's commitment to fairness.<sup>4</sup> The primary purpose of procedural rules is to ensure that justice is properly administered.<sup>5</sup> As Cappelletti and Garth have observed, access to justice is a reflection of an essential commitment to the protection of fundamental rights that forms the foundation of modern society.<sup>6</sup>

It is imperative to understand the link between procedural and substantive law on the supremacy and primacy of the former and the latter.<sup>7</sup> Rules of procedure have presented significant challenges in most legal systems since there is no shared vision on how they ought to be structured. At times, the procedural rules impede access to justice.<sup>8</sup> The debatable issue that attracts research is on how to balance between procedural compliance and substantive justice, particularly in cases where the surviving litigant suffers prejudice or loss despite having a valid claim or defence for failure to join a legal representative. This uncertainty not only affects litigants' access to justice but also exposes gaps in the procedural framework that warrant legislative or judicial reform.<sup>9</sup>

Ostensibly, abatement of a suit serves a procedural function, which enables litigation to be conducted promptly and diligently within the prescribed time. However, the three interconnected constitutional principles namely the right to be heard,<sup>10</sup> Access to justice and the right to a fair trial ought to be taken into account when determining the abatement procedure.<sup>11</sup> The procedural deadlock created by statutes is when legislation prescribes strict timelines for substitution of a legal representative without providing recourse after abatement. This approach undermines the right of the remaining litigants where the right to sue survives.

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<sup>1</sup> M Cappelletti and B Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buffalo Law Review 181.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> United Nations Development Programme (UNDP), Access to Justice: Practice Note (UNDP 2004) 3.

<sup>5</sup> N Mouttotos, 'Reform of Civil Procedure in Cyprus: Delivering Justice in a More Efficient and Timely Way' (2020) 49 Common Law World Review 99 <https://doi.org/10.1177/1473779520924441>.

<sup>6</sup> M Cappelletti and B Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buffalo Law Review 181

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<sup>7</sup> J A Jolowicz, *On Civil Procedure* (Cambridge University Press 2000) 59.

<sup>8</sup> SB Burbank, 'The Roles of Lawyers and Judges in Civil Justice Systems' (1996) 46 Journal of Legal Education 513 <https://www.jstor.org/stable/42898242>.

<sup>9</sup> A Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (4th edn, Sweet & Maxwell 2021) 3–4.

<sup>10</sup> Constitution of the United Republic of Tanzania 1977, art 13(6)(a).

<sup>11</sup> Art 13(6) (a).

The article invokes a doctrinal legal research methodology,<sup>12</sup> grounded in the theoretical framework of access to justice. Doctrinal methodology involved a critical analysis of legal rules, principles, and judicial decisions relevant to the doctrine of suit abatement under Tanzanian civil procedure law, specifically in relation to the death of a party during the pendency of the suit.

The article entails a detailed examination of primary legal sources, including the Civil Procedure Code,<sup>13</sup> The Law of Limitation Act,<sup>14</sup> The Constitution of the United Republic of Tanzania,<sup>15</sup> and relevant judicial decisions from the High Court and the Court of Appeal, which demonstrate abatement procedures. These materials were analysed to understand the procedural framework governing abatement, the judicial interpretation of substitution timelines, and the implications for surviving litigants. Additionally, the study draws on secondary sources, such as textbooks, legal commentaries, and scholarly journal articles, to contextualise the Tanzanian approach within broader legal and theoretical debates. Special emphasis is placed on the access to justice theory, which criticises procedural barriers that prevent individuals from accessing justice due to strict procedural requirements.

## 2. THEORETICAL FRAMEWORK

Access to justice in civil cases primarily rests on the principles of fairness,<sup>16</sup> efficiency, and

the right to be heard.<sup>17</sup> The named principles become important when a party to a civil suit dies during the pendency of the suit, as the continuance or abatement of the suit directly affects the substantive rights of the surviving parties in the delivery of justice.

Despite the importance of procedural justice in the event of a party's death in a suit, the aspect of suit abatement following the death of a party to a civil suit has received less attention, not only in Tanzania but also globally. While scholars like Whyte<sup>18</sup> Jolowicz,<sup>19</sup> Muftau,<sup>20</sup> Kennedy and Makaramba,<sup>21</sup> Morris,<sup>22</sup> Bynt, G., & Mauro,<sup>23</sup> M, Cappelletti, M., & B Gart,<sup>24</sup> and Cappellett<sup>25</sup> have made treasured

<sup>17</sup> S Willis, 'The Right to Be Heard: Can Courts Listen Actively and Efficiently to Civil Litigants?' (2023) 46(3) UNSW Law Journal 872 <https://doi.org/10.53637/TGJY8021> accessed 12 February 2025.

<sup>18</sup> G Whyte, 'Abatement and Revival: Survival of Actions: Public Liability Insurance' (1929) 18(1) California Law Review 44 <https://www.jstor.org/stable/3474998> accessed 01 June 2025.

<sup>19</sup> J. A. Jolowicz, *Jolowicz on Civil Procedure*, New York: Cambridge University Press, 2000, p. 10.

<sup>20</sup> R Muftau, 'Access to Judicial Justice in Nigeria: The Need for Some Future Reforms' (2016) 47 Journal of Law, Policy and Globalization 144 <https://www.iiste.org/Journals/index.php/JLPJ/article/view/31485/32336> accessed 20 March 2025.

<sup>21</sup> G. Kennedy and RV Makaramba 'Access to justice and inevitable reforms to the civil justice system: Reflections on case management and legal aid in Tanzania' (2016) 1(1) LST Law Review 1–40.

