

**IN THE HIGH COURT OF TANZANIA
(DODOMA DISTRICT REGISTRY)
AT DODOMA**

LAND CASE APPEAL NO. 3 OF 2019

(Arising from the Land Application No. 161 of 2016 in the District
Land and Housing Tribunal for Dodoma at Dodoma)

1. MEHERUN JINAT KASSAM }
2. JINAT ABDALLAH KASSAM } **APPELLANTS**

VERSUS

BAHADUR ABDALLAH HIRJI **DEFENDANT**

24/6/2020 & 6/7/2020

JUDGMENT

MASAJU, J

The Respondent, Bahadur Abdallah Hirji successfully sued the Appellants, Maherun Jinat Kassam and Jinat Abdallah Kassam, in the District Land and Housing Tribunal for Dodoma at Dodoma. Aggrieved by the trial Tribunal's decision, the Appellants came to the Court by way of an appeal. Their Memorandum of appeal is made up of three (3) grounds of appeal praying the Court to allow the appeal with costs. The Respondent did not file any reply in the Court.

When the appeal was heard in the Court on the 7th day of October, 2019 and the 18th day of May, 2020, the Appellants were represented by Mr. Paul Nyangarika, the learned counsel while the Respondent was in service of Mr. Isaya Edward Nchimbi the learned counsel on the first day of hearing and was later on represented by Mr. Godfrey Wasonga, learned counsel.

The Appellants vide the service of their learned counsel consolidated the three (3) grounds of appeal into one and submitted that, the property in dispute, Plot No. 1 Block 3 Madukani – Tembo Avenue Siasa Street, Dodoma Municipality was the property of the late Abdallah Hirji who by the time of his death, he was survived with six (6) issues one of them being dead. By now there are five (5) issues, one of them being the Respondent who was appointed the administrator of the estate of the late Abdallah Hirji in 1994. That, the Respondent applied for the suitland to be transferred to him as legal representative in his capacity as administrator of the estate of the late Abdallah Hirji.

That, the trial Tribunal erred in deciding that the suitland belonged to the Respondent by mere fact that the Respondent retained ownership of the suitland. That, the Respondent's appointment as administrator has since been revoked. That, Nizar Abdallah Hirji (PW3) testified to that effect in the trial Tribunal as it can be reflected at page 30 of the copy of proceedings of the trial Tribunal.

That, Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 was not complied with the trial Tribunal since the opinion of the assessors who were of the opinion that the suitland belongs to all the issues, was not reflected in the record of proceedings, pursuant to **Emmanuel Christopher Lukamay V. Juma Omar Mrisho (CAT) Civil Appeal No. 21 of 2013, Dar es Salaam Registry (Unreported)**. The Appellants prayed the Court to allow the appeal with costs.

On his part, the Respondent through the the service of his learned counsels submitted against the appeal that, there is no dispute that the suitland belonged to the late Abdallah Hirji who died testate, that there is a will. That, the suitland belongs to the Respondent for the late Abdallah Hirji bequeathed it to the Respondent. That, the will had never been contested by the Appellants. That, the Respondent's appointment as administrator of the estate of the late Abdallah Hirji has never been revoked. That, there is no evidence to support that allegation.

The Respondent went on submitting that, he tendered a certificate of right of occupancy in the trial Tribunal to support his ownership. The said certificate has never been challenged by the Appellants. That, this is not a probate matter but it is a suit over ownership of the land.

The Respondent finalized his submissions by arguing that, the 1st Appellant claimed to be the owner of the suitland but she did not have any

documentary proof of the alleged ownership contrary to section 110 of the Evidence Act, [Cap 6]. That, it is true that the Respondent allocated the suitland to himself in the course of administration of the estate. The Respondent then prayed the Court to dismiss the appeal accordingly.

In Rejoinder, the Appellants submitted that, there is no proof that there had been a will and the same had never been part of the record as an exhibit in the trial Tribunal's proceedings. The Appellant's learned counsel cited the case of **Waziri Maneno Choka V. Abasi Choka (CAT) Civil Appeal No. 51 of 1999, Dar es Salaam Registry, (Unreported)** where the Court held at page 9, thus;

"Bequeaths in excess of the legal third cannot take effect, unless heirs consent thereto after the death of the testator."

