

**IN THE COURT OF APPEAL OF TANZANIA  
AT BUKOBA**

**(CORAM: WAMBALI, J.A., FIKIRINI, J.A. And KENTE, J.A.)**

**CIVIL APPEAL NO. 109 OF 2022**

**ROBERT BANIGI.....APPELLANT**

**VERSUS**

**SCOLASTIKA ALCHADI ..... RESPONDENT**

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

**(Dyansobera, J.)**

**Dated the 4<sup>th</sup> day of June, 2019**

**in**

**Land Appeal No. 10 of 2017**

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**JUDGMENT OF THE COURT**

8<sup>th</sup> & 12<sup>th</sup> December, 2023

**KENTE, J.A.:**

This appeal seeks to overturn the judgment and decree of the High Court (Dyansobera, J.) sitting at Bukoba, dated 4<sup>th</sup> June, 2019 in Land Appeal No. 10 of 2017. It comes to us as a second appeal.

The parties have since 2006, been in a dispute over an unspecified piece of land located at Katoma Village-Bukoba District which the respondent claims to have purchased from one Felister Baijukya at TZS 150,000.00 in 1994. In 2006, the respondent sued the appellant together with his brother one Simeo Banigi who is now deceased in the

Bukoba District Land and Housing Tribunal (the DLHT) in Application No. 92 of 2006 accusing them with trespass and encroachment into her property. On another hand, the appellant and his brother insisted that the disputed piece of land belonged to them after they inherited it from their deceased father who had in turn been bequeathed the said land by his father one Banigi.

There was evidence before the DLHT that the dispute between the parties had earlier on been vainly referred by the appellant and his brother to the Katoma Ward Tribunal but the respondent did not show up. It is however not clear as to what was decided by the said Tribunal after the respondent's non-appearance.

After hearing the parties, the DLHT found that the appellant and his brother had not effected any development on the disputed land and that, that was because they had no any colour of right over that land. The DLHT found particularly, that the said property belonged to the respondent and to that end, a permanent injunctive order was issued restraining the appellant and his brother or anyone claiming title from them from trespassing or otherwise interfering with the suit property.

Aggrieved, the appellant and his brother appealed to the High Court (sitting at Bukoba) which essentially confirmed the trial DLHT's findings and held that, as opposed to the appellant and his brother whose evidence was insufficient to prove their claim, the respondent had managed to lead evidence proving her title over the suit property to the required standard.

Disenchanted with the decision of the High Court but still undeterred, through Mr. Joseph Bitakwate a learned advocate, the appellant has appealed to this Court. He has cited three grounds of complaint, thus:

1. That the High Court grossly erred in law in failing to discredit the proceedings and the decision of the trial DLHT in Application No. 92 of 2006 which was **res-judicata** to Civil Case No. 7 of 2006 before Katoma Ward Tribunal;
2. That the High Court erred in law in upholding the nullity decision of the trial DLHT that had been reached without the aid of the assessors contrary to the law; and

3. That the High Court erred both in law and in fact in reaching the findings that the respondent had proved her title to the required standard without evidence to support those findings.

On her part, the respondent was ably represented by Messrs. Josephat Rweyemamu and Abel Rugambwa learned advocates. For the reasons that will soon become apparent, we will not delve into the merits or demerits of the appeal.

When the appeal was called on for hearing, we invited Mr. Bitakwate to address us on the propriety or otherwise of the course which was taken by the first appellate court in dealing with the appeal by the late Simeo Banigi despite being informed by the present appellant on 30<sup>th</sup> May, 2019 that his brother and co-appellant had passed on. Upon reflection Mr. Bitakwate who was initially prepared to argue the appeal on merit, changed tack, correctly so in our view. He prayed that, this Court invokes its revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws (the AJA) and nullify the proceedings before the High Court from the 30<sup>th</sup> May, 2019 when the High Court was duly informed of the second appellant's demise, quash and set aside the impugned judgment and decree of the

High Court and direct for the hearing of the appeal by the High Court to proceed from there but after compliance with the mandatory requirements of Order XXII of the Civil Procedure Code, Chapter 33 of the revised Laws (the CPC).

On his part, Mr. Rugambwa who addressed the Court on behalf of the respondent was not opposed to the prayer by Mr. Bitakwate and he did not press for costs.

It must be noted that going by what transpired before the first appellate court on 30<sup>th</sup> May, 2019 as appearing on page 60 of the record of appeal, it is not in dispute that the present appellant took the trouble to dutifully inform the court that the second appellant who was his brother had passed on. Despite the said information which was very crucial, the first appellate court went on to hear the appeal and finally pronounced its judgment dismissing the appeal by the appellant and his deceased brother. Although the subsequent notice of appeal, the application for leave to appeal, the memorandum and record of appeal refer to the present appellant only, both the judgment and decree of the High Court which is being challenged, refer to the appellant and his deceased brother as the appellants before the High Court.

Having heard the uncontested prayer by Mr. Bitakwate and considered the factual background giving rise to this appeal, we start by making a pertinent observation as we did in the case of **Sharifu Nuru Muswadiku v. Razak Yasau and Another**, Civil Appeal No. 48 of 2019 [2020] TZCA 1914 (18 December 2020, TANZLII). We said that, civil actions survive death of the parties where the right or duty survives, and that, what should be done where a party to a civil action which survives death of the party as it happened in this case, dies while the suit is still pending in court, is provided for under order XXII of the CPC. We then went on holding that, 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 proceedings, failure of which may lead the suit by or against the deceased party to abate. Needless to say, in such circumstances, a trial or an appellate court is expected to exercise some patience and ensure that under any circumstances, a suit does not proceed by or against a party who is deceased as it happened in the instant case.

In view of the above position of the law, we entirely agree with Mr. Bitakwate that indeed, the proceedings before the High Court with effect from the 30<sup>th</sup> May, 2019 when the second appellant was reported to

have died were a nullity for being conducted in the absence of his legal representative. Pursuant to section 4 (2) of the AJA, we nullify the said proceedings, quash and set aside the resultant judgment and decree of the High Court. That results into the judgment and decree of the Bukoba DLHT to remain in force until it is otherwise varied after Land Appeal No. 10 of 2017 which is pending before the High Court, is properly conducted and determined.

Taking into consideration the circumstances that have resulted into this revisional order, we make no order as to costs.

**DATED** at **BUKOKA** this 12<sup>th</sup> day of December, 2023.

F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

P. S. FIKIRINI  
**JUSTICE OF APPEAL**

P. M. KENTE  
**JUSTICE OF APPEAL**

The Judgment delivered this 12<sup>th</sup> day of December, 2023 in the presence of Mr. Joseph Bitakwate, learned counsel for the appellant and Mr. Josephat Sebastian Rweyemamu, learned counsel for the respondent is hereby certified as a true copy of the original.



A. L. KALEGEYA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**