<sup>22</sup> C. Morris "Peace Through Law: The Role and Limits of Adjudication", 109 (3) University of Pennsylvania Law Review, 1960, p. 216

<sup>23</sup> G. Bynt, & C. Mauro, "Access to Justice: The Newest Wave in the Worldwide Movement to Make the Right Effective", 27(181) Buffalo Law Review, 1978. p.182-292.

<sup>24</sup> M, Cappelletti, & B. Gart, "Access to Justice", 27(2) The Newest Wave in the World Movement to make right Effective, Buff Law Review, 1987, p. 179.

<sup>25</sup> M. Cappellett, "Social and Political Aspects of Civil Procedure Reforms and Trends in Western Europe" 69(5)

<sup>12</sup> P Ishwara Bhat, *Idea and Methods of Legal Research* (Oxford University Press, 2019)

<sup>13</sup> Civil Procedure Code Order XXII,

<sup>14</sup> Law of Limitation Act, Cap 189 R.E 2023.

<sup>15</sup> Constitution of the United Republic of Tanzania 1977,

<sup>16</sup> B. Opeskin, 'Rationing Justice: Tempering Demand for Courts in the Managerialist State' (2022) 45(2) University of New South Wales Law Journal 531, 543 accessed 10 January 2025

contributions to the general understanding of civil procedure, their analysis often remains broad and does not delve in depth into the unique procedural challenges that arise when a party dies during the pendency of a civil suit. A review of existing literature indicates a considerable dearth of current academic work precisely focusing on the procedural gaps that arise in civil cases when a party dies during the pendency. Most of the available literature only discusses broad aspects relating to doctrine, while leaving pertinent aspects like when no legal representative is appointed and the power of the court to ensure the continuity of the suit to the remaining parties, especially where there is a justifiable claim and defence. Thus, the available literature focusses on broader civil procedure issues while overlooking serious matters of suit abatement, which are either unaddressed or mentioned only in passing. This limited engagement has created a considerable gap in legal scholarship. The present research seeks to fill this gap by providing a more focused examination of the legal and procedural challenges in suit abatement and recommending improvements that align with the principles of fairness, efficiency, and timely justice.

Building upon the preceding discussion, this article is grounded on the theory of Access to Justice, which considers justice not just as official access to courts, but as the realisation of substantive rights through accessible, fair, and comprehensive legal processes.<sup>26</sup>

The fundamental contribution of the theories of access to justice is that having legal entitlement without a formal mechanism to realise it remains useless.<sup>27</sup> The proponents of this theory propose reforms on access to

justice that focus on procedural transformation, which aimed at ensuring justice is realised. Among the challenges in the modern legal system are rigid procedures that do not promote access to justice, necessitating legal reforms.<sup>28</sup>

The theory of access to justice appears to be relevant in the context of abatement procedures. In such cases, failure to join a legal representative of the deceased party, where the right to sue survives within the time limit, results in the abatement of a suit against the deceased. The law does not provide for surviving litigants who have a bona fide claim or defence where the right to sue survives and the legal representative of the deceased party to a suit is not joined.<sup>29</sup> Considering the access to justice theory, such a strict requirement without an alternative remedy is inherently unjust, as it prioritises procedural compliance over the right to be heard and the right of access to justice as provided in the Constitution.<sup>30</sup>

Undoubtedly, Cappelletti and Garth offer a refreshing theoretical foundation on access to justice; however, their work is not immune to criticism, as the proposed theory is considered thematic and abstract, failing to provide clear guidance on how specific aspects of procedures, such as suit abatement, should be reformed.<sup>31</sup> Their comparative analysis is based on Europe and North America, where there has been a significant advancement compared to Tanzania. Their work provides limited guidance on court intervention by appointing a public officer or administrator

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Michigan Law Review 1971, p. 22.

<sup>26</sup> M Cappelletti and B Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 181

<sup>27</sup> *Ibid*

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<sup>28</sup> M Cappelletti and B Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 181.

<sup>29</sup> Civil Procedure Code, order XXII Rule 3(1)

<sup>30</sup> Constitution of the United Republic of Tanzania 1977, art 13.

<sup>31</sup> M. Cappelletti and B Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 181.

general to be joined as a party in case the legal representative of the deceased is not appointed to ensure proper access to justice. The ideal of this approach is to ensure that the court does not remain a mere passive observer in procedural failure but instead has the mandate to safeguard access to justice and the right to be heard when the procedural avenue is deficient.

Despite these deficiencies, Cappelletti and Garth's work remains crucial for reforming procedural rules aimed at promoting access to justice. The current research invokes the theory by relating it to the abatement of suit procedures in the Tanzanian context and views that the absence of judicial discretion powers to address procedural injustice is a matter of concern that needs to be addressed.

In fact, the general literature discusses access to justice and procedural fairness in a broad context. The following literature narrows down the discussion to procedural justice in general and the doctrine of abatement specifically. Whyte<sup>32</sup> addresses the challenges surrounding the doctrine of abatement and focuses more on the strict application of the abatement procedure, which at times terminates the proceedings upon the death of the wrongdoer in public liability insurance. The author argues that strict compliance with the doctrine of abatement in civil suits frustrates insurance claims whose prime goal is to protect the third-party victim from loss. Thus, strict procedural requirements are likely to hinder the valid claim of the insured party. This analysis aligns with the intricacies envisaged in the procedure of abatement of civil suit in Tanzania, which follows strict abatement rules that extinguish the claim when

no legal representative is appointed within the statutory period.

However, the review of Whyte's work is limited to tort actions, which involve public liability insurance, while the Tanzanian context requires a different reform agenda that addresses abatement in all civil suits. Regardless of this limitation, given the scarcity of literature on this topic, Whyte's work provides insightful thoughts about the doctrines, especially when strictly applied. His analysis strengthens the reform arguments in procedural rules in Tanzania to promote access to justice in the case of the death of a party to civil proceedings.

The relationship between procedural and substantive justice faces a tension in civil litigation. Green and Rhode's in their foundational work on access to justice, discourage procedural reforms that are detrimental to the fairness of outcomes.<sup>33</sup> They argue that any legal system must promote justice and not mere compliance with the rules of procedure. Delivery of inclusive justice is important. The authors' observation reflects the Tanzanian context that the right to sue survives upon the death of a party to a civil suit. Thus, there should be a mechanism to ensure that the legal representative or administrator General, or government officials are joined to ensure the continuity of litigation to achieve justice. Failure to join the legal representative of the deceased should not automatically result in abatement of the suit, especially where the legal representative is deliberately avoiding the legal consequences of the pending suit. If this practice is entertained, it will extinguish the existing valid claim or defence in the court among the litigants.

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<sup>32</sup> G Whyte, 'Abatement and Revival: Survival of Actions: Public Liability Insurance' (1929) 18(1) California Law Review 44 <https://www.jstor.org/stable/3474998> accessed 01 June 2025.

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<sup>33</sup> A. Green, D. L. Rhode's Access to Justice: Foreword' (2004) 73 Fordham L Rev 841; D L Rhode, 'Access to Justice: Again, Still' (2004) 73 Fordham L Rev 1017 <https://ir.lawnet.fordham.edu/flr/vol73/iss3/1> accessed 18 May 2025.



However, while both authors are persuasive in spotting the systemic nature of procedural exclusion, their work exhibits several limitations when applied to specific procedural mechanisms such as the abatement suits. While access to justice is widely discussed in legal literature, there is a clear doctrinal and policy gap in Tanzanian scholarship regarding judicial powers to prevent abatement when no legal representative is joined. Specifically, no existing work has critically analysed the potential for Tanzanian courts to appoint the Administrator General to preserve the surviving litigant's right to a hearing. This study addresses that gap by proposing reforms rooted in constitutional principles and the access to justice theoretical approach.

Genn and Paterson<sup>34</sup> gives an opening for socio-legal scrutiny in how individuals encounter, perceive, and respond to legal problems. The core argument of the authors is that legal needs are not objective phenomena, but rather subjective values based on judgments.<sup>35</sup> This argument has a thoughtful inference, for the Tanzanian context, particularly concerning procedural abatement in civil litigation. The article under review assesses how the rigid rules requiring substitution of parties following the death of a party to a civil suit hinder access to justice. The advocated reforms intend to accommodate the procedural realities where parties are unwilling to appoint a legal representative in order to protect bona fide claims and the defense of the surviving parties.

Genn and Paterson argue that individuals may not recognise their situations as legal challenges and know the steps to take and engage legal services.<sup>36</sup> In the context of

Tanzania, parties may delay or not join a legal representative due to fear, legal unawareness, and consequently, the suit abates against the deceased. According to an empirical study conducted by Rhode, some marginalised groups in rural areas perceive that courts are inaccessible and intimidating institutions and cannot be accessed easily.<sup>37</sup>

The author contends that no empirical method can fully capture the degree of realised legal need, and thus policy choices concerning access to justice should not be centred on secure, strict judgments.<sup>38</sup> It is for this reason that the current article employs a doctrinal approach that argues for policy reforms apart from quantitative data. This method finds relevance as it supports principle-based reforms in procedural justice in the doctrine of abatement of civil suit.

The reversal of Genn's findings in the Tanzanian setting requires caution. Her work is based on the socio-economic and legal infrastructure of Scotland, a jurisdiction with stronger legal aid, broader public legal education, and higher levels of institutional trust. These contextual differences are not adequately explored for Tanzania.<sup>39</sup> Although the article aligns with Genn and Paterson's conclusions, it does not directly align with their framework. Direct engagement could enhance academic rigour and stimulate debate on procedural concerns. Nonetheless, the article's core suggestion of introducing procedural flexibility and judicial discretion in substitution after party death aligns with Genn and Paterson's and broader work and acts as a reminder for procedural reforms.

<sup>34</sup> H. Genn and A. Paterson, *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law* (Hart Publishing 2001). 4.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid

<sup>37</sup> D L Rhode, *Access to Justice* (Oxford University Press 2004) 60–65.

<sup>38</sup> D L Rhode, *Access to Justice* (Oxford University Press 2004) 60–65.

<sup>39</sup> H. Genn and A. Paterson, *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law* (Hart Publishing 2001) 4.

Dickerman<sup>40</sup> in his published work titled: *Disposition of a Federal Criminal Case When Defendant Dies Pending Appeal*, assesses the abatement doctrine in criminal proceedings. is the author argue that in criminal proceedings, the suit abates automatically upon the death of an accused person. The reason is that the personal and punitive purposes of criminal litigation can only be fulfilled when the accused person is alive.<sup>41</sup> In criminal cases, it is justifiable that criminal punishment cannot be transferred to another person, thus ensuring the finality of criminal justice upon the death of an accused person.

Although this work focuses on criminal abatement, it remains relevant because it offers a theoretical framework for understanding abatement doctrines more generally.<sup>42</sup> However, its analytical value is limited when applied directly to civil litigation, including the study under review. It concentrates on the punitive nature of criminal law without considering the fundamental aspects that can be invoked in civil litigation, such as the survival of the right to sue in civil cases when a party to the suit dies. The article does not offer discussion on how procedural rules should accommodate the survival of rights and liabilities in civil matters, where the right to sue survives. This gap can be well discussed in the current article to offer a balanced view on criminal and civil abatement.

