

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISCELLANEOUS CIVIL APPLICATION NO. 34 OF 2018

(Originating from Probate and Administration Cause No. 5/2017 in the High Court of Tanzania at Arusha)

**IN THE MATTER OF THE ESTATE OF THE LATE ALFRED TUMAINI LEO**

**OF P.O. BOX 999 ARUSHA**

**AND**

**IN THE MATTER OF AN APPLICATION FOR REVOCATION AND**

**ANNULMENT OF LETTERS OF ADMINISTRATION GRANTED TO**

**KAREN KINDONDECHI LEO OF P.O.BOX 999 ARUSHA**

**BY ALLAN ALFRED LEO OF ARUSHA TANZANIA and NEMES LEO OF**

**MOSHI KILIMANJARO, TANZANIA**

**RULING**

21/6/2021 & 12/7/2021

**ROBERT, J:-**

In the course of this application, counsel for the Respondent, Mr. Salim Mushi raised an issue in terms of Order XXII of the Civil Procedure Code, Cap. 33 (R.E. 2019) to the effect that one of the Applicants, Mr. Nemes Leo

is reportedly dead and moved the court to make a determination whether the suit survives the death of the deceased Applicant or not.

The applicants in this application seek for orders of revocation and annulment of letters of administration of estate of the late Alfred Tumaini Leo granted to the Respondent herein, Karen Kindondechi Leo in Probate Cause No. 05/2017. The application is supported by the joint sworn affidavit of both Applicants, Allan Alfred Leo and Nemes Leo.

The applicants in this application were represented by Messrs. Median Mwale, William George and Vincent Stewart, Learned counsel whereas the Respondent was under the services of Mr. Salim Mushi assisted by Mr. Ngereka Miraji, learned counsel.

Mr. Salim Mushi submitted that, the cause of action in this suit does not survive the death of the deceased applicant because this is not an action in property, it is an action in persona which dies with the death of the deceased Applicant.

He submitted further that, this application cannot stand as it is since the joint affidavit filed in support of this application does not indicate which facts are deposed by the first Applicant and which ones are deposed by the second

Applicant. He stated that, the court has not been informed if there is a personal legal representative for the deceased Applicant. Even if such a person is appointed he has to be impleaded first before he could continue with the hearing.

He made reference to the case of Sharifu Nuru Muswadiku vs Razaka Yasau & another, Civil Appeal No. 48 of 2019 where the Court of Appeal of Tanzania nullified the proceedings of the trial tribunal for violating the requirements of Order XXII Rule 4(3) of the Civil Procedure Code.

He urged the court to determine the consequence of the death of the first Applicant before proceeding with the hearing of the application.

Submitting in response, Mr. George Mnzava admitted that one of the Applicants, Mr. Nemes Leo died in the course of this matter and further that this application is supported by the joint affidavit of both Applicants.

On whether the cause of action survives or not, he submitted that the suit survives based on the fact that the Applicants were praying for the same issue of revocation and annulment of letters granted to Karen Kindondechi Leo. With regards to their joint affidavit, he submitted that they both stated that what they deposed was known to them by virtue of their knowledge.

He argued that a legal representative cannot be appointed to address the court on the knowledge of the deceased because knowledge is not part of the estate of the deceased.

He submitted further that, even if the deceased Applicant would still be alive, he would not get an opportunity to add anything to his affidavit contrary to a normal suit where oral testimony is required.

He submitted that the Applicants' prayers are for revocation and annulment which the court cannot fail to grant whether they are two or one contrary to a normal suit where a decree would need to be executed.

On a legal representative for the deceased Applicant, he submitted that, Order XXII Rule 2 does not compel the surviving Applicant to apply for legal representative where the cause of action survives.

Submitting in addition, Mr. Mwale argued that, since parties in this application had already filed their affidavits and counter-affidavits respectively, the death of one Applicant cannot vitiate the proceedings which were complete on the lifetime of the deceased Applicant. He prayed that the application should be allowed to proceed as if the Applicant Nemes Leo has not passed on in the course of this application.

In a short rejoinder Mr. Mushi argued that since the learned counsel for the Applicants agrees that the provisions of the Civil Procedure Code applies in this matter, they need to agree to Order XXII Rule 6 which provides that where one of the parties dies in the course of a matter the court can only proceed with the determination of the matter where hearing of that matter had been concluded prior to the death of the said party. Since the deceased Applicant died prior to the hearing of this matter, if the course of action survives then counsel for the Applicants was supposed to apply for inclusion of legal personal representative within 90 days under item 16 of the schedule to the Law of Limitation Act, Cap. 89 R.E.2002. Since that was not done, the only remedy is for the court to declare that the cause of action has abated against the Respondent.

From the submissions made by the learned counsel for the parties, it is obvious that one of the Applicants, Mr. Nemes Leo is dead. The question for determination is whether the right to sue survives or the matter abates. According to Order XXII, Rule 1 of the Civil Procedure Code, Cap. 33 R.E.2019 the death of a party to a suit does not cause the suit to abate if the right to sue survives. Therefore, if the right to sue does not survive, the suit will abate on the death of the party.

In cases where there are more than one suing party and one of them dies, Order XXII of the Civil Procedure Code, Cap. 33 (R.E. 2019) makes a distinction between situations where the right to sue survives to the surviving member(s) of the suing party alone and cases in which the right to sue does not survive to the surviving member(s) of the suing party. In the former case, Rule 2 will apply and the suit shall proceed at the instance of the surviving member(s) of the suing party after court has caused an entry to that effect to be made on the record. In the latter case, Rule 3 will apply whereby the court on an application made within the time prescribed in that behalf will cause the legal representative of the deceased to be made a party and shall proceed with the suit provided the application for appointment of legal representative is done 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).

The test on whether the right to sue survives to the surviving member of the suing party alone depends on whether the surviving member(s) of the suing party can alone sue in the absence of the deceased.

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 which is connected to the individuality of that person cannot survive at the death of that person.

In the present case the Applicants, including the deceased Applicant, claimed in their joint affidavit to have been appointed by a clan meeting as administrators of the deceased estate and this is the main reason for their application for revocation and annulment of the Respondent's appointment.

In the circumstances of this case, the deceased Applicant's right to sue is connected to his individuality and cannot survive to his legal representative. Since the surviving Applicant can in law sue in the absence of the deceased, this court finds that the right to sue survives in the surviving Applicant alone under Order XXII Rule 2 of the Civil Procedure Code, Cap. 33 (R.E. 2019).

It is so ordered.



  
K.N. ROBERT  
JUDGE  
12/7/2021