The Appellant then prayed the Court to allow the meritorious appeal.

That is what was shared by the parties in support of and against the appeal in the Court.

There is no doubt that the suitland, Plot No. 1, Block 3, Madukani Tembo Avenue/Siasa Street within Dodoma Municipality was owned by the late Abdallah Hirji who died in 1983 according to the trial Tribunal's record of proceedings. The 1st Appellant and the Respondent being among the surviving five issues of the late Abdallah Hirji, the 1st Appellant being the sister of the Respondent who is the last born (brother). The 2nd Appellant being the 1st Appellant's husband.

It is also not disputed that the Respondent was appointed an administrator of the estate of their late father, in Probate Cause No. 35 of 1994 before Dodoma Urban Primary Court. And that, in 1995, the Respondent under the legal capacity of an administrator of the estate of his late father he transferred ownership of the land in dispute to himself.

The trial Tribunal's record of proceedings shows that the parties live together on the land in dispute. The 1st Appellant and her husband, the 2nd Appellant, started living in the property house in 1987, as well as conducting business there. In 2013 the Respondent started demanding the Appellants to pay land rents for their matrimonial home and the commercial rooms as tenants to the tune of 500,000/= monthly. The Appellants did not comply to the requirement, that is when the Respondent intituted Application No. 161 of 2016 in the District Land and Housing Tribunal for Dodoma claiming for the rent arrears and vacant possession of the suitland.

Annexure R '1' is Probate Form No. IV of the Respondent's appointment as administrator of the late Abdallah Hirji, thus the Court is satisfied of the fact that he was appointed as an administrator. Nizar Abdallah Hirji (DW3) who testified in the Court as the 1st Appellant and the Respondent's brother also tendered a decision of the District Court of Dodoma at Dodoma in Miscellaneous Civil Application No. 54 of 2016 where the Respondent's relatives prayed the Court to help them order the Respondent to distribute the estate to the beneficiaries. The Respondent

was ordered to distribute the estate to the beneficiaries in the Primary Court where the Probate Cause No. 135 of 1994 was instituted.

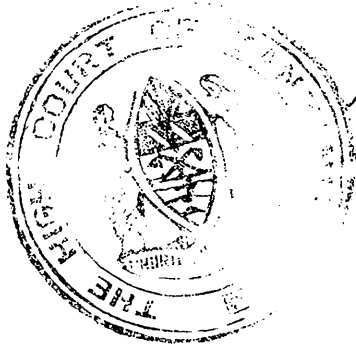
This shows very clear that the land in dispute is still under administration of the estate of the late Abdallah Hirji and the Respondent being an administrator has not yet performed his duty of distributing the same to the beneficiaries as per the requirement of Rule 5 of the Fifth Schedule of the Magistrates' Courts Act, [Cap II].

The issue raised by the Respondent that he was bequeathed the land in dispute through a will can not stand because the will was not tendered to prove the fact, as well as, the right procedure was not followed. The property was to be distributed in the Dodoma Urban Primary Court and Probate Form No. VI be issued to him, for him to transfer the land to himself as a beneficiary and not an administrator. The Respondent did not have any documentary evidence supporting the legality of his transferring the suit land to his ownership. Thus the title deed was illegally obtained.

The court is of the considered position that, since the land in dispute is still under administration of the estate of the late Abdallah Hirji, that is Probate Cause No. 35 of 1994 before Dodoma Urban Primary Court, yet to be concluded, the District Land and Housing Tribunal for Dodoma had no jurisdiction to entertain the matter, In **Mgeni Seif V. Mohamed Yahya Khalfani, Civil Appeal No. 1 of 2009 (CAT) at Dar es Salaam Registry**, the Court held, thus;

"When there is a dispute over the estate of the deceased, only the probate and administration Court seized of the matter can decide on the ownership."

That said, the meritorious appeal is allowed accordingly. The decision and decree by the District Land and Housing Tribunal for Dodoma at Dodoma is quashed and set aside respectively. The unduly pending Probate Cause No. 135 of 1994 before the Dodoma Urban Primary Court should be concluded in accordance with the law applicable as soon as practicable and in any case within not more than four (4) months of this judgment. The parties shall bear their own costs.



GEORGE M. MASAJU

JUDGE

6/7/2020