

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: OTHMAN, CJ., MUSSA, J.A., And JUMA, J.A.)

CIVIL APPEAL NO. 103 OF 2016

ALLY OMARI ABDI APPELLANT

VERSUS

**AMINA KHALIL ALLY HILDID (As an administratrix
Of estate of the late KALILE ALLY HILDID) RESPONDENT**

**(Appeal from the judgment and decree of the High Court of Tanzania
(Land Division) at Arusha)**

(Maghimbi, J.)

**dated the 13th day of February, 2015
in
Land Case No. 9 of 2013**

.....

RULING OF THE COURT

26th October & 17th November, 2016

JUMA, J.A.:

Disputed ownership claims over a surveyed Plot of land which once belonged to KHALIL ALLY HILDID (deceased), was at the centre of a suit in the High Court of Tanzania at Arusha, which has now led to this appeal.

It was the respondent AMINA KALILE ALLY who in her capacity as the Administratrix of the Estate of the deceased initiated the suit (Land Case No. 9 of 2013) against the appellant, ALLY OMARI ABDI. The respondent's case is that when her father KHALIL ALLY HILDID died in 1982, he was

survived by two children, the respondent and her brother YUSUFU KHALIL ALLY. In 1996 the respondent applied and was duly appointed by the Maromboso Urban Primary Court to administer the estate of her deceased father in Probate Cause No. 140/1996. That is how, according to the respondent, the PLOT NO. 30, BLOCK "E", AREA "F" (hereinafter referred to as "**the Plot**") came under her administration.

At some point during the course of her tenure as the administratrix of the deceased's estate the respondent left the country to live in Canada leaving behind the undistributed estate. Her ailing brother, YUSUPH KHALIL ALLY remained in Tanzania under the care of their uncle, OMARI ABDI who happens to be the appellant's father. The respondent's brother later passed away.

In 2011 the respondent returned back to Tanzania to attend the funeral of her brother YUSUPH. It was when she also learnt that whilst away in Canada, the deceased's property changed ownership. Her late brother first applied for letters of administration of the deceased property, then obtained a Right of Occupancy in his own name over the Plot and had subsequently transferred that Plot to the appellant. The respondent was

unhappy with the way her late brother transferred the ownership of their father's property without seeking her prior permission as an heir and administratrix of the estate of their late father.

In the suit, the respondent sought a declaratory order of the trial High Court that she is still the lawful owner of the Plot. She also prayed for a declaration that the purported transfer of Certificate of Title No. 18048 from her late brother to the appellant as illegal, null and void *ab initio*. She similarly prayed for specific damages, general damages and costs of the suit.

The appellant had different version about how the deceased property ultimately passed hands through YUSUPH right up to the appellant's ownership. In his statement of defence the appellant denied liability stating that the deceased was survived by two children— YUSUPH KHALIL ALLY and HAWA KHALIL ALLY when he died on 17th January 1981. YUSUPH KHALIL ALLY was then appointed by the Primary Court of Katesh to administer the estate of his deceased father in Probate and Administration No. 11 of 1987.

According to the appellant's version, in 1998 YUSUPH KHALIL ALLY registered the property of his late father in his own name and was granted Certificate of Title No. 18049 for 99 years. Another change of ownership took place on 28th December, 2005 when YUSUPH KHALIL ALLY transferred the property as a gift to the appellant. The appellant also contended that by the time YUSUPH KHALIL ALLY died in 2011, the Plot had been transferred and registered in the appellant's name. The appellant also averred that subsequent to the transfer of the Right of Occupancy in his name, he carried out developments by putting up a building valued Tshs. 800,000,000/=. On strength of this change of ownership to himself, the appellant urged the trial court to dismiss the suit with costs.

The learned trial Judge (S.M. Maghimbi, J.) found, on balance of probability that the plaintiff (the respondent herein) to be the legitimate daughter of the deceased and the sole survivor entitled to the estate following the death of her brother, Yusuph Khalil. The learned trial Judge declared that the transfer to appellant of land at PLOT NO. 30 BLOCK "E" AREA "F" under Certificate of Title No. 18048 from Yusuph Khalil (as administrator of the estate of the Deceased) in Arusha Municipality to be

null and void *ab initio*. The trial court also ordered the Plot of land to be surrendered to the respondent for her to process the administration of the estate of her father.

The appellant was aggrieved by the decision of the trial court. He preferred this appeal containing a memorandum of appeal predicated on the following seven grounds of appeal:

1. - THAT the learned trial Judge erred in law and fact in holding that on balance of probability the Respondent herein is the legitimate daughter of the late Mzee Khalile Ally Hildid.

2.- THAT the learned trial Judge erred in law and fact in holding that the late Yusuph Khalile had no title to transfer the property on Plot No. 30, Block "E" Area "F" held under Certificate of Title No. 18048 within Arusha Municipality as an Administrator of the Estate of his late father Khalile Ali Hildid.

3.- THAT the learned trial Judge erred in law and fact in disowning the Appellant the property; Plot No. 30, Block "E" Area "F" duly transferred to him by duly appointed Administrator and sole beneficiary of the late Khalile Ally Hildid after the death of his sister Hawa Khalile Ally.

4. - *THAT the learned trial Judge erred in law and fact in finding and holding that in view of section (sic.) 11 of the 5th Schedule to Cap. 11 of the Revised Edition of 2002, the Estate of the late Khalile Ally Hiidid is still undivided.*

5.-*That having found the appointment of the Respondent as an administratrix of the late Khalile Ali Hildid null and void, the learned trial Judge erred in law and in fact in ordering the Appellant to surrender Certificate of Title No. 18048 in respect of Plot No. 30, Block "E" Area "F", Arusha Municipality to the Respondent.*

6.- *THAT the learned trial Judge erred in law and fact in granting the Respondent specific damages to the tune of Tshs. 70,000,000/- sum that is neither pleaded in the Amended Complaint nor proved in evidence.*

7. *THAT the learned trial Judge erred in law and fact in granting the Respondent colossal sum of Tshs. 50,000,000/- as general damages on basis of insubstantial grounds and evidence.*

When this appeal came up for hearing on 26th October, 2016, Mr. Ipanga Kimaay, learned Advocate appeared for the appellant alongside two learned Advocates, Mr. Gwakisa Sambo and Mr. Patrick. The respondent was represented by two learned Advocates, Mr. Omar Iddi Omar and Mr.

Innocent Mwanga. The appellant's learned counsel informed us that they had a preliminary matter they were bringing under Rule 4 (2) (a) and (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules), which wanted us to address first.

Mr. Kimaay drew our attention to three sets of what the learned Advocates for the appellant regarded as fatal irregularities, which should attract the Court's order of nullification of a portion of the trial proceedings in Land Case No. 9 of 2013 subject of this instant appeal. These irregularities notice of which was filed in Court on 24th October, 2016 were:

"(i) - Unexplained failure of the Judge to observe individual calendar system.

(ii)-Failure or omission by the trial Judge to sign and date on Exhibit P-1.

(iii)- Unusual recording system of the proceedings which separates dates and Judge's Notes on date."

Mr. Sambo began his address of the "preliminary matters" by admitting the novelty of the prayer the learned Advocates for the appellant

were making because ordinarily preliminary points of objections seeking to fault the record of appeal or appeal itself are the preserve of the respondents under Rule 107 (1) of the Rules. And it was out of the ordinary for appellant's learned counsel to come out and raise fundamental irregularities found in the record of appeal, the record which was in the first place prepared and filed by the same appellant. But after a long exchange between the Court on one hand, and appellant's and respondent's learned counsel on the other hand, the Court concluded that it would address itself to only one preliminary matter, contending that a set of documents which were collectively admitted as **exhibit P-1**, were not endorsed by way of signing and dating as is required by Order XIII Rule 4 of the Civil Procedure Code, Cap.33 (the CPC). The relevant Order XIII states:

"4-(1) Subject to the provisions of sub rule (2), there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely—

(a)-The number and title of the suit;

(b)-The name of the person producing the document;

(c)-The date on which it was produced; and

(d)-A statement of its having been so admitted; and the endorsement shall be signed or initialed by the judge or magistrate”

The appellant's learned counsel took turns to submit that several documents which were collectively admitted as Exhibit P1 were not endorsed in compliance with the mandatory provisions of Order XIII Rule 4. To drive home their point, the appellant's counsel relied on the authorities of **SARKAR'S THE LAW OF CIVIL PROCEDURE (NINTH EDITION 2000** and **MULLA ON THE CODE OF CIVIL PROCEDURE (FOURTEENTH EDITION) VOL II** wherein the provisions that are in *pari materia* with Order XIII Rule 4 are discussed. In **SARKAR'S THE LAW OF CIVIL PROCEDURE** (supra) we were referred to the following statements of law appearing pages 1159-1160:

"When a document is exhibited the particulars in cls (a) to (d) of sub-r (1) have to be endorsed in order to make it admissible in evidence [Prithiraj v. Hansraj, A 1969 Pu 256; Eranna v. Thimmaiah, A 1966 AP 1984]. Documents admitted on the record without making the endorsement prescribed by this rule cannot be regarded as being legally before the court [Secy of S v. Sarala, A 1924 L 545]. The importance of strict compliance with the procedure laid down was emphasized by Judicial Committee and it was held that the appellate court may refuse to read or permit to be used any document not endorsed in the manner required [Sadiq Hussain v. Hashim, 42 IA 212, 237: 38 A 627, 664: A 1916 PC 27]..."

Regarding the authority of the case law in Tanzania on the compulsive requirements of Order XIII Rule 4, the appellant's learned counsel cited the decision of this Court in **A.A.R. INSURANCE (T) LTD VS BEATUS KISUSI**, Civil Appeal No. 67 of 2015 (unreported) where the Court on first appeal expunged exhibits from the record because they were admitted without being endorsed. The Court restated that ***"once the exhibit is admitted, if it is in civil proceedings, it must be endorsed as***

provided under O. XIII, R. 4 of the CPC..." and that *"the need to endorse is to do away with tempering with admitted documentary exhibits."* The appellant's learned counsel would like us to take similar stance with regard to exhibits P1.

Mr. Omar Iddi Omar learned counsel replied by conceding that Exhibit P1 and also Exhibit P3 (Certificate of Occupancy) were not endorsed in compliance with Order XIII R. 4 but he was quick to point out that the documents admitted under these exhibits did not prejudice the appellant or the respondent herein.

Undoubtedly, the preliminary issue which the learned Counsel for the appellant raised regarding non-compliance with Order XIII Rule 4 of the CPC is an area over which this Court has expressed itself in several decisions, including **A.A.R. INSURANCE (T) LTD VS BEATUS KISUSI** (supra).

While admitting a collection of documents without so much as endorsing the same in compliance with Order XIII Rule 4 of the CPC, the learned trial Judge stated:

"Court: Seven documents collectively intending to show that PW1 is the administratrix of the [estate] of the late KHALEEL ALLY's estate from Primary Court... of Arusha Urban having submitted earlier and Annex Amina 1 in the pleadings are hereby admitted as exhibit before this court and marked as exhibit P1."

As correctly submitted by the learned counsel for the appellant and for the respondent, the documents on pages 148 to 154 (marked on page 148 as **"Exp1"**) were admitted without complying with the provisions of paragraphs (a), (b), (c) and (d) of Order XIII Rule 4 in so far as the number and title of the suit (Land Case No. 9 of 2013); the name of the person producing the document (Amina Kalile Ally); date on which it was produced (06/01/2015); and statement of this document having been so admitted— were not endorsed on the exhibit.

We think, centrality of the documents falling under exhibit P1 in establishing who the real administrator of the estate of the deceased called for strict compliance with provisions of Order XIII Rule 4 of the CPC. The

need for compliance becomes even more apparent when we look closely at the individual documents under the collection "**Exhibit P1.**"

For instance, through the undated letter which appears on page 148, the respondent informed the Primary Court Magistrate-in-Charge of Arusha Urban Primary Court that the original copy of the letters of the appointment of the respondent as administratrix in of the estate of the deceased had been lost and the loss had since been reported to the police (**AR/RB/1678/2012**). The respondent also expressed her intention to apply for a duplicate copy of the letters of her appointment as an administratrix of the estate of the deceased. A document appearing on page 149 of Exhibit P1 which is similarly not endorsed, is a Ruling signed on 13/02/2012 whereby the Arusha Urban Primary Court (D.D. Shayo-PCM) grants the respondent a duplicate letters of appointment after misplacing the original copy.

The estate of the deceased has been subjected to two separate applications, in two different primary courts. The first application was filed in the Katesh Primary Court— as *Probate and Administration No. 11 of 1987*. The second was filed in the Maromboso Urban Primary Court in

Arusha which was filed as *Probate Cause No. 140/1996*. As matters now stand, it is not clear which between the two applications in the two different primary courts prevails to guide the distribution of the proceeds of the deceased's estate.

It seems to us that in a hotly contested dispute regarding over who, between the respondent and her late brother Yusuph Khalile, was lawfully appointed to administer the estate of their deceased father; possibility of exhibiting tampered documents as evidence must be eliminated. Endorsements on documents cleared for admission in terms of Order XIII Rule 4 is one way to ensure the genuineness of documents which parties tender in support of their respective appointments as the administrators.

Although Mr. Omar the learned counsel for the respondent would want us to believe that the documents collectively admitted as **exhibit P1** were not in favour of any of the disputing parties, our closer study of the judgment of the trial High Court leaves us in no doubt that the documents under this collection of exhibits duly informed the decision of the learned trial Judge when she observed:

*"...On the second issue as to whether the plaintiff is the legal administratix of the late Khalile Ally Hildeed; it seems to me that by the time the letters of administration were granted to Amina by Arusha Primary Court, she was the sole survivor of the late Khalil Hildeed. However, **there was in existence letters of administration issued to the late Yusuph Khalile by the Primary Court of Qatesh and even though the letters of administration of Arusha Primary Court were issued in 2012 after the death of Yusuph, the application for the same was done in 1996** while there already existed Qatesh Primary Court letters of administration appointing Yusuph Khalille as the administrator of the estate of Mzee Khalile Hildeed. The appointment of the plaintiff as the administrator of the estate was therefore null and void."*[Emphasis added].

Ordinarily, faced with the irregularity of the trial court using as evidence the documents which were not endorsed in compliance with Order XIII Rule 4 of the CPC, this Court would invoke its power of revision under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 (AJA) to quash all the trial proceedings which followed the exhibition of unendorsed exhibit P1.

But, there is another jurisdictional matter which we feel should have been first addressed by the learned trial Judge before proceeding to the hearing of the suit. The jurisdictional matter yet to be determined is on the competence of the High Court to determine property rights whose intestacy administration is still within the jurisdiction of two primary courts under the Fifth Schedule to the Magistrates Courts Act, Cap. 11. In paragraph 4 of her amended Plaint, the respondent traced her claim over the Plot back to her appointment in 1996 by the Maromboso Urban Primary Court of Arusha as the Administratrix of the estate of her deceased father. The respondent is impliedly contending that her appointment as the administratrix has not been annulled or revoked by the primary court which granted her the administration.

In paragraphs 4, 5, 6 and 7 of his written statement of defence, the appellant traced his claim over the suit property back to the decision of Qatesh Primary Court in Probate No. 11 of 1987 granting Yusuf Khalil Ally the letters of the administration of the estate of his deceased father. Following this grant, in 1998, Yusuf registered the deceased property in his own name. Seven years later on 28/12/2005, in consideration of love

and affection, Yusuph transferred his ownership of the right of occupancy to the appellant ALLY OMARI ABDI, who proceeded to develop the property.

Apart from the pleadings which disclose claims and counterclaims on probate matters, the issues which the trial court framed for its determination similarly raise probate matters for determination by the Primary Court of Katesh and the Primary Court of Arusha Urban:

1) - Whether the plaintiff is the legal daughter of the late Khalili Ally Hildid.

2) - Whether the plaintiff is the legal Administratrix of the late Khalili Ally Hildid

3) - Whether the transfer of right of occupancy of the suit land by the late Yusuph Khalil Ally Hildid to the defendant was done fraudulently.....”

It seems to us that once parties have submitted probate matters for administration by the Primary Courts under the Magistrates Courts Act, Cap. 11, they must as a consequence thereof follow through the remedies provided by the Primary Courts concerned. In **Richard Somba vs. Maria**

Somba, Civil Appeal No. 126 of 2006 (unreported) the Court dealt with a dispute over the letters of administration of the estate of the deceased person which was issued by a primary court, but an application for revocation of the appointment of an administrator was filed in the district court instead of the primary court. The Court stated:

"...A look at the record of the Primary Court will show that the appointment of the appellant as the administrator of the deceased's estate was made under paragraph 2(a) of Part I of the Fifth Schedule to the Magistrates' Courts Act, 1984, as amended. Under subparagraph(c) thereof, a Primary Court has power to revoke an appointment of an administrator for good and sufficient cause. It follows therefore, that an application for revocation of the appointment ought to have been filed in the Primary Court and not in the District Court as happened in this case."

There is no doubt in our minds that in the instant appeal before us, the pleadings and also issues for trial court's determination, were over probate matters which were opened in primary courts but had not been completed in accordance with the provisions of the Fifth Schedule to the

Magistrates Courts Act, Cap. 11 (the MCA). Clause 11 of the fifth schedule to the MCA provides for the duty of an administrator of the deceased's estate who had earlier been appointed by primary courts, after completing the administration of the estate, to account to the primary court concerned for his or her administration of that estate. The relevant Clause 11 of the fifth schedule to the MCA states:

"11.- After completing the administration of the estate and, if the primary court orders, at any other stage of the administration an administrator shall account to the primary court for his administration."[Emphasis added].

We think, before moving on to receive the evidence from the parties, the learned trial Judge should have first determined whether the High Court had jurisdiction in the suit before her to determine probate matters which parties had already submitted before two primary courts and had not been completed by completion full accounting to close the probate before the primary courts.

In the upshot of the above, we invoke the revisional powers of the Court under section 4 (2) of the AJA to quash and set aside the proceedings in Land Case No. 9 of 2013 which followed after the framing of the four issues right up to and including the Judgment and Decree of the High Court. We order the suit to be re-assigned to another learned trial Judge who should first hear the parties and determine whether the trial High Court has jurisdiction before moving on to decide on the four issues it framed for its determination. No order shall be made on costs. Ordered accordingly.

DATED at ARUSHA this 4th day of November, 2016




M. C. OTHMAN
CHIEF JUSTICE

K. M. MUSSA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


A. K. RUMISHA
DEPUTY REGISTRAR
COURT OF APPEAL