

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB – REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

LAND CASE NO. 77 OF 2016

MINAEL BENARD SENYA PLAINTIFF

VERSUS

AGNESS SIKITU KABIGI DEFENDANT

RULING

13th February & 3rd March, 2023

KISANYA, J.:

On 16th October, 2016, the plaintiff, Minael Benard Senya instituted a suit against the defendant, Agness Sikutu Kabigi. Her claim against the defendant was for declaration of rightful ownership, wrongful demolition and further declaration that she is the lawful owner of Plot No. 300, Block C, Chang’ombe in Temeke Municipality, Dar es Salaam (henceforth “the suit premise”). The plaintiff further prayed for special damages of TZS 39,384,780/=, general damages, interest on decretal sum, costs, and any other relief this Court deems just and fair to grant.

Upon being served with the plaint, the defendant filed a written statement of defence. She disputed the plaintiff’s claims and raised a counterclaim praying for the following reliefs, declaration that the plaintiff has breached the lease agreement, permanent injunction restraining the

defendant from any interference and trespass to the suit premise, payment of TZS 69,200,000/=, being rent in arrears, compensation for disturbance and annoyance, mesne profit and general damages, punitive damages, interest on decretal sum and costs of the suit.

When the matter was called for final pretrial conference on 30th July, 2019, the learned counsel for the parties informed the Court that the defendant/ plaintiff in the counter claim passed away on 26th July, 2019. On that account the matter was fixed for orders on 30th October, 2019 in order to pave way for the appointment of an administrator who would proceed with the matter. On 30th October, 2019, the Court extended the time to a period of 30 days from the date thereof.

When the matter was placed before the Court for mention on 4th December, 2019, the counsel for the deceased defendant/plaintiff in the counterclaim informed the Court that the administrator had been appointed. That being the position, this matter was scheduled for necessary prayer and orders in respect of the defendant's case status and final pretrial conference on 26th February, 2020. The record is silent on what happened on 26th February, 2020.

On 8th June, 2020, the Court was informed by the defendant's counsel that, Grace Martin Kabigi who had been appointed as an administrator of the

estate of the deceased defendant/plaintiff in the counterclaim had been revoked by the court. At the instance of the parties, the matter was adjourned for two months. Thereafter, this matter has been adjourned to pave way for settlement of administrator's issues.

When the matter came up for orders on 16th December, 2022, I probed the learned counsel for the parties to address the Court on whether the suit against and by the deceased defendant/plaintiff in the counter claim has not abated.

The said issue was heard on 13th February, 2023 during which Messrs Dickson Mtogeseva and Frodius Mutungi, learned advocates appeared for the plaintiff and defendant, respectively.

Mr. Mutungi was the first to take the floor. He commenced his address by giving a brief background of the matter as stated afore. It was his argument that the suit has not abated against the deceased defendant. His argument was founded on the reason that when the Court was informed of the demise of the defendant, it ordered for appointment of administrator and further that the parties have been informing the Court about the status of administrator. Referring the Court to Order XX, Rule 5 of the CPC, Mr. Mutungi argued that this Court is enjoined to determine the issue as to who is the administrator of the deceased defendant.

On his part, Mr. Mtogeseva was in agreement with Mr. Mutingi's submission there is a question as who is the administrator of the deceased defendant. He went on to submit that the case has been blocked by the law and that it will be unsafe to hold that the case has abated in the circumstances where the Court was informed of the death of deceased defendant. The learned counsel admitted that the application to join the administrator of the estate of the deceased could not be made due to the circumstances of this case. Making reference to Order XXII, Rule 6 of the CPC, he urged the Court to consider that the suit has been before it. He was of the further view that the defendant's husband should be given the right to be heard.

In his short rejoinder, Mr. Mutungi submitted that he is the one who was representing the defendant when she was alive. It was also his contention that after her demise, no person withdrew the instruction to represent the deceased defendant. The learned counsel was at one with Mr. Mtogeseva that the suit has not abated against the deceased defendant.

Having examined the record and considered the above submissions, the question for determination is whether the suit has abated against the defendant/the plaintiff in the counterclaim.

The foregoing issue is governed by Order XXII, Rules 3 and 4 of the CPC. In terms of both rules, where the plaintiff or defendant dies and the right to sue survives, his or her legal representative(s) has to be made a party to the suit. For The rules provide:

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.

4. (1) 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 an 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.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

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

As it can be scanned from the above provision, the legal representative (s) of the deceased plaintiff or defendant is made a party to the suit, on application in that behalf. Further to this, the law is clear that if the application to join the legal representative is not made within the time set out by the law, the suit must abate against the deceased plaintiff or defendant.

Now, item 16, Part III of the Schedule to the Law of Limitation Act, Cap 81, R.E 2019, provides that time within which to have a legal representative of a deceased party to be made a party is ninety days. The law does not state as to when does the time starts to run. In the case of **Dr. Hudson Winani Versus North Mara Gold Mine Limited**, Civil Case No. 4 of 2020 HCT at Musoma (unreported), this Court (Kahyoza, J) cited with approval the persuasive decision case of the High Court of Delhi in **Deep Verma Vs Daaya Nand** C. R. P 183/2018 where it was 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."

Being persuaded by the above decision, my senior brother, Hon. Kahyoza, J went on to hold as follows on the issue under consideration:

"...abatement under rule 3 Order XXII of the CPC is a legal consequence flowing from the omission to take the necessary steps within the time limited by law to implead the legal representative of the deceased plaintiff, hence a formal order of the Court is not necessary for such a consequence to happen. That must be the reason why the framers of the Code chose to use the expression that the suit shall abate so far as the deceased plaintiff is concerned instead of the expression that the Court may pass an order that the suit shall abate. Time starts to run from the date of death and not from the date of appointment of legal representative or knowledge of the death of a part by the Court or by the interested party."

I fully associate myself with the above position. Therefore, since the deceased defendant/plaintiff in the counter claim passed away on 26th July, 2019, the application to cause her legal representative a party to the main suit and counterclaim ought to have been made on or before 25th October, 2019.

Now, as rightly observed by Mr. Mtogese and Mr. Mutungi, the Court was informed of the death of deceased defendant/plaintiff in the counterclaim. Basing on that information, the Court fixed the matter for orders on 30th October, 2019 in order to pave way of appointment of administrator who would proceed with the matter. However, no application to cause the legal representative of the deceased defendant/plaintiff in the counterclaim as a party which has been made before the Court. The record bears it out that this matter has been adjourned to enable the parties to settle the issue pertaining to appointment of administrator of the deceased defendant/plaintiff in the counterclaim. It is my considered view that the said adjournments did amount to extension within which the legal representative of the deceased defendant/plaintiff in the counterclaim could be made a party. Even if it is considered that the Court extended the time, the extension was for a period of 30 days from 30th October, 2019.

I have considered the argument that Order XXII, Rule 5 of the CPC empowers the Court to determine the question as to who is the legal representative of the deceased defendant. Since there is no application made by any person on that aspect, this Court has no basis of determining that question.

As regards XXII, Rule 6 of the CPC relied upon by Mr. Mtogese, it bars abatement of the suit where the death of either party occurs between

the conclusion of the hearing and the pronouncing of the judgment. I have hinted earlier, that the defendant met her demise when the suit was at the final pretrial conference stage. On that account, the provision Order XXII, Rule 6 of the CPC does not apply.

For the above stated reasons, it is the findings of this Court that the time within which to cause the legal representative of the deceased defendant/plaintiff in the counter claim to be made a party has lapsed.

In the event, the main suit and counterclaim are hereby held to have abated. Considering the circumstances of this case, each party is ordered to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 3rd day of March, 2023.



S.E. KISANYA
JUDGE