

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

(CORAM: WAMBALI, J.A, SEHEL, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 45 OF 2019

MABONGOLO LUMA 1ST APPELLANT

KHADIJA ABUBAKARI MWINYI 2ND APPELLANT

VERSUS

PETER A. MLANGA RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania,
Land Division at Dar es Salaam)**

(Mutungi, J.)

Dated the 29th day of June, 2015

in

Land Case No. 271 of 2010

JUDGMENT OF THE COURT

18th March & 11th April, 2022

WAMBALI, J.A.:

Peter A. Mlanga who is indicated in the instant appeal as the respondent (then plaintiff) approached the High Court of Tanzania, Land Division at Dar es Salaam in which through Land Case No. 271 of 2010 he sued the appellants (then defendants), Mabongolo Luma and Khadija Abubakari Mwinyi over a land dispute on Plots No. 201 and 203 Block 'N' Mbagala, Temeke District, Dar es Salaam. In that suit he claimed, among other reliefs, the following orders: a declaration that the appellants are in

breach of commitment agreement to pay the compensation; a declaration that he was still a legal owner of the disputed plots and that the appellants are trespassers; and vacant possession of the disputed plots.

In the alternative, the respondent prayed for the payment of TZS. 70,000,000.00 as compensation for the two plots and TZS. 10,000,000.00 as payment of general damages for breach of commitment agreement and general damages for trespass.

Moreover, in what he termed as further alternative, the respondent claimed the following reliefs: payment of a reasonable sum to enable him purchase other two plots or equivalent within Mbagala or in neighbourhood; payment of the balance together with commercial and monthly compound interest at a rate of 30% from the due date to the date of final payment; costs of the suit and interest.

The respondent's claims were strongly resisted by the appellants, who also mounted a counter claim.

Be that as it may, after the High Court heard evidence from the parties, in the end it entered judgment in favour of the respondent and ultimately, he was declared a lawful owner of the suit plots.

Consequently, an order for vacant possession was issued against the appellants. On the other hand, the counter claim was dismissed with costs.

The appellants are seriously dissatisfied with the judgment and decree of the High Court, hence they have preferred the instant appeal advancing three grounds of appeal as reflected in the memorandum of appeal. However, for the reason which will come to light shortly, we do not intend to reproduce herein below the respective grounds of appeal.

It is noted that when the appeal was called on for hearing before us on 18th March, 2022, Ms. Sakina Sinda, learned advocate appeared for the appellants. On the adversary side, Ms. Consolata Peter Mlango, a daughter, appeared on behalf of the respondent. She informed the Court that she is currently the appointed administratrix of the estate of the respondent.

At the very outset, Ms. Sinda rose to inform the Court that the instant appeal is incompetent as it emanates from a nullity proceedings of the High Court in Land Case No. 271 of 2010. She explained that according to the record of appeal, the respondent died before the hearing of the suit started and the High Court was duly informed of the situation. Unfortunately, she stated, the trial judge scheduled the trial of the case though there was no evidence that the alleged legal representative, one Elizabeth Peter Mlango,

who testified as PW1 was legally joined as a party in place of the respondent as required by law. She did not however refer the Court to the specific provision of the law.

In this regard, Ms. Sinda submitted that the entire proceedings of the High Court in Land Case No. 271 of 2010 which were conducted after the death of the respondent are null and void for failure of the trial court to cause his legal representative to be joined in his place as a party. She thus argued that even the instant appeal is incompetent as it emanates from a nullity proceedings.

In the event, the learned counsel urged us to revise the proceedings of the High Court and nullify them with direction that a fresh trial be conducted after joining the legal representative in place of the deceased respondent as required by law.

On the other hand, Ms. Consolata Peter Mlango provided the Court with a copy of the letter of administration dated 9th June, 2015 issued by Temeke Primary Court appointing her as the administratrix of the estate of the deceased respondent. It is indicated in that letter that the respondent passed away on 17th July, 2013.

We have thoroughly, scrutinized the record of appeal placed before us in the light of the submission of the appellant's counsel. To this end, we

have no hesitation to conclude that the trial of the suit in respect of Land Case No. 271 of 2010, the subject of the instant appeal, commenced after the death of the respondent. According to the record of appeal, on 13th May, 2013 the trial court and the parties agreed and framed three issues for the determination of the dispute between the parties. Notably, on that day, the respondent was represented by Mr. Eustace, learned advocate and the appellants had the services of Mr. Kusalika, learned advocate. The trial judge then adjourned the hearing and set the trial of the case to be conducted from 18/9/2013 – 19/9/2013. The respondent was ordered to serve his witnesses.

Moreover, on 18th September, 2013, when the case was called on for hearing, Mr. Eustace, learned advocate prayed for adjournment on the reason that the respondent had passed away two weeks ago. Besides, he stated that there was no death certificate and thus they had not managed to get the administrator of the deceased estate. The trial judge then adjourned the hearing of the case and ordered Mr. Eustace to follow up on the appointment of the administrator of the respondent's estate.

