

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**PC CIVIL APPEAL NO. 73 OF 2019**

(Arising from the Ruling of District Court of Kinondoni in Misc. Civil Application No. 105 of 2017, date on 18<sup>th</sup> of day of May, 2018 before Hon. Lihambwike **RM**, Original Probate Cause No. 35 of 2005 Kinondoni Primary Court)

**ADELINA MBAYUWAYU ..... 1<sup>ST</sup> APPELLANT**

**THOMAS YOMO ..... 2<sup>ND</sup> APPELLANT**

*VERSUS*

**PHILIMONI MIRONGO ..... 1<sup>ST</sup> RESPONDENT**

**IGALULA AUCTION MART AND BROKERS LTD ..... 2<sup>ND</sup> RESPONDENT**

**FIDEA S. NJOKA ..... 3<sup>RD</sup> RESPONDENT**

**HALIMA S. NJOKA ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

*05<sup>th</sup> June & 03<sup>d</sup> July, 2020*

**E. E. Kakolaki, J**

This is an appeal by the appellants from the decision of kinondoni District Court in Misc. Civil Application No. 105 of 2017 the decision which was entered in favour of the respondents by dismissing appellants' application for revision. The appeal is contested by the respondent. Both parties appeared represented on the 05/05/2020 and

by consent agreed to be disposed the appeal by way of written submission. Filing schedule was issued by the court and complied with. The appellants were represented by Mr. Augustine Mathern Kusalika learned advocate whereas the respondents enjoyed the services of Ms. Fatuma Mwaja Kazimoto learned advocate.

Briefly the background story that gave rise to this appeal goes as hereunder. Before Kinondoni Primary Court in Probate Cause No. 35 of 2005 on 10/08/2015 the 2<sup>nd</sup> Appellant and 3<sup>rd</sup> Respondent were appointed administrator and administratrix of the estate of the late Steven S. Njoka who passed away on the 18/03/2004 at Muhimbili National Hospital. It appears he was survived with a widow one Fidea S. Njoka (3<sup>rd</sup> respondent) and nine children, five of which are from different mothers. He also left behind some estates one of which is house No. 312, located at Luponda Street Magomeni Makuti "A" within Kinondoni Municipality, Dar es salaam the subject of this appeal.

On noting that the house No. 312 at Magomeni Makuti "A" was to be treated as part of the deceased estate on the 08/05/2013 the 1<sup>st</sup> appellant appeared before the primary court and informed the court that the said house was not part of the estate as it was given to her and the deceased by one Gibson Jonathan Mawala as a gift long time ago. And that they continued to live therein with her four children until when the deceased met his demise as they had separated with him (deceased). Upon such assertion the court ordered for letter of inquiry from the Kinondoni Municipality land registry in which vide its letter dated 30/05/2013 with Ref. No. KMC/MTP/130 confirmed the owner of house to be the late Steven S. Njoka and recognised land and property tax payer. Basing on that letter the court decided that the house was falling

under the deceased estates. The 1<sup>st</sup> appellant unsuccessfully challenged that decision in the District Court Kinondoni Probate Appeal No. 6 of 2013 whose decision was entered on 24/03/2015. Before the 2<sup>nd</sup> appellant and 3<sup>rd</sup> respondent as administrator and administratrix could finalise their function and duties on the 07/03/2017 appeared before the primary court and renounced their office. And on the 23/03/2017 the primary court upon hearing other witnesses and the proposed new administrators approved said renunciation office by the 1<sup>st</sup> appellant and 3<sup>rd</sup> respondent and replaced them by appointing the 1<sup>st</sup> and 4<sup>th</sup> respondents as new administrator and administratrix respectively. The court also ordered the first administrators of estate to return the letters of appointment in which they complied with.

On the 02/08/2017 the 1<sup>st</sup> Respondent as administrator of estate appeared before the trial court praying for court's assistance to evict the 1<sup>st</sup> appellant from the suit house so as to allow the administrators to perform their duties as they had secured a buyer of the house in dispute, the prayer which was supported by Amina Steven Njoka and Winfrida Njoka both deceased daughters. Having heard them the primary court ordered a letter to be written to the District Court requesting for the appointment of the person or court broker to assist the administrators perform their function. It would appear the court broker was appointed as a result the 1<sup>st</sup> appellant rushed to the District Court of Kinondoni and on 15/01/2018 secured an order to stay her eviction vide Misc. Civil Application No. 104 of 2017 pending hearing and determination of the main application for revision in Misc. Civil Application No. 105 of 2017 which is the subject of this appeal. Following that stay and before disposal of the main application on the

12/02/2018 the administrator once again called at the primary court for assistance to evict the 1<sup>st</sup> appellant but his prayer was dismissed as the eviction process was stayed. On the 18/05/2018 the revision application by the appellants was dismissed as a result they appealed to this court canvassed with three grounds as follows:

1. That the Honourable Trial Court erred in law and fact in failing to examine the preposition that the 1<sup>st</sup> appellant and his children were given the house which is situated at Plot No. 312 Luponda Magomeni Makuti area Kinondoni Dar es salaam by the 2<sup>nd</sup> appellant and 3<sup>rd</sup> respondent during the distribution of the estates of the late Steven Njoka.
2. That the Honourable Trial Court erred in law and fact in holding that the decision of the primary court of Kinondoni of evicting the 1<sup>st</sup> appellant and thereafter selling the same should proceed while the said house which is situated at Plot No. 312 Luponda Magomeni Makuti area Kinondoni Dar es salaam was given to the 1<sup>st</sup> appellant during the distribution of the estates of the late Steven Njoka since 2005.
3. That the Honourable Trial Court erred in law and in fact in blessing the nullification of the 2<sup>nd</sup> appellant and 3<sup>rd</sup> respondent from being administrators of the estates of the late Steven Njoka without involving the 2<sup>nd</sup> appellant.

I hasten to state from the outset that in this appeal I will consider and determine each ground seriatim. Submitting on the first ground Mr. Kusalika is faulting the trial court allegedly for failing to examine the decision of the primary court of Kinondoni that evicted the 1<sup>st</sup> appellant and her children from the house in dispute No. 312 situated at

Magomeni Makuti "A" area Kinondoni, Dar es salaam. He maintained that, there is evidence that the 1<sup>st</sup> appellant was given the said house the evidence which is confirmed by the 2<sup>nd</sup> appellant and the 3<sup>rd</sup> respondent who also gave her full control of the house as first administrators of the estate of the late Steven S. Njoka and never disturbed her before.

Countering Mr. Kusalika's submission on the first ground Ms. Kazimoto for the respondents challenged the assertion that the said disputed house was allocated to the 1<sup>st</sup> appellant as there is no proof that she was married to the deceased and that the said house was acquired under joint efforts between the 1<sup>st</sup> appellant and the deceased. She stated further that the first administrators failed to prove that at the time of the purported distribution the 1<sup>st</sup> appellant was the deceased wife to entitle her to that house. He prayed the court to dismiss the ground. In rejoinder submission on this ground Mr. Kusalika contended that the respondent avoided to comment anything concerning the deceased children who are residing in the said house which fact was appreciated even by the clan meeting.

There is no dispute that the 1<sup>st</sup> appellant and her children were living in the said disputed house for a number of years. The only disputed issues are whether the same was bequeathed to the 1<sup>st</sup> appellant by the deceased and later distributed to her by the first administrators as alleged by the 1<sup>st</sup> appellant and whether it falls under estates of the deceased. A glance of an eye has revealed that there is nothing in the record of the primary court to suggest that the said house was bequeathed to the 1<sup>st</sup> appellant before or after the deceased death nor is there evidence to prove that the first administrators filed inventory of

the assets collected and account of the distributed estates to the heirs and other beneficiaries. And further no evidence was tendered by the 1<sup>st</sup> appellant to prove her ownership apart from mere assertion that it was given to her. Thus the appellants' assertion that the said house was allocated to the 1<sup>st</sup> appellant is unfounded. What is in record and which was considered by the trial court in its totality is that on the 08/05/2013 when the 1<sup>st</sup> appellant appeared in court to claim ownership of the house, the court ordered search to be conducted in Land Registry of Kinondoni Municipality by letter. The response made through a letter with Ref. No. KMC/MTP/130 dated 30/05/2013 proved to the court that the said house was owned by Steven Njoka (the deceased). It is from that evidence the primary court came to the conclusion and found that the said disputed house falls under the deceased estate thus subject to distribution. The preferred appeal to challenge this decision by the 1<sup>st</sup> appellant in the District Court of Kinondoni Probate Appeal No. 6 of 2013 was dismissed. No further appeal was preferred by the appellants thus the primary court's decision remained sound and the said house continued to be under the estates of the deceased. The appellants' complaint that the trial court failed to examine the primary court's decision is therefore baseless. It is from those reasons I hold the view that this ground lacks merit and is dismissed.

On the second ground Mr. Kusalika is challenging the trial court for blessing the decision of the primary court of Kinondoni of evicting the 1<sup>st</sup> appellant from the suit house and order for sale despite the fact that the said house was distributed to her since 2005. That by so doing the rights of her children to inherit their father's estate were infringed. He said the court erred to determine the issue of land ownership when



issuing eviction and sale order the function which is imposed upon land courts. Responding to this ground Ms. Kazimoto submitted that the eviction was issued by the primary court and blessed by the trial court upon administrator's prayer and after a complaint was raised by him that the 1<sup>st</sup> appellant was staying in a house unlawful as the same was not distributed to her while the beneficiaries were languishing. That it was administrator's decision that the said house be sold and the proceeds distributed amongst the beneficiaries so her eviction was inevitable. In rejoinder Mr. Kusalika said the assertion that there was resolution to sale the said house was never disclosed in court and that her 1<sup>st</sup> appellant's children was not part of it. Thus this ground is bound to succeed, Mr. Kusalika submitted.

