

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

PC CIVIL APPEAL NO. 48 OF 2020

(Originating from Probate Appeal No. 20 of 2017 at Kinondoni District Court)

**AZIZA IBRAHIM AHMEDAPPELLANT
VERSUS
HAMAD ABBAS.....RESPONDENT**

JUDGMENT

MASABO, J.

This is a second appeal. The Appellant Aziza Ibrahim Ahmed being an administratrix of the estate of the late Thereza Alphonse Lukanguzi prays this court to reverse the decision of the District Court of Kinondoni in Probate Appeal No. 20 of 2017. In this decision, the court ordered that the house located at Plot No. 39 Block, D Sinza B in Dar es salaam (disputed house) be excluded from the deceased's estates. Her appeal is premised on four grounds of appeal namely;

1. That the learned Magistrate erred in law and fact in ordering the exclusion of the disputed house from the estates of the late Thereza Alphonse Lukanguzi.
2. That had the learned magistrate considered that Land Registry failed to recognize the decision of Hon. Mwandu in Civil Case No. 143 of 1997 as the same was contrary to the alleged agreement between ABBAS ALI HAMIS and THEREZA ALPHONCE LUKANGUZI.

3. That the trial magistrate erred in law in his failure to consider that, the matter was time barred as Abbas Ali Hamis went to Kinondoni Land Housing Tribunal in Application No.211 of 2005 to claim the said property and he failed.
4. That taking into consideration that from 1988 up to 2012 the said house was legally registered in the name of Thereza ALPHONCE Lukanguzi (the deceased) therefore the appellant is legally entitled to administer the estate.

The brief back ground of the appeal is that, the deceased was the registered owner of the disputed house. On 18th October 1978, the deceased and one Abbasi Ali Khamis (her husband) agreed to have the disputed house registered in the name of Ahmada Abbasi Ali Hamisi (their son and the respondent herein) who was at the material time 4 years only. In 1997, they litigated over the disputed house in Case No 143 of 1997 before the Court of the Resident Magistrate for Dar es Salaam at Kisutu where it was ordered that, the disputed house be registered in the name of Ahmada Ali Hamis and his sibling, Kuluthum Abbasi Ali Hamis. However, no changes were affected to the title deed. In 2007, the deceased died interstate while the title deed was still registered in her name.

Upon her death, her three surviving children, Aziza Ahmed (the appellant herein) together with her two siblings Kuluthumu Abbasi Khamis and Hamad Abbasi (the respondent) successfully applied for joint administration of the deceased's estate in Marathi No. 128 of 2016 at Manzese Primary Court. In

the proceedings, the applicants indicated that the deceased left only one assets which is the disputed house. Hamad Abbasi was aggrieved. He filed an appeal in Probate Appeal No. 20 of 2017. before the District Court of Ilala. His first ground of appeal was that, the court erred in granting administration over the disputed house which was not the property of the deceased.

In the course of hearing of the appeal, the respondent brought to the attention of the court a decision delivered on 20th March 2000 by the Resident Magistrate Court for Dar es Salaam at Kisutu in Civil Case No. 143 of 1997 (between Abbas Ali Hamis and Theresia Alphonse (as above stated) vesting the ownership of the disputed plot into AHMADA ALLI HAMISI and KULUTHUM ABBASI ALLI HAMIS. Based on this record, the court ordered exclusion of the disputed house from the estate of Theresia Alphonse Lukaguzi. The instant appeal seeks to challenge this decision.

At the hearing of the appeal which proceeded in writing, the appellant made a long narration of the background of the appeal. Submitting in support of the 1st ground of appeal, she argued that although there was decree that the tile be registered in the names of AHMADA ALLI HAMISI and KULUTHUM ABBASI ALLI HAMIS, no transfer was effected. Thus, the tittle deed in respect of the disputed house bears the names of the deceased and for that matter, the deceased is the rightful owner of the disputed house. Therefore, it was wrong to exclude the house from her estate. She cited section 40 of the Land registration Act Cap. 334 RE 2019 and argued that registration in the Land Register is the only tangible evidence of an interest over land.

Hence, the bearer of a title deed is the lawful owner and/occupier of the disputed property.

She argued further that the decision of the Resident Magistrate Court in Civil Case No 143 of 1997 was wrong as it directed that the title be registered in the names of two persons above named whereas, the said decision was premised on an agreement concluded on 18th October 1978 between the deceased and Abbasi Ali Khamis (her husband) in which they agreed to have the disputed land registered in the name of Ahmada Abbasi Ali Khamisi (the respondent herein). Thus, the decision of the court was not in tandem with the agreement and because of that the Registrar of Titles declined to register it pursuant to section 42 of the Land Registration Act which empowers him to reject the registration of instrument if the instrument sought to be registered is defective. Further, she submitted that the decree of the court had serious clerical mistakes in the names of parties Abbas Ali Hamis and Terezia Alphonse Luganguzi but as of to date such mistakes have not been corrected hence it was wrong to say that the disputed property is not part of the estate as it has remained in the deceased's name.

On the 2nd ground of appeal, the order of the Resident Magistrate Court for Dar es Salaam at Kisutu in Civil Case No143 of 1997 has become ineffectual as it has not been executed. Her argument was that, the said decree was pronounced in 1998 which is about 20 years before the impugned appeal. Therefore, it was wrong for the appeal magistrate to rely on a decree which has not been executed for about 20 years as it has become ineffectual.

The respondent vehemently resisted. He submitted that, although the title deed of the disputed house bears the names of the deceased, the legal owners of the said property are Hamad Abbas and Kuluthum Abbas Khamis as per the decree in Case No 143 of 1997. He argued that, the duty of the administrator is to facilitate the transfer by applying to the Registrar of Titles so as to have the title deed registered in names of the administrators and to have it transferred to the respective owners. On the 2nd ground, he acknowledged that there are clerical errors in the name of the parties. In Civil Case No. 143 of 1997, the deceased name appears as Theresia Alphonse Lukanguzi whereas the name used in the agreement is Therezia Alphonse Luganguzi. He invited this court to invoke the provision of Article 107 A (2) (e) of the Constitution of the United Republic of Tanzania so as to rectify the anomaly.

I have carefully considered the length submissions from both parties. There is only one crucial issue to be determined by this court, namely whether the exclusion of the disputed property from the estate of the deceased was proper.

Before determining issue, I will first address a legal issue raised by the appellant regarding tendering of evidence on appeal. He has complained that the court un procedurally allowed the respondent to tender new evidence which was not tendered at the trial stage. The law is on tendering of new evidence on appeal is highly settled. The parties are precluded from

tendering new evidence on appeal save on exceptional circumstances. There is a plethora of the authorities on this subject. Needless to cite any of the authorities.

In the instant case, upon perusal of the records, I have observed as correctly argued by the appellant, the decision of the Court of the Resident Magistrate for Dar es Salaam at Kisutu in Civil Case No. 143 of 1997 was not produced at trial stage. I am however not inclined to his argument that the court was wrong in admitting the of judgment and using it in determining the issues between the parties. This is because, the evidence complained of is a court decision for which the court is bound to take judicial notice under section 59(1) of the Evidence Act, [Cap 6 RE 2019]. The first appellate court could not have turned a blind eye to the decision of the court which was brought to his attention to assist in dispensation of justice. As a court of law, not the court of the parties, it was bound to take judicial notice of the existence of the said decision even if the same was not brought to its attention by the parties. As held by the Court of Appeal in **Elias Kamagi v R.**, Criminal Appeal No. No. 118 of 1992, Court of Appeal of Tanzania at Mwanza (unreported) *"Justice may well be blind to personalities but it is certainly not blind to law"*. To that extent, although the argument raised rhymes very well with the position of the law pertaining to the admission of new evidence on appeal, it does not apply in this case.

Reverting to the question for determination, I have found it crucial to preface my determination with the definition of the term 'estate' as applied in our

jurisdiction, the status and duty of the administrator as they are fundamental in determining the main issue between the parties. The term 'estate' is not expressly defined under the Probate and Administration of Estates Act, [Cap 352 RE 2002]. It is however broadly used to encompass assets and liabilities of the deceased. Correspondingly, the duty of an executor or administrator of the estate is to collect all the properties which were in possession of the deceased pay debts due to the deceased if any, and faithfully distribute all the residuals to the heirs/beneficiaries. Section 108(1) of the Act state the following with regard to the duty of the administrator/executor.

108.-(1) The executor or administrator shall, with reasonable diligence, collect the property of the deceased and the debts that were due to him, pay the debts of the deceased and the debts and costs of administration, and distribute the estate to the persons or for the purposes entitled to the same or to trustees for such persons or for the purposes entitled to the same or to trustees for such persons or purposes or in accordance with the provisions of this Act, as the case may be.

These duties were further articulated by the Court of Appeal in **Joseph Shumbusho vs Mary Grace Tigerwa & Others** (Civil Appeal No.183 of 2016(unreported)), where it was stated that an executor or administrator of estate is a legal representative of the deceased, and:

"As a legal representative of the deceased's estates, all the deceased's estates are vested to him and has all the powers over the deceased assets as the deceased would have, save that he is acting in a representative capacity. As rightly submitted by the

learned counsel for the appellant, he is vested with the powers to sue in respect of all causes of action that survived the deceased, powers to recover debts due to the deceased at the time of his death, as the deceased had when he was living (section 100 of the Probate and Administration Act) and powers to dispose of property by way of sale, mortgage, leasing or otherwise in relation to immovable property (section 101 of the Probate and Administration Act). In addition, the law requires the legal representative to collect all debts due to the deceased and pay all the debts owed by the deceased."

In the instant case, the parties herein and one Kuluthum Abbasi Khamis are co- administrators of the estate of **Thereza Alfonce Lukanguzi** having being appointed on 7/8/2017 by the Primary Court for Kinondoni District at Manzese/Sinza in Mirathi Na. 128/2016. Pursuant to the authorities above, they are the legal representatives of the deceased with full powers to collect the properties of the deceased, pay her debts and distribute the residuals if any to the heirs.

As it could be discerned from the court record, it is a common fact between the parties that the disputed property is registered in the name of the deceased. It is equally common between them that the decree of the Resident Magistrate Court for Dar es Salaam at Kisutu in Civil Case No. 143 of 1997 vested the ownership of the disputed property under Hamad Abbas and Kuluthum Abbas Khamis. It is similarly indisputable that the fruits of the

said decree which was never realized as its title deed has remained in the deceased's name.

The appellant has invited me to disregard the decree on two grounds. First, it has errors and second, it was not executed hence it has become ineffectual. I will outright reject this invitation. Whether or not the decree vesting ownership of the disputed property into Hamad Abbas and Kuluthum Abbas Khamis was erroneous it is not a matter for this court to determine. It is to be noted that the instant appeal emanated from ***Mirathi Na. 128/2016*** and **Probate Appeal No. 20 of 2017**. Therefore, I am not clothed with appellate jurisdiction over Civil Case No. 143 of 1997. Any attempt to correct the judgment and decree in respect Civil Case No. 143 of 1997 would be tantamount to usurping the jurisdiction I do not have and will certainly render the proceedings of this appeal a nullity. Before I pen off on this issue, let me briefly add that, the avenue for correction of clerical mistakes in judgements is provided for under Section 96 of the Civil Procedure Code [Cap 33 RE 2019]. The parties may wish to pursue this option should they find it necessary. It is also to be noted that, neither the Probate Appeal No. 20 of 2017 nor the instant appeal are right forums to determine whether the decree of the court in Civil Case No. 143 of 1997 have become ineffectual by virtue of the Judgment holder's failure to execute it.

Based on what I have endeavoured to demonstrate above, there is nothing to fault the appeal magistrate's finding that although the disputed property

is in the name of the deceased, the ownership of such property passed from the deceased to Hamad Abbas and Kuluthum Abbas Khamis.

I however hold a different view on whether or not the disputed property forms part of the estate of the deceased. It would appear to me that the appeal magistrate's finding was based on a narrow interpretation of term estates to exclusively encompass assets owned by the deceased at her death. The definition is not in tandem with the broader definition applicable in our jurisdiction. In my firm view, the later dictates the inclusion of the disputed property as a liability to which the administrators are duty bound to facilitate transfer of ownership to the rightful owners by among other things surrendering the title deed to the Registrar of Titles and doing all matters incidental to. Excluding the said house from the estate will certainly hinder the registration of Hamad Abbas and Kuluthum Abbas Khamis as title holders.

To that extent, I allow to the appeal and direct the co-administrators to facilitate the registration of Hamad Abbas and Kuluthum Abbas Khamis as new title holders. Parties are to bear their respective costs.

DATED at DAR ES SALAAM this 21st day of October 2020



J.L. MASABO

JUDGE