

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DISTRICT REGISTRY OF ARUSHA)**

AT ARUSHA

LAND APPEAL NO. 1 OF 2020

(C/F Application No. 104 of 2012, District Land and Housing Tribunal for
Arusha)

HAMZA HATIBU1ST APPELLANT
BAKARI HATIBU2ND APPELLANT
HADIJA HATIBU3RD APPELLANT
AMINA HATIBU4TH APPELLANT
HAWA BENI5TH APPELLANT
MWANARABU BENI6TH APPELLANT
JUMAA BENI7TH APPELLANT
ADAM BENI8TH APPELLANT
HAJI BENI9TH APPELLANT
MWINYIMANI BENI10TH APPELLANT
KIHAO JUMAA.....11TH APPELLANT
HADIJA MSAMBO12TH APPELLANT
BENI KHALILI.....13TH APPELLANT

VERSUS

SALIMA SAIDI JUMA..... RESPONDENT

RULING

7/5/2021 & 11/6/2021

ROBERT, J:-

This is an appeal against the decision of the District Land and Housing Tribunal of Arusha (the trial Tribunal) in Land Application No. 104 of 2012. The Respondent sued the Appellants at the trial tribunal claiming ownership of a piece of land measuring 10 acres (farm land) located at Engosengui Area in Sokoni 1 Arusha City and a house built on plot No. 9 Block "H" L. O No. 23828 located at Bondeni Area herein Arusha City (the suit land).

Before probing into what has befallen this appeal, it is trite to recount the relevant facts leading to this appeal, albeit briefly. The Respondent claimed to have been bequeathed the suit land by her late father-in-law one Jumaa Kihago before his death. Since then, she had been cultivating the suit land without any interference from other members of the family. It happened that in 2012, the Appellants who are children of the Respondent's brother in law, organized a meeting to claim distribution of their grandfather's properties while the same was already given to the Respondent herein. Aggrieved with Appellants' interference she preferred a case at the tribunal where it was decided in her favour.

Dissatisfied with the decision of the tribunal the Appellants filed this appeal.

When the matter came up for hearing both parties were represented by Messrs Mnyiwala Mapembe and Bashiri Mallya, learned counsel for the Appellants and Respondent respectively.

Prior to the hearing, counsel for the Respondent raised a preliminary point of objection to the effect that the appeal is incompetent for lack of proper parties. As a matter of practice, the Court invited parties to dispose of the raised objection before arguing the appeal on merit if the objection is not sustained.

Highlighting on the point of objection, Mr. Mallya submitted that the 12th Appellant one Hadija Msambo died sometime in 2018 before this appeal was filed. He argued that, the Appellants filed this appeal knowing it is contrary to Order XXII rule 2 read together with rule 11 of the **Civil Procedure Code** [Cap. 33 R.E 2002] which requires that where there are more Appellants than one and any of them dies, and the right to appeal survives to the surviving Appellant or Appellants alone the court shall cause an entry to that effect to be made on the record and the appeal to proceed at the instance of the surviving appellants.

He submitted further that, where under Order XXII rule 3 of the CPC the right to appeal does not survive to the surviving Appellants and the right to appeal survives, the court, on an application made in that behalf, shall cause the legal representative of the deceased Appellant to be made a party and shall proceed with the appeal. He submitted that this was not done by the rest of the Appellants or their advocate and questioned who instructed the Advocate to prepare and file this appeal on behalf of the 12th Appellant in her absence and without legal representation.

He referred the Court to the case of **Simon Nchagwa versus Majaliwa Bande and John Nyakibari, Civil Appeal No. 293 of 2017** where the Court of Appeal of Tanzania stated that:

"...in the wake of the death of either the Appellant or the Respondent, the survival of an appeal is dependent upon a successful application by an interested person for the joinder in the Appeal, of the legal representative in the place of the deceased"

He argued that the principle established in that case applies in the present case against the deceased Appellant. Anything contrary to that procedure is invalid as it denies the right to be heard to the deceased. Since the Appellants ignored this legal requirement before filing this appeal, he submitted that this appeal is incompetent.