Reviewed literature indicates that while the procedural doctrine of abatement is intended to ensure prompt finality of civil litigation, its strict application often impedes access to civil

justice by terminating claims against the deceased party in cases where no legal representative is appointed within the prescribed timeline. This procedural rigidity limbo calls for redress. Despite valuable thoughts in the reviewed literature from other jurisdictions, the existing literature discloses a substantial gap in addressing the specific challenges as far as Tanzania's legal system is concerned. The article under review seeks to fill this gap by addressing the abatement procedure in a manner that will align with the pursuit of justice in litigation.

### 3. LEGAL FRAMEWORK

In Tanzania, the Civil Procedure Code<sup>43</sup> primarily governs procedural regimes on the abatement of civil suits upon the death of a party to civil suits. The Law of Limitation Act<sup>44</sup> provides for the time limit within which a person has to apply for a legal representative to be joined; otherwise, the suit against a dead party abates. Generally, the two legislations provide the situations under which a civil suit continues, abates, or is revived. Though the legal framework is intended to ensure procedural direction and certainty, its stringent compliance has often caused procedural injustice, especially when suits are abated, at the same time, the remaining parties have a legal claim and defence. This practice is tantamount to a denial of the right to be heard enshrined in the Constitution of the United Republic of Tanzania,<sup>45</sup> which guarantees the right to be heard before an independent body entrusted with the duty to dispense justice.

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<sup>40</sup> L R Dickerman, 'Disposition of a Federal Criminal Case When Defendant Dies Pending Appeal' (1979) 13 *University of Michigan Journal of Law Reform* 198.

<sup>41</sup> *Gilchrist v. State*, crim. Ct of app. 1929 281.

<sup>42</sup> Michigan Law Review Association, 'Crimes: Procedure: Abatement of Appeal in Criminal Case after Death of Defendant' (1930) 28(5) *Michigan Law Review* 619–620 <https://www.jstor.org/stable/1279618> accessed 6 April 2025.

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<sup>43</sup> Civil Procedure Code, Cap 33 R.E. 2023.

<sup>44</sup> Law of Limitation Act, Cap 89 R.E 2023.

<sup>45</sup> Constitution of the United Republic of Tanzania 1977, CAP 2 R.E 2008.

### 3.1 Constitution of the United Republic of Tanzania

The Constitution of the United Republic of Tanzania,<sup>46</sup> which in fact is the mother law, provides for the fundamental rights of the right to be heard. As a matter of principle, every person is entitled to the right to a fair hearing before an independent organ entrusted with the duties of dispensing justice. No person should be condemned unheard. The principle is a pillar of every civilised society, including Tanzania. The Constitution further provides for the right to equality before the law, in which case, each person must be treated equally before the law.<sup>47</sup> All people, including litigants in the proceedings, are to be treated equally and fairly. It is a principle of justice that an interpretation of procedural law, including those relating to abatement of suits, must comply with Constitutional requirements, which ultimately promote fairness, access to justice, and equality as the case may be.

#### 3.1.1 Constitutional Right to be Heard in Relation to Access to Justice

The Constitution of the United Republic of Tanzania<sup>48</sup> enshrines the fundamental right of being heard through a fair process regarding the right of everyone who is likely to be affected by the decision to be made. This represents the common law principle of *audi alteram partem*, a foundation of procedural justice in any civilised society, including Tanzania. The Court of Appeal, Tanzania, highlighted this authoritative principle in the celebrated case of *Mbeya-Rukwa Auto Parts and Transport Ltd v Jestina George Mwakyoma*<sup>49</sup>, where it held that the right to be heard is so fundamental and natural, that it

should be guaranteed even where it is not expressly stated. This principle becomes relevant in the context of civil litigation, in which strict rules of procedure applicable to abatement following the death of a party to a civil suit, when not invoked properly, undermine the constitutional principle of the right to be heard, thus any law which contravenes the Constitution is void to that extent. The surviving parties may lose the fundamental right of being heard where the suit has abated and the legal representative is not joined.

#### 3.1.2 Equality Before the Law

The Constitution of the United Republic of Tanzania further guarantees equality before the law.<sup>50</sup> Constitutionally, all persons are equal before the law and deserve protection under it. All forms of discrimination and arbitrary treatment are prohibited. The principle was reiterated in the landmark case of the *Director of Public Prosecutions v Daudi Pete*.<sup>51</sup> Thus, the constitution further gives any person the right to protect the constitution<sup>52</sup> and to petition in case of a breach of any constitutional right.<sup>53</sup> When there is an allegation that restricts access to justice, it has been the duty of the court to address it and to ensure that the same right is well-protected as required by law. In *Zaid Mohamed v Republic*<sup>54</sup> the Court of Appeal held that the constitutional right to equal treatment under the law applies in both substantive and procedural law. It is argued that automatic abatement when no legal representative is appointed is considered unfair as it automatically extinguishes the rights of the

<sup>46</sup> Constitution of the United Republic of Tanzania 1977, CAP 2 R.E 2008.

<sup>47</sup> Art 12.

<sup>48</sup> Art 13(6)(a).

<sup>49</sup> [2003] TLR 251 (CAT).

<sup>50</sup> Constitution of the United Republic of Tanzania 1977, art 13(1).

<sup>51</sup> [1993] T.L.R.22.

<sup>52</sup> Constitution of the United Republic of Tanzania 1977, art 27.

<sup>53</sup> Art 30(3).

<sup>54</sup> [1991] TLR 71.



valid claim or defence which the surviving parties have against the deceased party.

