

IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

PC CIVIL APPEAL NUMBER 34 of 2011

(Originating from District Court of ILALA Civil Appeal No. 65 of 2009-AND-Probate Cause No. 56 of 2009 Ukonga Primary Court)

SIWAJIBU SULTANI.....APPELLANT

VS

DOTO ALLY MLOMBO.....RESPONDENT

JUDGMENT

Date of last Order: 25-11-2011

Date of Judgment: 28-02-2012

JUMA, J.:

Siwajibu Sultan, appellant and Doto Ally Mlombo, respondent are cousins. Appellant's mother, Asha Salum Mlombo is sister to Respondent's father, Ally Salum Mlombo. Both Asha Salum Mlombo and his brother Ally Salum Mlombo are deceased. Ally died on 23rd May 1989. Asha died on 20 December 2005. Although Ally Salum Mlombo had died way back in 1989, it was much later on 28th February 2009 when his family convened to agree on a person who should administer his estate. That meeting nominated the Respondent Doto Ally Mlombo.

On 23rd March 2009 the Respondent filed the Probate Cause Number 56 of 2009 at the Primary Court of Ukonga seeking to be appointed as an administrator of the estate of the late Ally Salum Mlombo. On 8th May 2009 the Ukonga Primary Court, presided over by C.D. Mnkande-PCM, appointed the Respondent as the administrator of the estate of Ally. Respondent moved on to collect the property of the deceased. A House Number ILA/UKG/GBT/25/25 situated at Gongo la Mboto, was identified for purpose of collection.

On 25th June 2009 the appellant, and her two other sisters (Mosi Sultan and Amina Sultan) wrote a joint objection letter which they addressed to the Primary Court of Ukonga. The three were asking the primary court to exclude the house Number ILA/UKG/GBT/25/25 from the estate of their late uncle Ally Salum Mlombo. The appellant contended that their late uncle did not own that house which the respondent had ear-marked for administration. The primary court duly heard the opposing parties and their witnesses on the objection. In its ruling dated 6th August 2009 the primary court

rejected the objection and ruled that the house belonged to the estate of the late Ally Salum Mlombo.

Aggrieved by the Ruling of the primary court, appellant filed her first appeal, Civil Appeal Number 65 of 2009 at the District Court of Ilala. The learned P.S. Kalala, Resident Magistrate of the Ilala District Court agreed with the conclusion reached by the primary court and on 23rd November 2010 dismissed the appeal. Appellant was undeterred by the setback of losing her appeal. In this second appeal to this court the appellant has preferred four grounds to manifest his grievance.

Hearing of this appeal proceeded by way of written submissions. Only the Appellant filed her written submission in support of her appeal. Respondent did not file written submissions and gave no reason to explain the failure to file the replying submissions as scheduled by this Court. According to the appellant, the decision of the District Court was fraught with many shortcomings which amounted to an abuse of court process. The main thread that cut across the Appellant's submission was that the primary court of Ukonga while exercising its power over the probate of the late Ally S. Mlombo

exceeded its jurisdiction when it went on to deal with the dispute over land matters.

From the record of subordinate courts and submission made on behalf of the appellant on the four grounds, three interrelated issues call for determination by this Court. The first issue is whether the Primary Court of Ukonga lacked requisite jurisdiction to determine anything regarding the house Number ILA/UKG/GBT/25/25. The second issue is closely related to the first issue and relates to whether the disputed house is part of the estate of the late Ally Salum Mlombo. The final issue is whether the family of Appellant's mother, Asha Salum Mlombo has been compensated for developments that were made on the disputed house.

As I have suggested earlier, the issues arising from this appeal are closely related. First, I do not agree with the Appellant's suggestion that the Primary Court of Ukonga lacked jurisdiction to deal with the disputed house. As long as there was *prima facie* evidence that house or any land for that matter falls under the estate of a deceased person primary courts are vested with

requisite jurisdiction. The Fifth Schedule to the **Magistrates Courts Act, Cap. 11** provides for the powers of primary courts in administration cases. Rule 8 of the **Primary Courts (Administration of Estates) Rules** gives primary courts wide powers when exercising jurisdiction conferred on primary courts by the provisions of the Fifth Schedule to the **Magistrates Courts Act**.

Primary Courts have the power to hear and decide any question relating to identification of property belonging to the deceased, the sale of the property of the deceased, partition, division or other disposal of the property and other assets comprised in the estate of the deceased person for the purpose of paying off the creditors or distributing the property and assets among the heirs or beneficiaries.

I have no doubt that the widely worded statutory power of primary court provided by the Rule 8 of the **Primary Courts (Administration of Estates) Rules** vested the Primary Court of Ukonga with power to deal with the question whether the house disputed number ILA/UKG/GBT/25/25 is part of the estate the late Ally Salum Mlombo for purposes of administration by the

Respondent. I am therefore satisfied that Primary Court of Ukonga had the power to deal with any matter arising from ownership of a disputed house.

After re-evaluating the evidence at the Primary Court, my conclusion shall not be any different from the decisions reached by both the Primary Court of Ukonga **(Probate Cause No. 56 of 2009)** and the District Court of Ilala **(Civil Appeal No. 65 of 2009)**. Records show that Siwajibu Sultan failed to seize up an earliest moment to dispute ownership of the house.

This earliest opportunity presented itself at the hearing of an application that the Respondent had filed seeking to be appointed as an administrator of the estate Ally S. Mlombo. Siwajibu Sultan testified as PW3 but did not raise the question of the ownership of the house. The evidence of Mrs Kidawa Mohamed at the hearing of the objection proceedings confirms the Respondent's claim that the disputed house indeed belonged to the estate of Ally Salum Mlombo.

Mrs Kidawa Mohamed told the primary court that it was her own husband who originally built two rooms on the disputed house number ILA/UKG/GBT/25/25 at

Ukonga Gongo la Mboto. Her husband later sold it to the late Ally S. Mlombo. According to Mrs Kidawa Mohamed, Ally Mlombo lived in that house for a very long time. As far as Mrs Mohamed was concerned, this house belonged to the late Ally S. Mlombo. Significantly, the Appellant did not cross examine Mrs Mohamed to test whether that house belonged to Asha Mlombo.

Proceedings of the Ukonga Reconciliation Committee (Baraza la Usuluhishi) also corroborate the evidence of Mrs Kidawa Mohamed that Asha S. Mlombo built four extra rooms on her brother's plot of land. Later in 2004 arrangements were made to enable the family of Asha Mlombo to recoup through rentals a total of TZS 2,500,000/= which Asha S. Mlombo had spent to build the four rooms on a plot that belonged to her brother.

From the foregoing, I am satisfied that the trial primary court magistrate was right to conclude that the house belonged to the Respondent's father. The trial primary court was in addition correct to conclude that the TZS 2,500,000/= which the late Asha S. Mlombo had

spent to build four rooms on her brother's land had been fully paid up through rentals by the year 2009.

The Respondent was within her power as an administrator of the estate of her deceased father, to faithfully administer the estate when she proceeded to reclaim ownership of the disputed house. Respondent staked her claim by paying the debts which her late father Ally S. Mlumbo had incurred, and distributing the residue of his estate according to law.

Consequently, this appeal is dismissed and Respondent is awarded her costs.

DATED at DAR ES SALAAM this 28th February, 2012



**I.H. JUMA
JUDGE**

