IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A. And KITUSI, J.A.)

CIVIL APPEAL NO. 48 OF 2019

SHARIFU NURU MUSWADIKU.......................................APPELLANT

VERSUS

RAZAKA YASAU
MSWADIKU CHAMANI ....**RESPONDENTS**

(Appeal from the judgment of the High Court of Tanzania at Bukoba)

(Kairo, J.)

Dated 19th Day of August, 2016
in
Land Case Appeal No. 47 of 2013

RULING OF THE COURT

15th & 18th December, 2020

KITUSI, J.A.:

This appeal arises from proceedings that were commenced at the Ward Tribunal of Chanika, in Bukoba District, in January, 2012. Sharifu Nuru Muswadika, the appellant, sued Razaka Yasau and Muswadiku Chamani, the first and second respondents respectively, over a parcel of land located within Karagwe District. He lost before the Ward Tribunal but successfully appealed to the District Land and Housing Tribunal, (DLHT) Bukoba, vide Appeal No. 65 of 2012. On further appeal to the High Court preferred by the first respondent, the decision of the DLHT was reversed. Not to be outdone, the appellant has appealed to the Court to challenge the decision of the High Court.

In a nutshell, both the appellant and the first respondent claim title to the piece of land in dispute, each claiming to have been given the same by the second respondent. Incidentally, they are both related to him by blood; the appellant being his biological son and the first respondent being the second respondent's grandchild from another son who passed away. At the trial Tribunal, the second respondent supported the first respondent's version that he gave the piece of land to him. The Tribunal accepted that version and entered judgment for the first respondent, a decision which the appellant appealed against at the DLHT, as intimated earlier.

The appellant has raised five grounds to challenge the decision of the High Court that restored the Ward Tribunal's decision.

However, right from the beginning when the appeal was called on for hearing, with only the appellant and the first respondent appearing in person, we asked them to address us on the propriety of the proceedings at the DHLT and at the High Court. This is because the record of appeal placed before us indicates that on 26th September, 2012 the DLHT was informed about the second respondent's death. The appellant had with him a person to whom letters of administration of the estate of the second respondent had been granted. However, despite this fact and the knowledge that the second respondent had died, hearing at the DLHT proceeded without joining his legal representative. Unfortunately, and with respect, the High Court did not rectify the error and similarly proceeded without joining the legal representative of the deceased second respondent.

In addressing us, the appellant had a cocktail of arguments. First, he seemed to suggest that it was the duty of the administrator of the estate to take steps aimed at getting himself joined in the proceedings. Then within the same breath, he argued that after all, the second respondent had testified at the Ward Tribunal so we could dispense with his legal representative's appearance.

The first respondent hit back in response. He submitted that the appellant should have sorted out the matter with his siblings because the second respondent happened to be their father. He being a grandson, he submitted, could not meddle into the affairs of their family in discussing who should represent the interests of the second respondent in the case.

Having heard those brief submissions by the parties, we start by pointing out that, as a general rule, civil actions survive death of the parties where the right or duty survives. In our civil procedure, it is Order XXII of the Civil Procedure Code, Cap 33 R.E 2002 (the CPC) which provides for what should be done. Under Order XXII rule 4(3) of the CPC the surviving party is required to make an application for a legal representative of a deceased party to be joined in the proceeding, failure of which may lead to the suit to abate.

We are aware that the CPC applies in this case vide section 51 of the Land Disputes Settlement Act, Cap 206. What then should the DLHT have done in this case? We think the Tribunal should have adjourned the appeal to enable any interested person to apply to be joined as a party. This is the position we took in **Joseph Chamba & Another v. Ramson Mlay,** Civil Appeal no. 107 of 1998 (unreported). In that case we said;

"We were of the considered opinion that all that the Court is required to do upon being informed of the death of a party is to adjourn and give sufficient time within which an interested person could make an application which could entitle a legal representative of the deceased to step into the shoes of the deceased".

Although in the cited case the Court was interpreting Rule 98 of the old Court of Appeal Rules 1979 now Rule 105 of the Court of Appeal Rules 2009, (the Rules), the said rule is in effect similar to what order XXII of the CPC provides.

So, what happened in the DLHT on 26th September, 2012? We shall let the record speak:

"Appellant: The 2nd respondent (sic) has been passed away and I have come with the administrator of estate.

Tribunal: The purported administrator of estates has no any document to prove the appointment.

Order: Hg on 12th December, 2012 the parties to comply.

Sgd: Chairman

26 September, 2012"

There were several adjournments thereafter, but there was no indication that the same were related to appointment of an administrator of the 2nd respondent's estate or the joining of his legal representative. Later the hearing proceeded to finality.

We are settled that the DLHT not only violated the dictates of Order XXII rule 4 (3) of the CPC, but denied the respondents a fair hearing.

Thus, the proceedings before the DLHT and the subsequent appeal to the High Court were a nullity for being conducted in the absence of the second respondent's legal representative. In the exercise of our powers of revision under section 4 (2) of the Appellate Jurisdiction Act, (the AJA), we nullify those proceedings and quash the resultant orders. We order the judgment and decree of the Ward Tribunal of Chanika to be in force until it is otherwise varied through a properly conducted appeal.

In the circumstances of this case, we desist from determining the merits of the appeal because the proceedings before which it arises were a nullity as ordered. Considering the justice of this case, we make no orders as to costs.

DATED at **BUKOBA** this 18th day of December, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Ruling delivered this 18th day of December, 2020 in the absence of the Appellant, but represented by Mr. Ally Chamani, the learned counsel and in the absence also of the 1st respondent who was represented also by Mr. Ally Chamani, the learned counsel for the Respondents, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL