

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: WAMBALI, J.A., RUMANYIKA, J.A. And NGWEMBE, J.A.)

CIVIL APPEAL NO. 232 OF 2021

SHABANI KHALFANI KONDO.....APPELLANT

VERSUS

TAJIRI ABDI BARUA..... RESPONDENT

**(Appeal from the judgment and decree of the High Court of Tanzania, Land
Division at Dar es Salaam)**

(Mgonya, J.)

dated the 23rd day of July, 2019

in

Land Appeal No. 43 of 2017

JUDGMENT OF THE COURT

13th March & 15th April, 2024

RUMANYIKA, J.A.:

Before the District Land and Housing Tribunal for Ilala in Dar es Salaam Region ("the DLHT"), Tajiri Abdi Barua, the respondent unsuccessfully sued Shabani Khalfani, ("the appellant") herein vide Land Application No. 95 of 2007. The former sought, among other reliefs, to be declared the lawful owner of House No. 62 situated at Buguruni kwa Mnyamani, Ilala District. He also claimed TZS. 1,000,000.00/= being the respective unpaid three months' rental collections. The respondent was aggrieved by the DLHT's decision and successfully appealed to the High Court. The appellant is not satisfied, hence the present appeal with four

grounds. However, for the reasons that will follow shortly, we will not reproduce or discuss the four points of grievance any way.

At the hearing of the appeal, Mr. Melchzedek Joachim and Ms. Irene Nambuo learned Counsel joined forces to represent the appellant whereas the respondent appeared in person unrepresented.

At the very outset, the Court invited the parties to address it on the propriety or otherwise of the act of the DLHT to proceed with the hearing of the application in the absence of the appellant who was reported dead. And that later on appeal, the High Court judge also turned a blind eye to it.

Addressing on the issue raised by the Court, Mr. Joachim contended that, indeed on 10/07/2014 it was reported in the DLHT that the appellant died on 21/05/2014. And, that, following the report, the Chairperson adjourned the hearing of the application to 17/12/2014, giving room for whoever appointed to join in the proceedings as legal representative, in place of the appellant. However, Mr. Joachim further contended that, even before the DLHT's order was complied, from 17/12/2014 onwards, the DLHT continued with the hearing of the application to its finality. Likewise, the learned Counsel stated, the High

Court heard and determined the subsequent appeal, irrespective of the said anomaly.

On account of the alleged flawed procedure therefore, Mr. Joachim urged the Court, pursuant to section 4(2) of the Appellate Jurisdiction Act Chapter 141 ("the AJA") to revise and declare the proceedings of the two courts bellow vitiated. With respect to the DLHT, the proceedings appearing at page 51 of the record of appeal onwards and those of the High Court entirely because the case proceeded against the deceased appellant.

On his part, the respondent did not make any useful submission. He beseeched the Court to make any decision, as it may deem appropriate and just. He did not press for the costs of the appeal.

It is worth noting that the parties are agreed as follows: **One**, that before the DLHT in Land Application No. 95 of 2007, the respondent sued Shabani Khalfani, and **two**, that the said Shabani Khalfani survived the proceedings until 21/05/2014, after the first two applicant's witnesses had testified. Similarly, it is agreed that on 10/07/2014, one Hamidu Khalfan reported to the DLHT about the applicant's demise which, according to him occurred on 21/05/2014. On that account the presiding Chairperson adjourned the hearing of the application for five

months, to 17/12/2014 to allow appointment and appearance of whoever could be administrator of the deceased's estate. These facts appear at page 51 of the record of appeal. Indeed, the trial of the application was resumed on 17/12/2014 when Longino Chotimali Myovella testified as PW3. Then the applicant's case was closed to allow the defence case which took off on 04/05/2016 and it was closed on 06/12/2016. From that end, three witnesses testified, as appearing at pages 58-69 of the record of appeal. Then the DLHT pronounced its judgment on 01/02/2017.

In other words, despite the appellant being reported dead, still his name continued to appear in the proceedings of the DLHT as applicant. Quite strangely therefore, the deceased lost in the subsequent appeal, as it is reflected in the impugned judgment and decree at pages 73 and 84 of the record of appeal, respectively.

Upon reviewing the record of appeal, we are satisfied that indeed, irrespective of the appellant's demise and contrary to the DLHT's direction of 10/07/2014, no one ever had applied to be joined in the proceedings in place of the deceased appellant. We note that, the omission constituted a serious material irregularity. Notwithstanding the names Shabani Khalfani Kondo, which were newly introduced in the

proceedings of the High Court at a later stage as reflected at page 101 of the record of appeal.

We also note that, for a case which is purportedly prosecuted by or against a deceased party directly, as is in this appeal, the Court has all along nullified the respective proceedings. For instance, faced with a similar problem in **Florian Pantaleo Mtui v. Robert Inyasi Minja** (Civil Appeal No. 420 of 2021) [2023] TZCA 17728 (5 October 2023; TanzLII), we stated that:

"...the anomaly is indeed, a fatal one because, after the 1st plaintiff and 1st defendant has passed away, they should not have appeared as the parties in the trial courts' proceedings, judgment and the decree...the proceedings were rendered irregular and so were the judgment and the decree..." (Emphasis added)

We wish to stress that, in any judicial proceedings, the fundamental right of a party to be accorded a hearing is so much wide. It runs from him being heard fairly to a right of hearing of the evidence adduced by the adverse party. We note, without any hesitation that, from 21/05/2014 when the appellant died onwards, he was not heard. Besides, neither a legal representative nor any other person protecting

the rights and interest of the purported appellant appeared in the subsequent proceedings. We would add that, the court's duty to engage the parties fully in the proceedings before it is paramount. Just as, its duty to keep track of the parties' capacity to sue or being sued is not optional. It is no wonder, by way of analogy in **Cosmas Construction Co. Ltd v. Arrow Garments Ltd** [1992] T.L.R. 127 we stated that, even where there is a court order for *ex parte* proof, and the case is heard as such, the defendant is entitled to be notified of the date which the resultant *ex parte* judgment would be pronounced. See also, **Abutwalib Musa Msuya And Two Others v. Capital Breweries Ltd And Two Others**, Civil Revision No. 2 of 2012 (unreported).

In the present appeal, and for the reasons stated above, we are settled in our minds that, the proceedings of the DLHT dated 10/07/2014 onwards are a nullity and inconsequential. Similarly, the entire proceedings of the High Court will follow suit.

Consequently, consistent with section 4(2) of the AJA, in the exercise of the revisionary powers bestowed on us, we hereby nullify the proceedings of the DLHT from 10/07/2014 onwards. For the same reason, we also nullify the proceedings of the High Court and set aside its orders. As the dispute between the parties is traced way back to the

year 2007, thus, long pending, we order that the record of Land Application No. 95 of 2007 be remitted to the DLHT for a trial where it ended on 10/07/2014 when the said irregularity occurred, as soon as practicable in accordance with the law. We make no order as to costs in the circumstances.

DATED at DAR ES SALAAM this 9th day of April, 2024.

F. L. K. WAMBALI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

The Judgment delivered this 15th day of April, 2024 in the presence of Mr. Hamidu Shaban Khalfani, who represent the Appellant and the Respondent present in person; is hereby certified as a true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL