IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY]

AT ARUSHA

LAND CASE NO. 04 OF 2017

FATUMA ALLY KHATIBU.....1ST PLAINTIFF

MGENI ALLY KHATIBU.....2ND PLAINTIFF

Versus

HUSSEIN BAKARI MINDIA.....DEFENDANT

JUDGMENT

25/08/2020 & 13/11/2020

MZUNA, J.:

Fatuma Ally Khatibu and Mgeni Ally Khatibu herein after referred to as the 1st and 2nd Plaintiff respectively, claims for share of ownership of a house located at Plot No. 23 Block 21 Kaloleni Street Arusha Region (hereafter the house in dispute) jointly owned together with Hussein Bakari Mindia, the defendant herein. They also pray for the court to nullify the eviction notice issued by the defendant and declare them as lawful heirs.

The background story shows, the said house was built by their late grand-mother Kindishi Mkindi who was survived by two children, their late mother Asha Bakari and their uncle, Hussein Bakari Mindia, the defendant herein. The late Kindishi Mkindi died in 1982. It is said according to the

plaintiffs (though no will was tendered as proof thereof), she bequeathed her estate, the suit house, between her two issues and part of it was also bequeathed to the mosque (Msikiti Mkuu wa Ijumaa) as wakf. The defendant was appointed as administrator of his late mother's estate through Probate and Administration Cause No. 9 of 1988 at Arusha Urban Primary Court (received as exhibit P1). The defendant failed to distribute the estate between the heirs. Consequently, his appointment was successfully revoked and replaced with the 1st plaintiff on 17th October, 2014.

Aggrieved, the defendant unsuccessfully appealed to the District court of Arusha through Civil Appeal No. 60 of 2014. On further appeal to this court, it was overturned by Dr. Opiyo J. vides PC Civil Appeal No. 28 of 2015 dated 9th August, 2016. On 13th January, 2017, the defendant served a notice of vacant possession against the plaintiffs in respect of the suit house prompting this suit as they allege that such notice is unlawful.

During the hearing the plaintiffs appeared in person unrepresented while Ms. Christina Kimale, learned advocate, represented the defendant. The plaintiffs paraded four witnesses while the defendant procured two.

Three issues were framed namely: **One,** Whether the High Court PC Civil Appeal No. 2 of 2016 revoked the appointment of Fatuma Ally as the administratrix of the estate of the late Asha Bakari; **Two,** a) Who as between the plaintiffs and the defendant is the lawful heir of the house on Plot No. 23 Block 21 Kaloleni Street Arusha; b) Whether the late Kindishi Mkindi bequeathed part of the suit house to the plaintiffs, and, **Three,** what reliefs to which the parties are entitled thereto.

Let me start with the first issue as to whether PC Civil Appeal No. 2 of 2016 revoked the appointment of the 1st plaintiff Fatuma Ally as administratrix of the estate of the late Asha Bakari.

Reading from the record and evidence, the said PC Civil Appeal No. 2 of 2016 was tendered and admitted in evidence as exhibit D3. Analysis of the same shows that the 1st plaintiff filed an inventory with leave of sale of the estate of her deceased mother (Asha Bakari) to the Arusha Urban Primary Court in 2014. The filed inventory was unsuccessfully objected by the defendant at the District Court of Arusha. On further appeal this court, (Massengi, J. as she then was), vides Pc Civil Appeal No. 2 of 2016 (Exhibit DE2) above referred, found that there was a dispute over which properties form part of the estate of the late Asha Bakari and that of Kindishi Mkindi.

The court ordered that the issue of ownership of estate ought to be determined first before dealing with inventory and accounts of estates. Therefore, it quashed the proceedings and set aside the decisions and orders of the lower courts purporting to settle the ownership of the properties listed in the inventory. In view of this therefore, the said PC Civil Appeal No. 2 of 2016 did not in any way revoke the appointment of the 1st plaintiff as the administratrix of the late Asha Bakari. That said, the first issue is resolved in the negative.

I revert to the second issue (sub issue (a)) who as between the plaintiffs and the defendant is the rightful owner of the disputed house?

The plaintiffs' case is that the suit house was inherited through a will left behind by their late grandmother, Kindishi Mkindi. That the said will bequeathed the interest in the said house to their mother and the defendant jointly. They are, therefore, claiming interest in the second degree of inheritance through their deceased mother.

The defendant, through the appointed person holding special power of attorney Shafiq Ramadhan Mkindi (DW1), has vehemently disputed the plaintiffs' claim on the ground that after death of Asha Bakari the house at

Kaloleni remained in the hands of Hussein Bakari the last born. That is in accordance to the customs of the Wa-Arusha tribe and Chaga tribe. They cannot inherit from their grandmother as their tradition does not allow ownership to pass to the uncle's family instead it goes to the father's family. That the Children of Ally Khatibu and Asha Bakari are four. Surprisingly it is the plaintiffs only who instituted this case as other children knows that they have no right from uncle's side. Further that the revocation of the defendant's administration was overruled by this court in PC Civil Appeal No. 2 of 2016.

As already intimated earlier, it is not in dispute that the plaintiffs claim ownership under inheritance from their grandmother through their late mother. The alleged inheritance is based on an unproved will left behind by the plaintiffs' grandmother. The defendant disputed this claim on ground that the said will is a forgery. However, there cannot be direct inheritance by the plaintiffs from their grandmother through their late mother in absence of administration of the latter's estate.

The record shows that the 1st plaintiff was appointed administratrix of her mother's estate and the same was finalized save for the portion in the disputed house which has not been distributed by the defendant in his

capacity as the administrator of the estate of the late Kindishi Mkindi. She later on sought revocation of the defendant in respect of an undistributed estate of her grandmother. However, the same was overturned by this court (Opiyo, J) in PC Civil Appeal No. 28 of 2015 (exhibit DE3) on the ground that there was no original record that could prove that the defendant did not close the administration of his deceased mother's estate. In that the revocation of the defendant was restored. The decision of both Arusha District court in Civil Appeal No. 59/2014 and Probate Cause No. 60/2014, Arusha Urban Primary court were quashed and set aside because they were determined while they were time barred.

Based on the above observation, it is not clear whether or not the administration of the late Kindishi Mkindi's estate was closed. The same applies to that of Asha Bakari. Be it as it may, the only possible way the plaintiffs can claim from the estate of Kindishi Mkindi is through administration of their mother's estate in the disputed house. I say so because it has not been disputed that the house in dispute was bequeathed to their mother and the defendant jointly according to DW1 based on the clan meeting which set at the home of Alhaji Mkindi, brother of the deceased Kindishi Mkindi. If that is the correct exposition of the existing and

undisputable facts, then there is no way either party can claim exclusive ownership over the disputed house. Guided by the pleadings and evidence by both parties, the disputed house belongs to both the defendant and plaintiffs' mother.

The alleged will was disputed for being a forgery. What the will goes further to allege and which has not been proved is the allegation that the mosque was given part of the rooms. That has never been proved. I cannot rely on the document not tendered in court.

The defence witnesses relied on the Wa-Arusha and Chaga tradition to deny rights of the plaintiffs, this however is contrary to Article 13 of the United Republic of Tanzania Constitution 1979, Cap 2 RE 2002 (as amended) which clearly states that:-

> *"13.* ***(1) Watu wote ni sawa mbele ya sheria na wanayo haki, bila ya ubaguzi wowote, kulindwa na kupata haki sawa mbele ya sheria.***
>
> *(2)...and (3)... (N/A)*
>
> *(4) Ni marufuku kwa mtu yeyote kubaguliwa na mtu au mamlaka yoyote inayotekeieza madaraka yake chini ya sheria yoyote au katika utekelezaji wa kazi au shughuli yoyote ya Mamlaka ya Nchi."*
>
> (Emphasis mine).

The defendant relied on the administration of the plaintiffs' father's estate (i.e Ally Khatibu) by Seleman Ally Khatibu, a fact not in issue. Denying the said two plaintiffs their right simply because they are women, and or other children born by Asha never claimed or that they had their two houses of their father, is unjust, illegal and without any merit. Similarly, being married or that at one time the first plaintiff stayed there with her husband and paid rent, cannot disentitle them their right over the suit house through inheritance as heirs. The defendant admitted that Kindishi Mkindi never left a will. The defendant if I may hasten to add, has no exclusive and superior title over the suit house because the powers of the administrator is just to distribute the estate to the beneficiaries not to own it alone based on traditional beliefs.

That being the case, the first and second plaintiff just like other beneficiaries, have equal right with the defendant over the suit house. This is an answer to the issue under consideration.

Now to the second issue (sub issue (b)), as to <u>whether the late Kindishi Mkindi bequeathed part of the disputed house to the plaintiffs?</u>

The evidence by the plaintiffs is that the disputed house was bequeathed to their mother and the defendant. This fact is also admitted by the defendant in the written statement of defence as well as oral evidence on record. The basis of the plaintiff's claim is that they are claiming ownership of the disputed house through inheritance from the share of their mother bequeathed under the last will of Kindishi Mkindi. However the said will was not tendered but even without that will, as intimated above, the duty of the appointed administrator is to administer the estate to the heirs. The defendant never done so. It is worth noting that PW2 Abdul Aziz Shaban Mkindi, who said had such a will never tendered it. However, since the plaintiffs have been staying there ever since when their mother passed away, I find and hold that the late Kindishi Mkindi never bequeathed part of the house to the plaintiffs (just like the defendant) but have their interest over the house through their late mother Asha.

Lastly is on *the reliefs* to which the parties are entitles thereto. It is on record that the defendant sought to evict the plaintiffs for the reasons that they do not have any claim over the disputed house. As alluded earlier the plaintiffs' claim is based on their deceased mother's share over the suit house under inheritance. The notice is unlawful for want of distribution as alleged

by the plaintiffs. The allegation that the plaintiffs were invited by the defendant into the house after selling their parents' house is not true because the defendant admitted it was agreed the house should be jointly owned together with their mother. He admitted as well used to submit the collected house rent to Asha. Even DW2 Hawa Athuman Shundi said the house of Kaloleni (a house in dispute) belonged to Kindidhi Mkindi, their grandmother while that of Bondeni belonged to Bakari Mindia who passed away before Kindishi Mkindi at the time when they were separated.

The plaintiffs I dare say and hold, have interest in the disputed house. The notice is illegal and invalid because the defendant is not the sole owner of the disputed house for the reasons already discussed herein above. The appointed administrator (the defendant) is hereby compelled to administer the estate of the deceased Kindishi Mkindi, to cover even the plaintiffs. This court cannot say how many rooms each should occupy, that is the duty of the administrator, the defendant, in view of what was held in the case of **Ibrahim Kusaga v. Emmanuel Mweta** [1986] TLR 26 (HC) that:-

> *"A Primary Court (even this court) ought not to distribute the estate of the deceased; that is the job of an administrator appointed by court."*

I fully associate myself to the above holding. Similarly, in our case this court is not the proper forum to decide specific share of ownership of the disputed house to the heirs, that is the duty of the administrator, the defendant.

In conclusion therefore, the suit house belongs jointly to the heirs including the plaintiffs and defendant. Otherwise the status *quo ante* is restored. No eviction should therefore be issued against the plaintiffs. The claim is partly allowed with no order for costs.

M. G. MZUNA,
JUDGE.
13. 11. 2020

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY]

AT ARUSHA

MISC. LAND APPEAL NO. 16 OF 2019

(C/F District Land and Housing Tribunal of Arusha, Land Appeal No. 22 of 2018, Original Land Application No. BKK /06 /17 at Kimnyaki Ward Tribunal)

MEISHOORI LORAMATU.....APPELLANT

Versus

SAIGURANI LORAMATU.....RESPONDENT

JUDGMENT

06/10/2020 & 13/11/2020

MZUNA, J.:

This appeal by Meishoori Loramatu is against the decision of the District Land and Housing Tribunal of Arusha (District Tribunal) which upheld the decision of Kimnyaki Ward Tribunal, (hereafter the trial Tribunal), which adjudged in favour of Saigurani Loramatu (the respondent).

The said respondent sued the appellant for ownership of unspecified parcel of land located at Kimnyaki Ward within Arusha Region. During the hearing at the trial Tribunal, the appellant never adduced evidence to counter that of the respondent presumably that he engaged an Advocate. As a result, the trial Tribunal proceeded ex parte.