He argued further that, the Appellants may opt to concede to the preliminary objection and pray for adjournment for the family to select a legal representative upon successful appointment by the Competent Court and an interested party can apply for the legal representative to be joined in the case as provided by the law, however, the same cannot go without close observation of Order XXII Rule 3(2) of the Civil Procedure Code, Cap. 33 R.E. (2002) read together with item 16 of the Schedule to the Law of Limitation Act Cap. 89 (R.E. 2002) which require such application to be made within the time limit of 90 days.

He made reference to the case of **Salehe Said Nahdi vs National Microfinance Bank PLC and Adili Auction Mart LTD**, Commercial Case No. 1 of 2015 where this Court (Sehel, J as she then was) held that the application for the legal representative has to be made upon the death of the deceased Appellant. The application has up to ninety days to make such application without assigning any reason.

He added that, this is not a mere procedural rule which can be cured by Article 107A of the Constitution of the United Republic of Tanzania. Based on that submission, he prayed for the preliminary objection to be sustained with costs.

Contesting the point of objection raised, Counsel for the Appellant submitted that, the point of objection raised by the learned counsel for the Respondent cannot be raised as a point of preliminary objection based on the expounded in a leading case of **Mukisa Biscuits Manufacturing Company Limited vs West End Distributors Limited** [1996] E.A 969 where the East African Court of Appeal stated at page 700 DE that:

"the preliminary objection consists of a point of law which has been pleaded or which arises by clear implication of the pleadings and which if argued as preliminary point may dispose of the suit without the need of hearing"

At page 701 paragraph B the Court continued to state that:

"A preliminary objection is in nature of what used to be a demur. It raises a pure point of law which if argued or assumption that all the facts pleaded by other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion"

He submitted further that, the objection raised by the counsel for the Respondent that the 12th Appellant has died need evidence in the form of a death certificate to be ascertained as per section 25 (3) of the Births and Deaths Registration Act, Cap. 108 R.E of 2002. He argued that, the court cannot ascertain the death of the 12th Appellant without evidence hence this cannot be raised as appoint of preliminary objection.

He maintained further that, even if the 12th Appellant died as alleged, dismissing this appeal is not a proper course because the law is very clear under order XXII Rule 3 (1) of the CPC that if the Appellant dies and the right to sue survives, there shall be an application by the interested party to replace the deceased. And the interested party will be given 90 days to file the application according to item 16 of the schedule to cap. 89 R.E 2002.

He referred this Court to the case of **Simon Nchangwa versus Majaliwa Bande and John Nyakibari, Civil Appeal No. 293 of 2017** (unreported) where the Court of Appeal of Tanzania afforded an opportunity to the 2nd Respondent to apply and implead the legal personal representative of the deceased. The Court stated at page 6-7 of the Ruling that:

"To this end, we are of the decided view that an adjournment of this appeal is deserving so as to enable whoever are interested in the matter to appoint a legal representative of the deceased and, thereafter, seek the permission of the Court to have him/her installed as a party to the appeal in the place of the deceased. Since we cannot predict the length and timing of the exercise we deem it inappropriate to allocate a time frame for the completion of the process".

Concluding his submissions, counsel for the Appellant prayed to be afforded an opportunity to present an application for appointment of a legal representative and implead the person so appointed within 90 days so that the matter may proceed under Order XXII Rule 3 of the Civil Procedure Code.

I should pose here and make a determination on whether there is merit to the point of objection raised by the learned counsel for the Respondent.

From the submissions made by the learned counsel for the Respondent and the prayer made by the learned counsel for the Appellants, it is obvious that, despite the rival submissions, both parties are not disputing the fact that the 12th Appellant Hadija Msambo is dead. Accordingly, the preliminary objection raised by the counsel for Respondent cannot be disparaged for reasons that it is raised on a fact which needs to be ascertained by the court and therefore it cannot pass the test set in *Mukisa Biscuits (Supra)*. This case is distinguishable because the death of the 12th Appellant is not disputed and therefore not a fact to be ascertained by the court.

