

TANZANIA / JUDGMENT

JONAS BUDEBA Land Appeal 71

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA SUB REGISTRY OF SHINYANGA
AT SHINYANGA LAND APPEAL CASE NO. 71 OF 2023 (Arising from the judgment and orders of
the District land and housing Tribunal of Maswa at Maswa in Land Application No 44 of 2021)

1. JONAS BUDEBA APPELANT
2. KATALE CHARLES
3. MADUHU MUSIKULA
4. MUHANGWA MBITIMULULU
5. LIGWA WILBERT
6. MABEYO WILBERT
7. LUCAS NGELEJA
8. GAPI NTANGANYIKA
9. SITA YATUBA
10. SUSAN PASTORI 11 . NGELEA CHARLES
12. KAYUNGA BUDEBA
13. MALIMI NTENGANIJA APPELANTS
14. SAMWEL BUDEBA
15. MARIA MALOLE
16. MASALU KAZUKA
17. YEGILE MAGUHWI
18. MUSIKULA MADUHU
19. KABULA BUDEBA. VERSUS MINZA LUKALI RESPONDENT
(Administrator of the estate of the late Lukali Kinamhala)

JUDGMENT

13 March, & 19 April 2024 th th MASSAM J. 1 In this appeal, the appellants before the District Land and Housing Tribunal of Maswa at Maswain Land Application No, 44 of 2021, were sued by there spondent claiming to be declared as the owner of a suit property, with 150 acres located at Mwamgoba Village at Malili ward within Busega District in Simiyu Region, after he had inherited it from his father Lukali Kinamhala who died in the year 1976. Again, the respondent claimed that, the disputed property was claimed by one Seleman Kabuga (the diseased) and after the matter had been taken to the ward tribunal, he gave him only 2 acres hence the respondents have to be declared as the trespasser of the disputed land property. The same was replied negatively by some of the respondents who appeared before the tribunal and started that they inherited the disputed land property from their relatives who are diseased. The trial tribunal heard the matter against the Appellants and held in favour of the respondent, by declaring the disputed land property to his farther one Lukali Kinamhala (the diseased) and the appellants had to vacate and demolish their properties. Being aggrieved by the decision and orders of the trial tribunal, the appellants appealed to this court based on six grounds of appeal as advanced in the petition of appeal and 3 supplementary grounds of 2 appeal to the effect that, the matter before the trial tribunal was not proved to the required standard. When the matter was called for hearing, it was argued orally and Mr. Phares Malengo Advocate appeared for the appellant's while the Respondent was represented by Daudi Masunga learned counsel. Submitting in support of his grounds of appeal, the counsel for the appellant choose to combine the supplementary grounds with grounds number 4 and 3 of the petitions of appeal while other grounds were argued separately. Arguing on the first ground of appeal, the counsel contends that, the DLHT faulted by determining and entering judgment while there was un procedural change of assessors contrary to section 23 (3) of the Land Dispute Court Acts and Regulations 19 (3) of the Land Dispute Court Acts (Dispute Land and Housing Tribunal) as on 08th May 2022 the assessors were different from those who sat on 8th December, 2022 hence the change of the assessors contravene the mentioned provisions of the law. He referred this court to the case of Annalydia Gosbert Rutunda Versus Harold Eliud Mtunga, Land Appeal No. 40 of 2022 at Pg. 8 where it was confirmed that, such kind of errors renders the whole case nullity as it vitiates the trial proceedings of the tribunal. Again the trial tribunal was required to indicate to the 3 proceedings that, one assessor who is Mr Chambuso is not around hence he will continue with one assessor, and the said assessor who was changed did not hear the evidence testified by the respondent so he will not be in position to give opinion concerning that witness .In replying to the second ground of appeal he added that, the added assessors one Mrs Z. Mageuza was not allowed to give her opinion as she was not there when the evidence of all witnesses was given. He referred this court to the case of Amri Shaban Versus Salum Mohamed, Civil Appeal No. 84 of 2021 at Pg. 8 which held that an assessor/s who was not in the hearing of the wholly case is not allowed to give her /his/ opinion. With regard to ground number 3 of the Supplementary ground of appeal, the appellant complained that the trial Tribunal faulted by retaining the names of the respondents who are diseased. He submitted that, the trial tribunal was informed that the 4th, 50th and 64th respondents in the land application were diseased but unfortunately the trial tribunal did not comply with the said provisions of Order XX11 rule 4(3) which requires that, the surviving party

of the deceased to make application to join the legal personal representative as it was stipulated in the case of Robert Banigi Versus Scholastica Alchadi 4 at Pg. 6-7, in this case the High Court Judge was informed that some of the parties in the said case were deceased but he proceeded in hearing the said case. He added that, such kind of errors make the proceedings to be nullity. The appellant continued to submit that, in this present case at Pg. 2 of the trial Proceedings, dated on 20/09/2021, the trial tribunal was informed that some of the parties were deceased but he proceeded to hear the matter, it is his view that trial chairman was not required to proceed with the matter without having legal representative hence the proceedings are nullity and therefore the trial proceedings has to be nullified from 20/09/2021 after the trial Tribunal got the said information. In regard to the 4th ground appeal he contended that, he has already discuss it in ground number 3, Coming to 5th ground of appeal he complained that, the chairman did not consider the evidence that, the Applicant did claim about 4 acres from Selema Kabuga but he was awarded 150 acres which was more than what was claimed, and again when cross examined by one Abdallah, he said that, his dispute is against Suleman Kabuga only hence he did not know other respondents, therefore the trial Tribunal was required to consider such evidence before jumping into conclusion, thus he prayed to this court 5 that, the orders of giving the respondent 150 acres which he did not claim be set aside and this appeal be allowed by nullifying the whole proceedings, judgment, orders and the matter be heard by another Chairman with new sets of assessors. On his side, the advocate for the respondent replied on ground number one by objecting it and starting that, on 18/05/2021 when the matter was fixed for hearing, the sets of assessors were two, hence the whole proceedings shows that, the same assessor are the one who appear from the beginning to the end of the matter and therefore there is no change of assessors so the cited case of Annalydia Gosbert (supra) is distinguishable and therefore even the contents of ground number two is meaningless as the same assessors heard the matter from the beginning to the end. With regard to the ground No 3 and 4 as complained by the appellant that the trial tribunal erred by retaining the names of the deceased, he submitted that, the same issue was raised on 4/02/2022 hence no any party appeared and prayed to be joined as a legal representative of the said deceased hence the case of Robert Maningi Versus Scholastica (supra) is supporting them since no one come before the tribunal and requested to be joined as a legal representative. 6 Submitting on ground No 5, that, the trial court erred to award the respondent what he did not claim by giving him 150 acres instead of 4 acres, he submitted that, the respondent was bound by his pleadings which shows that, he was claiming 150 acres and not 4 acres. Again, he submitted that, as per the pleadings it featured that the said 150 acres were left to Seleman Kabuga, hence the trial tribunal was right to award 150 acres to the respondent as there was nowhere showing that the respondent claimed 4 acres hence this appeal needs to be dismissed. In his rejoinder, the advocate for the appellant added that, with regard to the issue of changing the assessors he submitted that, on 2/11/2023 it is when he realised that, the Corum on 18/05/2022 changed by deleting one assessor replacing another assessor and it happened when they filed Misc. Application No. 106/2023 when they prayed to the District Land and Housing Tribunal that, they had a chance to win due to that errors and un procedural change of assessors hence it is when the chairman went on and deleted the names of the assessors. Further to that, he insisted that, the trial Chairman did not comply with the provisions of order XX11 rule 4(3) concerning the

issue of joining legal representative persons of the deceased as the proceedings were silent as to whether the deceased case abated. Also, 7 the proceedings do not show as to whether the court invited a party to appear and filed an application to join as a legal representative of the said parties. Further to that, he submitted that, on 18/05/2022 when the applicant was cross examined, he did admit that the one who trespassed his land was only Seleman Kabuga and does not know other respondents, thus he prayed to this court to order remittal of this file to DLHT for retrial. I have systematically crossed through the trial tribunal records on the evidence given, and the arguments by both parties at the appeal level, and the issue for consideration is whether this appeal has been brought with sufficient cause. To start with, this court will choose to argue on the 3rd ground of the supplementary petition of appeal as submitted by the appellant complaining that, the trial Tribunal Chairman erred in law by retaining the names of the respondents as parties to the suit in the proceedings, judgment and decree despite being informed that some of them had died hence it contravene the provisions of order XX11 rule 4(3) which requires a surviving party to make an application to be joined as a legal personal representative. This was replied negative by the respondent that, no party appeared and prayed to be joined as a legal 8 representative of the said deceased in order for the case against them to abate. Accordingly, I am absolutely agreeing with both counsels that, some of the respondents are deceased preferably the 4th respondent. This is because, as per the proceedings and upon a thoroughly perusal of the attached summons, I observed that, the summon issued to the 4th respondent shows that, he is a deceased, unlike other summons from other unknown respondents does not feature as to whether they are alive or departed though both advocates admitted that there are respondents who are deceased. From the above illustrations, it is clear under the provision of Order XX 11 rule 4.-(1) that, 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..... 9 Again, sub rule 3 of the rule provides that, (3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant. This was emphasised in the case of Robert Banigi Versus Scholastika Alchadi, Civil Appeal No. 109 of 2022 at Pg 7 where by the court held that, "civil actions survive death of the parties where the right or duty survives, and that, what should be done where a party to a civil action which survives death of the party as it happened in this case, dies while the suit is still pending in court, is provided for under order XXII of the CPC. We then went on holding that, under Order XXII Rule 4 (3) of the CPC, the surviving party is required to make an application for a legal representative of a deceased party to be joined in the proceedings, failure of which may lead the suit by or against the deceased party to abate. Needless to say, in such circumstances, a trial or an appellate court is expected to exercise some patience and ensure that under any circumstances, a suit does not proceed 10 by or against a party who is deceased as it happened in the instant case (emphasised) From the above appropriate observations from the cited authorities ,and As much as I have grasped from the trial proceedings, the counsel for the respondent on 26/10/2021 informed the tribunal that, the 4th respondent one Selema Kabuga is a deceased and yet it continued to hear and determine the matter in the applicant's favor, who is

the respondent in this case. The trial tribunal was required to order the applicant to make an amendment to remove the said respondent/s to his case and order the surviving parties to pray to be joined as legal representative. The law is very clear that, when the respondent dies before the case is heard and determined the Administrator or Administratrix of the estate as the case may be, or a legal personal representative of the deceased who is party to, must be joined to the case. Further to that the onus of joining that Administrator or Administratrix of the estate as the case may be, or a legal person representative of the deceased party is vested to the applicant by amending the pleading to implead the said Administrator or Administratrix of the estate as per the orders of the court case may be, 11 or a legal person representative of the deceased party before continuing with the case and that duty cannot be shifted to a person who is not a party to the case or who is the potential respondent. The position was also debated by the court of Appeal of Tanzania in the case of Said Ibrahim (Legal Personal Representative of Ibrahim Ramadhan Versus Melembuki Kitasho, Civil Application No. 5 of 2014, when making an interpretation of rule 57(3) of its Rules the court observed that: "Civil application shall not abate on the death of the applicant or the respondent but the Court shall, on the application of any interested person, course the legal representative of the deceased to be made a part in place of the deceased." (Emphasis added). From the above critical research, this court will hold hand with counsel for the respondent and the cited case of Robert Banigi that the trial tribunal was obliged to insure that, the suit is not proceeded by or against a party who is a deceased person but the trial tribunal was supposed to exercise its discretionary power by ordering the applicant to make an amendment of the pleading by including a legal representative or eliminate the deceased from the case as it is clear from the above 12 positions that, any proceedings instituted and prosecuted in the name of a dead person or mounted against a dead person instead of his duly appointed administrator of estate as well as, the decision thereon are nullity, hence this court finds out that, this ground has merit. With the remaining grounds of appeal this court is honoured to say that, since there was procedural regularities before the trial tribunal in determine the matter, and the 3rd ground of appeal goes to the root of the case and alone is sufficient to allow this appeal this court will not trouble to discuss the remaining grounds of appeal. Having observed the same, my conclusive view is that this appeal has been brought with sufficient cause and consequently is hereby allowed. The judgement and decree of the trial tribunal are hereby quashed and set aside. The matter be remitted to the trial tribunal for retrial by different Hon. Chairman with different set of assessors. Regarding the circumstances of this case, No orders as to costs. It so ordered. DATED at SHINYANGA this 19th day of April, 2024. 13 R. B. Massam JUDGE 19/04/2024 14

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