

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**DAR ES SALAAM SUB-REGISTRY**

**CIVIL APPEAL NO. 7 OF 2023**

*(C/f Civil Appeal No.13 of 2022 in the District Court of Kinondoni, original Civil Case No.111/2020 in the Primary Court of Kinondoni at Sinza)*

**JOSEPHER EVERIST MATINDI.....APPELLANT**

**VERSUS**

**BOGACHI FINANCE COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

*Date of last Order: 8-2-2024*

*Date of Judgment: 8-4-2024*

**B.K. PHILLIP, J**

This is a second appeal. Aggrieved by the judgment of the Primary Court of Kinondoni at Sinza and the District Court of Kinondoni, (Hereinafter to be referred to as "the trial Court" and the 1<sup>st</sup> appellate Court" respectively), the appellant herein lodged this appeal on four grounds. The same are reproduced verbatim hereunder:

- i) The learned Magistrate erred in law by failure to fully address and exhaust illegality issues by the trial court (sic) which were raised by the appellant include. (sic)*
  - a) The case was filed against deceased person.*
  - b) Unprocedural amendment of the pleadings.*
  - c) Unprocedural change of the Magistrates.*

- ii) The learned Magistrate erred in law by not considering that all (sic) deceased properties were already distributed and the probate cause was already finalized at Bagamoyo Primary Court.*
- iii) The learned Magistrate erred in law by upholding the decision which ordered the widow to pay her deceased husband debt (sic) on her capacity as widow.*
- iv) The learned Magistrate erred in law by failure to define the jurisdiction of the Kinondoni Primary Court in this matter.*

In this appeal, the learned Advocate Benedict Temba and F.A.M Mgare appeared for the appellant and respondent respectively. The appeal was heard by way of written submissions.

A brief background to this appeal is that the appellant herein was the 2<sup>nd</sup> defendant before the trial Court. The 1<sup>st</sup> defendant was Kiam Makuru Kyamaris, deceased. The respondent herein was the claimant. It claimed for payment Tshs. 5,625,000/= being outstanding loan amount plus interests. The respondent alleged that it granted a loan facility to the late Kiam Makuru Kyamarsi to the tune of Tshs. 5,000,000/= at the interest rate of 50% which was equivalent to Tshs. 2,500,000/=. The said loan was payable within twelve months (12) at the monthly installment of Tshs.625,000/=. In his lifetime the deceased managed to pay back a sum of Tshs. 1,875,000/= only leaving behind an outstanding loan amount to the tune of Tshs.625,000/=. However, one of the issues for determination in this appeal is whether or not the claimant amended its claims and removed the deceased's name from the case. The same shall be dealt with later in this judgment. The case was heard inter-parties. The appellant defended the case

and was the only witness for the defence case. The respondent brought one witness namely Tusekile Amon Mwaifunga. The trial court entered judgment in favor of the respondent and ordered the appellant herein to pay back the outstanding loan amount plus interests to the tune of Tshs.5,625,000/=.

Aggrieved by the judgment of the trial court, the appellant appealed against it before the 1<sup>st</sup> appellate court on similar grounds of appeal to the ones in this appeal. Her appeal did not sail through. It was dismissed with costs. Undaunted, the appellant lodged the appeal in hand.

Submitting in support of the 1<sup>st</sup> ground of appeal, Mr. Temba argued that the respondent herein instituted the case at the trial court against two individuals, the first defendant being Kiam Makuru Kyamaris, deceased, and the appellant herein was the 2<sup>nd</sup> defendant as reflected in the 1<sup>st</sup> page of the impugned judgment. He went on to argue that according to **Section 99 of the Probate and Administration of Estate Act [Cap 352 R.E 2002]**, when legal action survives death or where the defendant is deceased, the proper party to be sued is the administrator of the deceased estate or the executor of the deceased's will if any. To cement his argument he cited the case of **Juma A. Zomboko and 42 others Vs Avic Coastal Development Co. Ltd and 4 others, Civil Application No. 676 of 2017**, (unreported), and **Babuhain Dhanji Vs Zainab Mrekwe [1964] 1 EA 24**. Mr. Temba contended that the 1<sup>st</sup> appellate court misdirected itself by holding that there was an amendment of pleadings in which the deceased's name was removed from the case whereas the order for amendment it referred to referred to did not specify the amendment allowed by the trial court. He maintained that an order for amendment of pleadings

has to be specific on the kind of amendment allowed by the court. He added that the amendments allowed under the law are the ones necessary for determining the real question in dispute between the parties only. He cited the case of **Jovent Clavery Rushaka and another Vs Bibiana Chacha, Civil Appeal No. 236 of 2020** (Unreported) to bolster his arguments.

Further, Mr. Temba submitted that there was an un-procedural change of the trial Magistrates at the trial court. Initially, the case was presided over by Hon. A.P. Mshingwa, and later on it changed hands to Hon. Futuruni. No rationale was provided to the parties for the change of the trial Magistrate. Mr. Temba insisted that the court needed to record and communicate to the parties the reasons for such changes. He cited the case **International Director of World Vision Tanzania Vs Basinda Construction Company Limited , Civil Appeal No.2/2017** ( unreported) and implored this court to uphold the 1<sup>st</sup> ground of appeal.

In rebuttal, Mr.Mgare admitted that initially the case was instituted against the deceased, Kiam Makuru Kyamaris, and the appellant. However, he contended that on 1<sup>st</sup> September 2020, the trial court ordered the respondent to amend its claims by removing the names of the deceased. He was of the view that the trial court's order for amendment of the respondent's claim was specific in the sense that it ordered the respondent to remove the deceased's name and the case should remain with one defendant only, that is, the appellant who is the administratrix of the deceased estate. Mr. Mgare contended that the respondent complied with the trial court's order. The respondent amended the names of the parties in

its complaint. Nothing more was added to that amended complaint and thereafter, the case started afresh. He insisted that the appellant herein was never prejudiced at all by the said amendment of the parties.

Further, Mr. Mugare went on to argue that the trial court had powers to either strike out the respondent's complaints or order amendment of the complaint. He maintained that the case of **Jovent Clavery Rushaka** (supra) cited by Mr. Temba is irrelevant and distinguishable from the case at hand since in that case parties were directed to amend the plaint, but they did not comply with the court order properly since they included other facts and documents contrary to the court order. That is not the issue in this case, contended Mr. Mgare. He was emphatic that the 1<sup>st</sup> appellate court's findings on the amendment of the respondent's complaints were proper and justifiable since the respondent amended his complaint by removing the deceased's name and remained with the appellant who is the administrator of the deceased's estate.

moreover, Mr. Mgare was of the view that the provisions of Section 99 of the Probate and Administration of Estate Act, Cap.352 RE 2019, and the case of **Juma A. Zomboko** (supra) and **Babuhain Dhanji** ( supra) relied upon by Mr. Temba in his submission are irrelevant in this appeal. Moreover, he added that the findings of the court in the aforesaid cases were based on the Civil Procedure Code, whereas the law applicable in the trial court is the Primary Courts Civil Procedure Rules, GN. 310 of 1964.

On the issue of un- procedural change of hands of the case file, Mr. Mgare contended that the same was never adjudicated upon by the 1<sup>st</sup> appellate

court. Hence he urged this court not to entertain it at this stage. However, he proceeded to submit on that issue as follows; that change of the presiding Magistrate is an administrative function discharged by the Magistrate in charge who is empowered to assign cases to himself/herself and other fellow Magistrates. So, Mr. Mgare contended that it was the Magistrate in charge who was required to give reasons for the change of the Magistrate presided over that case. The Magistrate to whom the case was re-assigned was not in a position to give the reasons for the re-assignment of the case to him/her. He conceded that initially, Hon. A.P. Mshingwa, dealt with the case but later on from 20.8.2020 Hon. H. Furutuni took over the case to its conclusion.

In addition to the above, Mr. Mgare was of the view that the aforesaid change of Magistrate was done according to Rule 48(1) of GN. 310 of 1964 which empowers the successor Magistrate to deal with the evidence taken by the predecessor Magistrate in case the latter is either dead, transferred, or due to other causes that prevent him from hearing the case to its finality. Expounding on this point Mr. Mgare maintained that the provision of Rule 48 of GN.310 of 1964 which governs civil procedures in Primary Courts no provision of law requires the successor Magistrate to state and record reasons for change of Magistrate. It was Mr. Mgare's stance that in any case the appellant has not been prejudiced in any way by the change of hands of the case file because Hon. Furutuni duly complied with Rule 48 (2) of GN 310 of 1964 by commencing with the hearing of the case afresh after the amendment. He maintained that the case of **The International Director of World Vision of Tanzania** ( supra) relied upon by Mr. Temba in his

submission is irrelevant in this appeal. In conclusion of his submission, Mr. Mgare invited this court to dismiss the 1<sup>st</sup> ground of appeal.

In rejoinder, Mr. Temba reiterated his submission in chief and added that the heading of the Judgment of the trial court makes it unmistakably clear that in Civil Cause No. 111/2020, there were two defendants the first one being Kiam Makuru Kyamaris ( deceased) and the second one was the appellant herein. He contended that he perused the trial court's proceedings and noted that the alleged amendment of the respondent's complaint was not reflected in the proceedings. There is no indication of any order for amendment of the complaints envisaging the change of the parties in the respondent's complaint. He was emphatic that if such an order had been made, as argued by Mr. Mgare then, it should have been explicitly reflected in the judgment of the trial court. Relying on the case of **Peter Wegesa Chacha and Two Others Vs North Mara Gold Mine Limited, Civil Appeal No. 49/2020**, (unreported), Mr. Tembe pointed out that an order for amendment has to specify the extent of the amendment allowed by the court. Moreover, he insisted that the cases he cited to support his arguments are relevant to this appeal. The correct procedure for amendment in pleadings and change of Magistrates are the same both in civil and criminal proceedings.

Having dispassionately analyzed the rival arguments made by the learned advocates, I have noted that Mr. Temba and Mgare are at one that is, it is not proper to institute a case against a deceased person. If the claimant's claims survive the death of the defendant, then the claimant has to sue the administrator/administratrix of the deceased estate. It is not in dispute that

Mr. Kiam Makuru Kyamaris is dead. The appellant herein is the administratrix of the estate of the late Kiam Makuru Kyamaris who was her husband. The respondent herein lodged his claims at the trial court against the deceased and the appellant personally not as the administratrix of the deceased estate. The controversy between the parties is all about the findings of the 1<sup>st</sup> appellate court that on 1<sup>st</sup> September 2020, the trial court ordered the amendment of the respondent's complaint to the effect that the name of the late Mr. Kiam Makuru Kyamaris be removed from the respondent's complaints and that the same was acted upon by filing an amended complaint in which the name of the deceased was removed and the appellant herein remained as the only defendant in the case in her capacity as the administratrix of the deceased estate. As alluded to earlier in this judgment, Mr. Mgare agrees with the stance held by the 1<sup>st</sup> appellate court whereas Mr. Temba does not. It is worth noting that the court's records are the ones that can be relied upon in the determination of the aforesaid controversy. First and foremost, as correctly pointed out by Mr. Temba, on the first page of the impugned judgment, the subject of this judgment, indicates that the parties to the case are; *Bogachi Finance Ltd, the claimant Vs Kiam Makuru Kyamaris, 1<sup>st</sup> defendant, and Joseph Evarist Matindi, 2<sup>nd</sup> defendant.* Not only that, I have perused the trial court's record and noted that the respondent herein lodged its complaint at the trial court on 10<sup>th</sup> June 2020. No amended complaint was filed in court following the court order made on 1<sup>st</sup> September 2020 by the trial court which led the hearing of the case to start afresh, leaving alone the fact that the said court order does not indicate that the amendment ordered was intended to remove the name of the deceased from

the case. No wonder the trial court's judgment included the deceased as a party to the case and the appellant herein appears as the party to the case in her capacity as an individual, not as the administratrix of the deceased estate. So, there is no gainsaying as per the court's records, that the name of the deceased was not removed from the case, which means that there was no amendment to the respondent's complaints. On top of the above, in the first paragraph of the impugned judgment, it is stated clearly that Kiam Makuru Kyamaris ( the deceased) was the defendant in that case. With due respect to Mr. Mgare, I am not inclined to agree with him that the trial court's order for amendment of the respondent's complaint was complied with even though it was not specific. Making an order for amendment is one thing and complying with that order is a different thing. Parties are required to take the necessary steps to comply with the court order and the same has to be reflected in the court's records by filing the amended document accordingly. From the foregoing, since it is obvious that the case filed by the respondent at the trial court was not proper as it was filed against a deceased person instead of the administrator of the deceased estate as required by the law, and the said anomaly is reflected in the trial court's judgment. It is obvious that the proceedings of the trial court are a nullity and the 1<sup>st</sup> appellate court erred to uphold the trial court's judgment.

In the upshot, for the aforesaid reasons, I hereby uphold the 1<sup>st</sup> ground of appeal and nullify the proceedings of the trial court and the 1<sup>st</sup> appellate court. Further, I hereby set aside the judgments of both lower courts. Under the circumstances, I do not see any plausible reasons to proceed with the determination of the remaining grounds of appeal. The respondent herein is

at liberty to file a fresh case against the proper party as required under the law. Since the fault that led to the nullification of the proceedings of both lower courts was partly caused by the trial court's failure to issue a clear order for amendment of the respondent's complaint and ascertain whether the amendment was effected or not, each party will bear her costs.

Dated this 8<sup>th</sup> day of April 2024



A handwritten signature in blue ink, appearing to read "B.K. PHILLIP", is written over a horizontal line.

**B.K. PHILLIP**

**JUDGE**