

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB-REGISTRY OF MWANZA  
AT MWANZA**

**LAND REFERENCE NO. 01 OF 2022**

*(Arising from Civil Appeal No 6 of 2021 of Sengerema District court original civil Case  
No. 5 of 2021 of Kasenyi Primary Court)*

**GASPER VITALIS LUANDA .....APPLICANT**

**VERSUS**

**ISACK MAHULU ..... RESPONDENT**

**RULING**

*1<sup>st</sup> & 17<sup>th</sup> November, 2022*

**Kahyoza, J.**

**Gasper Vitalis Luanda** instituted an application for extension of time to refer the decision of the taxing officer to this Court. The respondent is **Isack Muhulu**.

Briefly, the facts which precipitated the application are that **Isack Muhulu** filed the bill of costs, which the taxing officer taxed at Tzs. 1,350,000/=. Aggrieved, **Gasper Vitalis Luanda** did not refer the decision of the taxing officer within the prescribed time. He was compelled to file an application for extension of time to refer the decision of the taxing officer to

the Judge out of time. **Gasper Vitalis Luanda** instituted an application for extension of time and titled it as an application for Reference.

**Isack Muhulu's** advocate raised three points of preliminary hearing, which on being probed he withdrew them. Before, we could proceed to hearing the application on merit it came obvious that **Isack Muhulu** is dead. **Isack Muhulu's** wife was in court. She entered appearance on behalf of her late husband. **Isack Muhulu** met his demise in 2020.

Given that background I wanted to find out if an application filed against a deceased person is a competent application. I invited the parties' advocates to address me. The first to take the floor was Ms. Janeth, advocate, who held the applicant's advocate's brief with instruction to adjourn the matter submitted that she was not aware that **Isack Muhulu** is dead.

Mr Regan who advocated for **Isack Muhulu** submitted that he was not sure if the hearing of the application can be adjourned to join the administrator of the deceased's estate. He prayed for an adjournment.

In her rejoinder, Ms, Janeth submitted that she had no instruction to proceed but to pray for adjournment.

I wish to make it clear that while recording appearance of the parties to complete the day's court *coram*, it became obvious that a person who appeared for **Isack Muhulu** was woman. She told the court that her husband, **Isack Muhulu** passed on in 2020. It is that fact which brought to light the undisputed fact that the application before this court was instituted against a dead person. The applicant's advocate applied for adjournment, the application, which I refrained to entertain.

It is settled law that a nullity should not be adjourned. See the case of **Ghati Methusela V. Matiko Marwa Mariba**, Civ. Application No. 6/2006, where the Court of Appeal of Tanzania held that –

*"It is now established that an incompetent proceedings be it an appeal, application etc. is incapable of adjournment for the Court cannot adjourn or allow to withdraw what is incompetent before it."*

I decided to call upon the parties to address me whether the application was properly instituted as it was obvious that it was instituted against a dead person.

**Is an application instituted against a deceased party competent?**

There is no doubt that **Isack Muhulu**, the respondent is dead and that he passed on in 2020. Further to that, it is undisputed that the current application was instituted in 2022, that is when **Isack Muhulu** had long passed on in 2020. It is trite law that it is an administrator of the deceased's estate who is competent to sue or be sued in relation to the deceased's property. See the case **of Ibrahimu Kusaga v. Emanuel Mweta [1986] TLR 26** where the Court stated that-

*"I appreciate that there may be cases where the property of a deceased person may be in dispute. In such cases, all those interested in determination of the dispute or establishing ownership may institute proceedings against the Administrator or the Administrator may sue to establish claim of deceased's property."*

The Court of Appeal also, pronounced itself in **Mohamed Hassan vs. Mayase Mzee & Mwanahawa Mzee [1994] TLR. 225 CA**, that-

*"Administrator is the person who has mandate to deal with the deceased's properties".*

The law is clear that death of the plaintiff or the defendant and in this case, the applicant or the respondent does not cause a suit or an application to abate. {See rule 1 of Order XXII of the Civil Procedure Code, [Cap. 33 of

the R.E. 2019] (the CPC)} The law allows on application, the legal representative of the deceased party to be joined to replace the deceased. The application to join the deceased party's legal representative must be made within ninety days. Rules 3 of Order XXII of the CPC states that-

*3.-(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.*

*(2) 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 defending the suit, to be recovered from the estate of the deceased plaintiff.*

Time within which to apply to join the deceased party's legal representative is provided under item 16 of Part III of the **Law of Limitation Act**, [Cap. 89 R.E. 2019], which stipulates that-

*16. Under the Civil Procedure Code to have a legal representative of a deceased party, whether in suit or on an appeal, to be made a party. . . ninety days.*

It is trite law that time within which to apply to the join the deceased party's representative as a party runs from the date of that party's death. It does not start running from the time the surviving party becomes aware of death of the opponent party. The **Delhi High Court in Deep Verma Vs Daaya Nand C. R. P 183/2018** while interpreting rule 4 of Order XXII the CPC which is *pari materia* to our rule 3 of **Order XXII** of the **CPC**, held that-

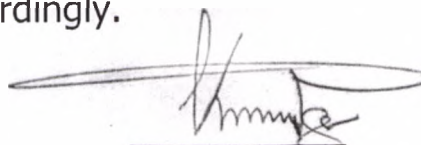
*"The position which emerges from the above discussion is that the period of limitation of making an application for substitution of legal heirs of a deceased defendant begins to run from the date of death of the deceased, and not from the date of knowledge thereof."*

The applicant instituted the current application two years after the death of **Isack Muhulu**, the respondent. The application was instituted against a non-existing person. If a suit or an application abates after death of the party, if no application is made within 90 days, there is no way a suit or an application can be instituted against a dead person. After a person dies and cause of action survives him, a suit must be instituted against that person's legal representative and if the suit or the application is already in court, the surviving party must apply within 90 days to join the legal representative.

In my considered view, it does not matter whether a party who instituted a suit or an application is not aware that the opponent party is dead to render the suit or an application incompetent. Once there is evidence that the party is dead and 90 days have elapsed before application to join the legal representative is made, that suit or the application abates.

I, therefore find that the application instituted against **Isack Muhulu**, the deceased respondent, is incompetent as it was instituted against a non-existing person. I also doubt whether a dead person can engage services of an advocate. I will not consider Mr. Regan advocate was had proper instructions to represent **Isack Muhulu**, the deceased respondent, case as the issue was not argued and counter-argued. I leave it at that. Having found that the application is incompetent, I strike it out and make no order as to costs.

It is ordered accordingly.

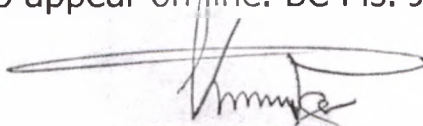
A handwritten signature in black ink, appearing to read 'J.R. Kahyoza', is written over a horizontal line.

**J.R. Kahyoza**

**Judge**

**17/11/2022**

**Court:** Ruling delivered in the virtual absence of the parties and their advocates with notice to appear online. BC Ms. Jackline Present.



**J.R. Kahyoza**

**Judge**

**17/11/2022**

