

IN THE HIGH COURT OF THE UNITED OF TANZANIA

THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

LAND APPEAL No. 27/2016.

(Arising from Land Appeal No. 147/2012 of the District Land and Housing Tribunal of Bukoba and Civil Case No. 6/2012 of Bugomora Ward Tribunal)

ABELI KAJOKI ----- 1ST APPELLANT

RICHARD PASCHAL ----- 2ND APPELLANT

NYAKATERA VILLAGE COUNCIL ----- 3RD APPELLANT

VERSUS

INNOCENT SAUS ----- RESPONDENT

JUDGMENT

12/3/2018 & 11/05/2018

Kairo, J.

Being aggrieved by the decision of District Land and Housing Tribunal in Land Appeal No. 147/2012 of the District Land and Housing Tribunal which

was heard *ex parte*, the Appellants preferred this Appeal to challenge the same raising the following grounds of appeal;

1. That the Respondent had no *locus standi* to sue on behalf of his late father's estate without being appointed the administrator of the estate.
2. That the third Appellant as a Local Government Authority was sued contrary to the law for want of serving a notice to sue.
3. That the trial tribunal embarked on determining the suit without assuming itself the pecuniary jurisdiction.
4. That the Judgment was delivered against the weight of evidence.

The Respondent generally refuted all of the grounds arguing that they were baseless and prayed the court to dismiss this appeal.

Briefly the facts that can be discerned from the record is that the Respondent unsuccessfully filed a claim at Bugomora Ward Tribunal alleging that the Appellants had trespassed into the family land which belonged to his late father one James Saus. He was not satisfied by the outcome and decided to appeal to the District Land Housing Tribunal for Bukoba which heard the matter *ex parte* and allowed the said appeal. The Appellant were aggrieved hence this appeal raising the above four listed grounds.

The Appellants are represented by the Learned Counsel Advocate Chamani while the Respondent is receiving the legal services from the Learned Counsel Advocate Frank John from Kabunga & Associates Advocates. When

the matter was scheduled for hearing, the parties by consensus agreed to dispose the appeal by written submissions. The schedule was drawn and the parties complied to it accordingly.

With regards to the first ground, Advocate Chamani for the Appellants challenged the *locus standi* of the Respondent to sue on behalf of his late father's estate without being appointed an administrator of the said estate. He submitted that the records of both lower courts reveal that the Respondent has stated that the suit land is among the properties comprised in the estate of his late father James Saus. He went on that, the law governing the deceased's estate especially when one requires to defend it was expounded in the case of ***Felix Costantine vrs Jofrey Modesti: Land Appeal No. 9/2010 Bukoba Registry (unreported)*** at page 7 wherein the court insisted that, before a person assumes the role of defending the estate of the deceased, must have been appointed to administer the estate of the said deceased. Advocate Chamani quoted the relevant part as follows;

"To be an heir of the estate creates an interest on the part of the heir, but that doesn't give him an automatic locus standi to sue or be sued over the property of the deceased". He concluded that, since the Respondent sued the Appellants while not yet appointed as an administrator, it goes that legally he had no *locus standi*. Advocate Chamani went on that, the counsel for the Respondent had argued in his reply to the petition of appeal that, the Respondent had *locus standi* by virtue of being the son of the deceased even in the absence of the letters of administration, but as per the case of

Maulid Makame Alli vrs Khamis Vuai, Civil Appeal No. 100/2004 CAT Dar es salaam Registry (unreported) the court at page 12 held that “*in instituting the suit, the Respondent had locus standi as the heir of the estate after the death of his father*”. In distinguishing the cited case with the one at hand, Advocate Chamani stated that the Respondent didn’t adduce any evidence before the trial tribunal to prove that he is among the heirs of James Saus disputing the assumption that since the Respondent is the deceased’s son, then automatically must be among the heirs of the deceased as he could have been disinherited or could have been given another property.

Advocate Chamani in the second ground of appeal challenged the procedure in suing the Village Council without serving it a 30 days notice of an intention to sue arguing the omission to be contrary to section 190 of the Local Government (District Authority) Act, Cap 287 RE 2002 which makes it mandatory to serve a one month’s notice to the Village Council which is among the Local Government Authority as per section 3 of the Act before commencement of any suit against it. As such any party who intends to sue it must comply with that legal requirement, short of it, the proceedings are bound to be quashed for want of the said notice. He cited the case of *Arusha Municipal Council vrs Lyamuya Construction Co. Ltd (1998) TLR 13* to support his argument. The Advocate concluded that, the Respondent filed a suit against the 3rd Appellant without complying with the legal requirement, thus the said suit is incompetent and thus prayed the same to be quashed.

When submitting for the third ground, Advocate Chamani argued that, before a court hears a suit, it must assure itself of its jurisdiction citing the case of *Fanuel Mantiri Ng'unda vrs Herman Mantiri Ng'unda & others (1995) TLR 155* to substantiate his argument and quoted the following part at page 159;

"The question of jurisdiction for any court is basic, it goes to the very root of the court to adjudicate upon cases of different nature. In our considered view, the question of jurisdiction is so fundamental that the courts must as a matter of practice on the face of it be certain and assured of their jurisdiction at the commencement of the trial. This should be done from the pleadings. The reason for this is that, it is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case".

The Advocate argued that, the Respondent was bound to ensure that the trial tribunal had pecuniary jurisdiction to entertain the suit but he didn't state the estimated value of the suit land. He concluded that, following the said omission, the trial court risked to determine the matter without ascertaining if it had the jurisdiction, and the consequence is to render the proceeding and judgment thereon a nullity and in the same vein even the District court's decision must crumble for want of a base to stand on.

With regards to the last ground of appeal, Advocate Chamani argued that, the first appellate court allowed the appeal in disregard of its duty to ere-

assess the weight of evidence adduced during the hearing of the suit, being the first appellate court. He gave an example whereby the key witness; the Respondent's mother didn't prove that her late husband acquired the suit land legally. He concluded by praying the court to quash the lower tribunal's proceedings and decisions for being composed of irregularities, with costs.

In reply, Advocate Frank for the Respondent prayed the reply to the petition of appeal be adopted as part of the Respondent's written submission. In addressing the first ground, the Advocate stated that, the argument that the Respondent had no *locus standi* to sue for want of being an administrator of the estate of the late James Saus is a very weak ground as it couldn't make any sense for the Respondent to leave the Appellants to take the land of their late father which could probably be their inheritance, simply because he isn't an administrator of the estate, argued Advocate Frank. He went on and quoted the observation in the case of *Shigela & 2 others vs Beatus G. Chandika Land Case appeal No. 13/2009 High Court Bukoba* (unreported) to support his argument as follows:-

"If the Respondent's father is dead and there is no administrator has been appointed does that prevent him from defending the property which had been bequeathed to him? Put it in a different picture, do the appellants achieve good title in the land in dispute simply because there is no administrator who had been appointed? I do not think so".

The advocate thus prayed the court to dismiss the grounds for lack of merit. He went further that the record shows that the Respondent had filed probate cause No. 24/2012 before Kayunga Primary court and as the same was pending, the Appellants started trespassing to the land in dispute with the view of allocating the same to other people. A copy of Probate Cause No. 24/2012 and form No VI was attached for reference.

Advocate Frank further attacked the second ground where it was alleged that the Respondent had sued the 3rd Appellant without issuing 30 days notice of an intention to sue arguing it be not true. He went on that the Respondent had fulfilled the mandatory provision of section 190 of Cap 287 (supra) by serving a notice of intention to sue to the 3rd Appellant dated 05/04/2011 and the same was received by one P. Bilima; the VEO by then. The Advocate also submitted that he had annexed the copy of the said notice of intention to sue for verification. (However the court had found none after going through the Respondent's documents).

With regards to the 3rd ground wherein the pecuniary jurisdiction of the trial court was challenged, Advocate Frank argued that the Appellants have tendered no evidence to support their argument. He added that the mere alleged fact that the value of the disputed land was not shown nor proved by evidence cannot form a ground of appeal.

As for the last ground of appeal, Advocate Frank contended that the same was seriously misconceived on the part of Appellants. He went on that the

1st appellate tribunal didn't venture in analyzing the evidence of the trial tribunal as the Appellants before the District Land and Housing Tribunal filed an appeal out of time which was dismissed. Thus there is no way the District Land and Housing Tribunal could have evaluated the evidence adduced at the trial tribunal, as such the ground has no merit. In conclusion, Advocate Frank prayed the court to find that the appeal as a whole is devoid of merit and dismiss the same with cost.

After going through the grounds of appeal, reply and written submissions filed by both parties, the main issue for determination in this court is whether or not this appeal is based on founded grounds. I will address the grounds of appeal on seriatim.

Starting with the first ground wherein the Appellants argued that the Respondent had no *locus standi* to institute this suit as he was not an appointed administrator of the estate of his deceased father. The Respondent vehemently contested the argument arguing that the fact that he wasn't an appointed administrator could not bar the Respondent from taking legal action against the Appellants who took the land of their late father, the land which could probably be their inheritance. The Advocate went on and took a leaf from the decision by Hon. Mjemmas (as he then was) in the case of *John Shigella (supra)* to bolster his contention. However I found the facts of the cited case distinguishable from the facts at hand. In the cited case, the property at issue had already been bequeathed to the respondent therein which means he was the owner, as such there was no

need to appoint an administrator because he was the owner and further technically there was nothing to administer as far as the property at issue was concerned. On the contrary the property at issue in the case at hand belonged to the family of the late James Saus and there were several beneficiaries over the land as can be proved by the submission given by Advocate Frank (2nd page 1st line) that the land could “*probably be their inheritance*”. In my judicial interpretation therefore, following the death of James Saus, who was the owner, the disputed land is to be inherited by several heirs and the Respondent could or couldn’t be among them. Being the deceased son doesn’t entitle him an automatic right to inherit the estate of his father as he could have been disinherited or given another property as rightly argued by the Appellant’s Advocate. In the said circumstance, an administrator must be appointed to administer the estate and ensure that each heir’s interest is catered for or protected and further even others who might have interest over the land in dispute. Even if it is assumed that the Respondent is the heir of the disputed land, thus has an interest on land as seems to be suggested by Advocate for the Respondent. However that fact alone doesn’t give him an automatic *locus standi* to sue or be sued over the deceased’s property.

I found fortification in this stance in the Misc. Land case appeal No. 9/2010: **Felix Costantine vrs Jofrey Modest (supra)** wherein the court observed as follows:

“to be an heir of the estate creates an interest on the part of the heir, but it doesn’t give him an automatic locus standi to sue or be sued over the property of the deceased”.

Further to that, a similar stance was also explained in the case of **Tatu Adui vs Mlawa Salum & Another Misc. Civil Appeal No. 8/1990 HCT Dar es salaam** (unreported) which held that only administrators of the estate who is also a personal legal representative of the deceased can sue or be sued over the estate. Besides it is not proved that the Respondent is among the heirs of the late James Saus as rightly argued by Advocate Chamani. Thus even the case of **Maulid Makame Alii vs Khamis Vuai** (supra) cannot be assumed to confer *locus standi* on the Respondent.

I am aware that the Respondent’s Advocate had attached the letters of Administration in respect of the respondent when filed his reply to the written submission. However the law required a party to be appointed before instituting the suit. According to records, the suit was instituted in 6/12/2011 while the Respondent was appointed as an administrator on 20/06/2012. This means he wasn’t an appointed administrator when instituting the suit and legally his later appointment cannot act retrospectively.

This finding alone suffices to dispose of the appeal. However the court finds pertinent to analyze yet the second ground of appeal so as to ascertain whether any defect has been occasioned in the process of filing the suit as

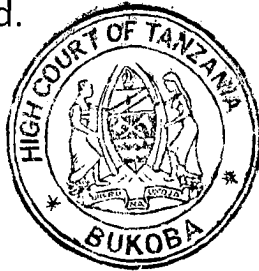
claimed. Advocate Chamani submitted that the Respondent didn't served a 30 days notice to sue to the village council which is against section 190 of Cap 287 (supra) before instituting the suit at the trial court. The argument was disputed by Advocate Frank for the Respondent stating that the same was served and that he has annexed the copy to that effect for court's verification. As earlier stated, I went through the documents but couldn't find any. I further went through the proceedings at the trial court where the matter was first instituted but again I found none. In this regard I am convinced that no notice was served to the Village Council who was sued as the 3rd Defendant as required by law as rightly argued by Advocate Chamani. The court has therefore found that the 1st and 2nd grounds of appeal to have merits. The pending issue to be determined is the consequences.

Having found that the Respondent had no *locus standi*, it goes that all of the proceedings and decision of the trial court were a nullity. In the same veins, no appeal could lie against nullity proceedings. But further even if it is assumed that the Respondent had *locus standi* which is not the case anyway, the omission to serve a 30 days notice of an intention to sue is another snag which also has the consequences of rendering the suit incompetent and thus nullifying proceedings and orders of the trial court.

Each of the two grounds of appeal above discussed is enough to dispose this appeal. I thus found no need to dwell on other grounds. This appeal is therefore allowed. I further quash the proceedings and orders of both of

the lower tribunals. The Respondent however can still institute a fresh suit if he still so wish. I order no cost in the circumstances of this case.

It is so ordered.



L.G. Kairo

Judge

11/05/2018

At Bukoba

Date: 11/05/2018

Coram: Hon. L.G. Kairo, J.

1st Appellant: Present in person

2nd Appellant: Reported sick

3rd Appellant: Phillemon Jeremiah, VEO

Respondent: Present in person Advocate F. John.

B/C: Tatu

Advocate Frank John: Hon. Judge, the matter is scheduled for judgment. We are ready to receive it.

1st Appellant: I am also ready

3rd Appellant: I am also ready

Court: The case is scheduled for judgment, the same is ready and is read over before the parties as per today's quorum.