Admittedly, after that order, hearing of the case was adjourned several times before the Deputy Registrar of the High Court and the trial judge, until 13th May, 2014 when Mr. Eustace informed the trial judge that

the administrator of the deceased had not secured all the documents as some of the relatives had confiscated them; for example, the letters of offer of the two plots. Following that information, though the trial judge did not make any order in respect of the joining of the legal representative, she simply set the hearing of the case to commence on 30th May, 2014.

As it were, hearing started on 30th May, 2014 when the respondent's (plaintiff's) case was opened and Elizabeth Peter Mlangi (PW1) testified in support of the claims. Most importantly, on that day, though the trial court did not make a specific order to show that PW1 was formally joined as a legal representative in place of the deceased respondent; it proceeded to record her evidence and in the course of her testimony, she tendered a copy of the "letter of probate" dated 2nd December, 2013 which was admitted as exhibit P1 after no objection was raised by Mr. Kusalika, learned advocate for the appellants (defendants). Despite the alleged admission of the "letter of probate" by the trial court, our close scrutiny of the entire record of appeal shows that there is no copy of the said letter on record appointing PW1 as the administratrix of the respondent's estate.

At this juncture, the crucial issue for our determination is whether after the death of the respondent on 17th July, 2013, a legal representative was made a party on his place in the suit. The answer to this question, we

hasten to say, is definitely no. We say so because, firstly, according to the record of appeal, there is no indication that before PW1 was called upon to testify at the trial, the trial court issued any order to the effect that she had been legally joined in place of the respondent as a legal representative. It is no wonder that at the end of the trial, the judgment in Land Case No. 271 of 2010 shows that the plaintiff (respondent) is Peter A. Mlangi. Secondly, according to the information in the record of appeal which indicates that there was misunderstanding among the relatives of the deceased respondent, it cannot be firmly concluded that PW1's purported appointment as the administratrix of the estate was conclusive as it is doubtful if it survived the conflicts among relatives until the end of the trial of the case. Our doubts on this position is enhanced by the letter forwarded to the Court by Ms. Consolata Peter Mlangi showing that she was appointed as administratrix of the respondent's estate on 9th June, 2015 by Temeke Primary Court in Probate and Administration Cause No. 894 of 2013.

More importantly, according to the letter, Consolata's appointment came hardly twenty days before the trial court delivered its judgment on 29th June, 2015. If Ms. Consolata's appointment is to be accepted and relied upon as the respective legal representative of the respondent, it may be concluded that there is a confusion on who is a real legal representative. All in all, the fact remains that the trial of Land Case No. 271 of 2010 started

and ended before the legal representative of the respondent was legally joined in his place as a party. Certainly, if PW1 or any other person had been joined as a party in place of the deceased, the trial court order would have been vividly shown in the record. Indeed, the respective name ought to have been included as the legal representative of the respondent before the trial commenced.

It is the position of the law that the executor or administrator has the power to sue in respect of all causes of action that survive the deceased. For purpose of clarity, section 100 of the Probate and Administration of Estates Act, Cap 352 R.E 2019 provides as follows: -

"An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same powers for the recovery of debts due to him at the time of his death as the deceased had when living."

In the circumstances, we are satisfied that the trial court ought to have complied with the procedure requiring the joining of the legal representative in place of the deceased respondent as a party before the trial of the case commenced as required under Order XXII Rule 3(1) of the Civil Procedure Code, Cap 33 R.E. 2019 upon an application to that effect. We say so because the trial started on 30th May, 2014 while the deceased

respondent passed away on 17th July, 2013. For sake of guidance, the respective provision provides as follows: -

"O. XXII R. 3(1) where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit."

In the event, we entirely agree with the learned counsel for the appellants that the proceedings of the High Court in Land Case No. 271 of 2010, particularly from 18th September, 2013, are a nullity for non – joinder of the legal representative of the deceased. This is so because neither the respondent's counsel nor PW1 had the mandate to prosecute the case after the death of the respondent without complying with requirement of the law. We are satisfied that the irregularity is fundamental to the extent of rendering the respective proceedings a nullity. It also follows that the instant appeal which has been preferred against the name of a dead person is incompetent for emanating from nullity proceedings of the High Court.

Consequently, acting under the provisions of section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019, we revise and nullify the

proceedings in Land Case No. 271 of 2010 from 18th September, 2013 and set aside the decree.

Ultimately, we order that a retrial of the case be conducted after the interested party comply with the procedure of being joined as the legal representative of the deceased respondent (plaintiff) as required by law. We make no order as to costs.

DATED at DAR ES SALAAM this 1st day of April, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 11th day of April, 2022 in the presence of Ms. Sakina Sindi, learned counsel for the appellants and in the absence of respondent is hereby certified as a true copy of the original.




A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL