

**IN THE COURT OF APPEAL OF TANZANIA**

**AT ARUSHA**

**(CORAM: MWARIJA, J.A., KEREFU, J.A., And MDEMU, J.A.)**

**CIVIL APPEAL NO. 420 OF 2021**

**FLORIAN PANTALEO MTUI ..... APPELLANT**

**VERSUS**

**ROBERT INYASI MINJA ..... RESPONDENT**

**(Appeal from the Judgment and Decree of the High  
Court of Tanzania at Arusha)**

**(Mzuna, J.)**

**dated the 26<sup>th</sup> day of February, 2021**

**in**

**Land Case No. 39 of 2016**

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**RULING OF THE COURT**

29<sup>th</sup> September & 5<sup>th</sup> October, 2023

**MWARIJA, J.A.:**

This appeal originates from Land Case No. 39 of 2016 filed in the High Court of Tanzania at Arusha by Pantaleo Raphael Mtui and Robert Inyasi Minja (the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs). They sued Akulina Pantaleo Mtui who was the wife of the 1<sup>st</sup> plaintiff and Florian Pantaleo Mtui, the 1<sup>st</sup> plaintiff's son (the 1<sup>st</sup> and 2<sup>nd</sup> defendants). The dispute giving rise to the suit involved a piece of land measuring six (6) acres situated at Ekenywa

Village, Olturumet Ward in Arumeru District within Arusha Region (the suit land).

The 1<sup>st</sup> plaintiff stated in the amended plaint that, he acquired the suit land in 1967, having been allocated the same by the then Arusha-Meru District Council. On 3/6/2015, he sold it to the 2<sup>nd</sup> plaintiff but in January 2016, the 1<sup>st</sup> and 2<sup>nd</sup> defendants trespassed into it and forcefully occupied it without having any right over it. He thus sought an order declaring him the rightful owner of the suit land, eviction order against the defendants for having trespassed into it, costs of the suit and any other reliefs which the court may deem fit to grant.

By their joint amended written statement of defence, the defendants disputed the plaintiffs' claim that they trespassed into the 1<sup>st</sup> plaintiff's land. In addition, they relied on the counterclaim filed by the 1<sup>st</sup> defendant on 5/9/2016 after the first plaint which was filed on 8/2/2016. She filed the counterclaim against 1<sup>st</sup> plaintiff and Robert Inyasi Minja Mtui (the plaintiffs in the amended plaint) and Peter Pantaleo Mtui @ Petro, the 1<sup>st</sup> plaintiff's son. She contended that, she was the rightful owner of the suit land, the same having been allocated to her by the Government in 1968 at the time when the Arusha Town was undergoing expansion. She thus prayed for *inter alia*, a declaration that she was the

rightful owner of the suit land and that, the plaintiffs (the defendants in the counterclaim) were trespassers. She also prayed to be awarded general damages, costs of the suit and interest. For reasons which will be apparent herein however, the counterclaim was not pursued.

The 1<sup>st</sup> defendant and the 1<sup>st</sup> plaintiff could not live to see the outcome of the case. On 13/7/2020, the court was informed that the 1<sup>st</sup> defendant had passed away. Few months later on 2/9/2020, it was again, informed that the 1<sup>st</sup> plaintiff had also passed away on 4/8/2020. After the statutory period for substitution of legal representatives of the deceased parties had lapsed without any application to that effect, on 27/10/2020, the learned trial Judge (Mzuna, J.) invoked the provisions of O.XXII r. 2 of the Civil Procedure Code, Chapter 33 of the Revised Laws read together with item 16 of the Third Schedule to the Law of Limitation Act, Chapter 89 of the Revised Laws and proceeded with the suit in respect of the surviving plaintiff and the defendant.

Having heard the evidence of three witnesses for the plaintiff, four defendant's witnesses and a Court witness, the learned trial Judge was satisfied that the suit land was a matrimonial property because the same was allocated to Pantaleo Raphael Mtui and Akulina Pantaleo Mtui who

were a husband and wife. The learned trial Judge thus proceeded to award reliefs to the parties.

The 2<sup>nd</sup> defendant, Florian Pantaleo Mtui, the appellant herein, was aggrieved by the decision of the High Court and therefore, preferred this appeal against the respondent, Robert Inyasi Minja. In his memorandum of appeal filed on 13/9/2021, the appellant raised a total of nine (9) grounds of his complaint against the findings of the trial court.

When the appeal was called on for hearing before us on 29/9/2023, the appellant was represented by Mr. Gwakisa Sambo, learned counsel while the respondent had the services of Mr. Hamis Mkindi, also learned counsel. Before the appeal could proceed to hearing, the Court required the learned counsel for the parties to address it on the propriety or otherwise of the act by the trial court, of retaining the deceased persons, 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant as parties to the suit after their demise as appearing in the proceedings after 27/10/2020 when the learned trial Judge made the order of proceeding with the surviving parties.

Mr. Sambo was quick to concede that, the inclusion of the deceased persons in the trial was an irregularity which vitiates that part of the proceedings thus affecting the judgment and the decree. He added that, not only did the irregularity affect the correctness of the judgment and

decree, but also the notice of appeal to this Court was rendered defective because the parties cited therein are different from those shown in the trial court's judgment and the decree. As a way forward, the learned counsel urged us to nullify the proceedings commencing immediately after the trial court's order dated 27/10/2020, quash the judgment and set aside the decree.

On his part, Mr. Mkindi also conceded that the irregularity is fatal. He supported the submission made by Mr. Sambo as regards the way forward.

As conceded by the learned counsel for the parties, the anomaly is indeed, a fatal one because, after the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant had passed away, they should not have appeared as the parties in the trial court's proceedings, judgment and the decree. Since their names continued to feature as shown above, the proceedings were rendered irregular and so were the judgment and the decree. For these reasons, in the exercise of the powers of revision vested in the Court by s. 4 (2) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws, we hereby nullify the proceedings starting immediately after 27/10/2020. We also quash the judgment of the trial court and set aside the decree. The record should be remitted to the trial court for the appeal to proceed to

hearing before another Judge from the stage at which the irregularity  
occurred as shown above. Each party to bear its own costs.

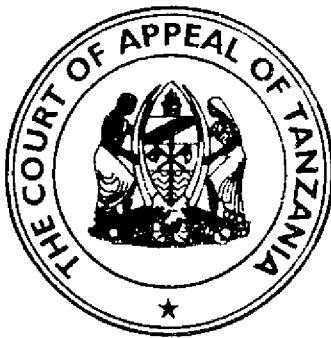
**DATED** at **ARUSHA** this 5<sup>th</sup> day of October, 2023.

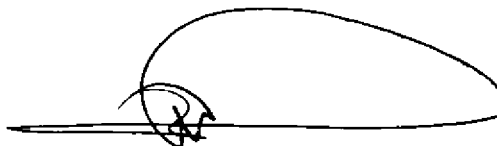
A. G. MWARIJA  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

G. J. MDEMU  
**JUSTICE OF APPEAL**

The Ruling delivered this 5<sup>th</sup> day of October, 2023 in the presence  
of Mr. Gwakisa Sambo, learned counsel for the Appellant who is also  
holding brief for Mr. Hamisi Mkindi, learned counsel for the respondent is  
hereby certified as a true copy of the original.



  
J. E. FOVO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**

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