

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF TANGA)

AT TANGA

LAND CASE NO. 7 OF 2020

ATHUMAN BAKARI KIBWIGIRI.....PLAINTIFF

-VERSUS-

LAURENT MARTINE LOWRI.....1st DEFENDANT

SALUM MDIBWIZA SALUM.....2nd DEFENDANT

MAZILI MAZILI EDWARD.....3rd DEFENDANT

HOSSEN MOHAMED NJEZO.....4th DEFENDANT

JABIRI BAKARI KIBWIGIRI.....5th DEFENDANT

ABBAS BAKARI KIBWIGIRI.....6th DEFENDANT

AMINA BAKARI KIBWIGIRI.....7th DEFENDANT

BAKARI ATHUMANI SWALEHE.....8th DEFENDANT

LEONARD GERALD BURA.....9th DEFENDANT

RULING

Date of last order: 15/02/2022

Date of ruling: 09/03/2022

AGATHO, J.:

The Plaintiff represented by Zakhe and Wantora Advocates filed a suit against 9 Defendants who are under the representation of Advocate Peter Bana. Among the Defendants one, the 8th Defendant is deceased. During the proceedings, the Defendants' counsel raised two points of Preliminary Objections (POs): the 1st

PO is that the suit is nullity for being filed against a dead person (the 8th Defendant), and the 2nd PO was that the Plaintiff has no cause of action against the 1st, 2nd, 3rd, 8th and 9th Defendants. The hearing of the PO was conducted on 15/02/2022. On that date the Defendants counsel Peter Bana dropped his second PO and concentrated on the 1st PO only.

Advocate Peter Bana began his submissions by focusing on the 1st PO that the suit is nullity for being filed against a dead person. He bolstered his arguments with the Court of Appeal of Tanzania decision in **Motto Matiko Mabanga v Ophir Energy PLC and 6 others, Civil Appeal No 119 of 2021 Court of Appeal of Tanzania at Dodoma at page 14**. He argued that the Court of Appeal of Tanzania held that no PO will be taken from abstract without reference to some facts laid in the pleadings and its annexure.

He went on submitting that the Plaintiff sued 9 Defendants. That among them the 8th Defendant was dead in 2017 even before the institution of the suit in 2020. The said 8th Defendant is the father of the Plaintiff. It was his view that the Plaintiff had knowledge

that he was suing a dead person. On this point he referred to the joint WSD, he submitted that in the verification clause the Defendants stated clearly that except Athuman Bakari Swalehe. He said the Defendants made that clear on the outset. He submitted further that on 23rd March 2021 he raised the same before Hon. Mkasimongwa J., to put on record that the 8th Defendant is deceased. He went on submitting that on 25th October 2021 he also made it clear before this Court that the 8th Defendant is a dead person. He repeated voicing on the same on 8th November 2021 that the 8th Defendant is a deceased person. Likewise on 8th February 2022 he mentioned that the 8th Defendant is deceased. And in all times that has never been objected by the Plaintiff.

He submitted that on the verification clause of the WSD the 8th Defendant could not sign it because by then he had already passed away.

He then made reference to **Juma A. Zomboko and 42 Others V. Avic Coastal and Development Co. Ltd and 4 Others, Civil Application No. 576/17 of 2017** decided on 25th August

and 16 November 2021. It was advocate Peter Bana's submission that in Zomboko's case the Court of Appeal of Tanzania gave a position as to what will happen when a suit is filed where one of the Defendants or one of the Plaintiffs is deceased before the institution. At page 10 of that decision the Court of Appeal of Tanzania held that the legal effect of filing a suit in the name of deceased person is to render it nullity. In that case the Court of Appeal of Tanzania at page 11 cited the case of **Babubhai Dhanji v Zainab Mrekwe [1964] 1 EA 24** in that case Law, J held that "a suit instituted in the name of a dead person is a nullity."

At page 12 of the Court of Appeal of Tanzania held that the since the suit was not filed in the name of a wrong party but a dead person as one of the Plaintiffs, it cannot therefore be amended by way of substituting or striking out a party in terms of Order 1 Rule 10 Civil Procedure Code [Cap 33 R.E 2019]. At page 13 the Court of Appeal of Tanzania added that because the deceased died before the plaint was instituted, neither the provisions of Order XXXII Rule 3 (1) and Order 1 Rule 10 of the Civil Procedure Code

could be applied to the suit which was a nullity. The Court of Appeal of Tanzania proceeded to strike the suit out with costs.

