

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPLICATION NO.219 OF 2019.

(Appeal from the Judgment and Decree of the Resident Magistrate Court of Dar es Salaam, At Kisutu, By W.A. HAMZA – SRM, In Civil Case No.100 of 2015, Delivered on 9th October, 2019)

ROBERT NGOLA NANDAOAPPELLANT

VERSUS

NATIONAL BICYCLE CO. LTD1st RESPONDENT

PANDYA RAJAN.....2nd RESPONDENT

RULING

MRUMA,J

The Appellant Robert Ngola Nandao instituted a suit at the Resident Magistrate court of Dar es Salaam at Kisutu against two Respondent namely the National Bicycle Co. Ltd and Pandya Rajan claiming for Tshs 95,000,000 being compensation for injuries and incapacity sustained as a result of road accident caused by the negligent act of the second Respondent.

After a full trial, the Resident Magistrate Court awarded him Tshs 500,000/= as compensation for injuries sustained and Tshs 336,000/= for medical expenses incurred. The Appellant was aggrieved and he appealed to this court.

The record show that due to his old age and illness, the Appellant appointed his son Zanuari Robert Ngola (pco1) to represent him through power of attorney.

While the appeal was pending, it was reported that the Appellant Robert Ngola Nandao has passed away. He passed away on 19.2.2020 that is about three months after instating the appeal.

This fact did not come to the knowledge of his advocate immediately (Probably because he was receiving instructions from the person with record of attorney. On 12.5.2020, this court (Ebrahim, J) ordered the Appeal to be argued by way of written submissions and made a scheduling order thereof.

However, on 28.8.2020 it came to the attention of the court that the appellant is dead. Counsel for the Appellant, Ms. Magreth Risoka prayed for leave to address the court on the states of the appeal. On 31.8.2021 counsel for the parties addressed me on two issues – namely the status of the appeal and that of the power of attorney granted by the Appellant to his son Zanuari Robert Ngola (PWI).

Apparently, counsel are in agreement that upon demise of the Appellant, power of attorney ceases.

I beg to start with this issue. The term power of attorney is not defined anywhere in the Civil Procedure code, the law which governs Civil Proceedings. However it can be defined as an instrument empowering a specified person to act for and in the name of the person executing it. in other words it is an instrument by which a person is authorized to act as an agent of the person granting it. Essentially a power of attorney creates an agency which is governed by the law of contract Act. In law an agency

is terminated by the principal revoking his authority or by agent renouncing the business of the agency or by the business of the agency being completed or by either the principal or agent dying. In the case at hand the principal has died therefore the agency has ceased.

Regarding the status of the Appeal, the law is clear under Rule 1 of order XXII that the death of a plaintiff(ie Appellant in our case) or dependants (ie Respondents herein) does not cause the suit to abate of the right to sue survives. Under the provisions of Rule 3(1) of Order XXII, on an application being made on behalf of the deceased, court can cause the legal representative of the deceased to be joined as a party to the suit.

It terms of item 16 of part III of the schedule to the Law of Limitation Act [Cap 89 RE 2019], such application has to be made within 90 days from the date of deceased's death.

As stated hereinbefore, the Appellant died on 19.2.2020. To date no application to have legal representative of the deceased be made a party to this appeal.

It has been submitted that failure to make an application within the prescribed 90 days abates the appeal in terms of Rule 3(2) of Order XXII of the CPC. I agree Rule 3(2) of Order XXII of the CPC provides that;

"Where within the time limited by law, no application is made under sub- rule (1), the suit shall abate so far as the deceased Plaintiff is concerned, and on the application of the Defendant the court may award to him the

costs which he may have incurred in depending the Suit to be recovered from the estate of the deceased plaintiff."

Rule 11 of the same order stated that in the application of this order to appeals, so far as may be the word "*plaintiff*" is held to include an appellant and the word "*Defendant*" a respondent, and the word "*Suit and appeal*."

Admittedly no application has been made to make the legal representative of the Appellant a party in this appeal and there is no pending application for extension of time to do so. That being the case, this appeal has abated and in my view, the remedy is not to dismiss it but to strike it out. Accordingly I strike out Civil Appeal No.219 of 2019.

Regarding costs, I note that the appeal was instituted on 5th November 2019 when the Appellant was still alive.

Between 8th November 2019 when it was called before a Judge for the first time and 19th February 2020, the date the Appellant is reported to have died it did not come before judge or Deputy Registrar. On 12.5.2020 in absence of the parties or their advocate court made an order for disposing the appeal by way of written submission. In the circumstances and bearing in mind that counsel for the Applicant was communication with the person holding power of attorney it could not be easy for the death of the Appellant to be communicated to the counsel for the Appellant and consequently to

this court. For those reason I refrain from awarding costs to the Respondents. I order that each party shall bear own costs.

I summary thereof the appeal is struck out and each party shall bear own Costs.



A. R. Mruma

Judge

19/1/2022



19/1/2022

Coram : Hon.A.R. Mruma ,J

For the Appellant : Ms Magreth Kesoha, Mr Armando Swenya
for the Applicant.

For the Respondent : Ms Magreth Kisoka for Neema Makunga
for the 1st Respondent

Cc : Ruling delivered.



A handwritten signature in blue ink, appearing to be "A. R. Mruma", is written above the printed name.

A. R. Mruma

Judge

19/1/2022.