

TANZANIA / JUDGMENT

juma a zomboko and 42 others vs avic coastal and development co ltd 4 others

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COURT
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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM FORAM: MWARIJA, J. A., SEHEL, J.A, And FIKIRINI, J.A. ^ CIVIL APPLICATION NO. 576/17 OF 2017 JUMA A. ZOMBOKO AND 42 OTHERS..... APPLICANTS VERSUS AVIC COASTAL AND DEVELOPMENT CO. LTD & 4 OTHERS RESPONDENTS (Application for revision of the ruling and drawn order of the High Court of Tanzania, Land Division at Dar es Salaam) fMzuna. 3A dated the 20th day of October, 2017 in Land Case No. 190 of 2013 RULING OF THE COURT 25th August & 16th November, 2021 MWARIJA, J.A.: In this application which has been brought by 43 applicants, the Court has been moved to revise the ruling of the High Court (Mzuna, J.) dated 20/10/2017 made in Land Case No. 190 of 2013. In that case, the applicants together the late Hamidu Nassoro Suleimani and the other five persons who are not parties to this application, were cited as the plaintiffs while the present respondents were the defendants. In the course of the hearing, an application was made by two persons, Yusuf Hamid Nassoro and Nassoro Hamidu Nassoro. They prayed to be made parties to the suit on account that, following the demise of Hamidu Nassoro Suleimani (the deceased) on 17/7/2017, they were appointed the administrators of his estate. Having considered the application, the learned trial Judge found that, the application was made after the prescribed period of 90 days in contravention of item 16 of Part III of the First Schedule to the Law of Limitation Act [Cap. 89 R.E. 2002, now R.E. 2019]. He found therefore, that the application was time barred and thus dismissed it. With regard to the effect of dismissal of the application on the suit, the learned trial Judge found that it rendered the suit to have abated in terms of O. XXIIr. 3 (2) of the CPC. The applicants were aggrieved by the ruling of the learned trial Judge hence this application which has been brought by way of a notice of motion preferred under s. 4 (3) of the Appellate Jurisdiction Act [Cap. 141 R. E. 2002, now R.E. 2019]. It is supported by an affidavit sworn by Meshack Lyabonga, advocate. According to the notice of motion, the application is predicated on the following grounds:- "(i) The Honourable trial Judge wrongly held that upon the death of one plaintiff in the representative suit, the suit abates in respect of all other remaining plaintiffs irrespective of being a representative suit. (ii) The Honourable trial Judge made an error by not admitting a certified copy of a survey plan which was certified by the Director of Mapping and whose 2 copy was annexed to the additional list of documents. (iii) The decision of the trial court is tainted with irregularity as has denied

the applicants the right to sue and prosecute their case just on the reason that one of the several plaintiffs is dead. (iv) The Ruling and Drawn Order are not appealable." At the hearing of the application on 25/8/2021, the applicants were represented by Mr. Edward Chuwa, learned counsel. On their part, whereas the 1st and 2nd respondents were represented by Mr. Augustine Kusalika, learned counsel, the 3rd, 4th and 5th respondents were represented by Mses. Paulina Mdendemi, Anna Juma and Mr. Benson Hoseah, learned State Attorneys. In compliance with Rule 106 (1) of the Court of Appeal Rules, 2009 as amended (the Rules), Mr. Chuwa duly filed his written submission in support of the application. On his part, in compliance with Rule 106 (7) of the Rules, the counsel for the 1st and 2nd respondents filed his written submission in reply to the submission filed by the counsel for the applicants. However, the 3rd, 4th and 5th respondents opted not to file any written submission in reply to the submission filed in support of the application. 3 In his written arguments which were essentially based on grounds (i) and (iii) of the notice of motion, Mr. Chuwa argued that, since the matter before the trial court was a representative suit not a joint suit, the learned trial Judge erred in failing to find that upon the death of one of the plaintiffs, the suit did not abate against all other plaintiffs. Relying on the provisions of O. XXII rule 9 (1) and (2) of the CPC, the learned counsel stressed that the death of one of the plaintiffs did not have the effect of making the suit to also abate against the plaintiffs who were alive. To bolster his argument, he cited a passage from Mulla, The Code of Civil Procedure, 16th Ed. at page 3038 where, commenting on O. 23 r. 3 of the Indian Code of Civil Procedure, the provision which is in pari materia with O. XXII r. 3 (2) of our CPC, the learned author states that: "...its words 'so far as the deceased plaintiff is concerned' mean that the suit shall primarily abate so far as the deceased plaintiff is concerned but they do not mean that the suit shall in no case abate as a whole. If a suit is in such a nature that it can proceed in the absence of the legal representative of the deceased plaintiff it will abate so far only as the deceased plaintiff is concerned..." The learned counsel distinguished the case of Mr. Godwin Charles Lemilia v. Slim Ndikoko and Another, Civil Appeal No. 28 of 2016 (unreported), because in that case, the suit was found to have abated only against the first respondent (who was the defendant at the trial) on account that no legal representative was joined after the death of the deceased. The learned counsel stressed, in his oral submission that, the trial court erred in deciding that the whole suit had abated thus punishing the rest of the applicants because of the inaction of the deceased's legal representatives. In reply, Mr. Kusalika did not have any oral arguments to make in response to the submission made by the counsel for the applicant. He adopted the contents of the affidavit in reply and written submission filed in opposition of the application. In his written submission, the learned counsel started by challenging the competence of the application arguing that the impugned ruling is appealable because it conclusively determined the suit. He argued further that the grounds of the revision are not tenable because the application does not conform to the requirements of the provisions of s. 4 (3) of the AJA. He cited inter alia, the case of Moses J. Mwakibete v. The Editor Uhuru [1995] TLR 134 to support his argument. On the finding that the whole suit had abated because of the failure by the deceased's representatives to apply within the prescribed time, to be joined as parties in the place of the deceased, Mr. Kusalika argued that such finding is correct in view of the decision of this court in the case of Mr. Godwin Charles Lemillia (supra), one of the authorities relied upon

by the learned trial Judge. With regard to the commentary in Mulla, The Code of Civil Procedure, Mr. Kusalika submitted that the stated position is distinguishable because the passage refers to the matter involving partnership, not co-plaintiffs in a representative suit. He elaborated that, since in the case at hand, the deceased did not sue in his personal capacity but in a representative suit, the irregularity had the effect of causing the whole suit to abate. Although as stated above, in his submission, the counsel for the applicant did not argue the second ground of the revision, Mr. Kusalika replied to it. He contended, and in our view correctly so, that the refusal by the learned trial Judge to admit a copy of the survey plan (the document) did not have any connection to the impugned ruling which arose as an aftermath of the death of the deceased. He argued however, in the alternative, that the trial court did not commit any illegality in refusing to admit the document. He stressed that the learned trial Judge rightly refused to admit it because, whereas the copy which was served to the 6 respondent was certified on 31/8/2015, the one which was to be tendered in court, was certified on 31/7/2015. The learned counsel concluded by arguing that the learned trial Judge rightly found, inter alia, that the suit had abated because of the failure by administrators of the deceased's estate to apply, within the prescribed time, to be made parties to the suit. On his part, Mr. Hoseah, who adopted the affidavit in reply sworn by Hellen Philip, the 4th respondent's Senior Legal Officer, supported the application. He prayed that the same be granted with costs. In rejoinder, Mr. Chuwa opposed the argument by Mr. Kusalika that since the plaint was filed in the form of a representative suit, the result of the irregularity was to cause the same to abate as against all the applicants. According to the learned counsel's submission, each of the applicants had his own interest in the suit and therefore, the irregularity did not result into abatement of the whole suit. Having heard the counsel for the parties, we adjourned the application for ruling on the date to be notified to them. However, in the course of our deliberations on the issues arising from the submissions with the view of determining the application, we realized that one vital issue arising from the proceedings giving rise to the impugned decision was not canvassed by the counsel for the parties. The issue is whether from the stage of the case at which the deceased passed away, his death would have attracted invocation by the High Court, of 0. XXII rules (1) and (2) of the CPC. Given the pertinence of the issue, we reopened the hearing and required the counsel for the parties to address us on the issue. In their submissions, all the learned counsel for the parties agreed that the deceased was already dead at the time when the plaint was filed. On the legal effect of filing the suit by the name of a dead person, Mr. Chuwa argued that, although the suit is a non-starter on the part of the deceased, the other applicants were not affected. He went on to state, during his rejoinder submission, that as a remedy, the Court should consider to apply the overriding objective principle to order amendment of the plaint by removing the name of the deceased. On his part, Mr. Kusalika submitted that the effect of filing a suit in the name of a dead person is to render it a nullity regardless of being a representative suit or otherwise. He argued further that, neither 0. XXII r

- (3) (1) of the CPC could be invoked to substitute the deceased's legal representative nor could 0. 1 r 9 of the CPC be acted upon to amend the plaint. The remedy, he said, is to strike out the appeal. Mr. Hoseah supported the submission made by the counsel for the 1st and 2nd

respondents. As pointed out above, the learned trial Judge held that the suit had abated because the legal representatives of the deceased were not joined as parties to the suit in terms of O. XXII r 3 (1) and (2) of the CPC read together with item 16 of the First Schedule to the Law of Limitation Act. Order XXII r. 3 (1) and (2) of the CPC state as follows:- "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 subrule (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" 9 As to item 16 of Part III of the First Schedule to the Law of Limitation Act, the same provides as follows, as regards the period within which an application for joining a legal representative in a suit:- "Under the Civil Procedure Code to have a legal representative of a deceased party, whether in a suit or appeal, to be made a party ... ninety days," It is clear from the wording of O.XXII r. 3 (1) and (2) of the CPC, that the provision applies where a deceased plaintiff was a party to the suit before his death, that is to say; he must have passed away after he had instituted the suit. In the case at hand, the deceased, passed away on 17/7/2017 while the suit was instituted on 15/10/2013. As such, although his name appeared in the plaint as one of the plaintiffs, he had never been a party to the suit and for that reason, the provisions of O. XXII r 3 (1) and (2) of the CPC could not be applicable as far as the effect of his death on the suit is concerned. We find therefore, that the learned trial Judge erred in proceeding to entertain the application by the deceased's legal representative's under O.XXII r. 3 (1) of the CPC while the deceased had never been a party to the suit. The position of the law is that a suit filed in the name of a dead person is a nullity. We subscribe, in that regard, to what was held by the 10 High Court of Tanganyika in the case of Babubhai Dhanji v. Zainab Mrekwe [1964] 1 EA 24. In that case, Law, J. held as follows on that aspect:- "a suit instituted in the name of a dead person is a nullity." Although from his ruling, the learned trial Judge was alive to that principle, having rightly observed that the suit was a nullity from its inception, we find, with respect, that he erred in deciding that the same abated because of the failure by the deceased's legal representatives to apply to be joined as parties to the suit within the prescribed time. As stated above, since the deceased, who was cited as the first plaintiff, had passed away before the suit was instituted, the effect is to render that suit a nullity and therefore, O.XXII r. 3 (1) and (3) of the CPC should not have been invoked to determine the fate of that application. On whether or not the irregularities had the effect of rendering the suit a nullity only as far as the deceased is concerned, we are with respect, unable to agree with Mr. Chuwa's argument. His reliance on the commentary by Mulla, The Code of Civil Procedure is, in our view, misconceived because the cited passage relates to the situation where a plaintiff was alive at the time of the institution of the suit. In the particular

circumstances of this case however, we agree with both Messrs Kusalika li and Hoseah that the whole suit was rendered a nullity. We similarly do not agree with Mr. Chuwa's argument that the Court may invoke the overriding objective principle to order amendment of the plaint. That argument is, with respect, untenable. This is because the suit was not filed in the name of a wrong party but a dead person as one of the plaintiffs. It cannot therefore be amended by way of substituting or striking out a party in terms of 0.1 r 10 of the CPC. We are supported in that view by the commentary by Mulla, The Code of Civil Procedure Abridged, 15th Ed., 2012. The learned author comments as follows on the scope of 0. 1 r. 10 (1) of the Indian Code of Civil Procedure which is in p ari m ateria with the same Order of our CPC. "The rule presupposes that the institution o f the suit, that is the presentation o f the plaint, was proper, Thus, where a su it was instituted in the name o f A and B and B had died 3 days before the date o f the presentation o f the plaint, the su it cannot be taken to have been instituted by B as he was dead a t that time. I f A could have instituted the su it alone, it was properly instituted and on his application B 's legal representative could be added under this rule . " On the basis of the foregoing reasons, we find that the learned trial Judge erred in deciding that the suit had abated under O. XXII r. 3 (2) of 12 the CPC because of the delay by the deceased's legal representatives to apply to be joined as parties to the suit. Because the deceased died before the plaint was instituted, neither the provisions of 0. XXII r 3 (1) and 0. 1

- r. 10 of the CPC could be applied to the suit which was a nullity. In the circumstances, the remedy is to strike it out. In the event, we hereby set aside the order of the trial court marking the suit as having abated and substitute thereof the order striking out the suit with costs. DATED at DAR ES SALAAM this 12th day of November, 2021. A. G. MWARIJA JUSTICE OF APPEAL B. M. A. SEHEL JUSTICE OF APPEAL P. S. FIKIRINI JUSTICE OF APPEAL The ruling delivered this 16th day of November, 2021 in the presence of Mr. Edward Chuwa, learned counsel for the Applicants also holding brief of Mr. Kusalika, (earned counsel for the 1st & 2nd Respondents and Mr. Edward Chuwa, holding brief of Mr. Chang'a for the 3rd, 4th & 5th respo- '1""1" 1 1 ■ f the original. 13

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