Advocate Bana did not end up there he cited the authorities from India. He argued that even in India whose Civil Procedure Code is in parimateria with ours, it was ruled in **Savitramma V Nanjundappa, 25 Mys, LJ 113** a Division of former Bench of High Court of Mysore that a suit filed against Naranappa who was dead prior to the presentation of the plaint, was nullity and the court had no jurisdiction to allow the amendment prayed for.

He submitted that the Plaintiff has no room to seek refuge on the overriding objective to cure the nullity emanating from suing a dead person as it was decided in the case of **Paulo Francis Kilasara v Stanbic Bank Tanzania Ltd, Civil Application No. 80/01 of 2019 CAT at Dar es salaam at page 13**. In this case the Court of Appeal of Tanzania held that the overriding objective cannot be used blindly. He cited also the Court of Appeal of Tanzania decision in **Puma Energy Tanzania Limited v Roadways (T) Ltd, Civil Appeal No.3 of 2018** where it held that the overriding objective was not designed to blindly disregard

mandatory procedural requirements going to the root of the matter before the Court, as it were. He concluded the PO by arguing that though the position in India is that the suit in which a dead person is sued is dismissed, his prayer is that the Court adopt the position of the Court of Appeal of Tanzania where the said suit is struck out.

Since the learned counsel for the Defendants dropped the 2nd PO, there is no point to restate it. However, Advocate Bana submitted that since the Plaintiff sued the 8th Defendant who was deceased before the institution of the suit then the whole suit is nullity before this Court. And he prayed that it should be struck out with costs without a remedy for amendment because the Court has no jurisdiction to allow such amendment in a suit which is nullity.

On his side the Plaintiff's advocate Wantora protested the PO. He submitted in his reply that the matter before the Court is proper. He argued that what the counsel for Defendant has submitted is contrary to the objection he has raised. The objection is that the suit is nullity for being filed in or against a dead person. To him, what the Defendants' counsel submitted is that the suit is nullity

for being filed against a dead person. Wantora was of the view that the present suit is not nullity because it was not filed by a dead person. He submitted that the suit before the Court was filed by Athumani Kibwigiri who is alive. He continued to submit that the authorities cited in the submission in chief are distinguished from the case or scenario at hand. The learned counsel Plaintiff's counsel argued that looking at **Juma Zomboko and 42 Other V Avic Coastal and Development Company Ltd, Civil Application No. 576/17 of 2017 CAT** is clear on page 10 that it is talking about Order XXII Rule 3 (1) and (2) of the Civil Procedure Code. The matter relates to deceased Plaintiff. It is not the Defendant as claimed by the learned counsel for the Defendants. The filing of the suit means the party who brought the matter to Court not the Defendant. At page 10 of **Zomboko's case** it is clear that it is about the suit filed in the name of a dead person. Meaning it is the Plaintiff and not Defendant. He submitted that it is clear that the 8th Defendant is deceased. The learned Plaintiff's counsel argued that the meaning of a word "Defendant" is a person who defends a claim filed in Court against him or her.

Order XXII Rule 1 of the Civil Procedure Code states plainly that the death of the Plaintiff or Defendant shall not cause the suit to abate if the right to sue survives. Advocate Wantora submitted that it is visible that the Defendants are 9 persons. And the right to sue other Defendants remain intact. Hence the suit before you is proper. He added that the claim of the Plaintiff against other Defendants other than 8th Defendant has not been affected by the death of that Defendant. He also submitted that there is no provision cited by the learned counsel that where there is more than one Defendant, and one seems to be dead should affect the claim against all other remaining Defendants even if they are alive.

Advocate Wantora thereafter turned to the case of **Moto Matiko Mabanga V Ophir Energy PLC & 6 Others, Civil Appeal No. 119 of 2021, Court of Appeal of Tanzania at Dodoma** at page 14, which he said the learned counsel for the Defendants cited. He argued that the concern that the 8th Defendant being deceased was stated by the Defendants' counsel, but the Plaintiff's side has not mentioned that. And he went further arguing that going through the whole Written Statement of Defence (WSD)

there is no information concerning the relationship of the Plaintiff and the 8th Defendant. The Plaintiff and the 8th Defendant are related that the latter is the father of the former. And making such reference was substantiating a fact which was neither alleged by the Plaintiff in the plaint nor stated by the Defendants in their WSD. He said it is a new fact unfounded in the pleadings. And he went on submitting that the suit is proper before this Court, and in that regard, the Preliminary Objection that suit if filed against the dead person failed to be a pure point of law as it is not ascertained on the pleadings. He argued that this has been stated in the **Mukisa Biscuits Manufacturing Ltd V West End Distributors Ltd [1969] EA 697**. Regarding the Indian case of **Savitramma V Nanjundappa, 25 Mys. LJ 113** cited by Defendants' counsel. The said Advocate submitted that India has a provision on the scenario (where the Plaintiff sue the Defendant who is deceased), Section 153 or Order 1 Rule 20 (2) of the Indian Civil Procedure Code. Advocate Wantora submitted that all the provisions and cases referred to are clear that where the Defendant is a sole Defendant and on the other side reference is made to where the deceased is a Plaintiff who instituted the suit

being a dead person before that institution of the suit. He argued that the suit before this Court is therefore properly filed. And he submitted further that if the 8th Defendant is deceased, other Defendants will remain, and a legal claim raised by the Plaintiff against those other Defendants will be unaffected. It is a legal principle that the Defendants are sued jointly and severally. Hence the claim against other Defendants remains valid before this Court. And the Court has jurisdiction to determine the claim between the parties. It was his prayer that the PO be dismissed, and the Court be pleased to proceed with hearing of the case.

In his rejoinder by Peter Bana Advocate for the Defendants submitted that the counsel for the Plaintiff cited the case of **Zomboko**. He said the notice is about filing the suit and not against a dead person. The Defendants counsel submitted that with regards to notice that is clear. The suit was filed in the name of or against a dead person. It means suing a dead person.

He also reacted to the learned counsel for the Plaintiff's submission that nowhere in the plaint where they made reference or stated that the 8th Defendant is dead. He then argued that

referring to the Defendants WSD, the verification clause in which after a suit was filed against the 8th Defendant the co-defendants informed him (Advocate Bana) and he made it clear in the WSD to notify the Plaintiff. He fiercely argued that there has never been any reply to the WSD to object that the 8th Defendant is not deceased. The 8th Defendant is deceased and did not sign the WSD.

He continued to argue that since the suit was filed against the deceased. And hence it is void an initio because the deceased cannot Defendant himself from his grave.

As for Order XXII Rule 1 of the Civil Procedure Coder he submitted that the provision requires substitution of the deceased Defendant with his legal representative if the deceased was made a party to the suit prior to his death.

Thereafter he Respondent to criticism by the Plaintiff counsel on the referred Indian case of **Savitramma V Nanjundappa (supra)**. Advocate Bana said that in India the suit filed against a dead person is dismissed while in our jurisdiction the Court of Appeal of Tanzania has set principle that the same has to be

struck out. The Defendants' counsel was of the view that this difference will not affect the PO raised because in both jurisdictions suing a dead person is not allowed. It is a nullity. He argued that the counsel for the Plaintiff cited Section 153 and Order 1 Rule 10 (2) of the Indian Civil Procedure Code. Advocate Bana said the judges in India apart from citing those provisions of the CPC they did not bless the Plaintiff to sue a dead person. Then, he referred back to the **Zomboko's case** and said one among the 42 Plaintiffs in that case was a dead person, and the counsel for the Plaintiff prayed to the Court that the name of one deceased Plaintiff be removed to let the matter proceed. The Court went further to decide that the act of joining a dead person as a Plaintiff in a suit at the time of filing it is a nullity.

He rested his case by submitting that the Plaintiff's counsel was praying that the suit to proceed, but Advocate Bana said the case cannot proceed because there is a deceased person sued (the 8th Defendant). He prayed the suit be struck out.

Before I venture into the merits or otherwise of the PO raised, it is crucial to throw an eye on Order 1 Rule 3 of the Civil Procedure

Code which provides for who may be joined as Defendants, and Order 1 Rule 5 of the Civil Procedure Code which states that Defendant need not be interested as to all reliefs claimed in any suit against him. It means the Defendant is dragged to the Court. Besides another provision worth mentioning is Order 1 Rule 10 (2) of the Civil which provides that:

At any stage of the proceedings either upon application or without application of either party and on such terms as may appear to the Court to be just, order that the name of any party improperly joined whether as Plaintiff or Defendant be struck out, and the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the Court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit be added.

Along the same line it is vital to restate Order XXII of the Civil Procedure Code which is a rule on effects of the death of Plaintiff or Defendant on the suit. The Order XXII Rule 1 of the Civil

Procedure Code states that the death of the Plaintiff or Defendant shall not cause the suit to abate if the right to sue survives.

In above cited provisions they deal with Plaintiffs and Defendants who are either living human beings or legal persons. When who would be Plaintiff dies before the suit is filed it would be improper for a suit to be filed in his name. That is the principle developed in **Zomboko's case**. Similarly, where who would be Defendant dies before he is dragged to court then it is improper for a suit filed against him (deceased) to be in his own name. This is the position in the Indian case of **Savitramma V Nanjundappa (supra)**. What is the crucial to be noted at this point is that the term Plaintiff and Defendants are used for living natural persons or legal persons. They also apply when the suit is properly filed before the Court. If who would be Plaintiff or Defendant dies before the suit is filed then it is proper for the administrator of the deceased estate to sue or be sued as appropriate.

However, the implications of a dead person to sue as a Plaintiff among many Plaintiffs and that of a dead person to be sued as a Defendant among several Defendants differs. In the former where

the dead person was suing (filed in the name of a dead person) will be struck out (**Zomboko's case**), and in the latter the claim against a dead person cannot stand as it is improper. However, I am of the view that the claim/suit against other Defendants (who were alive at the time of instituting the suit) cannot be struck out for the reason of one Defendant being a dead person before the filing of the said suit. The holding would have been different, and the case would have been liable to be struck out if the Plaintiff sued only one dead person as the Defendant. Therefore, the situation in the case at hand where there are many Defendants, and one is said to be dead before the case was filed is distinguished from both **Zomboko's case** (which was about Plaintiffs, and one of them was a dead person before the filing of the case), and the Indian case of **Savitramma V Nanjundappa (supra)** in which there was only one dead person sued as Defendant. For the latter it was proper to dismiss the case or to struck it out.

Unlike **Zomboko's case**, the case at hand is about Defendants in which one of them was dead prior to institution of the suit. Since Order 1 Rule 5 of the Civil Procedure Code states that the

defendant is dragged to Court and need to be interested in all reliefs claimed, it would be a miscarriage of justice to struck out the suit simply because one among many Defendants was deceased prior to filing of the case. This is not to say that to sue a dead person in is name is proper. However, the consequences are distinct when there is one deceased person only sued as a defendant, and where one among several Defendants is a dead person prior to the institution of the suit.

The remedy for the irregularity in the case at hand is provided for under Order 1 Rule 10(2) of the Civil Procedure Code, that the plaint may be amended and the administrator of the estate of the deceased be joined after being dully appointed subject to the Law of Limitation [Cap 89 R.E. 2019]. But if it is proved that the deceased person was sued in his own name while he was already dead prior to the filing of the case then the suit against him is not maintainable. However, since there are many Defendants, the rest of the claim against other the Defendants cannot be struck out. Therefore, the suit cannot be struck out or let to suffer because one among many Defendants was deceased before filing of the case.

It would have been a different story if the Plaintiff be it one or many Plaintiffs were deceased prior to the institution of the suit. In such a scenario the principle in **Zomboko's case** will apply.

The suit would also have suffered a fatal blow if it would have been filed against a dead person who is a sole defendant. In that case the suit would be nullity if proved that the purported Defendant was indeed dead even before filing of the suit. Consequently, the court could have struck it out.

I do not see a need to spill the ink over the differences between the suit filed in the name of a dead person and the suit filed against one dead person only. Both are not the case in the present suit. Here there is neither a dead person suing, nor one dead person only sued as defendant. In the case at hand there are nine (9) Defendants. And one (the 8th) Defendant is said to be dead before the filing of the suit. That makes the Indian authority **Savitramma V Nanjundappa (supra)** useless for being irrelevant and distinguished from the present case. And so is the **Zomboko's case**.

In the present case the Preliminary Objection raised seem in my view to not purely point of law as evidence may be need to establish it which is contrary to **Mukisa Biscuits case**. But even if it would have been a pure point of law, it would have nevertheless been overruled because there are many Defendants and the Plaintiff have an option of relinquishing the claim against the 8th Defendant (who in law is not a Defendant at all if proved was dead prior to filing of the case). And the suit against other remaining Defendants would have remained intact. The Plaintiff could also apply to the court to remove the 8th Defendant as the case against him is not maintainable. The Plaintiff could afterward apply to join the administrator of the estate of the said deceased person's estate. However, by virtue of Order 1 Rule 10 (2) of the Civil Procedure Code such order may be given simultaneously with other orders for instance costs be borne by the said negligent Plaintiff.

Before concluding, there few items worthy highlighting, that the Defendants counsel has spent considerable time to emphasize on the dates which he constantly reminded the Court on the issue of the 8th Defendant being deceased. I should hold briefly that such

assertions do not amount to proof. One of proving death is tendering death certificate. In this case nothing has been tendered to show that the 8th Defendant is deceased. It is elementary principle of evidence law (Section 110 of the Evidence Act [Cap 6 R.E. 2019]) that he who alleges must prove. It is conspicuous that if evidence was needed then the PO will lose its very foundation. Another item to be remarked is the question of the Plaintiff's implied duty to ensure the persons sued are living beings and if they are deceased to sue the administrator of their estates. The court presumes that all Plaintiffs and defendants are alive until the contrary is proved.


To conclude, in the present case the 8th Defendant in law is not a Defendant if proved that he was dead before being sued, and the Plaintiff knew about it. The suit against and in respect of such 8th Defendant alone is nullity. But since there are many Defendants who are alive, the suit can neither be dismissed nor struck out. Moreover, the suit cannot abate as per Order XXII Rule 1 and Rule 4 of Civil Procedure Code [Cap 33 R.E. 2019]. In the present case there are not only many Defendants but also when the Defendant dies the legal representative of deceased estate may be joined.

This though applies when the Defendant was alive when the suit was instituted. If we assume that the 8th Defendant was already dead when the case was filed as the Defendants' counsel wants the Court to believe there are two alternatives: the Plaintiff on his own motion may relinquish the claim against the Defendant (who was already dead before filing of the case) or he (the Plaintiff) may apply to court to remove the name of that person whose suit is nullity and seek an order to join the administration of his estate but in so doing such applicant will suffer costs as per Order 1 Rule 10(2) of the Civil Procedure Code [Cap 33 R.E. 2019].

In light of the foregoing the PO is overruled with costs.



DATED at **TANGA** this 9th Day of March 2022.


U. J. AGATHO
JUDGE
09/03/2022

Date: 09/03/2022

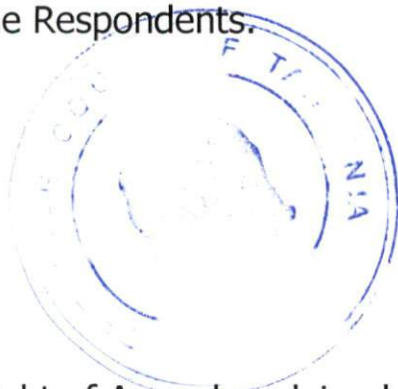
Coram: Hon. U. J. Agatho, J

Appellant: Present

Respondent: Present

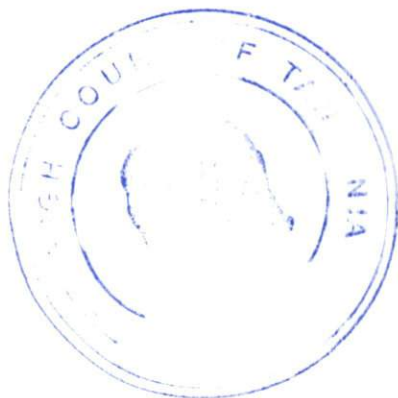
B/C: Zayumba

Court: Ruling delivered on this 09th day of March, 2022 in the presence of the Applicants, and Peter Bana, learned counsel for the Respondents.



U. J. AGATHO
JUDGE
09/03/2022

Right of Appeal explained.



U. J. AGATHO
JUDGE
09/03/2022