### **3.1.3 Prohibition Against Technical Injustice**

In the administration of civil justice, procedural rules are crucial in ensuring that litigation is conducted in a proper and orderly manner. However, under no circumstances should procedural rules be allowed to defeat the prime purpose of litigation, which is to achieve substantive justice by resolving disputes between the parties impartially, efficiently, and fairly. The Tanzanian legal system embraces the principle that rules of procedure are nothing but vehicles for justice. In *General Marketing Co. Ltd v. A.A. Sharraf*, the court reiterated the principle that the rules of procedure are the handmaidens of justice. In all situations, they should be applied to facilitate justice rather than defeat it

The above jurisprudential approach finds normative force in the constitutional architecture of Tanzania, which requires that justice be done without being tied up by strict procedural technicalities.<sup>55</sup> This constitutional requirement must be broadly interpreted to include the right to be heard as well as the right of access to justice, as these rights are related and interconnected. Thus, these Constitutional values form the foundation of any credible justice system.

In Tanzania, like in any other jurisdiction, the rules of procedure applicable to the substitution of a party upon the death of that party need to be interpreted by using a liberal approach. The broad approach of the Constitutional spirit<sup>56</sup> must be taken on board to ensure that the rules of procedure are construed in a manner that promotes access to

justice. Access to justice must not be frustrated by procedural rules that are interpreted narrowly.

### **3.1.4 Judicial Discretion and Access to Justice**

One of the noble functions of the court of law is to ensure that litigants have access to justice.<sup>57</sup> Thus, access to justice remains a cornerstone of the rule of law in any civilised society.<sup>58</sup> Any attempt to deny people access to courts of law is as good as a denial of justice.<sup>59</sup> Courts of law as custodians of justice must struggle to dismantle procedural requirements which do not serve any purpose.<sup>60</sup> The late Mwalimu Nyerere, the founding President of Tanzania, while supporting this assertion, contended that justice should always be seen to be done to both the weak and the powerful persons.<sup>61</sup> These views are in conformity with the judiciary's sacred obligation to facilitate access to justice. This can be achieved where the court has discretionary power to ensure that rules of procedure are not a bar to justice, but a vehicle for facilitating access to justice.

## **3.2 Civil Procedure Code**

The Civil Procedure Code regulates civil litigation in Tanzania. Among the issues that are regulated under the Act are the legal consequences of the death of a party to a civil suit. Essentially, the law provides the legal framework applicable where one of the parties dies, including substitution of a party, and abatement of a suit.<sup>62</sup> As a general principle,

<sup>57</sup> Ibid.

<sup>58</sup> Lord Woolf, Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (HMSO 1996) ch 1.

<sup>59</sup> Jeremy Bentham, The Works of Jeremy Bentham, ed. John Bowring, vol 5 (William Tait 1843) 235.

<sup>60</sup> Art 107A(2)(e).

<sup>61</sup> Julius K Nyerere, Freedom and Development: A Selection from Writings and Speeches 1968–1973 (Oxford University Press 1973) 26.

<sup>62</sup> Civil Procedure Code, Cap 33 R.E 2023, O. XXII

<sup>55</sup> Constitution of the United Republic of Tanzania 1977, art 107A(2)(e).

<sup>56</sup> Constitution of the United Republic of Tanzania 1977, art 107A(2)(e).

the death of a party to a civil suit does not lead to abatement of the suit if the right to sue survives.<sup>63</sup> The rationale of this rule is to maintain continuity of litigation in situations where the cause of action does not come to an end merely because of the death of a party to the suit. In *the Trade Union Congress of Tanzania (TUCTA) v Engineering Systems Consultants Ltd and 2 Others*,<sup>64</sup> the court stated that, as a matter of law, a suit does not abate automatically upon the death of the plaintiff or the defendant.

Also, at times where there are multiple parties to a suit, plaintiffs and defendants and one of them dies, while the right to sue survives in respect of or against surviving parties, an entry will be made by the court on record for the deceased party and the suit shall proceed without necessarily making a substitution.<sup>65</sup> Thus, the death of one of the parties in this regard should not be construed as a bar to litigation in a situation where the remaining parties can continue with the suit.

The Civil Procedure Code further regulates strictly procedural requirements in cases where the right to sue does not survive solely on the remaining parties to the suit. In this case, where two or more plaintiffs die and the right to sue does not survive, upon application, a legal representative of the deceased party will be substituted.<sup>66</sup> The law further imposes stringent consequences for failure to apply for substitution of the party which renders abatement of the suit.<sup>67</sup> In terms of the Civil Procedure Code<sup>68</sup> and the Law of Limitation

Act,<sup>69</sup> Where a party to a suit dies and the suit survives, his legal representative may be joined in his place within 90 days of his death. If no legal representative is so joined within the statutorily prescribed time, the suit against such a party abates. This means that it ceases to exist against that person.

The court of Appeal of Tanzania, while addressing this statutory position in the case of *Naomi Vuhahula Mpemba & Others v. Halifax Investment T. Limited & Others*<sup>70</sup> held that the legal position is clear that when a party to a suit dies and no legal representative has been joined within the statutory period, such suit abates against the deceased party. After abatement of suit, any proceedings conducted or decision made thereof in the absence of a duly appointed and joined legal representative render such proceeding and decision, if any, illegal for want of a proper party to the suit.

The suit abatement regime for the plaintiff has a similar regime that applies in the case of the death of the defendant.<sup>71</sup> This provision is a replica of the position of the plaintiff. It is required that where there is a sole or several defendants, and one of them dies while the right to sue survives, the legal representative may be added by the court in case of application and within the statutory prescribed time.<sup>72</sup> The effect remains stringent, that in case no application is made as required by law to join the legal representative, the suit against such defendant abates. This position of law was reiterated in the case of *Godwin Charles Lemilia v. Slim Ndikoko & Another*.<sup>73</sup> In line with established legal principles, the suit

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<sup>63</sup> Ibid., O. XXII r 1.

<sup>64</sup> Civil Appeal No 51 of 2016, Court of Appeal of Tanzania at Dar es Salaam, reported in (2016) TANZIIL.