In this ground I am not prepared to agree with Mr. Kusalika that the trial court assumed functions conferred to the land courts of determining the ownership of the land. What the primary court did was within its powers as found out by the trial court. Powers of the Primary Court concerning administration matters are derived from the provisions of section 19(1)(c) of the Magistrates Courts Act, [Cap. 11 R.E 2019] and paragraph 2 of the fifth schedule to the Act. There is also Primary Courts (Administration of Estates) Rules, GN. No. 49 of 1971 that prescribe for powers and procedures to be followed by the Primary Courts in Administration of Estates. Rule 8 of the Rules stipulates the matters that the primary court may hear and decide on. It provides as follows:

***Rule 8.** Subject to the provisions of any other law for the time being applicable the court may, in the exercise of the jurisdiction conferred on it by the provisions of the Fifth Schedule to the Act,*

*but not in derogation thereof, hear and decide any of the following matters, namely:-*

- (a) Whether a person died testate or instate;*
- (b) Whether any document alleged to be a will was or was not a valid or subsisting will,*
- (c) Any question as to the identity of persons named as heirs, executors or beneficiaries in the will;*
- (d) Any question as to the property, assets or liabilities which vested in or lay on the deceased person at the time of his death;*
- (e) Any question relating to the payment of debts of the deceased person out of his estate;*
- (f) Any question relating to the sale, 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;*
- (g) Any question relating to investment of money forming part of the estate; or*
- (h) Any question relating to expenses to be incurred on the administration of estates."*

Basing of the above cited provisions of the law it is patent clear that under rule 8(d) the primary court was right to inquire from the Kinondoni Municipality to establish whether the disputed house belonged to the deceased before his death and whether it falls under his estate or not. With regard to the allegation of primary court issuing sale order my perusal of the primary court records have unearthed nothing to prove



that serious allegation. No sale order was ever made apart from the evidence tendered in court on 02/08/2017 by the 1<sup>st</sup> respondent as administrator of estate supported by Amina Steven Njoka and Winfrida Njoka that they had secured a buyer and wished to sale the disputed house so as to distribute the proceeds of sale amongst the beneficiaries. It follows therefore that the trial court correctly reached its decision and I have no reasons to fault it. Thus this ground has not merit.

With regard to the third ground Mr. Kusalika is faulting the trial court for blessing the nullification of the 2<sup>nd</sup> appellant and 3<sup>rd</sup> respondent from being administrators of the estate of the late Steven S. Njoka. He laments that the process did not involve the 2<sup>nd</sup> appellant as it was commenced and forced by the District Administrative Secretary for Kinondoni District. He therefore prayed that the 1<sup>st</sup> and 4<sup>th</sup> respondents' appointment as administrators of the estate of the late Steven S. Njoka be revoked as were illegally appointed. In her response Ms. Kazimoto was brief that the first administrators' nullification based on their own will and further that this point cannot be raised at this point for it was never raised before in the primary court. And on the challenge of appointment of new administrators she echoed that their appointment was never challenged by any party from the primary court to the trial court's stage. It is therefore strange to challenge it at this stage of appeal thus the ground is devoid of merit, Ms. Kazimoto contended. She prayed generally for dismissal of the appeal with costs.

It is true and I subscribe to Ms. Kazimoto's submission that the first administrators denounced their office wilfully. This fact is fetched from the evidence in the primary court proceeding dated 07/03/2017 when the 2<sup>nd</sup> appellant and 3<sup>rd</sup> respondent appeared before the primary court

and informed the court that they were willingly denouncing their office. The court on 23/03/2017 proceeded to nullify their appointment and order them to return their letters of appointment. In turn the 1<sup>st</sup> and 4<sup>th</sup> respondents replaced them. It is settled law that under section 110 of the Evidence Act, [Cap. 6 R.E 2019] he who alleges must prove. As there is no evidence to prove that the first administrators were forced to denounce their office, I am inclined to find the said assertion to be unfounded. With regard to revocation of the 1<sup>st</sup> and 4<sup>th</sup> respondents as new administrators I also share Ms. Kazimoto's lucid submission that their appointment have never been challenged before and cannot be done at this stage. Anyone who fills dissatisfied with their appointment or their performance in the office is at liberty to challenge the process in the primary court. It follows therefore that this ground is devoid of merit and I dismiss it.

In the circumstances and for the foregoing reasons I am inclined to hold that this appeal is devoid of merits and is hereby dismissed in its entirety with costs.

It is so ordered.

DATED at DAR ES SALAAM this 03<sup>rd</sup> day of July, 2020.

  
E.E. KAKOLAKI

**JUDGE**

03/07/2020

Delivered at Dar es Salaam this 03<sup>rd</sup> day of July, 2020 in the presence the Mr. Augustino Kusarika learned advocate for appellant, Mr.

Cyprian Sirungwa Advocate holding brief for advocate Davis Katesigwa for the respondent and Ms. **Lulu Masasi**, Court clerk.

Right of appeal explained.



E. E. Kakolaki

**JUDGE**

**03/07/2020**

