IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And MASSATI, J.A.)

CIVIL APPEAL NO. 28 OF 2016

MR. GODWIN CHARLES LEMILIA.....APPELLANT

VERSUS

1. SLIM NDIKOKO
2. LIKIMBALONYE SEREIYO .....RESPONDENTS

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Massengi, J.)

Dated the 29th day of July, 2013
in
Land Case No. 22 of 2008

.....

JUDGMENT OF THE COURT

29th July & 2nd August, 2016

MASSATI, J. A.:

The background to this matter is that on 15th July, 2008, the appellant instituted a Land Case No. 22 of 2008 in the High Court at Arusha against the respondents for the following major relief:-

> *"That the proceedings and decisions in Kiranyi Ward Tribunal Complaint Number 4 of 2002, the District Land Conciliation Tribunal Appeal No. 15 of 2002, the Customary Land Appeals Tribunal*

Appeal under 27 of 2003, and the Emosi Primary Court Execution proceedings in application number 15 of 2002 be quashed and set aside."

The suit was resisted by the then defendants. In particular, the first respondent/defendant successfully raised a preliminary objection that the suit was bad and incompetent in law as it disclosed no cause of action against the first defendant/now respondent. In a ruling dated 29/1/2013 that preliminary objection was upheld by the High Court (Massengi, J.) and the suit was struck out with costs.

On 14/2/2013, the appellant through his advocate M/s Maro and Company, lodged a notice of appeal to this Court. All the necessary documents were supplied to the learned advocate, who accordingly lodged the present appeal on 15th December, 2015.

When the appeal came up for hearing, Mr. Elivaison Maro, learned counsel, appeared for the appellant. The first respondent was absent, but the second respondent was present in person. According to Mr. Maro, in the course of trying to serve the first respondent with the records of appeal he learned that the first respondent, had in fact, expired. The learned counsel had earlier on 21/7/2016 written to the Court, a letter reference EELM/19/MISC/Vol. XXXVIII/7/2016 to inform

the Court of the first respondent's demise. He also attached a copy of a death certificate No. 1000035151. According to that certificate the respondent expired on 20/9/2011.

Mr. Maro then went on to submit that, the High Court proceeded with the hearing of the case without the knowledge of the first respondent's death on 20/9/2011. In fact even the respondent's counsel Mr. Siay, fully participated in the proceedings by raising the preliminary objection on 12/7/2012 and filed a written submission thereon on 1/8/2012. He did not seem to be aware of his client's death, or if he was, he did not inform the trial court. So, Mr. Maro pointed out that it was obvious that all the proceedings at the High Court after 20/9/2011 were conducted in the absence of a deceased party.

The learned counsel submitted that in terms of Order XXII r. 4 (1) and (2) of the Civil Procedure Code Cap. 33 R.E. 2002 (the CPC) the suit could not proceed without joining the first respondent's personal legal representative. He also pointed out that in terms of the Law of Limitation Act, third schedule, item 16, such an application ought to have been made within 90 days. The 90 days expired on 21/12/2011. After the 90 days, and in terms of OXXII r. 4 (3) of the CPC, the suit against the first respondent abated. So, in his view, all the proceedings after the demise

of the 1st respondent were a nullity. He therefore invited the Court to invoke its revisional powers, revise and quash all those proceedings, from 20/9/2011 onwards.

The second respondent, a layman as he was, had nothing useful to add to, but supported what Mr. Maro had submitted.

On his part, Mr. John Materu who introduced himself as holding a watching brief for the beneficiaries of the first respondent's estate, was invited to address the Court as its friend. He wholly subscribed to Mr. Maro's submission, and prayed that since the proceedings after the first respondent's demise were illegal they ought to be quashed.

There is no doubt that the first respondent in this appeal had expired since 20/9/2011. It is also true that as the suit related to property interests, the interest to sue survived to the appellant, in terms of OXXII rr. 1 and 2 of the CPC, it also survived against the defendants/respondents. As the matter of the first respondent/defendant death is not disputed, we agree with Mr. Maro that under O XXII r. 4 (1) a legal personal representative of the first respondent ought to have been made a party to the action, if the court was moved to do so.

As Mr. Maro and Mr. Materu have demonstrated, no such step has been taken in the instant case.

We think that the matter before us is straightforward. The position of the law admits of no ambiguity or interpretation. In terms of Order XX 4 rr. 1, 2 and 3 of the CPC and the Law of Limitation Act, Cap 89 R.E. 2002 (part III – schedule item no. 16) where a defendant dies and the suit survives, his personal legal representative may be joined in his place within 90 days of his death. If no legal representative is so joined, the suit against such a party abates. It ceases to exist against that person. So unless the defendant had died after the conclusion of the hearing and the pronouncing of the judgment, in terms of O XX r 6 CPC, nothing lawful can be conducted or decided in the absence of a legal representative, or after the abatement of the suit. We therefore agree with Mr. Maro and Mr. Materu that in the present case, everything done or decision made after the death of the first respondent (on 20/9/2011) and after the suit had abated against him is null and void. Even in terms of O XX r. 6 and assuming the preliminary objection was a hearing, it still proceeded after his death.

We accordingly exercise our revisional powers under section 4 (2) of the Appellate Jurisdiction Act Cap 141 R.E. 2002, revise all the

proceedings from 20/9/2011 onwards and quash them. We order that the case file be remitted to the trial court for the parties to apply for necessary orders before the High Court after the death of the first respondent, if they so wish.

We make no order as to costs.

DATED at **ARUSHA** this 1st day of August, 2016.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL