

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

MISC. LAND APPLICATION NO. 48 OF 2021

(Arising from the Land Appeal No. 12 of 2012, original Land Application No. 167 of 2009 of the District Land and Housing Tribunal for Kagera at Bukoba)

WILFRID BIGIRWA..... APPLICANT

VERSUS

VERDIAN LUTABEGANWA..... RESPONDENT

RULING

09/02/2022 & 10/02/2022

NGIGWANA, J.

The applicant Wilfrid Bigirwa on 28th day of May, 2021 through his advocate, Mr. Joseph Bitakwate has filed this omnibus application seeking for extension of time within which to file a notice of appeal, and certificate that there is a point of law involved in Land Appeal No. 12 of 2012 handed down on 24/11/2015 by this court (Kairo, J as she then was) worthy consideration by the Court of Appeal of the United Republic of Tanzania.

The application is made under Section 11(1) of the appellate Jurisdiction Act, Cap. 141 R: E 2019. The application is supported by the affidavit of the applicant.

Briefly, the facts that resulted to this application as can be gathered from the available records can be summarized as follows; the respondent Verdian Lutabeganwa instituted Civil Application No. 167 of 2009 against the applicant Wilfrid Bigirwa in the District Land and Housing Tribunal (DLHT)

for Kagera at Bukoba for encroachment of the suit land belonging to Petro Rwilemela. The respondent was represented by Henry Muyaga through Special Power of Attorney. The respondent initiated the said proceedings after being appointed as the Administrator of the Estate of the late Henerico Rwilemela who bequeathed his land to his children including Petro Rwilemela sometimes in 1975. Sometimes in 2007 Petro Rwilemela alleged that the applicant herein has encroached into his land, as a result he filed a suit against the applicant in the DLHT which was registered as Civil Case No. 28 of 2008, but he was found to have no locus standi since he was not the Administrator of the Estate of the late Henerico Rwilemela. The Respondent being the Administrator filed Civil Application No. 167 of 2009 which was decided on 19/04/2011 in his favor.

Dissatisfied by the decision of the DLHT, the applicant instituted Land Appeal No. 12 of 2012.

After hearing the parties, the appeal was dismissed with cost by this court (Kairo, J as she then was) for want of merit.

From there, the applicant filed Misc. Land Application No. 10 of 2016 seeking for extension of time within which to file an application to certify that there is a point of law worthy of consideration by the court of Appeal.

However on 8th day of November 2018, the same was struck out by the court (Mlacha, J) for being incompetent. In all cases, Muyaga appeared for the respondent through Power of Attorney. My observation is that, the respondent was the Administrator of the Estate of the late Henerico Rwelemela. The issue whether he had power to donate a Power of Attorney to Henery Muyaga should not detain me because that is not the subject of

this ruling, however, the general rule is clear that, when a court issues letters of administration or grants a probate of written will, such letters or grants are issued personally to the person applying to administer the estate of the deceased. The person applying for letters of administration or grant of probate cannot on his party delegate the powers granted to him by the court to someone else to administer the estate on his behalf. This is also supplemented by the well-known maxim in the doctrine of *Deligatus non potest delegare*.

The applicant did not end there because on 28/05/2021, through his advocate, he filed the present application. On 30/08/2021 when the matter was called on for mention so that necessary orders can be issued, Mr. Bitakwate, learned advocate for the applicant notified the court that the respondent had died long time ago.

Since there was no documentary proof to back-up the information given by the learned counsel, the matter was adjourned until 28/09/2021 where Mr. Henry Muyaga entered appearance, and upon such appearance, and considering that he represented the respondent in the previous matters through Special Power of Attorney, he was assigned to bring a certificate of death of the deceased.

Henry Muyaga acted upon the court instructions whereas, he submitted to the court **a certificate of Death with S/No. 1003004737 issued on 26/10/2021, showing that the respondent died on 02/10/2016.**

The issue is whether Henry Muyaga can continue representing the deceased. There is no doubt that power of Attorney is an authority whereby

the donee is put in the shoes or place of the donor to act into donor's name in a sense that, the donee assumes the person of a donor and by implication, the latter cannot be present when the former is acting for him. See **General Manager Pamba Engineering Ltd versus the Managing Director and Proprietor of Nyanza Sterilization and General Service**, Civil Appeal No.51 of 1995 (Unreported)

It is trite that when an individual passes away the Power of Attorney becomes in effective. In other words, a Power of Attorney terminates upon the death of the Donor/Principal. In this application therefore, Henry Muyaga had no power to institute or continue the suit after the demise of the respondent "*Donor*". His power automatically abated upon the death of the respondent on 2nd day of October 2016.

It is the general rule that civil actions survive death of the parties where the right or duty survives. In that premise, Mr. Bitakwate relied under Order XXII rule 4(1) and (3) of the Civil Procedure Code Cap. 33 R: E 2019, read together item 16 Part III of the First Schedule to the Law of Limitation Cap. 89 R: E 2019 and urged the court to allow the suit to abate.

For easy reference, Order XXII rule 4(1) of the Code states as follows;

"Where one of 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 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"

Rule 4 (3) provides that;

"Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant".

In our jurisdiction Order XXII of the Civil Procedure Code Cap. 33 R: E 2019 makes a distinction between cases in which the right to sue or appeal survives and cases in which it does not where one or more of the parties in a pending suit or appeal dies. Where the right to sue or appeal does not survive, that is the end of the case/suit.

As per Order XXII rule 4(3) of the said code, the surviving party is required to make an application for a legal representative of the deceased party to be joined in the proceeding, failure of which may lead to the suit to abate.

However, under the circumstances of this application, it is my considered view that Order XXII of the Civil Procedure Code Cap. 33 R: E 2019 does not apply due to the fact that the said order governs a situation where death of the party or parties to the case pending before the court of law occurs. Reading Order XXII rule 6 of the Civil Procedure Code between lines, it is very easy to discover that fact. The rule states as follows;

*"Notwithstanding anything contained in the fore going rules, whether the cause of action survives or not, **there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as it had been pronounced before the death took place**"*.

Order XXII therefore, does not deal with cases where a party died before the matter is filed in court. Where the party dies before the matter is filed in the court of law, the Administrator or Administratrix of the estate of the deceased should be appointed and made a party to the suit/appeal

In the present application, the Respondent Verdian Lutabeganwa who was also the administrator of the estate of Henerico Rwilemela had passed away on 2nd day of October, 2016 whereas, this application was filed on 27th day of May, 2021. It is almost four (4) years and seven (7) months from the date of the death of the respondent. That therefore means, the respondent died before the application at hand was filed in this court.

In that premise, I find the application at hand incompetent for want of the proper respondent. In the event, this application is hereby struck out accordingly. No order as to costs entered.

The applicant is at liberty to file a proper application against the legal representative for the deceased, Henerico Rwilemela, since the respondent (deceased) was the legal representative of the said Henerico Rwimelera (deceased).

It is so ordered.




E. L. NGIGWANA

JUDGE

10/02/2022

Ruling delivered this 10th day of February, 2022 in the presence of Mr. Joseph Bitakwate, learned advocate for the applicant, Mr. E.M. Kamaleki, Judges' Law Assistant and Ms. Grace Mtoka, B/C.




E.L. NGIGWANA

JUDGE

10/02/2022