

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

AT MWANZA

LAND APPEAL NO. 42 OF 2020

SIMION BUNZALI (*Administrator of the estate*

of the late SUMUNI BULAYA CHAYA) **APPELLANT**

VERSUS

JOSEPH MALYENGETE **1ST RESPONDENT**

MASEBU NKONDO **2ND RESPONDENT**

KADILANHA MANYANDODI **3RD RESPONDENT**

MASHAKA FULANO **4TH RESPONDENT**

JUDGMENT

22nd April & 1st July, 2021

ISMAIL, J.

The proceedings which bred the instant appeal were commenced by the appellant in the District Land and Housing Tribunal (DLHT) for Geita at Geita. In the said proceedings, the applicant prayed for vacant possession of the suit land against the respondents; and for a restraint order against the respondents' continued use of the suit land. At stake was a three-

hundred-acre land, situated at Nduha street in Isole village, Buyagu Ward in Sengerema District. The said Land is alleged to belong to the late Sumuni Bulaya Chaya who died on 8th August, 1980. After his demise, the land was entrusted to his sister, Mageni Bulaya Chaya who is said to have let it to seven people, three of whom surrendered it, leaving the respondents clinging onto it. The latter contended that the land they occupied was sold to them. The contention by the appellant and other clan members is that the alleged disposition was not sanctioned by any of the clan members, and that their stranglehold was without any colour of right.

Unable to convince the respondents to cede ground on the claim, the appellant decided to enlist the assistance of the DLHT through an application that bred the instant appeal. The application was met with a serious opposition from the respondents. Besides denying allegations levelled by the appellant, they raised a preliminary objection, contending that the matter is time barred. The DLHT was convinced that the application was preferred in dilatoriness. It, therefore, upheld the objection. In dismissing the application, the DLHT made the following observation:

"It is proved from the respondents (sic) submissions that this application is time barred, it offends section 9 (i) of the Limitation Act. Therefore (sic) proceed to dismiss this application with costs. It is so decided."

This finding has caused a serious disquiet on the part of the appellant, hence his decision to take a ladder up, through the instant appeal which has listed five grounds of dissatisfaction, reproduced with all their grammatical challenges as follows:

- 1. That, the trial tribunal erred in law and in fact to dismiss the application in the pretext of time bar without considering that the respondents were family members who had been allowed a specific short term use of the suit land while the applicant had an obligation of allocating the clan land to all beneficiaries equally.*
- 2. That, the trial tribunal misdirected itself by continuing with the proceedings while the 5th respondent passed away in the subsistence of the matter and without ordering an amendment of the application to allow the administrator of his estate to take part in the proceedings.*
- 3. That, the train tribunal erred in law and in fact by wrongly admitting the respondents' claim that they bought the suit land from the first owner, the late Sumuni Bulaya Chaya, without procuring the testimony of an eye witness to the sale or written evidence to that effect.*
- 4. That, the trial tribunal misdirected itself when it held that the appellant intended to evict the respondents who had invaded the suit land while the objective was to enable the administrator to collect the clan land with a view to distributing it to beneficiaries.*

Noting that both parties were unrepresented and lay, it was decided that the appeal be disposed of by way of written submissions whose filing creditably conformed to the schedule of hearing.

With respect to ground one, the appellant's contention is that the decision to hold that the suit was time barred was erroneous as it did not consider that the respondents were mere 'borrowers' of the suit land which ought to be distributed amongst clan members who are the beneficiaries.

Submitting on ground two, the appellant argued that the 5th respondent met her demise in the subsistence of the trial proceedings but the trial tribunal did not take an action which would allow amendment of the pleadings, to allow for inclusion of the deceased's personal legal representative. The appellant took the view that this was an error that rendered the proceedings incompetent.

With regards to ground three, the contention by the appellant is that the DLHT was not treated with any evidence to prove that the respondents bought the suit land from the late Sumuni Bulaya Chaya. Such testimony would involve an eye witness account or written evidence both of which were missing. He argued that in the absence of such testimony the contentions by the respondents were mere narrations that carry no weight.

Finally, on ground four, the appellant's argument is that the DLHT was misled into believing that the claim is for invasion of the suit land by the respondents, while the truth of the matter was that the matter was for collection of the deceased's estate with a view to distributing it to the clan members who are the beneficiaries of the estate. The appellant prayed for the quashing and setting aside of the DLHT's decision.

The respondents have not seriously disputed the contention raised in the appeal. Choosing to argue the appeal in a combined fashion, the respondents did not dispute that the appellant was an administrator of the deceased's estate by virtue of which he enjoyed the powers of collecting the assets forming part of the deceased's estate. The respondents implored upon the Court to ensure that beneficiaries enjoy their share of the estate equitably.

For the reason that will be apparent soon, I choose to confine my analysis to ground two of the appeal, and the issue for determination in this ground is whether the proceedings were competent and regular, while the 5th respondent, who died while the proceedings were pending, had not been succeeded by her personal legal representative.

The law is settled, a court proceeding survives death of a party, and that proceedings that are pending shall not abate if the right to sue survives

the party's demise. This is in terms of Order XXII Rule 4 which provides as hereunder:

"Where one of the two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit."

This position has been underscored in a number of decisions. Quoting with approval the decision of Court of Appeal in ***Saidi Kibwana & General Tyre E.A Ltd v. Rose Jumbe*** [1993] TLR 175, this Court (Masabo, J.) held in ***Mahusiano Limited v. Lucky Jonh Bosco***, HC-Land Appeal No. 15 of 2018, as follows:

"... The death of the plaintiff or defendant shall not cause the suit to abate because as the general rule all rights of action and all demands existing in favour of or against a person at the time of his death survives to and against his representative except those rights which are tied to individuality of the deceased."

The trial proceedings are silent on the 5th respondent's demise, though what is clear is the counsel's exchange on what was alleged to be a power of attorney, purportedly filed in the DLHT but without knowledge of the

counsel for the respondents, including the 5th respondent. The said document was subsequently expunged by the DLHT. The 5th respondent's appearance or whereabouts remained a mystery and she was unrepresented. In the instant matter, the respondents have not denied that the 5th respondent passed on while the matter was pending, and that no substitution was ordered. This, then, left the matter to proceed to its conclusion, while the fate of the 5th respondent's appearance and participation in the proceedings was not clarified.

The DLHT's silence on the matter and the respondents' lack of interest rendered the proceedings shrouded in wanton irregularity. The irregularity renders the proceedings in the DLHT and the resultant decision a profound travesty that is intolerable. It is a fatal infraction and this Court cannot condone it.

Accordingly, I quash the entire trial proceedings, set aside the ruling, and order that the matter be remitted to the DLHT for trial *de novo*, before another judicial officer. Each party will bear own costs.

Order accordingly.

DATED at **MWANZA** this 1st day of July, 2021.




M.K. ISMAIL
JUDGE

Date: 01/07/2021

Coram: Hon. M. K. Ismail, J

Appellant: Present

Respondent: Absent

B/C: J. Mhina

Court:

Judgment delivered in chamber, in the virtual presence of the appellant and in the absence of the respondents, this 01st day of July, 2021.


M. K. Ismail

JUDGE

At Mwanza

01st July, 2021