<sup>65</sup> Civil Procedure Code, Cap 33 R.E 2023, O. XXII r 2.

<sup>66</sup> Ibid, O. XXII r 3(1),

<sup>67</sup> Ibid, O. XXII r 3(2),

<sup>68</sup> Ibid, O. XXII rr 3 (1) & 2.

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<sup>69</sup> Law of Limitation Act, Cap 89 R.E 2023, Part III to the Schedule item 16.

<sup>70</sup> Civil Appeal No 319 of 2020 (Court of Appeal of Tanzania at Dar es Salaam), reported in TANZLII, p 8.

<sup>71</sup> Civil Procedure Code, Cap 33 R.E 2023, O. XXII r 4.

<sup>72</sup> Ibid.

<sup>73</sup> Civil Appeal No 28 of 2016 (Court of Appeal of Tanzania at Arusha) [2016] TANZLII 5.

abates when the defendant passes away and no legal representative is joined within the prescribed time limit. After abatement, the suit against the deceased ceases to exist, and no lawful order can be made against the deceased.

Besides, the law gives the mandate to the court that, in case any question arises as to who is the legal representative, the court in which the suit is pending shall determine it.<sup>74</sup> However, the doctrine of abatement does not apply where a party dies after the conclusion of the hearing but before the pronouncement of judgment. Thus, the judgement will be delivered with the same effect as if the judgement were pronounced despite the death of the party to suit.<sup>75</sup>

The Law of Limitation Act further reinforces procedural rigidity by prescribing a strict timeline within which the application for substitution of a legal representative can be made. According to the Act, an application for a substitution of legal representative must be made within ninety days from the death of a party to a suit. The legal consequences for failure to make such an application are that the suit against the deceased party abates. Time limit is of the essence, and it creates legal architecture to ensure litigation comes to an end. However, the intersection of this strict provision in both the Civil Procedure Code<sup>76</sup> and the Law of Limitation Act<sup>77</sup> is too formal, preventing the court from exercising its discretion to determine the matter before it on merit in case one of the parties to the proceedings dies. This rigidity undermines the constitutional right to be heard and often results in the denial of access to justice. This is because suits are forced to terminate without considering genuine claims or defences that

the surviving parties have against a party whose death led to abatement of the suit. This raises questions about the principles of equity and fairness in civil litigation.

### **3.3 The Tanzania Court of Appeal Rules of 2009 as Amended**

The abatement procedures in the Court of Appeal of Tanzania, hereinafter called the CAT, are governed by the Tanzania Court of Appeal Rules of 2009<sup>78</sup> as amended by the Tanzania Court of Appeal (Amendment) Rules of 2019.<sup>79</sup> The architecture of the abatement in the CAT is in two folds: the procedure for abatement in applications pending before CAT, and the second is the procedure governing abatement in appeals. Both procedures operate on similar requirements. However, they have a different timeline for abatement of suits compared to the Civil Procedure Code.<sup>80</sup>

#### ***3.3.1 Abatement of Applications and Appeal in the CAT***

The treatment of the death of a party in appellate litigation is comprehensively governed by the Tanzania Court of Appeal Rules,<sup>81</sup> hereinafter referred to as the CAT Rules. The CAT Rules addressed the abatement of applications<sup>82</sup> and appeals.<sup>83</sup> As a general rule, a civil application<sup>84</sup> and a Civil Appeal<sup>85</sup> does not abate upon the death of the applicant or the respondent. However, in case either of the parties dies, then the interested party may apply, and the court will cause that party, based on the application made be joined

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<sup>74</sup> Ibid, O. XXII r 5.

<sup>75</sup> Ibid O. XXII r 6.

<sup>76</sup> Ibid O. XX rr ,2,3,4,5,6.

<sup>77</sup> Law of Limitation Act, Cap 89 R.E 2002, pt III sch item 16.

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<sup>78</sup> Court of Appeal Rules, G.N. No. 368 of 2009.

<sup>79</sup> Court of Appeal Rules (Amendment), G.N. No. 344 of 2019.

<sup>80</sup> Civil Procedure Code, Cap 33 R.E 2023, ord XXII.

<sup>81</sup> Court of Appeal Rules, G.N. No. 368 of 2009, as amended by G.N. No. 344 of 2019, r 57.

<sup>82</sup> Ibid r 57.

<sup>83</sup> Ibid r 105.

<sup>84</sup> Ibid r 57(3).

<sup>85</sup> Ibid r 105 (1).

as a legal representative of the deceased in either an application<sup>86</sup> or appeal.<sup>87</sup>

The law further stipulates the time limit within which the application must be made. Legally, the application by a legal representative to be joined in the application or appeal<sup>88</sup> must be made within twelve months from the death of the deceased, after which the application shall be deemed to abate.<sup>89</sup> The law under the CAT Rules has stipulated a reasonable time compared to CPC to allow an interested party to apply to be joined as a legal representative. However, the consequences remain the same in case no application is made within that time; the suit shall abate.

The law further gives an avenue for any person who claims to be a legal representative of the deceased to apply to revive an application that has abated for failure to join a legal representative within a stipulated time. However, such a person should be required to adduce a sufficient cause as to what prevented him from making the application on time. It will be the sole discretion of the court to assess the reasons and to grant or not to grant an application for the revival of an abated application<sup>90</sup> or appeal<sup>91</sup> and may even order the costs or any other relief appropriate to the court.