The question for determination is whether the right to appeal survives. If it does, whether the procedure laid down by the law for

effective prosecution of the appeal where one of the Appellants dies was followed by the remaining Appellants.

Order XXII of the Civil Procedure Code, Cap. 33 (R.E. 2019) makes a distinction between cases in which the right to sue or appeal survives and cases in which it doesn't where one or more of the parties in a pending suit or appeal dies. Where the right to sue/appeal does not survive that is the end of the case.

According to the famous maxim "**Actio personalis monitur cum personal**" which means a personal right of action dies with the person, the test whether the right to sue survives depends on whether such a right is connected with or referable to the individuality of the deceased. A right to sue or appeal which is connected to the individuality of that person cannot survive at the death of that person.

In the present case the Appellants, including the deceased Appellant, claims distribution of the suit property which allegedly belongs to their late grandfather. Therefore, the cause of action at the time of the death of the 12th Appellant is connected to a claim of property which, as a general rule, survives to his legal representative. Accordingly, I find that the deceased's right to appeal in this matter survives.

I will now consider whether the Appellants followed the procedure laid down by law for prosecution of the appeal where one of the Appellants dies when the appeal is pending. According to rule 2 of Order XXII read together with rule 11 of the Civil Procedure Code, in cases where one of the Appellants dies and the right to sue/appeal survives to the remaining appellant or Appellants alone, the court shall cause an entry to that effect to be made on the record and the appeal shall proceed at the instance of the surviving Appellant or Appellants.

However, according to rule 3 of Order XXII of the Civil Procedure Code, in a situation where the right to sue/appeal does not survive to the surviving Appellant or Appellants alone, the court on an application made in that behalf shall cause the legal representative of the deceased Appellant to be made a party and shall proceed with the appeal provided the application is filed within the statutory period of limitation. The appeal abates against the deceased Appellant where no application is made within the prescribed time.

In the present case, the Appellants did not follow any of the requirements under Order XXII rule 2 or 3 of the Civil Procedure Code. In fact, information related to the death of the 12th Appellant was brought to the attention of this court through the preliminary objection filed by the

learned counsel for the Respondent. It is not clear as to why the learned counsel for the Appellants opted to withhold this information from the Court prior to this objection instead of bringing it to the attention of the Court and apply for necessary orders.

Although in his submissions counsel for the Appellants prayed to be afforded an opportunity to present an application for appointment of a legal representative and implead the person so appointed within 90 days so as to proceed with the appeal under Order XXII Rule 3 of the Civil Procedure Code, I find that argument untenable as it intends to pre-empt the objection raised by trying to rectify an error complained of.

Most importantly, counsel for the Appellants did not inform this court when the 12th Appellant died which makes it difficult to determine if this appeal abates against the deceased Appellant under Order XXII rule 3(2) of the Civil Procedure Code for failure to file the application for appointment of legal representative within the statutory period of limitation which is 90 days according to item 16 of the Law of Limitation Act, Cap. 89 (R.E.2019).


However, under the circumstances of this case, I am inclined to rely on the submissions by the learned counsel for the Respondent, which is not disputed, that the 12th Appellant one Hadija Msambo died sometime

in 2018 before this appeal was filed. This means Order XXII of the Civil Procedure Code is not applicable in this situation because that provision deals with the effect of death in pending cases not in cases where a party died before the matter is filed in the court. In those situations, the Administrator of Estate of the deceased should be appointed and be made a party to the appeal.

That said, I find this appeal incompetent for lack of proper parties. ~~Accordingly, I sustain the point of objection raised by the counsel for the~~ Respondent and struck out this appeal. Appellants are at liberty to file a proper appeal after appointment of a legal representative for the deceased Appellant.

It is so ordered.




K.N. ROBERT
JUDGE
11/6/2021