IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND CASE APPEAL NO. 9 OF 2019

(C/F Application No. 61 of 2016 District Land and Housing Tribunal of Moshi District at Moshi)

VALERIA LUDOVICK NGATARA ..... APPELLANT

Versus

FLORA STANSLAUS PIMA [Suing as Administrator of Estate of the late Stanslaus Pima Mushi **..... RESPONDENT**

Date of Last Order: 12th December, 2019
Date of Judgment: 5th March, 2020

JUDGMENT

MKAPA. J:

This is an appeal against the judgment and decree of the District Land and Housing Tribunal of Moshi at Moshi (trial tribunal) in respect of Land Application No. 61 of 2016 dated 6th May 2019. It is clear that in the present appeal the appellant Valeria Ludovick Ngatara appeals in this court on four grounds as follows;

1. That, the Chairman of the tribunal committed error by delivering a judgment and decree in favour of the respondent on the basis of deceased WILL only.

2. That, the Chairman of the tribunal erred in entertaining the case before him which was *res judicata* based on the judgment of the Primary Court in Civil Case No. 9 of 1992.
3. That the Chairman of the tribunal erred in law and fact in holding that the appellant was a trespasser to the suit land.
4. That the Chairman of the tribunal failed to analyze properly the evidence on balance of probability and decided in favour of the respondent.

Before determining merits or demerits of this appeal, a brief history of the matter is that the appellant Valeria Ludovick Ngatara is the administrator of the estate of the late Ludovick Andrea Ngatara Shayo who died on 16th January 2002 while the respondent is an administrator of the estate of the late Stanslaus Pima Mushi who died on 17th July 1985.

It is alleged that in 1982 out of love, respect and good will, the late Stanslaus Pima bequethed a piece of land measuring one acre (the suit land) located at Uru Mawalla, in Uru Rau Village within Moshi district in Kilimanjaro region to the late Ludovick Ngatara. That, apart from the said handing over which was documented on 13th January, 1982 and exhibited as D-2 at the trial tribunal, the late Stanslaus Pima also wrote a WILL on 16th February, 1984 in which he bequeathed the same suit land to the late Ludovick Ngatara. The said WILL was received and

admitted as Exhibit D-3 at the trial tribunal. Further, the late Pima's family continued enjoying peacefully the use of the suit land until 2009 when the appellant allegedly trespassed into the suit land and occupied the same. In an effort to finding a solution on the alleged trespass, the appellant herein instituted Application No. 9 of 1992 at Uru Primary Court against Amati Stanslaus Mushi, son of the late Slanslaus Pima claiming legal ownership of the suit land.

The Primary Court decided in favour of the appellant. Soon after, the respondent together with 3 other family members were arraigned before the Moshi District Court for the offence of criminal trespass c/s 299 of the Penal Code, Cap 16. However, the application was dismissed on the ground that it was more of a civil nature dispute than a criminal matter. In 2016, through Application No. 61 of 2016, before the District Land and Housing Tribunal of Moshi at Moshi, the respondent sued the appellant for trespass and won the case. Aggrieved, the appellant preferred this appeal.

At the hearing, Mr. Charles J. Mwanganyi, learned advocate appeared for the appellant while Mr. Ibrahim Komu also learned advocate represented the respondent. By consent of the parties, the appeal was ordered to be disposed of by filing written submissions and the following filling schedule was fixed, that

appellant file written submission in support of the appeal by or on 21st November, 2019, submission by or on 5th December, 2019 and rejoinder if any by or on 12th December, 2019. The learned counsel for the parties complied timely.

In his written submission in support of the appeal, Mr. Mwanganyi agreed that, the trial tribunal did not take time to consider appellant's testimony together with that of her witnesses' and made a decision in favour of the appellant instead, the trial tribunal concentrated on a WILL and made a decision by relying solely on the same. Furthering his argument, he explained that, there were criminal and civil cases prior to the one at hand back in 1990's and all were decided in the appellant's favour by declaring her a lawful owner of the suit land. Mr. Mwanganyi submitted further that, the respondent falled to account as to why she had failed to distribute the late Stanslaus Pima's estate despite the fact that there was a WILL which was read in public at the funeral in which the suit land was bequeathed to appellant's late husband.

Mr. Mwanganyl averred further that, the appellant inherited the sult land from her late husband who acquired the same from the late Stanslaus Pima who is also her maternal uncle. Therefore, all the legal requirements for handing over were fulfilled therefore this court has a duty to re- evaluate the evidence of

the therefore tribunal as it was held in the case of **Deemay Daat & 2 Others V. R** (2005) TLR 132 that;

> *"it is common knowledge that where there is misdirection and non-direction on the evidence of the lower court has misapprehended the substance, the nature and quality of evidence, an appellate court is entitled to look at the evidence and make own finding of the fact."*

Mr. Mwanganyi contended further that, the trial tribunal spent much time in discussing the validity of a WILL despite the fact that, the same had no jurisdiction to do so. That, the trial tribunal unreasonably declared a WILL invalid by relying on the fact that, a copy of a WILL was given to the appellant's husband while there were no any other witnesses from the family of Stanslaus Pima. It was Mr. Mwanganyi's further argument that at the trial tribunal, the appellant tendered a judgment of Uru Primary Court in Civil Case No 9 of 1992 (admitted as Exhibit D-1) which declared the said WILL valid, thus, the trial tribunal became *functus officio* in overruling the said decision and declare it invalid.

Mr. Mwanganyi went on submitting on the issue of the WILL to the effect that, the trial chairman erroneously stated that a WILL is normally witnessed by a professional executor and a layman and that upon the death of a testator, the advocate attesting the

WILL has to read it to the bereaved family. However, he argued that, there is no such legal requirement in mainland Tanzania.

Contesting tribunal's findings, Mr. Mwanganyi argued further that, the respondent was appointed as administrator on 4th September, 1992 but filed the application at the tribunal on 4th May 2016 (24 years later), contrary to the requirement of the Law of Limitation which requires suits for recovery of land be instituted not more than twelve (12) years. Therefore, the trial tribunal ought to have dismissed the application in first instance with costs.

Finally, it was Mr. Mwanganyi's contention that, the appellant is not a trespasser to the suit land therefore this court should further re-evaluate the evidence of the trial tribunal as it was held in the case **Ndizu Ngassa V Masisa Magasha** (1999) TLR, 202 and **Deemay case** (supra). Thus, he urged this Court to nullify the whole proceedings and judgment which was tainted with irregularities and allow this appeal with costs.

Resisting the appeal, Mr. Komu argued that, the appellant had been stubborn by constant trespassing into the suit land thus making it impossible for the respondent as administrator of the late Stanslaus Pima's estate to distribute the same to the lawful beneficiaries. He further argued that, the WILL which was tendered by the appellant to support her case cannot be relied

upon since it contained a lot of inconsistences and divergences. It was Mr. Komu's argument that, the purported WILL together with testimonies from appellant's witnesses does not support nor confirm her allegations regarding the suit land.

Submitting further on the issue of the WILL, Mr. Komu argued that, DW2's advocate Peter Mushi, alleged to have written a handing over agreement in 1982 and a WILL in 1984. In the handing over agreement he was the sole witness while the appellant and her witnesses testified to have witnessed the handing over, however, the same is not evidenced in the said agreement. It was Mr. Komu's submission that, it does not sound logical for the late Stanslaus Pima to give a piece of land to the late Ludovick Ngatata through a handing over agreement at the same time mentioning the same suit land in his WILL yet none of his family members including his wife not being aware of.

More so, the purported WILL was never presented to the family during the burial ceremony nor challenged when the respondent was appointed as an administrator of the estate of Late Stanslaus Pima at the District Court of Moshi. Mr. Komu submitted further that, the trial tribunal's chairman considered all the evidence before him and after a thorough analysis decided in favour of the respondent after being satisfied that appellant's

evidence was not watertight especially on the validity of the WILL. On the issue of the application being *res judicata*, Mr. Komu contended that, parties to the Civil Case No. 9 of 1992 are different from the parties in Land Application No. 61 of 2016 hence does not contravene the principle of *Res Judicata* as provided for under **section 9 of the Civil Procedure Code**, Cap 33 R.E. 2002 (the CPC) does not apply.

On the issue of the application being time barred, Mr. Komu averred that, after a series of cases from 1992, the suit land was in possession of respondent's family until 2009 when the appellant trespassed into the suit land and the matter was referred to the village authorities. The dispute has never subsided, ever since hence the application is not time barred. Finally, he prayed for the appeal to be dismissed with costs. In his brief rejoinder, Mr. Mwanganyi reiterated his stance in submission in chief.

From the above submissions and evidence on record, this Court being the 1st appellate Court has powers vested upon it to re-valuate the evidence and make its own findings with the following issues for determination on whether;

i. The application is res judicata,
ii. The application is time barred,

iii. There was sufficient evidence to prove that the late Ludovick Ngatara was bequeathed the suit land?

iv. The suit land forms part of the estate of the late late Stanslaus Pima.

To begin with the issue as to whether the application is *res judicata*, **section 9 of the CPC** provides as hereunder;

> *"**No court shall try any suit or issue** in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the **same parties** or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."[Emphasis mine]*

The section bars Courts from entertaining any suit or issue to which the rule of *res judicata* applies. In the present appeal the appellant claimed that this matter is *res judicata* as the same had already been determined by Uru Primary Court in Civil Case No. 9 of 1992. However, records revealed that, in the 1992's application the parties were Valeria Ludovick suing on behalf of her husband Ludovick Ngatara who was abroad at that time *versus* Amati Stanslaus, son of the late Stanslaus Pima, while in the present appeal parties are Flora Stanslaus Pima as

administrator of the late Stanslaus Pima *versus* Valeria Ludovick Ngatara. Thus, although the cause of action may appear to be the same to wit; trespass over the same suit land but parties are completely different, hence the principle of *res judicata* cannot apply in the present application. In the case of **George Shambwe V Tanzania Italian Petroleum Company LTD** [1995] TLR 21 it was held that;

> *"For res judicata to apply not only it must be shown that the matter directly and substantially in issue in the contemplated suit* ***is the same parties*** *but also it must be shown that, the matter was finally heard and determined by a competent court"* [emphasis mine]

Turning to the 2nd issue of time limitation, the same is also answered in the negative. In **Yusufu Same and Another V Hadija Yusuph** 1996 TLR 347 it was held that;

> *"...where a person institutes a suit to recover land of a deceased person whether under will or intestacy and the deceased person was on the date of his death in possession of the land and was the last person entitled to the land to be in possession of the land, the right action shall be deemed to have accrued on the date of death"*

In the present appeal, after the respondent was appointed as the administrator of the late Stanslaus Pima estate in Probate

and Administration Cause No. 10 of 1992 by Moshi District Court, immediately the appellant instituted Civil Case No. 9 of 1992 at Uru Primary Court contesting the ownership of the suit land and this is where the issue of WILL emerged. It is my considered opinion that, having a purported WILL at hand, and since the late Ludovick Ngatara was still alive, the right move would have been for the appellant to contest the same at the District Court where the probate case was lodged rather than instituting a fresh suit.

Regardless of the decision made, the matter subsided for a while until Criminal case No. 707 of 1998 and Criminal Appeal No. 45 of 1999 respectivelly, for criminal trespass were instituted. It was until 2009 when the appellant allegedly trespassed into the suit land and the matter was brought before the village authorities. The feud has been fuelling todate. Given the nature of feud between the parties it is evident that, the allegation that it took 24 years for the respondent to file this application cannot be established as evidenced by a perpetual tag of war between the parties' families over the same suit land.

Since it is undisputed that the suit land belonged to the respondent's deceased father, after his death the said land has been under the administration of respondent and as mentioned

earlier, it hasn't been distributed. In the event, I am of the considered view that this application was not time barred.

Turning to the third issue, as to whether the suit land was bequeathed to the late Ludovick Ngatara. It was alleged that appellant's husband was given one among the 8 acres of the late Sanslaus Pima. Thus, it is evident that, the suit land initially belonged to the late Stanslaus Pima. The claim that the late Ludovick Ngatara was given the suit land in my view, is unsupported due to the fact that DW1's evidence in relation to this aspect candidly stated she was present when the handing over took place but never signed the handing over agreement, more so, none of Stanslaus Pima's family members was present. The same applies to all other appellant's witnesses and their evidence was not clear if they were actually present during the handing over while the handing over agreement does not reflect their presence. This leaves a lot to be desired.

It is noteworthy that, the trial tribunal entertained extraneous matter namely, probate issue while it had no jurisdiction. However, the evidence leading the trial tribunal to dwell on the WILL thus touching probate area was brought by the appellant herself when defending her case. I think she brought up the issue of a WILL in order to prove that her late husband was actually bequeathed the suit land vide handing over agreement

dated 13th January 1992 and the WILL dated 16th February, 1984. Since the copy was admitted as evidence, it would have been an omission had the Tribunal not assessed it and make a finding.

While I agree that the Tribunal is not seized with jurisdiction to entertain probate matters but under the circumstances the Tribunal was not determining probate matter but evaluating the document which was exhibit D3 presented before it in support of the appellant's case to the effect that, the suit land had been bequeathed to her late husband. Essentially, this evidence would probably have strengthened the appellant's case had it not been for its short coming. To this end, I cannot escape from discussing its validity. Upon close examination of the WILL admitted at the trial tribunal, I am of the considered view that, the said WILL could not have been considered as a valid WILL. The following are my reasons;

First, on 24th July, 2018 it is on record at page 36 of the typed proceedings, DW2 tendered the WILL and the same was admitted as Exhibit D3. However, from the trial tribunal's records, what was tendered and admitted into evidence as exhibit D3 was a certified true copy of the original. I have been wondering, if that was the certified true copy it means it was created from the original copy yet, it was not the original copy

which was tendered document. DW3 who wrote it conceded the fact that he never knew when Stanslaus Pima died and he is not certain whether such WILL was read to the deceased family. He became aware of the dispute pertaining the WILL at a later day. With due respect to this testimony, it is my considered view that after knowing that the deceased had passed away, he was duty bound to notify the family of the testator on the existence of the said WILL. *Second*, a WILL becomes valid as long as the maker complies with the requirement under **Rule 5 of the 3rd Schedule of the Local Customary Law (Declaration) (No.4) Order of 1963** (G.N. No. 436 of 1963) (G.N. No.436/1963).

A testator can express his desires by way of a WILL and such WILL has to be complied with. The position has been affirmed in **Celestina Paulo V Mohamed Hussein** [1983] T.L.R 291**, Elia Kisamo V Obediodom S. Chanjarika,** PC Civil Appeal No. 55 of 1997, (unreported) High Court at Moshi**,** and **Julius Petro V Cosmas Raphael** [1983] T.L.R 346.

However, as mentioned out above, validity of the WILL as guided by the Rule 5 to the 3rd Schedule of G.N. No. 436/1963, has to be made voluntarily by the testator as to how he would wish his estate be administered upon his demise. Also, there has to be special witnesses to the intended WILL and a testator's wife or

wives at his household must also witness. The alleged WILL lacks the said perequisite, its validity is therefore questionable. The requirement that the wife or wives must attest to the WILL is a mandatory according to the above provision of the law and the same was never complied with and no reasons were advanced as to why Stanslaus Pima's wife was not present as a witness. This omission is incurably fatal thus renders the purported WILL invalid. *Thirdly* it is a requirement under G.N. No. 436/1963 that beneficiaries mentioned as heirs in a WILL shall not witness the WILL except the wife or wives. However, the late Ludovick Ngatara was a witness to a will in which he was part of the inheritance. This also questions its validity.

Fourthly, WILL is a secret, however, after the demise away of a testator, it is a known practice although not mandatory that a WILL has to be revealed and read out to the family either at large or nucleus. In the process, those present and in particular beneficiaries must be made aware of when was the WILL prepared and where was it placed prior to the day when the WILL was read. The rationale behind this practice is to avoid disputes within the deceased family and/or other heirs. DW2's counsel, Advocate Shayo testified to the effect that, he wasn't aware of the death of the late Stanslaus Pima, which could be a bonafide excuse, however, when he became aware, I believe it was his duty to notify the family on the deceased wishes or

report the same to the court which determined the probate matter.

It is on record that, DW2 being a custodian of the WILL admitted not to do so, failure of which has led to a feud with the parties todate. Also DW3 testified to have been at Stanslaus Pima's funeral but did not recall whether the said WILL was read while DW4 testified to have been at Stanslaus Pima's funeral and it was declared that the suit land was given to Late Ludovick Ngatara but he does not know who made the declaration. Apart from the established inconsistence, there is also no clear record on where or who kept the said WILL. From the above observations, there are more questions than answers which as I stated earlier creates a number of questions than answers on the validity of the purported handing over agreement and the WILL.

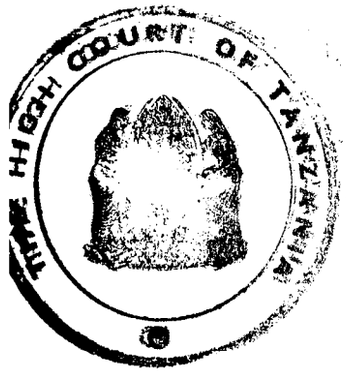
On the last issue for determination, basing on the above analysis, I am inclined to rule out that the suit land still forms part and parcel of the late Stanslaus Pima's Estate.

Additionally, I think I should point out that, the respondent stated to have failed to fulfill her obligation as an administrator of the late Stanslaus Pima due to appellant constant trespassing over the suit land. However, since the probate case is still open I am unable to understand why she is yet to close the matter

todate and report the obstacles she faced to the court which appointed her at the earliest stage. Be it as it may, the probate case is not closed, thus leaving a room for endless suits.

In the light of the above, I still find the evidence by the respondent watertight than that of the appellant and her witnesses. Under the circumstances, I find the suit land forms part of the late Stanslaus Pima's estate subject to administration by the respondent. I consequently, dismiss the appeal with costs for lack of merits.

Dated and delivered at Moshi this 5th day of March 2020.



S.B. MKAPA

JUDGE

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