Dissatisfied, the appellant filed appeal to the District Land and Housing Tribunal of Arusha which upheld the trial Tribunal's decision with costs. It found that the appellant was accorded the right to be heard but he unreasonably refused the same. Further aggrieved, the appellant preferred this second appeal with two grounds in the petition of appeal as follows:-

> ***First**, that the trial Tribunal entertained the case which was res judicata as the plot in dispute was already decided by the District Land and Housing Tribunal in Land Application No. 140 of 2011 between the appellant and Osanyai Loramatu.*
>
> ***Second**, that, the first appellate Tribunal erred in law and fact when it failed to appreciate that the Ward Tribunal contravened Section 16 (2) (a) of the Ward Tribunal Act, 1985.*

The appeal was disposed by way of written submissions. Both parties appeared in person and unrepresented. The respondent raised a preliminary point of time bar during his reply submissions.

The main issue for determination is whether the appeal was filed within the prescribed time?

The respondent submitted that the appeal is hopelessly incompetent for being filed out of time because the impugned District Tribunal's decision was delivered on 9th April, 2019 in the presence of both parties. The appeal was filed on 12th June, 2019 almost after the expiry of sixty (60) days stipulated under section 38 (1) of the Land Disputes Courts Act, Cap 216 RE 2002 (Cap 216). That in the absence of leave to file it out of time being sought and granted, the appeal is hopelessly out of time. He urged the court to dismiss it.

On his part, the appellant admits that the appeal was filed after the expiry of sixty days but the delay was caused by late supply of copies of judgment and decree. That, he applied for such copies on 25th April 2019 and another reminder on 3rd June, 2019 but was not supplied with same. Copies were annexed to the rejoinder submission. It is his view that the court should rely on Order XXX1X of the Civil Procedure Act, Cap 33 RE 2002 and section 19 (1) and (2) of the Law of Limitation Act, Cap 89 RE 2002. That the former provision requires necessity of annexing copies of judgment and decree whereas the latter provision directs that the time for supply of such copies should be excluded in computation of the appeal period.

I should not indulge in the merits of the appeal instead deal with the raised point of time limitation. I have decided to deal with this issue of time bar, because it is capable of disposing the appeal without going into the merits of the appeal.

The governing law clearly says that the party aggrieved by the decision of District Land and Housing Tribunal in its appellate and revision jurisdiction, may appeal to this court within sixty (60) days after the date of the decision. That is clearly stated under section 38 (1) of Cap 216 which I quote *in extenso* for emphasis: -

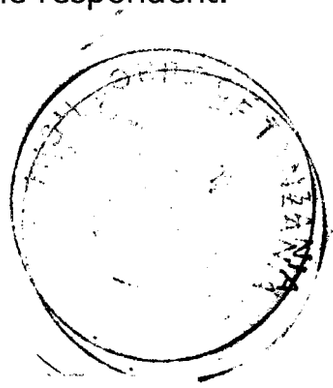
> *"Any party who is aggrieved by a decision or order of the District Land and Housing Tribunal in the exercise of its appellate or revisional jurisdiction,* ***may within sixty days after the date of the decision or order, appeal to the High Court ..."***
>
> (Emphasis mine)

In view of the above, therefore, any appeal filed beyond sixty days after the date of the decision by the District Land and Housing Tribunal must be made after the order of enlargement of time showing good cause for the delay in line with the proviso to section 38 (1) of Cap 216. The appellant as a matter of law (above reproduced) ought to have sought for leave of the

court to file the appeal out of the prescribed time as rightly submitted by the respondent.

Since there is no such leave sought and granted, the appeal is equally out of time. The appellant who engaged Mr. Richard Manyota from Legal and Human Rights Centre in drafting his submissions, must have known that the appeal is out of time. The alleged provisions of Order XXX1X of the CPC and section 19 (1) and (2) of the LLA, with due respect do not apply for an appeal which originates in the Ward Tribunal as there is specific law governing the matter at hand.

The appellant conceded that the appeal is out of time and I dare say for three days. There is therefore no proper appeal before the court. The ultimate effect is to strike out the appeal as it filed outside of the prescribed 60 days. The appeal which is incompetent is hereby struck out with costs in favour of the respondent.



M. G. MZUNA,

JUDGE.

13. 11. 2020