#### **4. COMPARATIVE REFLECTIONS BETWEEN THE CIVIL PROCEDURE CODE AND THE TANZANIA COURT OF APPEAL RULES**

Provisions of the Tanzania Court of Appeal Rules governing the abatement of both

applications<sup>92</sup> and appeals<sup>93</sup> demonstrate a more lenient and justice-conscious approach to abatement in appellate proceedings compared to those in the subordinate courts.<sup>94</sup> While the CAT Rules give a grace period of twelve months for an interested party to apply to be joined as a legal representative, the CPC only provides ninety days. Thus, the duration of ninety days under CPC is considered somewhat shorter and punitive. Moreover, the CPC does not provide a standalone mechanism for the revival of an abated suit. Ideally, the applicant must make a fresh application for revival of the abated suit, which also prolongs the legal process and is subject to court interpretation, without guaranteeing that the applicant will be granted an order to revive the suit.<sup>95</sup>

It is undisputed that the 90-day abatement period is justifiable within the procedural logic of subordinate courts, especially in matters assigned under Speed Track One, which lasts ten months. Thus, expeditious disposition of a suit is an overriding objective of justice administration. However, under accelerated tracks, the death of a litigant involves a tedious process initiated by interested surviving parties which often exceeds ninety days. Evidentially, Speed Track as it stands is not absolute. Courts routinely exercise their jurisdiction to extend Speed Track if there are justifiable reasons, such as when one of the parties dies before the conclusion of the proceedings. Thus, rigid adherence to expedited schedules may undermine interest of access to justice. Whilst, the CAT's twelve-month grace period is expressly calibrated to the realities of appellate litigation, where records are complex and parties may be widely dispersed. The extended timeframe advocated is a reflection of a more justice-conscious approach, ensuring that

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<sup>86</sup> Ibid r 57(3).

<sup>87</sup> Ibid r 105 (2).

<sup>88</sup> Court of Appeal Rules, G.N. No. 368 of 2009, as amended by G.N. No. 344 of 2019, r 105(2).

<sup>89</sup> Ibid, r 57(4).

<sup>90</sup> Ibid r 57(5).

<sup>91</sup> Ibid r (3).

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<sup>92</sup> Ibid r 57.

<sup>93</sup> Ibid r 105.

<sup>94</sup> Civil Procedure Code, Cap 33 R.E 2023, ord XXII.

<sup>95</sup> Ibid O. XXII, r 9.

appeals are not prematurely disposed of due to the death of a party, while undermining substantive justice.

By contrast, the CAT Rules provide a twelve-month window and expressly allow revival upon good cause, which conforms with constitutional principles of fair hearing.<sup>96</sup> This flexibility is commendable. However, it heavily depends on the parties' initiatives, which could be improved by giving the court the discretionary power to act *suo motu* to enhance justice, especially when no legal representative is appointed within the prescribed time.

The cumulative effect of these legal procedural rules is to ensure that there is an orderly control of legal proceedings and that proceedings come to an end. Thus, the rules on substitution and abatement aim to ensure the orderly administration of civil proceedings. However, their strict compliance may lead to the denial of the right to be heard and access to justice for a party with a valid claim or defense.

Generally, the legal framework does not accommodate situations where the beneficiaries of the deceased's property are not willing to appoint a legal representative to avoid the deceased's legal obligations. Furthermore, the absence of a statutory provision authorising the court to substitute a public officer, such as the Administrator General, in circumstances where no legal representative is appointed within the limitation period, aggravates the problem, leaving meritorious cases to abate solely on procedural grounds. The strict application of these rules of procedure creates tension between the demands of justice in accessing justice and the adherence to procedural requirements.

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<sup>96</sup> Constitution of the United Republic of Tanzania 1977, art 13(6)(a).

## 5. LESSONS FROM INDIA

The legal framework for suit abatement in India offers expressive jurisprudential guidance for addressing procedural challenges in suit abatement. The basis for taking India as a country from which to draw a lesson is centered on the shared feature between the Indian and Tanzanian legal systems.<sup>97</sup> Both countries inherited common law systems that were transplanted and became operational in Tanganyika and India.<sup>98</sup> Taking into account the similar legal system between Tanzania and India, Indian jurisprudence on suit abatement is well developed, which gives the author confidence to draw lessons from the Indian legal system on abatement procedure.

Unlike Tanzania, Indian civil procedure on suit abatement offers a pragmatic and justice-oriented approach to such situations. Under the Civil Procedure Code<sup>99</sup> the general principle of the suit abatement in India and Tanzania is similar; thus, the provision expresses the same aspect. To avoid repetition of similar statutory provisions, this article has selected only provisions from the Civil Procedure Code that are dissimilar to those of India.

The Code of Civil Procedure<sup>100</sup> provides that, in a situation in which the court finds that a deceased party has no legal representative, upon an application made by any of the surviving parties, the court may appoint Administrator General, Court officer or any other person who, in the opinion of the court, is capable of standing in the shoes of the

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<sup>97</sup> Sen, A. Legal Aspects of Public Enterprise in India and Tanzania: A Comparative Study. (Thesis). SOAS University of London, <https://doi.org/10.25501/SOAS.00033680>

<sup>98</sup> Menski, Werner, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2nd ed.). Cambridge: Cambridge University Press, 2006.

<sup>99</sup> Code of Civil Procedure 1908 (India) (Act No 5 of 1908), ord XXII r 4A.

<sup>100</sup> Ibid r 4A.



deceased. The rationale of this provision is to ensure the continuity of filed suit and its consequential determination on merits. This ensures that no suit is terminated on the mere ground that there is no legal representative. The consequential effect of the suit that has been rendered in the presence of parties on behalf of the deceased appointed by the court will have the same effect as if a legal representative had been joined.

From the aforementioned provision, it is clear that it intends to facilitate access to justice. It does not hinder the same as this is the primary purpose of procedural rules. The discretion vested in the court to appoint a representative is an important protection against abatement of a civil suit. It places the rule of procedure as a vehicle for promoting substantive justice. This resolves the situation in which family members are not willing to take on the administration of the estate due to reasons known to themselves.

The Indian legal position on abatement of suit has developed a steady jurisprudential flexibility in procedure when a party to a suit dies. In the case of *Smt Kamrunisha Wd/o Mohd Umar & Others v Smt Karorabai Wd/o Matafer Gupta & Others*<sup>101</sup> the court held that it was proper for the government official or any officer of the court to be joined by the court upon application to stand for the deceased party where no legal representative has been appointed.

Thus, Indian courts have also invoked inherent powers to ensure justice is not only seen but seen to be done. The law has given them a discretionary power to join any suitable person in case no legal representative is joined, solely to ensure that the suit is adjudicated on merit

and to avoid the abatement consequences which may not yield the intended justice outcome to the surviving litigant. To contrast, Tanzanian courts do not currently have such express statutory mechanisms under both the CAT Rules<sup>102</sup> and the Civil Procedure Code.<sup>103</sup> Thus, the Indian approach demonstrates how procedural rules ought to be interpreted in order to ensure that justice is accessed fairly and equitably without procedural stumbling blocks.

The jurisprudential lesson drawn from India is therefore not prescriptive but illustrative. The legal system needs to develop internal operating conditions that ensure sound guiding procedural rules and the interest of justice. This mechanism ensures that justice is properly achieved under the vehicle of procedural rules. If this is not taken care of, the ultimate result is that substantive justice will become subordinate to procedural justice, which should not be the case. The old and cherished principle that the rules of procedure are handmaidens of justice must be considered when interpreting procedural law for the better attainment of justice.

## 6. CONCLUSION

This article has shown that the Tanzanian civil procedural regime concerning suit abatement is condemned for being rigid, particularly under the Civil Procedure Code, the Law of Limitation Act, and the Court of Appeal Rules. The statutory requirement to substitute a deceased's legal representative within ninety days without judicial discretion to inquire as to why no legal representative is appointed, and a lack of discretionary power by the court to join any suitable person to stand in the shoes of the legal representative, is often regarded as a vehicle for procedural injustice. While the Tanzania Court of Appeal Rules provide a

<sup>101</sup> *Smt Kamrunisha Wd/o Mohd Umar & Others v Smt Karorabai Wd/o Matafer Gupta & Others*, Appeal No 45 of 2006 (Bombay High Court, Nagpur Bench, 21 September 2021).

<sup>102</sup> Court of Appeal Rules, G.N. No. 368 of 2009.

<sup>103</sup> Civil Procedure Code, Cap 33 R.E 2019.

longer period of twelve months for substitution of a legal representative upon application, these safeguards are not available in the subordinate courts. The longer duration, though recommended, is not a panacea for procedural injustice in the abatement of the suit. Under the Civil Procedure Code, the Court of Appeal Rules do not provide an avenue for the court to appoint any suitable person to stand as a legal representative in the absence of one, as is permitted in India. This procedural deficiency defeats the purpose of civil litigation.

Grounded in the access to justice theory, this article argues that procedural rules should not operate as traps for the unwary but should facilitate the resolution of disputes on their merits. The article has drawn practical jurisprudential lessons from India, a jurisdiction with a similar common law heritage and developmental context, where courts have been empowered both statutorily and jurisprudentially to preserve claims from abatement in the interest of justice. The Tanzanian legal system can benefit from such experience, not by direct comparison, but by recognising that similarly situated legal frameworks can adopt mechanisms that uphold fairness without compromising procedural discipline.

To address the procedural injustices arising from rigid abatement rules, the following reforms are proposed: The authors propose that the justice system should abolish procedural rules that impede access to justice. The strict application of procedural rules has an adverse impact, including the loss of valid legal claims. Extension of time in the Civil Procedure Code and reduction of time under the Tanzania Court of Appeal Rules within which the suit should abate. While the Tanzania Court of Appeal Rules provide twelve months for abatement of a civil suit where no legal representative is appointed, the

Civil Procedure Code, on the other hand, provides a ninety-day time limit. This period under the CPC may, at times, be insufficient, especially when there are contentious matters. Though parties may apply for extension of time, the ninety-day limit is intended to ensure that the legal representative is appointed promptly. However, it should be extended to give a reasonable period and avoid frequent applications for extension of time. It is further recommended that the period under the Court of Appeal Rules be reduced to six months. Twelve months is quite a long time, and there should be a balance between the timely delivery of justice and the legal process in the dispensation of justice.

Courts should have the power to appoint the Administrator General or any other public officer to represent a deceased party in order to allow the suit to proceed. This should apply where a legal representative is not appointed within the prescribed time. This practice is followed in India and ensures that just claims are not defeated merely because a party to a civil suit has died. It also allows lawful defenses to be heard to their conclusion. Such a measure would enhance access to justice and ensure that litigation is concluded through a proper legal process.

The judicial discretion should be invoked for the purpose of enhancing access to justice. Procedural rules on abatement should be guided by the application of judicial discretion. This will help ensure that where injustice is likely to be caused by procedural rules, courts are able to intervene and streamline the process. Rules of procedure should not be applied robotically. Doing so may lead to injustice and defeat the very purpose of litigation.

In conducting this research, several challenges were observed. This study is primarily based on doctrinal methodology, relying on statutory interpretation, legal theory, and judicial

decisions, without incorporating empirical data. While this approach is valuable for analysing the doctrine of abatement, it may be subject to criticism due to the absence of empirical evidence demonstrating practical application. Nevertheless, the methodological approach was justified, as the nature of the study required a detailed assessment of the law and relevant case decisions. Future studies, however, may adopt an empirical approach to provide a more balanced perspective.