IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A., And GALEBA, J.A.)

CIVIL APPEAL NO. 272 OF 2020

MADENI ALLY MOHAMED ..... 1ST APPELLANT
MWANABAKARI ALLY MOHAMED ..... 2ND APPELLANT
FATUMA ALLY MOHAMED ..... 3RD APPELLANT
MWANSHASHA ALLY MOHAMED ..... 4TH APPELLANT

VERSUS

SHAME ALLY MOHAMED ..... 1ST RESPONDENT

SHAIBU SEIF SULEIMAN ..... 2ND RESPONDENT

[Appeal from the Decision of the High Court of Tanzania, Land Division at Dar es salaam]

(Makani, J.)

dated the 16th day of August, 2019

in

Land Case No. 388 of 2013

.....

JUDGMENT OF THE COURT

4th & 23rd May, 2023

GALEBA, J.A.:

In this appeal, the four appellants and the first respondent are siblings. Their father is the late Ally Mohamed Kapulilo (the deceased), who passed away intestate on 30th June, 1976. Following their father's demise, their paternal uncle, one Bakari Mohamed was appointed administrator of his estate. Unfortunately, in 1988 Bakari Mohamed also passed on. Subsequent to his death, on 6th November, 1989, the first respondent was

appointed administrator of their late father's estate, in the place of Bakari Mohamed.

It is common ground also that, part of the estate that was left behind by the deceased, which is actually the epicentre of this appeal, was a house erected on Plot No. 104 Block 'E' Shariff Shamba Ilala Dar es Salaam (the disputed property). In the process of administering the estate, the first respondent sold the disputed property to Shaibu Seif Suleman, the second respondent. The sale was concluded in 1996. Nonetheless, seventeen years later in 2013, the appellants filed Land Case No. 338 of 2013, moving the High Court to nullify the disposition.

The cause of action in the case was that Bakari Mohamed, the first administrator carried out his duties from start to completion, and in doing so, the disputed property was distributed to the appellants jointly with Athumani Ally Mohamed, Ramadhani Ally Mohamed and Eda Ally Mohamed, (the three other siblings), who are not parties to this appeal. Thus, in view of the appellants, the first respondent had no mandate to sell their house to the second respondent.

According to the joint written statement of defence of the respondents, Bakari Mohamed passed away in 1988 before he could

conclude administration of the estate of the deceased. From the point of view of the first respondent, he took over from where Bakari Mohamed had ended, till when he finished execution of his mandate, in terms of the letters of administration appointing him. It was therefore his position that, the sale was lawful because, the first administrator did not, at all, deal with the disputed property.

After hearing parties' contending positions, the High Court, Makani, J. dismissed the suit on ground that there was no evidence to prove that the first administrator distributed the disputed property to the appellants and the three other siblings. The appellants were dissatisfied by that decision, hence the present appeal. Initially, the appellants had raised two grounds of appeal, but prior to commencement of hearing, they abandoned the second ground, thus retaining only the first ground of appeal. The remaining sole ground is to the following effect:

> *"That the learned Judge erred both in law and fact, when she failed to consider exhibit P1 from the Tanga Urban Primary Court to the Tanganyika Law Society which shows that at the death of the late Bakari Mohamed, the former administrator had already distributed the estate of the deceased Ally Mohamed Kapulilo."*

At the hearing of this appeal, all the appellants and the first respondent appeared in person. The second respondent was represented by Mr. Reginald Shirima, learned advocate.

As per the submissions of the first appellant, the point we were able to gather from him zeroed down to the substance of the very complaint in the above ground of appeal. His position was that the trial Judge was not supposed to expect any more evidence in addition to exhibit P1, for her to believe that; **first**, at the death of the late Bakari Mohamed, the estate of the late Ally Mohamed Kapulilo had been fully administered and duly closed and; **two**, that before his death, the said Bakari Mohamed had distributed the disputed property to the appellants jointly with the other three siblings. He argued therefore that, had the learned High Court Judge attached exhibit P1 with necessary evidential weight it deserved, it could not have dismissed their case. He thus implored us to set aside the decision of the High Court, and declare the appellants and the other three siblings as the lawful joint owners of the disputed property.

The second, third and the fourth appellants had no substantive arguments to add to their brother's. They just implored us to apply the first appellant's contentions to support their respective appeals.

The first respondent was next to argue in opposing the appeal. He confidently submitted that the first administrator of their father's estate died before he could complete his duties as an administrator. He argued that, he was appointed with concurrence of the family members in order to complete the unfinished assignment of the first administrator. He defended his act of selling the disputed property as being necessary for there was a debt due to be settled with the bank at the time, because the house was mortgaged. In any event, he contended, there was no evidence to prove that the first administrator of the estate completed the exercise or even that he distributed the disputed house to the appellants. He finally beseeched us to dismiss the appeal for want of merit.

On his part, Mr. Shirima supported the decision of the High Court because, the information in exhibit P1, was obtained from the first appellant, who is an interested party. He contended that, other than the contested exhibit, there is no other evidence proving that the first administrator exercised his mandate over the disputed property. He went further to argue that, there is no document showing that the first administrator was even appointed as such. According to him, the sale of the disputed property by the first respondent to the second, was and

continues to be a lawful disposition, and in conclusion, the learned advocate implored us to dismiss the appeal with costs.

We have exhaustively studied the record of this appeal and have attentively paid attention to parties' oral arguments in support and against the appeal. We thus find that the issue for resolving the sole ground of appeal is whether the letter, exhibit P1, was sufficient proof that the first administrator distributed the disputed property to the appellants and the other three siblings. Therefore, in this judgment we will mainly be discussing the weight and credibility of that exhibit.

Before we get there however, because the question is a critical consideration of the evidence, we will briefly first discuss the burden and standard of proof in civil cases, as was the case before the High Court. The relevant law on that aspect, is the Evidence Act. Section 110 (1) of that Act, places a burden of proof on a party who alleges existence of particular facts to prove the existence of such facts. That section provides that:

> *"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*

Applying the principle in the above law to this matter, we can firmly state that the burden to prove that indeed the first administrator distributed the disputed property to the appellants and the three other siblings, rested squarely on the appellants' shoulders at the trial before the High Court. The extent or the degree to which the appellants were to attain in discharging the said burden, is legally called the standard of proof. In civil cases, for a court to take a fact alleged on pleadings as proved and established at the trial, such a fact must be proved by evidence on a balance of probabilities. That standard of proof is also called proof by a preponderance of probabilities. The standard is provided under section 3 (2) (b) of the Evidence Act, that:

> *"(2) A fact is said to be proved when-*
> *(a) N/A*
> *(b) in civil matters, including matrimonial causes and matters, its existence is* ***established by a preponderance of probability.****"*
> [Emphasis added]

The above standard of proof is said to be attained and actually discharged, only where a party upon whom the burden lies, establishes his case such that the fact he has to prove, is proven and the court either believes it to exist, or it considers its existence so probable that a prudent

man ought to act upon the supposition that the fact does indeed, exist. See this Court's decisions in **Ernest Sebastian Mbele v. Sebastian Sebastian Mbele & Others,** Civil Appeal 66 of 2019; and **Godfrey Sayi v. Anna Siame as Legal Representative of the late Mary Mndolwa,** Civil Appeal No. 114 of 2012 (both unreported). We must add here that in law, if the burden of proof is not fully discharged to the appropriate standard, the plaintiff's case must fail, whether or not the case is defended.

Having said that, there is yet one more point of law we feel obliged to clarify. In determining this appeal, this Court being the first appellate court, is entitled to determine the appeal in a form of a rehearing, in which case it has mandate to subject the evidence before the trial court to scrutiny and come up with its own findings and conclusions which might not be the same as that of the High Court. This Court derives that mandate from the provisions of section 4 (2) of the Appellate Jurisdiction Act, (the AJA), which clothes this Court with jurisdiction of the court from which an appeal before it, is brought. See also this Court's decision in **Deemay Daati and Two Others v. R** [2005] T.L.R. 132 at 133. Other decisions on that point include **Future Century Ltd v. TANESCO**, Civil Appeal No. 5 of 2009; **Maramo Slaa Hofu and Others v. R**, Criminal Appeal No. 46 of 2011; and **Siza Patrice v. R,** Criminal Appeal No. 19 of 2010 (all

unreported). So, we will critically audit and analyse the contested exhibit as if we were the High Court and make a finding on whether the decision reached by that court was indeed proper.

Because the merits or demerits of this appeal, wholly depend on exhibit P1, although a lengthy letter, we feel compelled to reproduce it in full, in this judgment. That document which was a letter from the Tanga Urban Primary Court to whomever was concerned at the TLS, reads as follows:

"Ofisi ya Hakimu,
Mahakama ya Mwanzo,
MJINI TANGA
4/10/93

Kwa yeyote anayehusika,
The Tanganyika Law Society,
S. L. P. 2148,
DAR ES SALAAM.

YAH: MIRATHI NA: 44/89

MSIMAMIZI .....BAKARI MOHAMED

MAREHEMU .....ALLY MOHAMED KAPULILO

MIRATHI NA. 84/89

MSIMAMIZI .....SHAME ALLY

MAREHEMU ..... BAKARI MOHAMED

Tafadhali rejea barua yako ya tarehe 12/8/93 isiyokuwa na kumbukumbu na ikihitaji Hati ya Usimamizi ya kumteua Bakari Mohamed – Marehemu

Ally Mohamed Kapulilo na ya kumchagua Shame Ally kwa Marehemu Bakari Mohamed.

Bahati mbaya majalada yote hayo mawili hayakuweza kupatikana, na hivyo hivyo mwenendo na hukumu za kesi hizo hazikupatikana.

Lakini msimamizi Bakari s/o Mohamed kabla hajafariki naye aligawanya mali za marehemu Ally Mohamed Kapulilo kutokana na taarifa za mmoja wa watoto wake aitwaye Madeni A. Mohamed ya kuwa Marehemu alikuwa na wake watatu (3) *: -*

1. *Hivyo watoto –* ***Madeni A. Mohamed, 2. Athumani A. Mohamed, 3. Mwanabakari A. Mohamed, 4. Fatuma A. Mohamed, 5. Mwanshashi A. Mohamed, 6. Ramadhani A. Mohamed, 7. Eda A. Mohamed – aliwapa nyumba ya huko Dar es Salaam Sharifu Shamba Plot No. 104.***
2. *Watoto 1. Shame A. Mohamed, 2. Mwanaidi A. Mohamed walipewa nyumba iliyoko Tanga Ngamiani Area Barabara Kumi na Nane (18).*
3. *Watoto 1. Amina A. Mohamed, 2. Mwanaharusi A. Mohamed – walipewa kiwanja hapa Tanga Ngamiani Area Barabara ya 21.*

Hivyo alivyofariki Bakari Mohamed, mirathi hiyo ya kwanza ilikuwa mali za marehemu Ally Mohamed Kapulilo ameshazigawa kwa wategemezi.

Kwa hiyo mirathi ya pili ilikuwa mali hizo hazimuhusu Bakari Mohamed hizo za ndugu yake Ally Mohamed Kapulilo. Na alipoteuliwa Shame Ally, Bakari Mohamed hakukuwa na mali zozote.

Ulikuwepo mkataba wa kupangisha nyumba hiyuo Plot Na. 104 Sharifu Shamba kwa Idara ya Uhamiaji na hati ya mkataba huo ipo katika ofisi yako.

Fedha za N.P.F kiasi cha Tshs. 118,000/= zilipatikana na kati ya hizo Tshs. 42,000/= zililipwa T.H. B. kwa

mkopo wa nyumba hiyo na Tshs. 1,299. Na baadae zingine ziligawanywa kwa wategemezi ambao ni watoto na kuwekwa katika a/c za kila mtu.

Hivyo ni wazi kuwa Shame Ally hahusiki kabisa katika nyumba hiyo iliyoko Sharifu Shamba Plot Na. 104 Dar es Salaam asiingilie kwa jambo la kuizua.

Hakimu Mwandamizi Mahakama
ya Mwanzo Mjini Tanga"
[Emphasis added]

In the case before the High Court, the above letter is the only evidence, that the appellants relied upon to support a claim that the house in Dar es salaam was distributed to them. In disbelieving and therefore discrediting the above piece of documentary evidence, the learned trial Judge observed as follows:

"*The plaintiffs are basically relying on the letter from the office of the Primary Court Tanga dated 04/10/1993 addressed to the Tanganyika Law Society (Exhibit P1). ... the said letter is not conclusive enough to be relied upon. Firstly, the letter categorically states that the files in relation to Probate 44/89 and 84/89 in respect of Bakari Mohamed and Shame Ally appointment as administrators of Ally Mohamed Kapulilo respectively were not found...Secondly, the contents of the said letter were based on information from the 1st plaintiff. ...It is apparent therefore the letter*

was based on information from the 1st plaintiff, and not from the files in the registry of the Primary Court in Tanga. This court cannot rely on such a document whose information is not from the original of the court on information from that very person who was interested in the matter. In the absence of concrete evidence, the claim that the late Bakari Mohamed had an opportunity of distributing the landed properties as alleged by the plaintiffs cannot stand."

Essentially, the sole ground in this appeal seeks to fault the above finding of the High Court. The law relevant for proof of administration of estate and the stage reached, is the Probate and Administration Act, (the Probate Act). Section 107 (1) of that Act provides that within six months from the date of the grant of the probate or the letters of administration, the administrator must prepare and exhibit an account of the estate showing the assets which have come to his hands. Further, within one year, he must exhibit the manner in which the assets have been applied or disposed of. Section 107 (2) of the same Act, provides for exhibiting accounts if the administration of estate is not concluded in one year. The inventory and the accounts, which must be filed in the court that appointed the administrator, in terms of the above law are the documentary exhibits

we expected to be the evidence to be tendered by the appellants in arguing that the disputed property was bequeathed to them. It is beside the point that the two files which would contain such documents were missing in the Primary Court, because the absence of such files cannot be equated to proof of anything that ought to be contained in them.

Now the letter and its evidential value. We have thoroughly reviewed it, and we wish to make two observations: **One**, it is beyond certainty that the letter was written by its author wholly depending on the information he received from the first appellant simply because there was no record to make reference to, as the two original files were missing. In our view, the letter having been authored in October 1993, when the first respondent was the administrator of the deceased's estate, the authentic and official spokesperson for the estate of the deceased was the first respondent, at the time. However, there is no evidence that he was either consulted before writing the letter, or even copied with it after writing it. For purposes of clarifying ourselves, we wish to state that the first appellant not being an administrator of the deceased's estate at the time of writing the letter, any information from him ought to have been verified with the appointed administrator before it could be acted upon or communicated.

Two, according to his own evidence, the first appellant left the country in 1984 and did not come back until the year 2012, and even at the hearing of this appeal before us, he repeated that point on several occasions. However, the author of the letter (in 1993) states that, it was the very first appellant who told him that the property in Dar es Salaam had been distributed to the appellants and the other three siblings. There was no evidence however to prove that from abroad, the first appellant contacted any Tanga Urban Primary Court judicial officer and passed to him or her, such information. This evidence leaves a lot to be desired as to what was the true and authentic source of the information that the Urban Primary Court of Tanga was passing on to the TLS, in the circumstances where the two original files were missing and that the first appellant was abroad. In our view, these two complementary points, badly compromised and impaired the dependability and reliability of exhibit P1 and rendered it materially worthless and evidentially, useless.

Thus, we find nothing credible on record in terms of evidence to prove that the first administrator dealt with the disputed property at any time during his tenure as an administrator. Accordingly, sale of the disputed property by the first respondent to the second, cannot be impeached as long as his appointment at the time of the sale in 1996 was

valid. In the circumstances, we are unable to fault the trial Judge on her findings that exhibit P1 was patently deficient of evidential value to prove the appellant's case to the required standard. Accordingly, the sole ground of appeal has no merit, and we dismiss it.

Finally, and by way of concluding, as this appeal was wholly dependent on one ground of appeal which we have just dismissed, this appeal must endure a similar experience; the same is therefore dismissed with costs for want of merit.

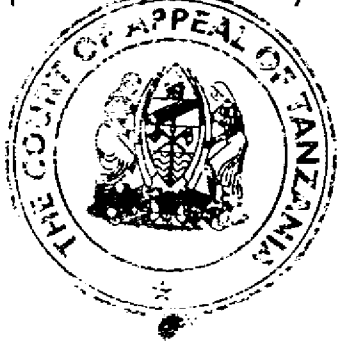
DATED at **DAR ES SALAAM**, this 19TH day of May, 2023

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

Judgment delivered on this 23rd day of May, 2023 in the presence of Ms. Fatuma Ally Mohamed on behalf of the 1st, 2nd and 4th appellants, 1st respondent in person, and Mr. Reginald Shirima, counsel for the 2nd Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL