

IN THE HIGH COURT OF TANZANI

(LAND DIVISION)

AT MTWARA

LAND CASE REVISION NO.1 OF 2019

(Arising from Land Appeal No.2 of 2008 District Land and Housing Tribunal for Mtwara,
Originating from Land Dispute No.33/2007 Nanhnyanga Ward Tribunal)

FRANK EDWARD.....APPLICANT

(ADMINISTRATOR OF THE ESTATES OF THE LATE ASHA SWALEHE)

VERSUS

HAWA SWALEHE MKAMBA RESPONDENT

RULING

8 & 24 June, 2020

DYANSOBERA, J.:

The applicant, Frank Edward is seeking revision of the proceedings of the District Land and Housing Tribunal for Mtwara in Land Appeal No.2 of 2008 whose judgment was delivered on 17.03.2008. He craves for the said

judgment to be quashed and set aside together with the subsequent orders. The applicant has moved this court under section 43 (1) (b) of the Land Disputes Courts Act, No. 2 of 2002 and section 79 (1) (a) (c) of the Civil Procedure Code [Cap. 33 R.E 2002]. The grounds in support of the application are contained in the applicant's affidavit.

Before I determine these revisional proceedings, a brief background of the matter is apposite. On 22.11.2007 Fahadi Gharibu, the younger son of Asha Swalehe Mkamba (the deceased) filed a suit against the respondent Hawa Swalehe Mkamba before Nanhnyanga Ward Tribunal in Tandahimba District. The claim was on ownership of the suit land which, allegedly, belonged to his late mother. The Ward Tribunal heard and determined the matter rendering judgment in favour of the respondent. Fahadi Gharibu was aggrieved by the decision of the trial Tribunal and appealed to the District Land and Housing Tribunal for Mtwara. On 17th March, 2008, the appellate Tribunal upheld the decision of the Ward Tribunal declaring respondent the lawful owner of the suit land she claimed to have inherited from her late mother one Lukia Hamdani. Subsequent to the first appellate Tribunal declaring the respondent the rightful owner of the suit premises, she (respondent) executed the decree by filing an application for

execution. During the execution exercise, Namic Investment Limited and Court Broker was appointed to conduct the execution, the duty it performed by evicting Fahad Gharibu from the suit farm and handing it over to the respondent. It is on record that sometime in 2013 the respondent filed a criminal case before Tandahimba Urban Primary Court against the Applicant and Fahadi Gharibu on criminal trespass contrary to section 299 of The Penal Code, Cap 16 R.E 2002. The applicant and Fahadi Gharibu were found guilty and convicted and subsequent to that, they were sentenced to pay a fine of Tshs. 60,000/= or to serve a three months imprisonment, in default of payment of the fine. Seeing this, the applicant, having been appointed as administrator of the estate of the late Asha Swalehe did, in the year 2019, successfully apply for extension of time to apply for revision against the decision of the District Land and Housing Tribunal for Mtwara. The application was granted by this court on 11th October, 2019 hence these revisional proceedings.

Now, coming to the application on hand, in the affidavit of the applicant who is the son of the late Asha Swalehe (promoted to Heaven in 2005), it is averred that the deceased, during her life time, legally owned a piece of land located at Nanhnyanga Ward, Tandahimba District in Mtwara Region

since 2004 after it was given to her as a gift by her father one Swalehe Halfan Mkamba. It is further averred that soon after the demise of Asha Swalehe, the family members convened a meeting and appointed the respondent one Hawa Swalehe Mkamba as a guardian entrusted to take care of the deceased's estates which included the suit land and serving legates and beneficiaries. At paragraph 8, the applicant averred that at the age of 14 years in his personal capacity one Fahadi Gharibu being among the heirs and beneficiaries of the estates of the late Asha Swalehe approached the respondent to recover the disputed land but astonishingly, the former denied and claimed ownership of the same. The applicant then applied for letters of administration and the same were granted to him. Soon after his appointment, he discovered that Fahadi Gharibu had initiated a complaint against the respondent one Hawa Swalehe Mkamba via Land Dispute No. 33 of 2007 before the Nanhnyanga Ward Tribunal with a view to recover the disputed land which forms part of the deceased's estate and the Tribunal had decreed in favour of the respondent. An appeal was preferred to the District Land and Housing Tribunal in Land Appeal No. 02 of 2008 which confirmed the decision of the trial Ward Tribunal. An execution was subsequently initiated and effected.

Since both the applicant and Fahad Gharib believed that they were using the suit farm as their mother's property, their guardian one Hawa Salehe Makamba initiated criminal proceedings vide Criminal Case No. 80 of 2012 before Tandahimba Urban Primary Court which resulted into their being fined Ths. 60,000/= on criminal trespass.

In response to these revisional proceedings, the respondent filed her affidavit in which she admitted some contents in the applicant's affidavit and at the same time denying others. She vehemently averred that the late Asha Swalehe had never owned the suit land. She, therefore, put the applicant to strict proof.

During the hearing of these revisional proceedings, the applicant Frank Edward enjoyed the legal services Mr. Robert Dadaya, learned advocate, in the time, the respondent was represented by Mr. Gide Magila, learned counsel.

Mr. Dadaya adopted the contents of affidavits affirmed by Frank Edward and Fahadi Gharibu and in amplifying them, dwelt much on the 15th paragraph of the applicant's affidavit which run as follows:

"15. That I have filed this revision in order to cure the mischief and illegalities namely:-

- i. That the decisions and orders from both the trial and first appellate Tribunal originate from illegal proceedings due to lack of locus standi by all parties imitated the proceedings without letters of administration.*
- ii. That the said Fahad Gharibu equally initiated the proceedings for recovery of the suit land while he was a mior with no capacity either to sue, 'be sued, contract or represent anybody in any transaction*
- iii. That, the trial Tribunal had no jurisdiction to entertain the matter since it was or ascertained. Alternatively, the first appellate Tribunal gross erred for not making inquiries thereunto:*

In expounding on these grounds, Mr. Dadaya combined the 2nd and 3rd grounds. As regards the 1st ground, he contended that the proceedings were a nullity on the original matter and the subsequent appeal. He argued that Fahadi Gharibu had no power to institute Land Dispute No. 33 of 2007 before Nanhnyanga Ward Tribunal as well as Appeal No. 2 of 2008 in the District Land and Housing Tribunal for Mtwara. According to him, Fahadi

Gharibu was recovering the estate of his late mother Asha Swalehe as such he ought to possess the letters of administration before he had filed that matter. It was learned counsel's further argument that it is the law that a matter can be instituted in court by either an administrator or an executor. To fortify his argument he cited sections 70 (a) (b) and (c) and 71 of the Probate and Administrator of Estates Act [Cap 352 R.E 2002] and various court decisions. The referred cases are **Keiphas Masome Kulwa v. the Returning officers and others** [1996] TLR 320, **Lujuna S. Balonzi S. V. Registered Trustees of Chama cha Mapinduzi** [1996] TLR 205, the **Registered Trustees of Catholic Arch. Diocese of Nyari and Another v. Standard Limited** (2003) Vol. 1 EA 257 and **Kajubi Kayanja** [1967] EA 301. It was his view that lack of letters of administration went to the very root of the powers of the litigant and the remedy is nullifying the proceedings.

Learned counsel for the applicant further contended that the Tribunals failed to properly use their powers which led to the miscarriage of justice which vitiated the proceedings hence liable to be quashed at that level. Cementing his argument, the learned counsel cited the case of **Abdurahman Abdurahman and Others v. Majid Hamis**, Land Appeal

No. 16 of 2014 at page 5 where Hon. Twaib J. nullified the decision of the District Land and Housing Tribunal for Mtwara as the person who instituted the matter had no power.

On the 2nd and 3rd grounds, Mr. Dadaya submitted that Fahadi Gharibu filed Land case No. 33 of 2007 while he was a child of 14 years old, hence a minor with no legal capacity to sue or be sued only through a next friend. He insisted that the aim is to prevent a child from losing his/her rights or incur liabilities. He vowed that the age was confirmed by the District Land and Housing.

Learned counsel cited Order XXXI Rule 1, 2 (1) of Civil Procedure Code, [Cap 33 R.E 2002] on cases which should be instituted by the next friend of a minor. This court was also referred to the Book of B.D. Chipeta **Civil Procedure in Tanzania** – a Student's Manual, at page 256. Mr. Dadaya pressed that both the original and appeal cases were not properly before the Registry. They were a nullity and should be so declared so that competent persons should institute the matters according to laid down procedures. Learned counsel also prayed for costs.

In response, Mr. Gide Magila, learned counsel for the respondent, refuted the contents of the applicant's affidavit on ownership of the disputed piece of land contending that such matter has to be proved when the main matter is heard. As regards the contents of paragraph 15 of the applicant's affidavit, Mr. Magila, avowing to be a court officer who has to assist the court to administer justice, conceded that both Tribunals lacked powers for failure to take into account the capacities of the litigants and invited this court to order a re-trial but by persons with legal capacities to sue and be sued. As to the award of costs, Mr. Magila prayed that each part to bear its own costs.

In his rejoinder Mr. Dadaya informed the court that his addressing the court on the ownership of the suit land, it was just an endeavour to give a brief history of the matter and did not intend to go in detail. Since Mr. Magila has conceded. Mr. Dadaya insisted that the proceedings to be nullified with costs.

Having summarized the background, the averments in the affidavits and the submissions, I am now in a good position to determine this application. From records of this application there is no dispute that the suit land was claimed to be owned by the late Asha Swalehe who is the

mother of applicant and Fahadi Gharibu. Likewise the respondent claimed that the suit land was owned by her late mother one Lukia Hamdani. It is also not disputed that none of the parties was granted letters of administering the estates of the mentioned deceased persons neither were they executors of the probate of the wills as both deceased died intestate. This means that they lacked capacity to sue and being sued in respect of the properties of the deceased persons. As rightly contented by Mr. Robert Dadaya, and conceded by Mr. Gide Magila, the law is settled that a matter concerning the estate of the deceased can only be instituted in a court of law by either the administrator who has been granted letters of administration or an executor who has been granted a probate of a will. On this I need not cite any authority save to insist that both Fahadi Gharibu and the respondent herein lacked capacity to initiate and prosecute the matter before the Ward Tribunal of Nanhnyanga and the District Land and Housing Tribunal for Mtwara. Given the fact that the persons claimed to own the suit land are all dead, Fahad Gharibu and the respondent were required to have either probate of wills if the deceased died testate or the letters for administration of the estates if the deceased died intestate as

was the case in this matter. Otherwise, Fahadi Gharibu and the respondent lacked *locus standi* to sue or be sued over the suit land.

Furthermore, I join hands with Mr. Dadaya that Fahadi Gharibu brought the matter to the attention of the Ward Tribunal and the District Land and Housing Tribunal while he was aged fourteen (14) years. He was, therefore, a minor and could only sue through a next friend. The age of the said Fahad Gharib is reflected at page 1 of the Complaint Form presented at the Ward Tribunal and annexure A-2 (Copy of the affidavit of Fahadi Haribu when he filed Land Dispute No.33/2007 before Nanhnyanga Ward Tribunal and also under paragraph 5, seventh line from top of page 3 of the typed judgment of the District Land and Housing Tribunal for Mtwara. name through a next friend.

It is unfortunate that the District Land and Housing Tribunal lost sight of this serious anomaly. Admittedly, the provision of law as cited by the learned counsel for the applicant that is Order XXXI Rule 1, 2(1) of Civil Procedure Code (*supra*) is very elaborative on how a minor as was Fahadi Gharibu had to bring the matters before the Tribunals.

Being aware of what transpired from the Ward Tribunal and District Land and Housing Tribunal for Mtwara I am of the settled view that Fahadi

Gharibu, a minor as he was, lacked legal capacity to sue the respondent without a next friend. Additionally, he also he lacked *locus standi* he having been granted neither probate of the will nor letters of administration. Locus standi is the right to bring an action in a court of law. This right, as correctly pointed out by Mr. Robert Dadaya, is circumscribable.

In my view, there has been an error material to the merits of the case involving injustice and the court cannot brook the illegality pass by.

I am inspired in this by the guidance of the Court of Appeal of Tanzania in the case of **Diamond Trust Bank Tanzania Ltd versus Idrisa Shehe Mohamed**, CAT Civil Appeal No. 262 of 2017 Zanzibar Registry at p. 12 of the typed judgment, where the Court of Appeal, speaking through Hon. Mbaruku, J.A had this to say:

"The superior courts have the additional duty of ensuring proper application of the laws by the courts below."

And further that,

"The court cannot normally justifiably close its eyes on a glaring illegality in any particular case because it has a duty

to ensuring proper application of the laws by subordinate courts.”

Admittedly, these revisional proceedings have been preferred under, inter alia, sub-sections (1) (b) of 43 of the Land Disputes Courts Act [Cap. 216 R.E.20002] on revisional powers of this court which stipulates as hereunder:

43.-

(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court

(a).....(not relevant)

(b) may in any proceedings determined in the District Land and Housing Tribunal in the exercise of its original, appellate or revisional jurisdiction, on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it may think fit.


Invoking sub-section (2) of section 43 of the above legislation, I grant the application and, accordingly, I revise the proceedings of both the

District Land and Housing Tribunal for Mtwara in Land Appeal No. 2 of 2008 and the Nanhnyanga Ward Tribunal in Land Dispute No. 33 of 2007 by nullifying all proceedings, judgments and orders subsequent thereto.

Parties are advised to pursue their legal rights in accordance with the dictates of the laws of the land. Each party to bear his/her own costs.

Order accordingly.





W. P. Dyansobera

JUDGE

24.6.2020

This ruling is delivered under my hand and the seal of this Court on this 24th day of June, 2020 in the presence of Mr. Shadrack Rweikiza, learned counsel for the applicant and in the presence of Mr. Gide Magila, learned advocate for the respondent.




W.P. Dyansobera

JUDGE