

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

(CORAM: JUMA, Ag. C.J., MJASIRI, J.A. And MWARIJA, J.A.)

CIVIL APPLICATION NO 1 OF 2009

MGENI SEIFU.....APPLICANT

VERSUS

MOHAMED YAHAYA KHALFANI.....RESPONDENT

**(Application for Revision from the Judgment of the High Court of Tanzania
at Dar es Salaam)**

(Ihema, J.)

dated the 29th day of November, 2004

in

Civil Case No 175 of 2001

RULING OF THE COURT

19th June & 3rd July, 2017.

JUMA, Ag. C.J.:

Although the deceased Ibrahim Athumani Ngude died intestate sixty five years (65) ago in 1952, the fate of his estate is not settled yet. This motion before us is a classic example of confusion which invariably results, when a person dies intestate, and the beneficiaries fail to immediately apply for letters of administration of the deceased's estate. The motion also underscores a lesson; it is only a probate and administration court which can empower an administrator to transfer the deceased person's property.

Before us is an application by way of Notice of Motion made pursuant to Section 4 (3) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (hereinafter referred to as "**the AJA**"). The applicant, Mgeni Seif, seeks to move the Court to exercise its power of revision. Concretely, the applicant would like us to call for, examine and determine the correctness, legality, propriety, regularity of the record of proceedings of the High Court of Tanzania at Dar es Salaam in Civil Case No. 175 of 2001 which led to a Ruling of Ihema, J. dated 29 November 2004. To support his motion, the applicant relies on the following grounds:

- 1. The said proceedings, ruling and order of Ihema, J. were fraudulently and illegally procured in view of positions already taken by the District Court of Ilala, the High Court notably vide decisions made by Chipeta, Mackanja and Ihema, JJJ (as they then were) in JUMANNE NGUDE v. ALLY SAID- Civil Revision no. 25 of 2000 as well as by this Court.*
- 2. The High Court wrongfully exercised its original jurisdiction to stay execution of a decree of the District Court of Ilala which had already been executed by eviction of the respondent and*

wrongfully evicted the applicant who was in lawful occupation of the suit premises and restored the respondent.

- 3. The decision of Ihema, J. is not otherwise supported by law, sense or reason in that pleadings of persons dragged into court as defendants cannot be incompetent for want of locus standi and that a plaintiff who must first establish a claim of right over some suit premises is not entitled to any relief until the claim of right is established.*
- 4. The High Court wrongly entertained a suit in contract for an action that arose in 1986 after the expiry of the period within which such claim could lawfully be brought.*

The motion is supported by two affidavits. The applicant affirmed how, as a *bona fide* purchaser for value of a house number 10 situate along Iringa Street in Ilala Dar es Salaam, he bought that house from Jumanne Ngude and Mohamed Ngude who were joint administrators of the estate of the deceased Ibrahim Athumani Ngude. One of the two administrators, Jumanne Ngude, affirmed that he indeed sold the disputed house in his capacity as the administrator of the deceased's estate.

The decision of Ihema, J. which the applicant seeks to impugn had ordered a stay of execution of the decision of the District Court of Ilala (at Samora) in Civil Revision No. 3/1986. That decision of Ihema, J. also restored the respondent Mohamed Yahaya Khalfan back in the House No. 10 at Iringa Street, on the explanation that the restoration will avoid waste and to minimize loss of property. In this context, it also appropriate to observe that the decision of the District Court in Civil Revision No. 3/1986 which Ihema, J. stayed, was itself a revision over the decision of the Primary Court of Kariakoo. The primary court had earlier been directed by the District Court to decide whether or not the estate belonging to the deceased Ibrahim Athumani Ngude had long been dealt with by any court of law.

Instead of determining whether any court of law had settled the issue of administration of the estate of the deceased as directed by the District Court, the Primary Court ordered the sale of the house. The Principal District Magistrate found the action taken by the primary court to be unwarranted and ordered its correction. He set aside the order of sale, and directed the District Land Officer to be notified of the decision of the District Court.

