

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MUSSA, J. A., MKUYE, J. A. And WAMBALI, J. A.)

CIVIL APPEAL NO. 293 OF 2017

SIMON NCHANGWA APPELLANT

VERSUS

**1. MAJALIWA BANDE }
2. JOHN NYAKIBARI } RESPONDENTS**

**(Appeal from the decision of the High Court of Tanzania
at Dar es Salaam.)**

(Mzuna, J.)

dated the 7th day of August, 2015

in

Civil Case No. 274 of 1995

RULING OF THE COURT

24th September & 8th October, 2018

MUSSA, J.A.:

In the High Court of Tanzania, the first respondent sued the appellant along with the second respondent over a sale transaction in relation to a house erected plot on No. 98, block "C" Mikocheni area, Dar es Salaam. Having heard the case on the merits, the High Court (Mzuna, J.) partly upheld the claim by the first respondent. The appellant is aggrieved and presently seeks to impugn the

decision of the High Court upon a memorandum of appeal which is comprised of five points of grievance.

When the appeal was placed before us for hearing on the 24th September, 2018 the appellant was represented by two learned Advocates, namely, Dr. Masumbuko Lamwai and Mr. Juma Nassoro. The second respondent had the services of Professor Gamaliel Mgongo Fimbo, learned Advocate, whereas the first respondent entered appearance through Mr. Mluge Fabian, also learned Advocate.

At the very outset, Professor Fimbo rose to inform us that his client, the second respondent, passed away on the 25th July, 2018 in Bujumbura, Republic of Burundi. The learned Professor further informed that the sad occurrence was communicated to the Court through a letter dated the 21st September, 2018 which was addressed to the Registrar of the Court of Appeal. In the circumstances, Professor Fimbo prayed for an adjournment so as to give an opportunity to the family members to agree on the name of a person fit to be the legal representative of the deceased. Once

that is done, he added, the legal representative should, in turn, apply to the Court to be made a party to the appeal in the place of the deceased. To buttress his quest for an adjournment, the learned counsel for the second respondent referred to us the unreported decision of this Court in Civil Appeal No. 23 of 2009 – **Citibank Tanzania Ltd versus Tanzania Telecommunications Company Ltd and Four Others**. It is, perhaps, pertinent to observe that, in that case, the Court was faced with the issue as to whether or not it was safe to proceed with the hearing of an appeal in the absence of the liquidator who had died. Having heard the parties, the Court held that there was need for the appointment of another liquidator who should, in turn, apply to be made a party in the place of the deceased liquidator.

Professor Fimbo was optimistic that the entire process of installing the legal representative as a party in the place of the deceased should be done within three months from the date of the delivery of this Ruling.

The prayer for an adjournment was fully seconded by Mr. Fabian, the learned counsel for the first respondent who had nothing useful to add.

From the adversary side, Dr. Lamwai strenuously resisted the prayer for an adjournment. In his submission, this is a fairly old matter to which the paramount concern should be towards its final disposal. Since, he said, counsel for the second respondent has already filed his written submissions, what remains is an oral submission in support thereof. That being the position, Dr. Lamwai urged that it will be in the best interests of all the parties to proceed with the hearing so as to finally determine the matter. The learned counsel for the appellant distinguished the case of **Citibank** (*supra*) on account that the same was concerned with the death and replacement of a liquidator, whereas the present matter relates to the death of a party to an appeal.

Having heard the learned rival arguments from both sides, we propose to, extract in full, the relevant provisions of the Tanzania

Court of Appeal Rules, 2009 (the Rules). The same are comprised in Rule 105 which goes thus:-

"An appeal shall not abate on the death of the appellant or respondent but the Court shall, on application of any interested person, cause the legal representative of the deceased to be made a party in place of the deceased."

To cull from foregoing extracted rule, in the wake of the demise of either the appellant or the respondent, the survival of an appeal is dependent upon a successful application by an interested person for the joinder, in the appeal, of the legal representative in the place of the deceased. Thus, the Rule necessarily contemplates a double-jointed process: **First**, the appointment of the legal representative of the deceased which should be done, we should suppose, by family members of the deceased and; **second**, subsequent to the appointment, an application should be made, by any interested person, for the joinder of the legal representative, in

the appeal, in the place of the deceased. Again, we should suppose, the "interested person" may as well be the appointed legal representative.

All said, we take the position that such are the prerequisites for proceeding with the hearing of an appeal in the wake of the demise of either the appellant or the respondent. To put it differently, the presence of a legal representative is obviously required for the Court to proceed with the hearing of an appeal following the death of either the appellant or the respondent. Besides, one should expect the Court as, indeed, it is the best interests of either party, for it to determine a matter upon the hearing of the parties either personally or their legal representatives. A contrary approach will put in jeopardy a party's right to a fair hearing and may just as well render the resultant decision to be inexecutable.

To this end, we are of the decided view that an adjournment of this appeal is deserving so as to enable whoever are interested in the matter to appoint a legal representative of the deceased and,

thereafter, seek the permission of the Court to have him/her installed as a party to the appeal in the place of the deceased. Since we cannot predict the length and timing of the exercise we deem it inappropriate to allocate a time frame for the completion of the process. In fine, the hearing of the appeal is, accordingly, adjourned to a date to be fixed by the Registrar. Costs will follow the event in the main cause.

DATED at DAR ES SALAAM this 28th day of September, 2018

K. M. MUSSA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL