

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CIVIL APPEAL NO 28 OF 2020

1. ESTHER BHOKE BEGA _____ 1st APPELLANT

2. DAUDI NYAKARUNGU _____ 2nd APPELLANT

VERSUS

1. ROZA KIRUTU _____ 1st RESPONDENT

2. MANGAZENI BEGA _____ 2nd RESPONDENT

(Arising from the decision and orders of the district of Musoma at Musoma, Hon. Mushi SRM, in civil appeal no 111 of 2019 dated 05.05.2020)

RULING

2nd & 27th November 2020

GALEBA, J.

In order to understand what the issue in this appeal is, a relatively long narrative is unavoidable; I will start with the description of parties and to avoid confusion reference to them will be by their first names. In this matter, **ROZA** and **MANGAZENI** were husband and wife but they obtained a divorced order in 2015 but matrimonial assets were not divided. **ESTHER** and **DAUDI** are joint administrators of the estate of the late **BEGA NYAMWARYA** (the deceased) who died on 05.08.2014. **BEGA NYAMWARYA** was the husband of **ESTER**, the father of **MANGAZENI** and the father in law of **ROZA**. On his part, **DAUDI** was the deceased's

close relative he could refer to him as an uncle. In other words, all parties are closely related family members but three of them have interests that are diametrically opposed to those of **ROZA** the divorcee of **MANGAZENI**. The story will unfold slowly to full understanding as we go.

ROZA and **MANGAZENI** contracted marriage in 1987 but relations grew sour and in 2015 **ROZA** filed **matrimonial cause no 48 of 2015** at Kukirango primary court, where she managed to procure a divorce decree but as the issue of division of matrimonial assets was not addressed. To achieve that, she filed **matrimonial cause no 12 of 2016** in which assets were appropriately divided between **ROZA** and **MANGAZENI**. **ROZA** was dissatisfied so she filed **civil appeal no 38 of 2017** to the district court which somehow improved her share by ordering an equal division of the assets amongst the two parties to the dissolved union. A further appeal, **PC matrimonial appeal no 40 of 2017**, to the high court by **MANGAZENI** to challenge the 50/50 division of the assets was dismissed for want of prosecution by Makaramba J. of this court on 07.08.2018. That means therefore the valid decision on record remained the 50% division of the assets to each party.

A few days after the dismissal of **MANGAZENI**'s appeal in the high court, **ROZA** approached Kukirango primary court seeking enforcement of her 50% share in the matrimonial assets and by a ruling dated 20.08.2019, she was awarded assets contained in 17 items, and no 1 the list was "**1. Nyumba mbili za bati (2), Nyamongo (1) na madaraka (guest house)**". This last item, the guest house erected at Madaraka area in Kiabakari settlement, is the subject matter of this appeal.

When all the above were happening, it appears that **ESTHER** and **DAUDI** were also pursuing **probate and administration cause no 23 of 2019** at the same primary court of Kukirango because on 24.09.2019 the duo were appointed joint administrators of the estate of the late **BEGA NYAMWARYA** by Kukirango primary.

In pursuance of the order issued on 20.08.2019 listing the division of the assets in favour of parties, **ROZA**, with assistance of the ward executive officer, went to the house of **ESTHER** and among other things, attached 26 herds of cattle and the guest house, is the property in dispute in this appeal. The attachment was implemented but **ESTHER** and **DAUDI** were dissatisfied with the attachment so they filed **civil case no 105 of**

2019 at Kukirango primary court impleading **ROZA** and **MANGAZENI** moving that court to exclude the 26 herds of cattle, 6 goats 7 sheep and a guest house from the assets that are liable to attachment following the order for division of matrimonial assets. In resolving the matter, the primary court ordered that **ESTHER** and **DAUDI** were right only in respect of the 26 herd of cattle only which the court ordered to be restored to **ESTHER**, but attachment of other assets including the guest house located at Madaraka was ordered to continue because **ESTHER** and **DAUDI** did not prove that the house belonged to the estate of the deceased. They were aggrieved by that order maintaining that the guest house at Madaraka is part of the estate of the deceased.

Following the above grievance, **ESTHER** and **DAUDI** filed **civil appeal no 111 of 2019** in the district court of Musoma challenging the decision of the primary court in **civil case no 105 of 2019** for having ruled that they did not prove ownership of the guest house. The district court heard parties and on 05.05.2020, it dismissed that appeal with costs on grounds that **ESTHER** and **DAUDI** did not produce original documents

in proof of ownership of the guest house. It is this decision that **ESTHER** and **DAUDI** are now appealing before this court to challenge.

Although the complaints of **ESTHER** and **DAUDI** are contained in a petition of appeal with 6 substantive grounds, but going through the whole record and this appeal, and I noted that the issue between the parties is that of ownership of the guest house and the land upon which the same is erected. Having noted that, this court asked itself whether the primary court had jurisdiction to resolve land ownership of the guest house and whether the district court had appellate jurisdiction in land matters.

Because of the above two issues, I shelved the grounds of appeal and summoned parties to appear before me for appropriate orders on 23.11.2020. **ROZA** and **MANGAZENI** appeared but the appellants, **ESTHER** and **DAUDI** did not appear. So I adjourned the matter to 27.11.2020 for me to address the parties on the above land issue and make necessary orders.

On 27.11.2020, Mr. Masud Hamisi learned advocate appeared the appellants and submitted indeed the primary court had no jurisdiction to make a decision on who owned the house because it is not one the land

courts under the law. As other parties were lay, none had any useful contribution as to the way forward.

Section 167 (1) of the Land Act [Cap 113 RE 2002] establishes the dispute resolution mechanism for land matters. It states;

'167 (1) The following courts are hereby vested with exclusive jurisdiction, subject to the provisions of this Part, to hear and determine all manner of disputes, actions and proceedings concerning land, that is to say–

(a) the Court of Appeal;

(b) the Land Division of the High Court established in accordance with law for time being in force for establishing courts divisions;

(c) the District Land and Housing Tribunals;

(d) Ward Tribunals;

(e) Village Land Councils.'

In the above court system, the primary court and the district courts are missing; they are not part of the land dispute resolution legal system. The courts cannot declare a person as owner of any land.

Section 4(1) of the Land Disputes Courts Act [Cap 216 RE 2019] expressly states that courts established under the Magistrates Courts Act shall not exercise jurisdiction in land matters. It provides;

'4 (1) Unless otherwise provided by the Land Act, no Magistrate's Court established by the Magistrates' Courts Act shall have civil jurisdiction in any matter under the Land Act and the Village Land Act.'

From the above, the primary court at Kukirango and the district court in Musoma had no original and appellate jurisdiction respectively to deal with the guest house at Madaraka area. In other words, when Kukirango primary court noted that the issue between the parties turned out to be a land dispute of who was the real owner of the land between the family of the respondents and that of the deceased, that court was supposed to advise parties first to sort out the issue of land ownership in the land courts established under the above sections of law, before it could make any decision of who was the lawful owner.

In the circumstances this court makes the following orders;

1. Part of the decision of Kukirango Primary court and Musoma district court conferring ownership of the guest house to the family of the respondents is set aside.
2. An order that the guest house is part of the matrimonial assets of **ROZA** and **MANGAZENI** is set aside pending resolution of the issue of ownership of the land by an appropriate land court.
3. The appellants are directed to file a land matter in a land court with jurisdiction to determine ownership of the guest house before they can deal with it as part of the estate of the deceased.
4. None of the respondents shall enforce any order of the primary court in any matrimonial cause and levy any attachment of the guest house until such time that the proceedings to determine ownership of that house shall be finalized as per the above stated directive.
5. From issuance of this order till such time that the issue of ownership shall be determined, the guest house shall be managed by whoever was managing it immediately after the death of the deceased.

6. This appeal succeeds to the above extent with no orders to costs since parties are close family members.

DATED at MUSOMA this 27th November 2020




Z. N. Galeba
JUDGE
27.11.2020