It is apparently clear that the applicant herein is aggrieved with the decision of Ihema, J. to hand over the disputed house to the respondent Mohamed Yahaya Khalfan. He complains that following the handover of the house, the applicant was evicted from the house he claimed to have purchased from one of the administrators of the deceased estate. The applicant affirmed his belief that the decision of Ihema, J. was tainted with illegality and was obtained under the cloud of fraud. The applicant also affirmed that he decided to seek the revisional jurisdiction of the Court because he was not a party to the Civil Case No. 175 of 2001 and only became a party when he moved the High Court to vacate its order of eviction, and he lost on 16th June, 2008.

At the hearing of the Notice of Motion on 19 June, 2017 learned counsel for the applicant, Mr Herbert Nyange, adopted his written submissions which he had filed earlier and urged us to grant the application. Mr. Nyange reiterated his position that the proceedings which led to the decision of Ihema, J. on 29/11/2004 were fraudulent and illegal in view of the previous decisions of the High Court on the estate of the deceased. He similarly attacked that decision to order a stay of the

execution of the decree of the District Court at the time when execution had been completed by eviction of the respondent.

The learned counsel for the respondent, Mr Florence Tesha adopted his written submissions and urged this Court to dismiss the application. Mr. Tesha contends that it is the respondent who owns house at number 10 Iringa Street which he purchased on the order of sale issued by the Primary Court of Kariakoo in Probate Cause No. 15 of 1985. He argued that having occupied the disputed house for over twelve years, it was not proper to evict the respondent from the premise. Mr. Tesha supported the 29/11/2004 decision of Ihema, J., who had restored the respondent back into the house at number 10 Iringa Street.

In order to understand the substance of the competing claims over the disputed house between the applicant, and the respondent, we took the trouble of reconstructing the chain of events and salient court decisions leading up to this application for revision. Ultimately, we found that the bone of contention is in essence, who the rightful successor is, to the estate of the deceased Ibrahim Athumani Ngude who died intestate way back in 1952.

On one hand of the dispute the applicant claims that he purchased the house from the two administrators of the estate of the deceased, Jumanne Ngude and Mohamed Ngude. The applicant traces this claim back to the moment when the deceased owned and left behind a house at No. 42 Mchikichi Street in Ilala District. It is not clear whether his surviving widow and four issues acted under any letters of administration when, as the applicant claims, they sold the house at Mchikichi Street.

It was submitted on the applicant's behalf that the beneficiaries of the deceased's estate used the proceeds from the sale of the Mchikichi Street house to buy a house at number 10 Iringa Street, which it is further submitted that they owned jointly as tenants in common. To prove that he purchased the house from administrators of the estate of the deceased at consideration of Tshs. 7,750,000/=, the applicant attached to his affidavit, a copy of LAND FORM NO 35 dated 20/08/2002 which he lodged in the Land Office in Dar es Salaam to be registered as the owner of the remaining right of occupancy over the House No. 10 Iringa Street.

The respondent's version to the claim, asserts that he bought the disputed house from one Abdallah Ibrahim Ngude who, it was submitted, exercised his power to sell the house which once belonged to his deceased

father. The respondent's version staking as a son of the deceased, did not disclose whether he had been appointed as the administrator of the estate of his deceased father. The respondent disputed the applicant's claim over the house by pointing out that Mohamed Ngunde and Jumanne Ngunde could not sell the house because they were not the administrators of the estate of the deceased.

It seems clear to us that there are competing claims between the applicant and the respondent, over deceased person's estate. In the circumstance, only a probate and administration court can explain how the deceased person's estate passed on to a beneficiary or a *bona fide* purchaser of the estate for value. In other words, a person claiming any interest in the estate of the deceased must trace the root of title back to a letters of administration, where the deceased died intestate or probate, where the deceased passed away testate.

For purpose of this motion the deceased died intestate in 1952. It is not clear how his heirs and beneficiaries shared out his estate for 33 years till 1985 when one Jumanne Ngunde is recorded to have filed the Probate and Administration Cause No. 15 of 1985 in the Primary Court of Kariakoo. In his written submissions the applicant herein stated that the deceased

was survived by his widow and four children who he identified as Abdallah Ibrahim, Abdulrahman Ibrahim, Mariam Ibrahim and Tatu Ibrahim. It was submitted that the four children inherited the property at No. 42 Mchikichi Street jointly.

The applicant concedes that there are no records of administration of the estate evidencing how the estate was divided out to the heirs. The applicant has not shown how the estate passed for Jumanne Ngude to apply for letters of administration in 1985. The applicant relied on facts in the record of the District Court (Civil Revision No. 3/1986) which disclose that the heirs to the deceased's estate had sold the house at Mchikichi Street and bought the house number 10 at Iringa Street. By the time the dispute was taken to the primary court, all the heirs to the deceased Ibrahim Athumani Ngude had already died except Abdallah Ibrahim.

Although this Court was not availed with the records of the primary court, it was all the same submitted that the primary court as a probate and administration court, found that the deceased had left a house on plot number 42 Mchikichi Street in Kariakoo. After finding that there was a dispute amongst the heirs over the house, the primary court had ordered its sale. But, before the order of sale could be carried out, the District

Court of Ilala intervened by way of a revision and suspended the sale of the house. But, the High Court (Mnzava, JK) intervened by way of revision when he quashed the decision of the Primary Court and ordered the complainants (Jumanne Ngude and his brothers) to apply for letters of administration of the estate of the deceased. Mnzavas, JK also ordered the district court to inform the land office about what he had just ordered.

From the documents presented in this motion we can say that there are contradicting positions how the administration of the deceased's estate has changed hands over the years since 1952. The applicant claims that he bought the disputed house from Jumanne Ngude and Mohamed Ngude who he introduced as the administrators of the estate of the deceased. Jumanne Ngude supported the applicant's version. He affirmed that on 6/6/1990 the High Court granted him the letters of the administration of the estate of the deceased. He attached **(JN-1)** a fading copy of the order of the High Court at Dar es Salaam in Probate and Administration Cause No. 7 of 1990 which allegedly granted him letters of administration.

Understandably, Mr. Nyange made no great effort to rely on the purported grant of the letters of administration by the High Court (Probate and Administration Cause No. 7 of 1990) to Jumanne Ngude as the basis of

the applicant's claim to ownership of the disputed house. It is appropriate to note that parts of the letter of grant containing the signature of the Registrar and the rubber stamp have faded away. The basis of Jumanne Ngude's power to sell as an administrator of the estate of the deceased is not clear to us. At any rate, at the time in 1990 when the High Court is purported to have granted Jumanne Ngude letters of administration through Probate and Administration Cause No. 7 of 1990, the Primary Court of Kariakoo was already well and truly seized of the estate in Probate and Administration Cause No. 15 of 1985.

Further, despite the claim that Jumanne Ngude had been appointed as the administrator of the deceased's estate in 1990, as late as in 2005 when the respondent in this application filed Application No. 166/2005 in the District Land and Housing Tribunal at Ilala Boma, the Tribunal Chairman (R.L. David) after referring to the 29/11/2004 decision of Ihema, J. made a pertinent observation that the ownership of a House No. 10 on Plot No. 51 Iringa Street Ilala Dar es Salaam had by then not been determined by any court.

As matters now stand, we do not think the chain of events which the respondent relies upon, definitely proves his claim of ownership of the

disputed house. In his affidavit in reply the respondent claimed that he bought the disputed house from the deceased's son, one ABDALLAH IBRAHIM NGUDE. In his written submissions the respondent put forward the following claim:

"The Respondent is a lawful registered owner of the landed property described as House No. 10, Plot No. 51, Block R Iringa Street at Ilala within Dar es Salaam City. The said property was bought by the Respondent in September 1986 from Abdallah Ibrahim Ngunde who was the administrator and legal heir (son) of the late Ibrahim Ngude vide Probate and Administration Cause No. 15 of 1985 before Kariakoo Primary Court. Soon after the purchase of the said property the Respondent transferred the right of occupancy to his name and on 24th day of September, 1997 the said property was duly registered in the name of Mohamed Yahaya Khalfan who is the Respondent herein."

We do not think the respondent's claim is straight forward as painted above. The respondent, through Mr. Tesha his learned counsel, seems to be oblivious of the Ruling of the District Court of Ilala (at Samora) dated

22/9/1986 (in Civil Revision No. 3 of 1986) which had revised the decision of the Primary Court of Kariakoo District Court thereby blocking the sale of the house to the respondent. Similarly, while determining Civil Revision No. 12 of 1987 (which was decided on 21/5/1991) Msumi, J. had detected anomalies in the order of sale of the primary court when he stated that the house in dispute and the subject of the illegal order of the primary court is number 10 Iringa Street Ilala and not number 42 Mchikichi Street, Kariakoo.

We do not think that as matters now stand, the respondent can still legitimately claim that he bought the house on the strength of the orders of the primary court which had been revised by the District Court.

As we already pointed out at the beginning of this judgment, the dispute over the estate of the deceased Ibrahim Athuman Ngude can only be sorted out by a probate and administration court, in this case, the Primary Court of Kariakoo in Probate and Administration Cause No. 15 of 1985. In so far as his decision to grant ownership of the house No. 10 to the respondent interfered with the Primary Court of Kariakoo which was seized with the matter, that order of Ihema, J. was an irregularity which has contributed to more confusion. The learned judge should not have

stayed the decision of the District Court which was in essence complying with earlier orders of his fellow Judges of the High who had found that the disputed house was sold illegally and transactions leading to the sale were null and void.

We think, after the District Court of Ilala (Civil Revision No. 3 of 1986) had during its exercise of its power of revision, found that the Primary Court of Kariakoo (Probate and Administration Cause No. 15 of 1985) had illegally sold the house number 10; the question of ownership of that house is still pending and is still subject of administration by the same Primary Court. To that extent, it was an irregularity calling for our intervention by way of revision for the High Court (Ihema, J.) to restore to the respondent the same house that was still under probate and administration by the primary court.

As we have said earlier, where there is a dispute over the estate of the deceased, only the probate and administration court seized of the matter can decide on the ownership. Our decision to intervene by way of revision is fortified by a recent decision of the Court directing what should be done where beneficiaries to an estate of the deceased apply for letters of administration in two different courts. In **ALLY OMARI ABDI VS. AMINA**

KHALIL ALLY HILDID (AS AN ADMINISTRATIX OF ESTATE OF THE LATE KALILE ALLY HILDID), CIVIL APPEAL NO. 103 OF 2016 (unreported), two separate applications for letters of administration of the estate of the deceased had been filed in two different primary courts. The Court stated:

*"...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.**"*[Emphasis added].

The guidance from above decision is applicable to the matter before us. Since the Primary Court of Kariakoo (Probate and Administration Cause No. 15 of 1985) is seized with the administration of the estate of the deceased Ibrahim Athumani Ngude, it should be allowed to complete its task. The applicant and respondent herein, or any other person who has any vested interest in the estate of the deceased, must go back to the Primary Court of Kariakoo which is still seized with an application for administration of the estate of the late Ibrahim Athumani Ngude. It is that

Primary Court which is at the moment best placed to sort out and distribute what remains from the estate.

In the end result, we invoke the Court's revisional jurisdiction under section 4 (2) of the AJA to quash and set aside the proceedings which led to the Ruling and Order of Ihema, J. dated 22/11/2004 wherein he stayed the execution of the decision of the Ilala District Court (Civil Revision No. 3/1986) and erroneously restored the respondent Mohamed Yahaya Khalfan back into the house no. 10 along Iringa Street in Ilala (Dar es Salaam).

We order the Kariakoo Primary Court (Administration of Estates No. 15 of 1985) to comply with order of the District Court of Ilala (Civil Revision No. 3 of 1986), that is, to set aside its order directing the sale of the disputed house. After setting aside its order of the sale of disputed house, the Primary Court of Kariakoo shall resolve the outstanding question whether the estate belonging to the deceased Ibrahim Athumani Ngude had been dealt with by any court and shall issue appropriate orders on way forward in accordance with the law.

In determining the administration of what remains from the estate of the deceased Ibrahim Athumani Ngude (including the ownership of the disputed house number 10 at Iringa Street), the Primary Court of Kariakoo shall afford the applicant, the respondent and any person with vested claim in the estate of the deceased, the right to be heard. Each party to this motion shall bear its own costs. We order accordingly.

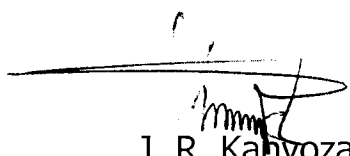
DATED at **DAR ES SALAAM** this 29th day of June, 2017.

I. H. JUMA
AG. CHIEF JUSTICE

S. MJASIRI
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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


J. R. Kahyoza
REGISTRAR
COURT OF APPEAL