

**IN THE HIGH COURT OF TANZANIA**

**(IN THE DISTRICT REGISTRY)**

**AT MWANZA**

**LAND REVISION NO. 37 OF 2018**

*(Application No. 170 of 2018)*

**JULIUS ZAWADI BYENGONZI ..... APPLICANT**

**VERSUS**

**1. MERECIAN M. MAGAIWA**

**2. GRACE JOHN**

**3. POLE NDIINGU**

**4. AMOS MOSHI NYANGWESO**

**5. KHERI MPOGOLE**

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**..... RESPONDENT**

**RULING**

*Last Order: 05.06.2020*

*Ruling Date: 11.06.2020*

**A.Z.MGEYEKWA, J**

The application is made under section 43 (1) (a) and (b) (2) of the Land Disputes Courts Act No.2 of 2002 section 95 and Order XLIII Rule 2 of

the Civil Procedure Code, Cap. 33 [R.E 2019]. The applicant is requesting for the following orders:-

1. That this court to call for and inspect the records of the District Land and Housing Tribunal for Mwanza at Mwanza in the Land Application No. 170 of 2018 for the purpose of ascertaining their appropriateness and legality and give appropriate directions.
2. To revise and set aside the order of District Land Housing Tribunal for Mwanza in Land Application No. 170 of 2018 dated 4<sup>th</sup> September, 2018 for illegality, material irregularity and errors on the face of record involving injustices.

Following the global outbreak of the Worldwide COVID- 19 pandemic (Corona virus) the hearing was conducted via audio teleconference, Mr. Kilenzi, learned counsel represented the applicant. The matter proceeded *ex parte* since the respondents failed to appear before the court even after duly being served.

Supporting his application, the learned counsel for the applicant urged this court to examine the Land Appeal No. 170 of 2018 which contains the

errors on the face of the record. He argued that the death of a party to a suit does not automatically cause the case to abet. He referred this court to Order XXII Rule 1 of the Civil Procedure Code Cap.33 [R.E 2019] and Rule 2 and Rule 4 of the same Order, the law provides that when a party dies in a situation where the suit has many parties.

Mr. Kilenzi further argued that Order XXII Rule 4 (1) of the Civil Procedure Code Cap.33 [R.E 2019].in a situation where one administrator dies the court on the application should proceed with the other parties. He went on to argue that in the instant application there was no way the applicant could have to join the legal representative because he had not filed any application before the court. Mr. Kilenzi went on to refer this court to Order XXI 4 (3) which provides the circumstance under which a suit against a defendant or respondent could abet.

He lamented that the Tribunal did not observe the position of Order XXII of the Civil Procedure Code Cap.33 [R.E 2019] and insisted that the application could only abet against the 3<sup>rd</sup> respondent and not to abet the whole suit. To buttress his position he cited the case of **Sulemani Ali Nyamalege & Another v Mwanza Engineering Road Ltd**, Civil

Application No. 22 of 2014. Mr. Kilenzi lamented that the two tribunals acted contrary to the provision of law to quash the proceedings and Ruling of the trial tribunal for being illegal. He urged this court to involve its discretion power to quash the proceedings and the Ruling of the tribunals.

In conclusion, he prays this court to grant the application prayers as stated in the Chamber Summons and revise the proceedings and Ruling of the Land Application No. 170 of 2018 and set aside the order of the District Land and Housing Tribunal for containing an error of illegality. He also prays this court to allow the Land Application No. 170 of 2018 to be heard and determined before another competent Chairman of the Tribunal.

I have considered the submissions for the application, and I now proceed to make my determination thereof.

I had to peruse the trial tribunal records and found that on 13<sup>th</sup> November, 2013 the applicant filed an application No. 158 of 2103 and parties were Juluis Zawadi Byengonzi v Maseke Magaigwa Mhono. Then on 27<sup>th</sup> June ,2014 the applicant filed an amended application No.158 of 201

parties were; Juluis Zawadi Byengonzi v Merciana M. Magaiwa, Grace John, and Pole Ndingu.

The records reveal that on 3<sup>rd</sup> April, 2018 the applicant prayed to amend the application to join other necessary parties, the District Land and Housing Tribunal and 27<sup>th</sup> April, 2018 granted the applicant's prayer. The applicant on 16<sup>th</sup> April, 2018 filed an amended application No. 158 of 2013 to include the 4<sup>th</sup> respondent; Amosi Moshi Nyangweso and the 5<sup>th</sup> respondent; Kheri Mpogole. On 27<sup>th</sup> April, 2018 the applicant prayed for the District Land and Housing Tribunal to allow him to withdraw the application and refile a fresh one without costs, his prayer was granted. On 17<sup>th</sup> May, 2018 the applicant file a fresh application and on 4<sup>th</sup> September, 2018 the District Land and Housing Tribunal struck out the application for the reason that the applicant did not comply with the court order as he was directed to file an amended application to join the necessary parties including the administrator of the estate of the 3<sup>rd</sup> respondent.

I fully subscribe to the applicant's Advocate contention that the death of a party to a suit does not automatically cause the case to abet. Order XXII Rule 1 of the Civil Procedure Code, Cap. 33 [R.E 2019] provides that:-

*" 1. The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives."*

Similarly, the procedure where one of several plaintiffs or defendants dies and right to sue survives are stipulated under Order XXII Rule 2 of the Civil Procedure Code, Cap. 33 [R.E 2019] that:-

*" 2. Where there are more plaintiffs or defendants than one and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants."*

Moreover, Order XXII Rule 4 of the Civil Procedure Code, Cap. 33 [R.E 2019] provides for a procedure in case of death of one or several defendants or of the sole defendant which reads as follows:-

*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.”*

Based on the above provisions of law, it is vivid that in the instant application one of the respondents died and the District Land and Housing Tribunal wanted his name to be replaced with a name of an administrator of estate contrary to the law, the applicant could not have joined the administrator of the estate or legal representative because he did not file an application before the court. In accordance to Order XXII Rule 4 (3) of the Civil Procedure Code, Cap.33 [R.E 2019] a suit could abet against the 3<sup>rd</sup> respondent and not the whole suit thus, the District Land and Housing Tribunal could allow the applicant to struck out the name of the 3<sup>rd</sup> respondent as it was held in the case of **Sulemani Ali Nyamalege and Another** (supra) whereas the Court of Appeal struck out the name of the 1<sup>st</sup> applicant from the Notice of Motion and the application concerning the 1<sup>st</sup> applicant was similarly struck out and the Court proceeded to determine the application on merit with respect to the second and third applicants.

For the aforesaid reasons, and guided by the authorities above, I find that the application has merit thus I proceed to quash and set aside the order of the District Land and Housing Tribunal for and I order the Application No. 170 of 2018 to be determined before another competent Chairman of the Tribunal. The application is allowed without costs.

Order accordingly.

DATED at Mwanza this 11<sup>th</sup> day of June, 2020.

  
A.Z.MGEYEKWA

**JUDGE**

11.06.2020

Ruling delivered on the 11<sup>th</sup> day of June, 2020 and Mr. Kilenzi, learned counsel was remotely present.

  
A.Z.MGEYEKWA

**JUDGE**

11.06.2020

Right to appeal fully explained.