

IN THE HIGH COURT OF TANZANIA
[DAR ES SALAAM DISTRICT REIGISTRY]
AT DAR ES SALAAM

CIVIL APPEAL NO. 92 OF 2016

*(Appeal from decision of Ilala District Court in Civil Revision No. 11
of 2016, Originating from Kariakoo Primary Court in Probate Cause
No. 81 of 2006)*

ABDULATIF MOHAMED ----- APPELLANT

VERSUS

FATUMA MOHAMED ----- RESPONDENT

JUDGMENT

MUTUNGI, J.

The genesis of this appeal is rooted in the stay of execution decision by the Ilala District Court delivered on 10/11/2016. The same was a revision filed by the respondent and in view thereof the District Court was called upon to examine the order of the Primary Court which had ordered the sale of the house situate on Plot No. 9 Block "A" Aggrey Street, Kariakoo. This was among the properties left

behind by one Mohamed Khamis Abdallah (deceased). The respondent had been appointed the administrator of the said estate in Probate Case No. 81 of 2006 in which the appellant had not been included as one of the children of the deceased. The reason being the allegation that, the deceased had disowned him as a child born out of wedlock. Come year 2007 in Probate and Administration No. 89/2007 the appellant's mother prayed to be appointed the administrator incidentally of the same estate before the same court (Kariakoo Primary Court). Her prayer was based on the fact that, she too was the deceased's lawful wife through a celebrated Islamic marriage. She alleged they had been blessed with two issues of marriage, Khadija and the appellant (Abdulatif Mohamed).

Having heard from the parties with the respondent on the opposing side contesting against Chiku Kaniki Iddi's marriage and the status of the mentioned children in the said estate, the Primary Court did make a decision. The same was such that, in the absence of any documentary evidence to prove the marriage between Chiku Kaniki and the deceased, Chiku's claim could not be

established. Chiku Kaniki did appeal to the District Court (Civil Appeal No. 3 of 2008) and the court reversed the Primary Court's decision and proceeded to find in terms of section 160 of the Law of Marriage Act, Cap. 29 R.E 2002. It was held that, there was ample evidence to find Chiku Kaniki had indeed been married to the deceased notwithstanding that she had not produced a marriage certificate. The court proceeded further, to find and declare that the two purported issues of marriage (Khadija and Abdulatif - Appellant) were lawful heirs of the estate of their late father (Mohamed Khamis Abdallah). The respondent was aggrieved by the said decision hence knocked at the door of appeal in Civil Appeal No. 31/2009 in this court contending that, the District Court had erred in finding there was sufficient evidence to establish and confirm the Islamic marriage between the deceased and Chiku Kaniki Iddi. Further the 1st appellate court did error for allowing a child born out of wedlock to inherit in the said estate.

The High Court having deliberated on the submissions before it, found that indeed the said Chiku Kaniki had not

relied on any marriage certificate to proof her marriage with the deceased. The court did not stop here but made a further finding that, the child known as Khadija was indisputably born out of wedlock hence could not be legitimized after her parents contracting a marriage subsequent to her birth. On the same stance under the Islamic rules of inheritance an **“illegitimate child”** is considered to be the child of its mother only. Having so found the High Court did make an order that, the administratrix of the said estate (Respondent) should include the child Abdullatif (Appellant) in the list of beneficiaries and to apportion him his lawful share according to Islamic law.

In compliance with the court order the respondent did convene a family meeting and broke the unpleasant news that, she had nothing to distribute to the heirs since had already distributed the estate much earlier before the appellant had been included as one of the beneficiaries. The appellant did approach the trial court in order to execute the High Court's order to be included as one of the heirs and be given his share in line with the Islam

law. Further, since the respondent had never filed anything to show the distribution of the estate, the appellant prayed the house in issue be sold. He made this request considering there was no other way of executing the High Court order. The trial court consequently did make an order that the same be sold.

The respondent was aggrieved by the order requiring the house in dispute to be sold hence filed a revision (No. 11 of 2016) with the District Court. The arguments by the respondent in support of the revision were that, the trial court had made an order for sale in a probate matter where there was no application to sale the said house. The trial court was only to recognize the appellant as one of the heirs and that he be given his share.

It was further argued that the truth of the matter is that, the trial court before making its order was informed and availed with the High Court Land Division (No. 329/2015) decision to the effect that, the said house had long been sold in 2006 and its title transferred in 2015 to a third party (one Mehboob). In view thereof the trial court was to take

judicial notice of this fact. The said new owner was never summoned and to put salt to the wound, the appellant has already instituted an appeal with the supreme court of this land against the decision of the High Court Land Division. In light of the same the issue of ownership of the said house is yet to be decided. The respondent further explained that, even the High Court decision which gave the appellant a right to inherit is also subject of an appeal filed with the Court of Appeal.

On the other side of the coin the appellant argued that, the only means of him getting his share, was for the trial court to make an order for sale of the said house. The appellant had conceded that indeed he had filed an appeal with the Court of Appeal against the decision of the High Court Land Division which had declared Mehboob the legal owner of the said house. He did this after carrying out an official search with the Land Registry on 04/05/2016, only to find the property is still registered in the deceased's name. The appellant faulted the mentioning of the said Mehboob in the Primary Court since he was not a party to the said case neither did he feature in the whole process.

Considering the above arguments, the District Court invoking its revisionary powers made an order to the effect that, ***“the order of the Kariakoo Primary Court to sale the house on Plot No. 9 Block “A” Aggrey Street be set aside since there is a pending matter in the Court of Appeal over the ownership of this house”***.

Further that; ***“should the Court of Appeal decide that the house was illegally sold and that it is still the property of the deceased the order of the Primary Court will stand”***.

It is now that the appellant has filed the instant appeal which is grounded on 25 grounds of appeal. When the appeal was called up for hearing it was agreed and ordered that the same for the sake of justice be disposed by way of written submissions. In the course of the submissions it has been found that, the appellant had decided to argue only 3 grounds which in his settled opinion will encompass all other grounds raised. The same are ground No. 21, 10 and 25.

In his written submission the appellant started off with the 21st ground that, the learned magistrate erred in law and fact by not considering the appellant's Counter Affidavit and submission. He argued that the magistrate simply considered what the respondent had pleaded in her Affidavit, Re-joinder and what she *suo motto* thought to be the facts of the case through not pleaded. Nothing on the part of the appellant was ever considered. In his opinion he submits, it is as though the application was heard Ex-parte. The appellant feels injustice was occasioned and is enough to nullify the decision of the District Court.

The appellant clarifies further that, in his Counter Affidavit Para 2, 4 and 20 had stated that, it is not proper for the respondent to object the sale of the probate house by filling a revision in the District Court without filling objection proceedings in the Primary Court. Had the respondent filed objection proceedings then a suit would have commenced and the disputed decree (the Land Case No. 329/2015) received as an exhibit. Further the said Mehboob Yusuf Osman summoned as the respondent's witness. Without this

procedure of filing objection proceeding, the appellant was definitely denied of his right of hearing.

The appellant proceeded further to move the court to find that, by the District Court imputing that the record shows that the house was sold to Mehboob Yusuf Osman and the respondent ordered to sign a deed of transfer was tantamount to imposing facts which were not pleaded by the two disputing camps. Neither were these facts supported by any legal document or law. The District Magistrate was to confine herself to the "owner" as registered in the land registry. In this case ownership is in the name of Fatma Mohamed as legal personal representative of Mohamed Khamis Abdallah. The decree of the High Court Land Division was hence irrelevant in this matter at the trial court.

The appellant complained that the District Court did not consider any other orders as raised by the appellant. Among these were the order that the respondent's appointment be revoked due to the fraud in appointing her. The foregoing notwithstanding, she had disobeyed the

trial court's sale order on allegations, she had sold the said house. To cap it all, for ten years the respondent had failed to file an inventory with the court as required by law.

In regard to the 10th ground of appeal, ***“that Land Case No. 329 of 2015 cannot effect the probate proceedings in the Primary Court because the respondent was sued in her personal capacity not as an administrator of the estate of the late Mohamed Khamis Abdallah”***. To this the appellant submitted, the decree in Land Case No. 329/2015 was decreed on Fatma Mohamed and not Fatma Mohamed as legal representative of Mohamed Khamis Abdallah (deceased).

Lastly on ground No. 25, ***“that the learned magistrate erred in law and fact by favouring the respondent when she failed to discharge her duties as an appellate court and a court with supervisory powers over primary court by not giving directions as to what should be done in the Primary Court after her judgment and how to deal with the administrator who has refused to execute the High Court decree”***.

Submitting on this ground, the appellant stated the court vested with supervisory powers over primary courts, had a duty to give directives as to how to deal with the administrator (respondent) who has refused to execute the Higher Court's decree. The order of the High Court was to the effect that the appellant be included in the list of heirs which had not been done. He had neither been given his lawful share according to the Islamic law. In the given scenario, the District Court should have given directives as to what should be done in order for the High Court decree be executed.

In the upshot, the appellant prays that this court finds, there is nothing showing that the respondent would be prejudiced by the Primary Court order of sale. It would only facilitate the respondent to give the appellant his share as was ordered by the High Court. In the event, the appellant prayed the appeal be allowed with costs, the decision of the District Court of Ilala be reversed and the order of the Primary Court be upheld. Further, the respondent's appointment be revoked and the appellant be appointed as the new administrator.

In response to ground 21 as filed by Jerome Joseph Msemwa, Advocate simply submitted that, the record speaks for itself. Both parties were given an opportunity to stage their submissions (fair hearing) on pleadings filed therein. Consequently, the court made its decision.

It was further submitted that, by the appellant arguing on matters such as:

- (a) The issue of procedure of objecting the sale in execution.*
- (b) The issue that the probate house was sold or not.*
- (c) Revocation of the respondent's grant of letters of Administration.*

The above will amount into introducing new grounds of appeal during the submission stage. The counsel called upon the court to find the appellant had clearly suggested that, he will only proceed to argue grounds 21, 10 and 25 and abandon the rest. Be as it may, even if these issues are considered at this stage, they are found to have no merits as they have no legs to stand on.

Submitting on the 10th ground of appeal, it was argued that the subject matter in Land Case No. 329/2015 (High Court Land Division) was the same property subject of the sale ordered by the Primary Court. This was the actual and core issue subject of the controversy. The trial court could not execute a High Court decree by virtue of the decision in the Land Case No. 329/2015. By that decision the property did not belong to the respondent nor was it the property of the estate of the late Mohamed Khamis Abdallah (deceased). This scenario is still existing and is still valid in law. On the same footing the two lower courts were bound by this decision (Land decision). The respondent prayed this ground should be dismissed.

Lastly on ground 25 of the appeal, the respondent's side submitted, the District Court under section 82 of Cap. 352 could not proceed to revoke the letters of appointment issued to the respondent. The obvious reason was that, the prayer ought to have been lodged in the Primary Court which had effected the appointment. It follows, since the High Court Land Case No. 329/2015 was in respect of

Plot No. 9 Block "A" Aggrey Street Kariakoo, the subject of Probate No. 81/2006 there was nothing upon which the District Court could exercise its supervisory powers.

In totality, the respondent prayed the appeal be dismissed for lack of merits.

In rejoinder the appellant submitted that the honourable Judge in Land Case No. 329/2015 acted without jurisdiction in determining ownership of a probate property in the said court. Once a court is not clothed with jurisdiction, its decision can not be binding on other courts as was the case in this matter. To cap it all, in the said Land Case (No. 329/2015) there is a decree without a judgment contrary to section 28 of the Civil Procedure Code Cap. 33 RE 2002.

On the issue of revocation, the appellant prayed by virtue of powers vested in this court (section 29 of the Magistrates Court's Act Cap. 11 R.E 2002), the court can still proceed and revoke the appointment of the respondent for failing to honour the Primary Court orders.

