

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT DAR ES SALAAM**  
**(CORAM: MUGASHA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)**

**CIVIL APPEAL NO. 275 OF 2019**

**EXIM BANK TANZANIA LIMITED..... APPLICANT**

**VERSUS**

**YAHAYA HAMISI MUSA (As the Administrator of the  
Estate of the Late HAMISI MUSA MOHAMED t/a**

**MAPILAU GENERAL TRADERS..... RESPONDENT**

**[Appeal from the Ruling and Drawn Order of the High Court of Tanzania  
(Commercial Division) at Dar es Salaam]**

**(Fikirini, J.)**

**Dated 13<sup>th</sup> day of August, 2019**

**in**

**Commercial Case No. 13 of 2017**

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**JUDGMENT OF THE COURT**

*27<sup>th</sup> & 30<sup>th</sup> September, 2022*

**MUGASHA, J.A.:**

In this appeal, the appellant is challenging the dismissal of its suit by the High Court of Tanzania (Commercial Division) in a Ruling dated 13/08/2019. This was after the High Court sustained a preliminary objection which was raised by the respondent.

A brief background underlying the appeal is to the effect that; the appellant instituted a suit against Hamisi Musa Mohamed t/a Mapilau General Traders hereinafter referred to as the deceased. The claim was for payment of TZS. 2,567,302,918.89 being the principle amount of loan advanced to the deceased plus interest thereon as at

18/09/2016, general damages for breach of contract and costs. This was pursuant to an overdraft facility of a total sum of TZS. 150,000,000.00 which was extended to the deceased between 10/12/2001 and 31/12/2002. The reliefs sought by the appellant included payment of the principal sum, interest, general damages and costs.

In the written statement of defence, the respondent as the administrator of estate of the deceased, denied the claim and raised a preliminary objection inviting the High Court to dismiss the suit for being incompetent on grounds that, **one**, it was time barred; **two**, it was instituted against a dead person; and **three**, it had abated in terms of Order XXII Rule 4 (1) and (3) of the Civil Procedure Code (Cap 33 RE. 2002). The High Court disposed the second point of preliminary objection and dismissed the suit having found that it was wrongly instituted against a dead person. Aggrieved, the appellant has preferred the present appeal fronting six (6) grounds of complaint which we have opted not to reproduce on account of what is to unfold in due course.

The appellant was represented by Mr. Gabriel Simon Mnyele, learned counsel whereas the respondent had the services of Mr. Daimu Halfani, learned counsel.

In the course of the hearing, Mr. Mnyele abandoned 1<sup>st</sup> to 4<sup>th</sup> grounds of appeal. He proceeded to adopt the written submissions filed in respect of the remaining 5<sup>th</sup> and 6<sup>th</sup> grounds of complaint. In the 5<sup>th</sup> ground, the appellant is faulting the trial court for dismissing the suit instead of striking it out as it was instituted against a dead person. In both oral and written submissions, it was argued that, since the suit was preferred against a dead person, it was not competent and as such, the proper course was to strike it out instead of dismissing it. On this, Mr. Mnyele argued that, the latter action was not justified considering that in the wake of an incompetent suit, there was nothing warranting dismissal by the trial court. He added that, the appellant has been prejudiced by the dismissal of the suit as she is barred to institute another similar suit against the respondent who is the administrator of estate of the deceased. To bolster the argument cases cited to us included **NGONI MATENGO CO-OPERATIVE MARKETING UNION LTD. VS. ALI MOHAMED OSMAN** (1959) E.A. 577, and **JUMA A. ZOMBOKO AND 42**

**OTHERS VS. AVIC COASTAL AND DEVELOPMENT CO. LTD. AND  
4 OTHERS**, Civil Application No. 576/17 of 2017 (unreported).

In respect of the 6<sup>th</sup> ground, the appellant is faulting condemnation to suffer costs subsequent to the dismissal of the suit for reason that, she was unaware about the occurrence of death of deceased. Thus, Mr. Mnyele implored on the Court to allow the appeal and that each party bear own costs.

On the other hand, the respondent opposed the appeal and prayed for the Court to dismiss it with costs. It was Mr. Daimu's submission that the suit was a nullity having been instituted against a dead person, and as such, the dismissal was justified. In this regard, it was argued that, since the dismissal was on the ground of a nullity and not competence, the case of **NGONI MATENGO CO-OPERATIVE MARKETING UNION LTD. VS. ALI MOHAMED OSMAN** (supra), is distinguishable from the present matter. Further it was argued that, the dismissal of the suit with costs was justified considering that, although the occurrence of death was brought to the attention of the appellant, she did not bother to remedy the defect. On this, he referred us to pages 283 and 287 of the record of appeal and argued that, a dismissal of the suit with costs was justified so as

not to condone the appellant's inaction to have taken measures to withdraw the suit and subsequently institute it against a proper person.

After a careful consideration of the rival arguments and the record before us, it is not in dispute that, the suit before the trial court was instituted against a dead person as reflected at pages 283 and 287 of the record of appeal whereby the respondent intimated to the Court and the appellant about the expiry of the deceased. However, the learned counsel parted ways on the resultant fate of such a suit which constitutes the bone of contention. While Mr. Mnyeale argues that the proper course was to strike out the incompetent suit, Mr. Daimu was of the view that a dismissal was appropriate because the suit was a nullity.

In the case at hand, the record bears it out that the deceased passed away on 14/9/2016 which was before the suit was instituted on 25/1/2017. Therefore, he was never a party and according to the settled position of the law, the suit filed against a dead person is a nullity. See **BABUBHAI DHANJI VS ZAINAB MREKWE** [1964] I E.A 24. In this regard, the suit could not be amended by way of substituting a party in terms of Order 1 Rule 10 (1) of the CPC. On

this we borrow a leaf from the Indian case of **PRESTIGE FINANCE P  
LTD VS BALWANT SINGH AND ANOTHER**, 1978 48 compaCas  
459 Delhi where it was stated as follows:

*"If a suit is filed against a dead person, then it is a nullity and you cannot join any legal representatives; you cannot even join any other party because it is just as if no suit had been filed. On the other hand, if a suit is filed against several persons, one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void, but the Court has to strike out the name of the party who has been wrongly joined. Such a person would be deemed to be wrongly joined, because he was dead on the date of the institution of the suit and, therefore, incapable of being joined."*

[Emphasis supplied]

We fully subscribe to the cited decision and in the light of the bolded expression, in the present case, the suit filed against a dead person was a nullity and it was as if no suit was filed and as such, a legal representative could not be joined and thus, as earlier stated, the shortfall could not be remedied under Order 1 Rule 10 (1) of the

CPC. See also the case of **JUMA A. ZOMBOKO AND 42 OTHERS VS AVIC COASTAL AND DEVELOPMENT CO. LTD & 4 OTHERS**, Civil Application No. 576/17 Of 2017 (unreported).

Next for consideration is the propriety or otherwise of the dismissal of the suit. Since it is settled that a suit instituted against a dead person is a nullity which is tantamount to no suit had been filed, there was nothing before the trial court which was capable of being dismissed. On this we are guided by the case of **NGONI MATENGO CO-OPERATIVE MARKETING UNION LTD. VS. ALI MOHAMED OSMAN** (supra). In that case, the appeal was found to be incompetent for not being accompanied by a necessary decree. Having considered the distinction between a dismissal and striking out of an appeal, the Court was of the view that the proper remedy was to strike out the appeal instead of dismissing it. It thus, made the following statement of principle: -

*"...This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to **"strike out"** the appeal as being incompetent; rather than to have **"dismissed"** it, for the latter phrase*

*implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of."*

In the case of **NGONI MATENGO** the defunct Eastern African Court of Appeal was addressing an improperly constituted appeal, but the broad statement of principle equally applies as here, to an incompetent suit. The principle that an incompetent matter before the court deserves to be struck out as it is not capable of being dismissed was followed in the cases of **CYPRIAN MAMBOLEO HIZZA VS EVA KIOSO AND ANOTHER**; Civil Application No. 3 of 2010, **JOAN CONSTANTINE VS MOHAMED SLEYM**, Civil Application No. 25 of 2012, **YAHYA KHAMIS VS HAMIDA HAJI IDDI AND TWO OTHERS**, Civil Appeal No. 225 of 2018, **TABU RAMADHANI MATTAKA VS FAUZIA HARUNI SAIDI MGAYA**, Civil Appeal No. 456 OF 2020 (all unreported).

In the light of the stated position of the law, although a suit preferred against a dead person is a nullity it is as well incompetent and not capable of being dismissed. Given the circumstances, the proper remedy herein was to strike out the suit instead of dismissing it so as to enable the appellant a chance to file a suit against the legal



representative of the deceased. Thus, the 5<sup>th</sup> ground is merited and it is allowed.

Regarding the 6<sup>th</sup> ground, the appellant is faulting the condemnation to suffer costs following the dismissal of the suit. At pages 282 to 283, it is glaring that the death of the deceased was brought to the attention of the appellant and the High Court subsequent to which, the son of the deceased sought and was granted leave to be joined as legal representative. This was with respect, a wrong stance considering that no person could be joined in a suit which was instituted against a dead person. It was thus, incumbent on the trial court before the preliminary objection was raised to engage parties on the propriety or otherwise of the suit instituted against a dead person so as to make necessary orders which was not the case. In the premises, it is our considered view that, it was not warranted to condemn the appellant to suffer costs following the dismissal of the suit which was in itself erroneous. This renders the 6<sup>th</sup> ground of complaint merited.

In view of what we have endeavoured to discuss, we find the appeal merited and it is hereby allowed. Consequently, the dismissal order is hereby set aside and substituted with the order of striking out

the suit. Given the circumstances of the matter, we make no order as to costs. It is so ordered.

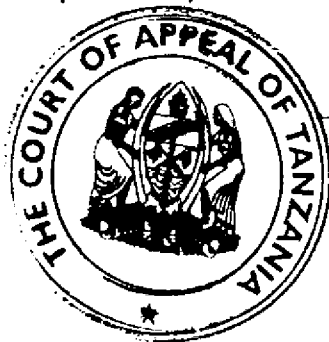
**DATED at DAR ES SALAAM** this 28th day of September, 2022.

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

A. M. MWAMPASHI  
**JUSTICE OF APPEAL**

The Judgment delivered this 30<sup>th</sup> day of September, 2022 in the presence of Mr. Lucas Myula, learned counsel for the Appellant, also holding brief of Mr. Daimu Halfani, learned counsel for the Respondent, is hereby certified as a true copy of the original.



  
S. P. MWAISEJE  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**