

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

(CORAM: WAMBALI, J.A., KEREFU, J.A. And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 188 OF 2020

**SALMA SALUM SAID (Administratrix of
the deceased Salum Mohamed Said).....APPELLANT
VERSUS**

**DAR ES SALAAM WATER AND
SEWERAGE AUTHORITY (DAWASA)RESPONDENT
(Appeal from the Judgment and Decree of the High Court of Tanzania,
Land Division at Dar es Salaam)**

(De-Mello, J.)

Dated the 26th day of July, 2019

in

Land Case No. 148 of 2015

.....

JUDGMENT OF THE COURT

28th April & 22nd May, 2023

WAMBALI, J.A:

This appeal arises from the Judgment and Decree of the High Court of Tanzania, Land Division in Land Case No. 148 of 2015. According to the record of appeal, the parties in that case were Salum Mohamed Said (deceased) as the plaintiff and Dar es Salaam Water and Sewerage Authority (DAWASA) as the defendant. The plaintiff sued the defendant over a dispute of land on Plot No. 429 Mbezi Industrial Area, Kinondoni District, Dar es Salaam Region in which he prayed for judgment and decree as follows: a declaration that Plot No. 429 Mbezi Industrial Area, Kinondoni District, Dar es Salaam and all the buildings thereon belong to

the plaintiff; a declaration that the defendant's act of entering upon the said property, marking it and subsequently demolishing it without the consent of the plaintiff and/or payment of full and adequate compensation was unlawful and a trespass; an order of perpetual injunction restraining the defendant, its servants, assigns, successors in title and agents from interfering with the plaintiff's peaceful enjoyment of the suit property; payment of the sum of TZS. 6,000,000,000.00 (six billion); interest on the decretal amount at the court's rate from the date of judgment till when the decree is fully satisfied; costs and any other relief that the trial court would have deemed fit to grant.

The defendant (respondent) lodged a written statement of defence to contest the claim. It is on the record of appeal that on 15th February, 2018, when the case was placed before Kente, J (as he then was) for hearing as the pleadings were complete, it was reported by Mr. Bethwel learned advocate who held brief of the late Dr. Lamwai learned advocate, that the plaintiff, Salum Mohamed Said had passed away. Based on that information, Kente, J adjourned the hearing to 8th May, 2018 pending the appointment and joining of the legal representative of the deceased plaintiff. The record of appeal reveals further that the case was reassigned to De-Mello, J who commenced the trial on 13th February, 2019. It is on

that date that Salma Salum Said, the appellant in this appeal, testified as PW1 and revealed that she was appointed on 5th June, 2018 by the Kinondoni Primary Court as the administratrix of the estate of her late father, Salum Mohamed Said (the plaintiff) who passed away on 6th January, 2018.

The trial of the case then proceeded and both sides adduced evidence in support of their respective position. In the end, the trial judge analyzed the evidence and came to the conclusion that the plaintiff (appellant) did not prove the case on balance of probability, hence she dismissed it with costs.

The appellant was dissatisfied with the judgment and decree, hence the current appeal as alluded to above. Initially, the appellant lodged a memorandum of appeal comprising five grounds of appeal. Moreover, on 21st April, 2023, she lodged a notice of her intention to apply for leave of the Court to argue two additional grounds of appeal, in terms of rule 113 (1) of the Tanzania Court of Appeal Rules, 2009. However, for the purpose of this judgment and the reason to come to light shortly, we do not intend to revisit the detailed facts of the case leading to the judgment of the trial court. Equally important, we do not deem it appropriate to reproduce the respective grounds of appeal herein.

At the hearing of the appeal, the appellant was represented by Mr. Makanja Manono assisted by Mr. David Pongolela, both learned advocates. On the adversary side, Mr. Lameck Merumba, learned Senior State Attorney assisted by Mr. Charles Mtae and Stanley Mahenge, learned State Attorneys appeared for the respondent.

Before we considered the grounds of appeal, Mr. Mtae sought leave of the Court to address a preliminary point of law on the competence of the appeal with regard to the legality and propriety of the participation of Salma Salum Said in the proceedings of the trial court in Land Case No. 148 of 2015. We granted the requisite leave as there was no objection from the appellant's counsel.

Submitting in support of the point of law, Mr. Mtae argued that according to the record of appeal, though the current appellant participated in the trial court proceedings as the Administratrix of the estate of the late Salum Mohamed Said (the plaintiff), there is no indication that she was legally joined as a legal representative in accordance with the law. He stated that the record of appeal does not contain any order of the trial court joining the appellant in place of the deceased Salum Mohamed Said before Salma Salum Said testified as PW1. In his submission, the omission by the trial court rendered the proceedings

from 13th February, 2019 null and void. Indeed, he added, the current appeal is incompetent for emanating from nullity proceedings of the trial court. In this regard, Mr. Mtae prayed that the trial court's proceedings be revised and nullified, followed by an order of a retrial of Land Case No. 148 of 2015.

In response, Mr. Manono, readily conceded that according to the record of proceedings of the trial court, though Salma Salum Said stated that she was appointed as administratrix, there is no order joining her as a legal representative of the deceased Salum Mohamed Said, who was the plaintiff. In this regard, he joined hands with the respondents' counsel to pray that the trial court's proceedings from 13th February, 2019 be nullified as the omission is fatal. Similarly, he prayed that a retrial be ordered.

Having heard the submissions of counsel for the parties on this matter, we entirely agree that the appeal before us is incompetent for emanating from nullity proceedings of the High Court in Land Case No. 148 of 2015. We have thoroughly scrutinized both the record of appeal and original record with regard to this matter. It is noteworthy that the trial of the case started without compliance with the requirement of the law in respect of joining of Salma Salum Said, who participated in the

proceedings throughout as the legal representative of the deceased plaintiff, who passed away on 6th January 2018 before the trial commenced. We have further noted from the record of appeal that on 13th February, 2019, before the trial commenced, the trial judge did not make any order joining the appellant as the legal representative of the deceased as required by Order XXII Rule 1 and 3 of the Civil Procedure Code Cap. 33 R.E. 2019 (the CPC). On the contrary, she simply allowed her to testify as PW1 without ascertaining her status and granting her the requisite leave to join in the proceedings. It was in the course of her testimony when she tendered a letter of administration which was admitted as exhibit P1. Admittedly, though before the hearing commenced the trial judge noted that an order to lodge an amended plaint was complied with and that the written statement of defence was also lodged on 6th February, 2019, the said observation is not supported by the record of appeal. This is so, because, before the trial commenced on 13th February, 2019, the trial judge's last order made on 3rd December, 2018 in the presence of counsel for the parties reads as follows:

"ORDER: Hearing 13/2/2019

Sgd: J. A. De Mello

Judge

3/12/2018"

In this regard, on that date she did not make any order with regard to the lodging of the amended plaint and written statement of defence as she observed on 13th February, 2019 before the trial commenced. Therefore, the amended plaint lodged on 17th December 2018 containing the name of Salma Salum Said as a legal representative of Salum Mohamed Said and indicating that it was pursuant to the order of De-Mello, J. dated 3rd December, 2018 is not supported by the record of the proceedings of the trial court reproduced above. There is no dispute that the amended plaint was served on the respondent through K & M (ADVOCATES) on 24th January, 2019. On the other hand, the amended written statement of defence which was lodged on 6th February, 2019, does not indicate that it was pursuant to the order of the trial judge dated 3rd December, 2018.

In the circumstances, we are satisfied that the trial before the High Court, whose decision is the subject of the instant appeal, commenced without Salma Salum Said being joined legally as a legal representative of the deceased Salum Mohamed Said as there was no order to that effect contrary to the requirement of the law. For clarity, Order XXII Rule 3 (1) of the CPC provides as follows:

"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 serving 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 this regard, since the trial commenced and proceeded without the trial court legally causing the legal representative of the deceased, in this case, Salma Salum Said (PW1) to be made as a party, the omission constituted a fatal irregularity which went to the root of the trial rendering the proceedings a nullity. For this stance, see for instance the decision of the Court in **Mabongolo Luma and Another v. Peter A. Mlangi**, Civil Appeal No. 45 of 2019 [2022] TZCA: [11 April 2022: TANZLII]).

In the result, we entirely agree with learned counsel for the parties that the proceedings of the trial High Court in Land Case No. 148 of 2015, particularly from 13th February, 2019 are a nullity for the failure to join the legal representative in place of the plaintiff, Salum Mohamed Said the deceased. In the circumstances of what we have stated above, Salma Salum Said (PW1) had no capacity and mandate to prosecute the case after the death of the plaintiff, her deceased father.

In the final analysis, we invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019, to revise, nullify the proceedings of the High Court in Land Case No. 148 of 2015 from 13th February, 2019 and set aside the decree. Consequently, we order that a retrial of the case be conducted before another judge after the legal representative of the deceased party is joined in accordance with the law. On the other hand, considering the interest of justice, we make no order as to costs.

DATED at DAR ES SALAAM this 18th day of May, 2023

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of May, 2023 in the presence of Mr. Pongolela Daud, learned advocate for the appellant and Mr. Stanley Mahenge, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL