

TANZANIA / JUDGMENT

george kihinja vs efc tanzania microfinance bank others 2023 tzhclandd 16481 26 may 2023

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26 May 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT PAR ES
SALAAM LAND APPEAL CASE NO. 115 OF 2023 (Originating from Land Application No. 99/ 2018
of the District Land and Housing Tribunal for Ilala at Ilala dated 28/02/2023 before Hon. A. R.
Kirumbi, Chairperson) GEORGE KIHINJA.....APPELLANT
VERSUS EFC TANZANIA MICROFINANCE BANK.....1st RESPONDENT KHALIDI ALLY
SALUMU..... 2 nd RESPONDENT TANZANIA QUALITY AUCTION
MART.....3 rd RESPONDENT

RULING

Date of last Order: 23.05.2023 Date of Judgement: 26.05.2023 A. Z. MGEYEKWA. J The context of this matter derives from Land Application No. 99 of 2018 before the District Land and Housing Tribunal for Ilala at Ilala by whereas the trial Tribunal dismissed the matter in favour of the respondents. The i appellant herein, being disgruntled with the said decision, preferred the instant appeal before this Court. At the inception, the following were the appellant's grounds of appeal against the respondent:

1. That, the decision of the District Land and Housing Tribunal for Ilala erred in law and fact for abetting the applicant's case and not according to the administrator to be joined;
2. That, the District Land and Housing Tribunal for Ilala erred in law and fact for failing to construe OrderXXII of the Civil Procedure Code and item 16 to the 2nd schedule o f the Law of Limitation Act; The appellant was duly represented by the learned counsel Mr. Joseph Mafie while the 1st and 2nd respondents had the legal service of Mr. Stephen Mayombo. The 3rd respondent was absent since the commencement of this matter, thus, the matter proceeded ex parte against her. On 17th May, 2023 when the case was set for hearing, the same ensued viva voce. In support of the appeal, Mr. Joseph started the ball rolling. He opted to argue both grounds of appeal in tandem. He averred that the proceedings before the trial Tribunal dated 11th August 2020 entail the appellant commenced to adduce evidence but he could not finish. He added that, on 1st March 2022, the case was called for

hearing and the trial Tribunal was informed that the appellant passed away and his family was in the process to appoint an administrator of his estate. He further stated that, on 16th November 2022, the trial Chairman was informed by the deceased's son that he was appointed to administer the estate of his late father. He maintained that, when a party passes away the proper procedure is under Order XXII, rule 1 of the Civil Procedure Code, Cap.33 [R.E 2019]. To bolster his position, he cited the case of Mahusiana Ltd vs. Lach John Bosco, Land Appeal No. 15 of 2018 on page 9 of the Judgment. He qualified that, according to item 16 to the Schedule of the Law of Limitation Act, [Cap 89 R.E 2019], is only applicable when a deceased passed away and the Court has not informed then the lapse of 90 days is counted as not existing. To back up his stance, he referred this Court to the decision of Simon Mchangwa vs. Majaliwa Bande & John Njagidiri, Civil Appeal No. 263 of 2017 on page 6 same applies to the case of Registered Trustees of Shadili vs. Salim Omary, Civil Appeal No. 275 of 2016 at page 3. To his end, he prayed this Court to allow the appeal and the administrator of the estate of the deceased be allowed to proceed with the matter. 3 In rebuttal, Mr. Stephen asserted that, pursuant to Order XXII, rule 3(1) and (2) of the Civil Procedure Code, [Cap 33 R.E 2019], time for the administrator to join in the case starts when the deceased passed away and not the date when the appellant informed the Tribunal. To fortify his assertion, he mentioned the case of Masanjwa Mohamed Kuru (Legal Representative of the Late Erika Maswaja) vs. Commercial Bank of Africa (TZ) Ltd, Civil Application No. 16 of 2021 on page 7 as the law prohibits them to join automatically until prayer of joinder to the case is made. In his rejoinder, the advocate for the appellant was very brief. He uttered that on 1st June 2022, the deceased's son appeared in Court and inform the Court that the administrator was yet to be appointed, therefore, the trial Tribunal adjourned the hearing. Therefore, he insisted that the trial tribunal blessed the whole process of appointing an administrator. Before I get to the substance of the appeal, I suo motu asked both counsels to address this Court whether the appeal is proper before this Court because the deceased has signed the memorandum of appeal and the same is brought by a deceased person. In their submissions, both the learned counsels for the appellant and respondent briefly stated that the proper person to lodge the instant appeal was the administrator of the estate of the late George Kihinja. Mr. 4 Mayombo, learned counsel for the respondent added that the appeal is incompetent before this Court. Having heard the submissions of both counsels, I am in accord with their submission that a deceased person cannot lodge a case before any Court of law. Where a person dies it is automatically that the administrator of the estate or legal representative steps in his shoes and joined as a party in place of the deceased. It is the position of the law that a legal representative or administrator has the power to sue in respect of all causes of action that survive the deceased. For the purpose of clarity, section 100 of the Probate and Administration of Estates Act, Cap. 352 [R.E 2019] provides as follows: - "An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same powers for the recovery of debts due to him at the time of his death as the deceased had when living." Similarly, the Court of Appeal of Tanzania in the case of Mabongolo Luma & Another v Peter Mlangi, Civil Appeal No. 45 of 2019 (unreported) held that:- "Once a party passes away, a

trial should not commence without replacing the deceased with a legal representative.” 5 In the circumstances, I am satisfied that the deceased’s relatives or administrator of the estate of the late George Kihinja ought to have complied with the procedure requiring the joining of the legal representative in place of the deceased before filing the present appeal before this Court. In the event, I entirely agree with the learned counsel for 1st and 2nd respondents that the appeal before this Court is incompetent. Ultimately, I proceed to strike out the instant appeal with leave to refile a proper appeal/revision after the interested party complies with the procedure of being joined as the legal representative of the deceased as required by law. I make no order as to costs because the issue which formed the basis of this Judgment was raised suo mottu by the Court. Order accordingly. Judgment delivered on 26th May 2023 through audio teleconferencing whereas Mr. Joseph Mafie, counsel for the appellant, and Mr. Stephen Mayombo, learned counsel for the 1st and 2nd respondents were remotely present. 6 7

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