IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

LAND APPEAL NO. 09 OF 2019

(Arising from the Decision of the District and Housing Tribunal for Kahama in Land Case No. 88/2016)

PASCHAL JUMA NG'WENDESHA..... APPELLANT

Versus

AMOS NDAKI.....RESPONDENT

JUDGMENT

Date of the last Order: 19th June, 2020
Date of the Judgment: 14th August, 2020

MKWIZU, J.:

This appeal originates from application No.88 of 2016 instituted in Kahama District Land and Housing Tribunal. In those proceedings below, the respondent prayed for a declaration that Tabitha Julius Brashi is a lawful owner of the suit premises which were bequeathed to her by her late husband Julius Brashi and that appellant is a trespasser and therefore be permanently retrained from trespassing on the suit premises.

Appellant resisted the application, while agreeing that the property was lawfully owned by the late Julius Brashi, he said, on his death, Julius Brashi left a WILL in which Tabitha Julius Brashi was given three rooms for dwelling purposes only but the house was left under the care of Juma Brashi from whom he inherited the suit premises through a WILL dated 11th November,2005.

The tribunal declared the respondent a lawful owner of the suit premises and appellant was declared a trespasser and permanently restrained from interfering with the applicant's premises.

Appellant **PASCHAL JUMA NG'WENDESHA** is aggrieved by that decision. He has come to this court with a petition of appeal containing four grounds of appeal reproduced as follows;

1. That the Chairman erred in law and in facts for relaying on a revoked WILL of the late JULIUS BRASH date 29th May, 1991 which was revoked by the WILL of 3rd September,1991
2. That the trial Chairman erred in Law and in facts to declare that Tabitha Brashi the Widow of the late Julius Brash is the

lawful owner of the disputed house while the dated 3rd September, 1991 declares for the Widow one Tabitha Brash should only use three rooms from the said house in dispute for the rest of her house.

3. That the trial Chairman erred in law and in facts to deliver his decision in favor of the respondent herein basing on poor and weak evidence adduced, and ignoring strong evidence of the appellant herein during the hearing.

4. That the Trial Chairman erred in law and in facts for reaching erroneous in favor of the Respondent gerein named as Administrator of the estate of the late JULIUS BRUSH, while for the moment as time required by the law for administrator of the estate he was no longer administrator of the estate hence lacks locus stand for the same.

In their reply to the memorandum of appeal filed in this court on 30/4/2019, respondent raised a preliminary objection to the effect that the appeal is time barred.

Both the preliminary objection and the appeal were heard by way of written submissions. The court was minded to first decide on the preliminary objection and, depending on the outcome, it WILL decide on the merit of the appeal. Both parties filed their respective submissions on the preliminary objection and the appeal. Appellant had the service of Advocate Pastorry Biyengo whereas Elisha Amos also learned counsel, represented the Respondent.

Submitting in support of the preliminary objection, Mr. Elisha Amos stated that, judgement and decree subject of this appeal was delivered on 20/2/2018 while the appeal was filed on 5/4/2019 almost 400 days after the delivery of the impugned judgement contrary to section 41 (1) of the Land Dispute court's Act.

In his response to the preliminary objection, Mr. Biyengo, counsel for the appellant contended that, it is true the impugned decision was delivered on 29/2/2018. On the same date, they applied for copies of the proceedings, judgement and decree which he was supplied on 20/2/2019.

Mr. Biyengo explained further that, section 19 (1) (2) and (3) of the Law of Limitation Act allows exclusion in computation of the time limitations, the days used in obtaining copies of the judgment and decree. He was of the view that, from 20/2/2019 when the appellant was supplied with the necessary copies to 5 April, 2019 when the appeal was filed is only 44 days out of 45 days prescribed by the law and therefore the appeal was within time. He cited the case of **Registered Trustees of Marian Faith Healing Center @ Wanamaombi V. The Catholic Church Sumbawanga Dioces**, Civil appeal no. 64 of 2007 and prayed to have the preliminary objection overruled with costs.

I have considered the rival submissions. The appeal before the court originates from the decision by District Land and Housing Tribunal whose appeal are governed by Section 41 of the Land Dispute Court Act which

requires any party aggrieved by the decision of the DLHT in its original jurisdiction to file an appeal within 45 days from the date of the said decision. In terms of section 19 (2) of the Law of Limitation Act Cap. 89, the requisite time used to obtain copies of Judgment and Decree is excluded from computations of the time within which the appellant is required to lodge his/her appeal. It reads:-

> *"(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal, or an application for review of judgment, the day on which the judgment complained of was delivered, and the period of time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed, shall be excluded"*

As the records would reveal, the judgement was delivered on 20/2/2018.The appellant wrote to the tribunal requesting for copies of the proceeding, judgment and decree on 20/2/2018. The requested documents were supplied to the appellant on 20/2/2019.This appeal was filed on 5th April, 2019 within 45 days from the date when copies of judgment and decree were availed to the appellant. Since, under section 19 (2) of the Law of

Limitation Act cited above, the appellant was entitled to exclusion of the period he was waiting for a copy of the decision, then the time between 20th February 2018 when the judgment was delivered to 20th February, 2019 when the requested copies of judgment and decree were issued is not to be included in computing the time limitations. This is the position in the cited case of **Registered Trustees of Marian Faith Healing Center @ Wanamaombi** (Supra). For the above reasons, I find the appeal timely filed and therefore, the preliminary objection is without merit. It is hereby overruled.

Now coming back to the main appeal, Mr. Biyengo opted to argued grounds 1 and 2 jointly and 3 and 4 grounds separately, that is one after the other. Submitting on the first two grounds, Mr. Biyengo contended that, trial tribunal erred in law and fact for relying on the WILL of the late Julius Brash dated 29th May 1991 of which its admission was challenged. On why the said WILL was challenged, he gave the following reasons ***one***, that it was meant only for few properties, the house in dispute located in Plot No. 23 Block C, furniture with the house assert, Music Instruments, and the Guest house allocated on plot No. 21 Block C only and excluded the rest of the deceased's

properties contrary to the law. **Two**, that it was made for a single person, Miss TABITHA BRASH, the wife of the deceased excluding other beneficiaries such as children. **Three**, that respondent witnessed a Promise date 3rd September, 1991 which he later disputed it's legality before the said Tribunal. He queried on how the respondent distributed the deceased's estate using the said WILL and not the promise given by the deceased on 3rd September, 1991 in his presence.

On the 3rd ground, Mr. Biyengo submitted that, the Chairman erred in law and in facts for giving a decision basing on poor and weak evidence adduced by the respondent ignoring a strong evidence of the Appellant. He said, the tribunal entertained a hearsay evidence given by two witnesses called by the respondent. He said, the tribunal wrongly and without any justification refused to admit Juma Ng'wendesha's WILL dated 11th November, 2005 and Form IV which altogether gave right of ownership of the suit premises to the appellant.

On the 4th ground, Mr. Biyengo argued that, the Chairman erred in law and in facts for reaching its erroneous decision in favour of the Respondent

herein, the administrator of the estate of the late JULIUS BRASH, who had no locus stand at the time of the filing and adjudication of the matter. He was of the view that, respondent failed to prove why he was still regarding himself as the Administrator of the late Julus Brushi, for more than 24 years. He relied on the provisions of **section 107 (1), (2) and (3) of the Probate and Administration of estate Act, Cap 352 R:E 2002 a**nd the case of **Lucas John Mkuya V. Honorath M. Urassa,** Misc. Land Appeal No. 52 of 2018 Hc **Benny Mganga Bwire V. Rio Development Ltd & 4 Others,** HC at Dar es salaam Land Case No. 56 of 2019 (All unreported). Mr. Biyengo finally urged the court to allow the appeal and quash the decision of the Kahama District Land and Housing Tribunal with costs.

Mr. Elisha Amos for respondent supported the decision of the trial tribunal. He submitted that, there was nothing that was brought at the trial tribunal showing revocation of the WILL being complained of. To him, the tribunal was justified to appreciate the contents of the WILL date 29th May 1991 which gave Thabitha Brash Plot N. 23 Block "C" and not a Promise dated 3rd September 1991 without showing revocation of the first WILL.

Answering to the issue why administrator was still handling the issue of administration of the deceased's estate over 24 years, Mr. Amos was of the view that, being a land matter, administrator was legally allowed to intervene under section 35 of the Law of Limitation Act, Cap 89 RE 2002 .He therefore prayed this court to dismiss the appeal with costs.

Having considered the trial tribunal's record, the ground of appeal and reply thereto together with the submissions by the learned counsels, the main issue for determinations is whether the appear is merited or not.

To start with the 1 and 2 grounds of appeal, i.e. Whether the trial tribunal erred in law and in facts for relying on the WILL of late Julius Julius Brashi dated 29th May. It is evident from the records that, application No.88 of 2016 was for declaration that Tabitha Julius Brashi is a lawful owner of the suit premises which were bequeathed to her by her late husband Julius Brashi ,a lawful owner and that appellant is a trespasser. It was argued and agreed by both parties that, the suit premises belonged to the Late Julius Brash and

further that he, via a WILL dated 29th May, 1991, bestowed the suit premises to his wife Tabitha Julius Brash. The complaint by the appellant is that in the said WILL, Tabitha Julius Brashi was given three rooms for dwelling purposes only but the house was left under the care of Juma Brashi. On this issue, appellant was recorded at page 17 of the trial tribunal's proceedings to have said:

> *"The disputed land was the property of the late Julius brash and he had other properties and the late issued a WILL while Thabitta was given only three rooms to dwell in the disputed house but all what has been stated is nothing but rather than trespassing the disuted land; the WILL he wrote on 03/09/1991 which it divided the disputed land"*

As already pointed above, there is no dispute that the suit premises was the property of the late Julius Brash. Appellant claimed to be the lawful owner of the same premises through a WILL left by the late Juma Ng'wendesha dated 11th November,2005.On how Juma Ng'endesha got hold of the suit premises, appellant said, the house in dispute was left under the care of Ng'endesha via a promise written by the late Julius Brasha in September,

3,1991 . Now whether the suit premise was left to Thabitha Brashi or Juma Ng'endesha, the content of the said WILL unfold the truth of the matter.

Exhibit 3, a WILL dated 29/5/1991 titled **"WOSIA WA MZEE JULIAS BRASH ALIOUTOA TAREHE 29/5/1991"** states:

2.kwamba nyumba ya ndoa ambayo ndiyo ninayoishi yenye kitalu No. 23 Block C pamoja na vyombo vya nyumbani akabidhiwe mke wangu ***TABISA W/O J. BRASH*** *ambaye ni mke wangu tuliyeoana naye mwaka 1942.*

3..N/A

4.Kwamba mapato ya nyumba vitatu vya nyumba ya wageni Plot 21, karibu na nyumba ambayo tunaishi awe anapewa mke wangu TABIA W/o BRASH (sic) kwa matumizi yake ya kila siku kwa Maisha yake yote..."

There is no doubt from the above part of the quoted WILL that the house in dispute was bequeathed to Tabitha Brashi.

Both parties are also at one that Julius Brash later on 3/09/1991 wrote a promise (AHADI) **AHADI YA URITHI WA MALI ZA MZEE JULIUS BUSLASH 3/9/1991.** This document was not tendered as exhibit in this matter, its copy was just appended in the written statement of defence and therefore not part of the evidence.

My perusal of the proceedings reveals that, the WILL dated 29/5/1991 was a valid WILL. It was never revoked, meaning that, despite of a promise made on 3/9/1991, nothing was done to revoke the said WILL. The tribunal correctly, in my view found that the promise which came later did not neither amend the WILL nor revoked it anyhow. In other words, the WILL left by the late Julius Brash which bestowed the house in dipute to Tabitha Julius Brush remained undisturbed to date.

On another instance, appellant queried the validity of the said WILL on the ground that, it included only one person excluding other heirs and that it excluded other properties belonging to the testator. This is a new issue. It was never raised at the trial tribunal. The trial tribunal's decision confined itself on issues which were framed before the commencement of the hearing

and these were (1) *Whether the applicant is the Legal Administrator of the Estate of the* ***late JULIUS BRASHI*** *(ii) Who is the owner of a house Located at plot No. 23 Block "C" Lumelezi Kahama(iii) Whether the respondent is a trespasser (iv) What relief(s) if any parties are entitles to?*

The issue of the validity of the WILL was never raised at the trial tribunal and therefore it is wrong to fault the tribunal for something it was not called upon to decide on. In the case of **Hotel travertine Limited and two others V. National Bank of Commerce Limited** (2006) TLR 133, it was held that

> *"As a matter of general principle an appellate court cannot consider matters not taken or pleaded in the court below to be raised on appeal"*

Correspondingly, in this case the appellant cannot be allowed to raise issues that was not canvased by the trial tribunal. It should, however be noted that, even if the issue of the validity of the WILL would have been raised, the tribunal had no jurisdiction to adjudicate the issue. This is the domain of the

trial Court that appointed the respondent administrator of the estate of the late Julius Brushi.

Ground 3 of the appeal WILL not take much of my time. In this ground appellant is faulting the trial chairman for finding in favour of the respondents basing on poor and weak evidence while ignoring strong evidence adduced by the appellant. As stated above in relation to grounds 1 and 2 of the appeal, It was proved that the house in dispute was bequeathed to Tabitha Julius Brush through a valid WILL. In other words, appellant failed to say why he should be declared owner of the suit premises.

Having found that the WILL dated 29/5/1991 was still in force, then it goes without saying that, the house in dispute remained the property of Tabitha Julius Brushi and nothing was left for Juma Ngwendesha and that being the case, Juma Ng'wendesha could not bequeath something which is not his. see the case of **Farah Mohamed Vs. Fatuma Abdallah** [1992] TLR 205 (HC), where it was stated that:

"he who doesn't have legal title to the land cannot pass good title over the same to another".

This ground also fails.

In 4th ground of appeal, appellant is questioning the respondent's locus stand in this matter. His contention is that respondent has not indicated why he is still administrating the deceased's estate for 24 years since 1992 he was appointed administrator of the late Julius brush's estate. Both counsel had refereed this court to section 107 of the Probate and Administration of estate Act, Cap 352.It should be stated here that, this law is inapplicable in this matter. This is because, respondent was appointed administrator of the estate of late Julius brush by the primary Court whose applicable law is the 5th schedule to the Magistrate courts Act. In this ground, the appellants complaint is on delay in exhibiting inventory by the respondent. This is again a misconception. If at all there was a delay or any question regarding the respondent's administrator ship , the appellant, could make an application for revocation under Part I of the Fifth schedule to the Magistrate Court Act, Cap 11 R.E 2019 .This is to be made before the trial court which granted the letters of administration which is mandated to revoke the letters of

administration upon sufficient cause. The DLHT had no mandate to deal with the issue of administration of estate as hinted herein above. I have gone through the case of **Benny Mganga Bwire V. Rio Development Ltd & 4 Others, (supra)** cited by the appellant's counsel on this point. The case is distinguishable. In that case, the court found that the plaintiffs who were originally administrators of the estate in which one of the properties was in dispute , were fully discharged of their duties as administrator of the said estate after satisfying the court that the estate was duly administered , the court at page 3 of the typed judgement said:

> *"...In the said order, the plaintiffs who were joint administrators of the estate of the late raphael Petro Kabande, were fully discharged of their duties as Administrators of the said estate after satisfying the court that, the estate was duly administered. The estate was accordingly closed..."*

Again in, Lucas John Mkuya V. Honorath M. Urassa, (supra)also cited by the appellant's counsel, the facts are different. In this case, the appellant had filed a land case claiming the property to be of his late father without

first being appointed an administrator of the said estate. My sister Makani J at page 7 and 8 of the typed judgement had this to say:

> *"having established that the appellant did not have the mandate (locus stand) to initiate the application, then the subsequent order was for the proceedings in the Ward Tribunal to be declared a nullity and the decision therein be quashed and set aside. The rational is easy to comprehend since the initiator of the case had no mandate, there was thus nothing to act upon.*
>
> *...it was improper for the Ward Tribunal and most importantly the district tribunal to have proceeded with the case and subsequent orders, after noting the defect that appellant was not appropriately mandated to file the land application at the Ward tribunal while he was not an appointed administrator of his fathers estate."*

This is not the case here, there was nothing said in evidence apart from the averment in the first paragraph of the amended written statement of defence that explained why appellant is in doubt of the respondent's letters of administration. The respondent tendered in court documents proving that he

was appointed administrator of the late Julius brush's estate and nothing was laid to indicate that he was discharged from his responsibility.

All said and done, I find the appeal lacking in merit, it is hereby dismissed with cost

It is so ordered.

DATED at **SHINYANGA** this 14 day of **AUGUST**, 2020.

E.Y.MKWIZU
JUDGE
14/08/2020

COURT: Right of appeal explained.

THE HIGH COURT OF TANZANIA

E.Y.MKWIZU
JUDGE
14/08/2020