Commenting on the concluding part of the District Court's ruling in the revision, the appellant stated that this has an effect as an order for stay of execution. The Court of Appeal issues did not feature in the Affidavit, Counter Affidavit and the record below in the said matter. Thus it was erroneous for the Honourable District Magistrate to conclude as she did. The appellant made a prayer that if the appeal is not allowed he will never get his share of inheritance which he has fought for in 40 law suits in a period of eleven years.

The court has scrutinized the foregoing narrations and in a nutshell, the issue which is quite obvious is whether the District Court sitting as a revision court did make a proper and just decision in the circumstances of the matter.

The appellant on one side harbours a feeling that, it was wrong for the District Court to have reversed the sale order granted by the trial court and in so doing had not considered the pleadings he had filed before the said court. On the other side of the coin the respondent is comfortable with the same. Perusing through the

respondent's Affidavit, Re-joinder Affidavit and appellant's Counter Affidavit it is observed that the District Magistrate did consider the same. Paragraph 9,13,14 of the respondent's Affidavit clarify in clear terms that the respondent had already convened a meeting to recognize the appellant as one of the heirs as ordered by the High Court but was unable to make any division of the estate available to the appellant. The reason being the house had already been sold to one Mehboob way back in 2005 and ownership transferred accordingly.

On the other side the appellant in his Counter-Affidavit specifically paragraph 6, 11, 14 and 16 he seems to recognize that, indeed the said property was sold and he has taken stern steps. These include reporting to the Police, the PCCB and the Honourable Chief Justice on the way the High Court (Land Division) had colluded with the respondent to swindle the estate by selling the disputed house to one Mehboob.

Considering the above, the magistrate after going through the pleadings and the submissions from both parties made during the hearing was of the firm view (at Page 2 of

the ruling) that, ***“the court declared Mehboob Osman the rightful owner in Land Case No. 329/2015. The applicant was compelled by court’s order to sign the Deed of Transfer. The High Court Land Division so declared on 16/12/2015”***.

The Honourable Magistrate at Page 3 of the ruling makes the following observation;

“The respondent in this revision is aware of this High Court decision and he told this court that he has made an appeal to the Court of Appeal which is yet to be determined”.

Given the glaring facts deponed and submitted by the two camps, that is when the court proceeded to make its finding that the disputed house which the Primary Court ordered to be sold for the appellant to enjoy his share as one of the heirs had **already** been declared to be someone else's property. The Court of Appeal is yet to decide otherwise, hence it was not proper for the trial court to order for its sale. This court supports the District Court's findings in all fours which encompassed the pleadings from the two camps and respective submissions. The District Court in that regard was

only faced with the question as to whether the trial court was justified to order for the sale of the disputed house. It was therefore not proper for the District Court to indulge itself into extraneous matters such as objection proceedings, whether the house was sold or not and the issue of revocation of the respondent's letters of administration. On the foregoing reasons this ground of appeal fails.

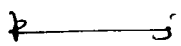
As regards the 10th ground of appeal it is found to be misplaced since as already pointed out the core of the appeal is on the issue of the reversed order of the trial court, which had ordered the sale of the probate house. It was not on the *locus standi* of the respondent in the purported sale but the house itself whose status had been determine in the Land Case No. 329/2015. The ground is found to have no merits.

Lastly, the 25th ground of appeal, if the ruling is read well, there is in fact an order written in black and while that, the trial court's order was reversed pending the Court of Appeal decision. The court further advised that, should the Court of Appeal decide that it was illegally sold then the order of the

Primary Court will stand. In that regard the District Court was not only giving directives but the way forward of this matter in the future. This ground fails.

All said and done, the appeal is found to have no merits and is accordingly dismissed. I make no orders to costs as the parties herein are closely related.

Read this day of 02/05/2018 in the presence of Geoffrey Said for Msemwa for respondent and the appellant in person.


B. R. Mutungi

JUDGE

02/05/2018

Right of appeal explained.


B. R. Mutungi

JUDGE

02/05/2018