

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**AT SUMBAWANGA**

**PROBATE APPEAL NO. 3 OF 2019**

***(Originating from Probate Appeal No. 1 of 2019 of Sumbawanga District Court, from Probate Cause No. 108 of 2010 at Urban Primary Court of Sumbawanga)***

**CAROLINA HOPKIN ..... APPELLANT**

**VERSUS**

**WILBROAD KAPUFI ..... RESPONDENT**

*Date of last Order:* 08/12/2020

*Date of Judgment:* 28/12/2020

**JUDGMENT**

**C.P. MKEHA, J**

When the late Stella Lukonde Ngalawa passed on, one Christopher George Hopkin was appointed the administrator of her estate. Before accomplishing the task of collecting the estate of the late Stella Lukonde Ngalawa, the appointed administrator passed on as well. That is when the appellant was appointed to step into the shoes of the former administrator of the estate of Stella Lukonde Ngalawa who died on 26/10/1996.

Earlier in 2011 Christopher Hopkin (the first administrator) sued one Lazaro Sungura who was by then a care taker of the disputed plots, Nos. 33 and 35 at Mazwi Area within Sumbawanga in view of redeeming properties of the late Stella Lukonde Ngalawa. It was through Land Case No. 11 of 2011 of the District Land and Housing Tribunal of Sumbawanga. The Tribunal decided in

favour of the administrator. On appeal to the High Court, it was decided that the administrator of the estate of the late Stella Lukonde had sued a wrong party. The High Court held that, **if Christopher G. Hopkin thinks that Plot No. 35 does not belong to Anatory Kapufi, then he has the obligation of instituting a suit against the administrator of the estate of the late Anatory Kapufi and not suing Lazaro s/o Sungura. See:** Misc. Land Case Appeal No. 3 of 2012 as decided by his Lordship (Sambo, J) as he then was. That was on 21/10/2014.

Therefore, the responsibility of suing the administrator of the estate of the late Anatory Kapufi who was in occupation of the disputed properties shifted to the appellant when Christopher George Hopkin passed on. In the course of pursuing the High Court's advice, the appellant had to go back to Sumbawanga Urban Primary Court which had the conduct of Probate Cause No. 108 of 2010 regarding the estate of the late Stella Lukonde Ngalawa so that an issue regarding who was the rightful owner of Plots Nos. 33 and 35 could be decided.

On 18/01/2019 "Madai Nambari" 11 of 2019 was registered at Sumbawanga Urban Primary Court. The claim reads as hereunder:

**"Madai:** Ninamdai mdaiwa anikabidhi nyumba mbili zilizopo Eneo la Mazwi Mtaa wa Kapele zenye nambari Plot No. 33 na 35. Madai haya yanatokana na

shauri la Mirathi No. 108/2010 ambapo niliteuliwa kuwa msimamizi wa Mirath na mdaiwa amekataa kukabidhi hizo nyumba.

**Mdai:** CAROLINA GEORGE HOPKIN

**Mdaiwa:** WILBROD NICHOLAUS KAPUFI"

Following registration of the said complaint, on the same date, a summons was issued to the respondent for him to attend court session on 22/1/2019 so that ownership issue could be decided. Although summons was issued through Civil Case No. 11 of 2019, the actual dispute was heard and determined through Probate Cause No. 108 of 2010 in the absence of the respondent. The trial court held that both, Plots Nos. 33 and 35 were properties of the late Stella Lukonde, hence, the respondent was ordered to handover the said properties to the appellant. The trial court was satisfied that the respondent chose not attending hearing of the matter, despite duly service to him.

Following the trial court's decision the respondent appealed to the District Court which overturned the trial court's decision. The District Court held that, ownership issue had been decided by the High Court in Misc. Land Case Appeal No. 3 of 2012. In view of the District Court, the matter was therefore res-judicata as between the parties. The District Court added that even assuming that the matter was not res-judicata, the same, being an issue involving land ownership, ought to be decided through land courts and not

ordinary courts. The appellant was advised if she was still interested, to appeal against the decision in Misc. Land Case Appeal No. 3 of 2012 which in view of the learned Resident Magistrate, had conclusively determined ownership issue. It is this decision of the District Court of Sumbawanga in Probate Appeal No. 1 of 2019 which prompted the present appeal.

In this appeal, the appellant was represented by Mr. Mathias Budodi learned advocate. On the other hand, the respondent appeared in person. Although the learned advocate for the appellant argued five grounds of appeal before this court, three, out of the preferred grounds are considered determinative. These are grounds:

- No.3. That, the first appellate court's Magistrate grossly misdirected himself in holding that the decision of the trial court was res judicata hence reached to a wrong and unjust decision;
- No.4. That, the first appellate court's Magistrate erred in law and fact by declaring that the High Court of Tanzania (Sumbawanga Registry) in Misc. Land Case No. 3 of 2012 pronounced one Anatory Kapufi to be the owner of Plot No. 33 and
- No.5. That, the first appellate court's Magistrate grossly misdirected himself in holding that Plots No. 33 and No. 35 are in ownership of Anatory Kapufi while the evidence on record clearly proves the

same to be in ownership of the late Stella Lukonde Ngalawa whom the applicant is the administratrix of her estate.

It was submitted by the learned advocate for the appellant in respect of the 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal that it was wrong for the District Court to hold that the matter was res judicata. The learned advocate submitted that Misc. Land Case Appeal No. 03 of 2012 of the High Court (Sumbawanga Registry) did not conclusively determine the issue of ownership of the disputed plots.

The learned advocate went on to submit that, if the issue is whether or not the alleged property in dispute falls under the deceased's estate, through a Probate matter, the said issue can be resolved. Reference was made to the case of **Mgeni Seifu vs. Mohamed Yahaya Khalfani, Civil Application No. 01 of 2009**. According to the learned advocate, what is instructed in the above cited case is what the appellant did. She returned at the trial court for determination of ownership of Plots No. 33 and 35 through Probate Cause No. 108 of 2010.

The learned advocate submitted in respect of the 5<sup>th</sup> ground of appeal that, when the appellant was appointed as an administratrix of the estate of the deceased, she encountered resistance from the respondent who alleged that the late Anatory Kapufi bought the disputed Plots from Stella Lukonde Ngalawa. The learned advocate submitted that, the appellant asked for a

summons to invite the respondent to come and prove ownership before the trial court. In view of the learned advocate, the appellant established before the trial court that the late Stella Lukonde Ngalawa died while still owning Plots No. 33 and 35. According to the learned advocate, given the fact that the respondent was invited to hear the application, only that he (the respondent) refused to accept summons, there was justification for the trial court to proceed hearing the case in his absence.

The respondent submitted in reply that the first appellate court was correct to hold that the matter was *res judicata*. The respondent made reference to pages 2 and 3 of the High Court's decision. He went on submitting that, even if it is true that the appellant did file her complaint before the trial court regarding ownership of the disputed Plots, he (the respondent) was not accorded an opportunity of being heard. The respondent renounced having refused to receive a summons.

After the parties had exchanged arguments for and against the appeal, I invited them to address the court on whether the trial court's summons dated 18/01/2019 was in respect of Probate Cause No. 108 of 2010 whose decision prompted the present appeal. Mr. Budodi learned advocate conceded that, actually, the summons dated 18/01/2019 which the respondent is condemned to have refused accepting, does not reflect Probate Cause No. 108 of 2010 but Civil Case No. 11 of 2019. The learned advocate submitted that, it was for

convenience purposes the trial court opted to determine the claim in Civil Case No. 11 of 2019 via Probate Cause No. 108 of 2010. The learned advocate insisted that, in doing so, the trial court was complying with directives of the Court of Appeal in **Mgeni Seifu's case**. In view of the learned advocate, there was no injustice on part of the respondent.

The respondent replied in short that, he never received a summons in respect of Civil Case No. 11 of 2019 which he was not aware of. He insisted that, had he known, he would have attended court sessions as he regularly does. The issues for determination are the following:

- 1. Whether an issue regarding ownership of the disputed plots had been decided by the High Court in Miscellaneous Land Case Appeal No. 3 of 2012 as between the parties.**
- 2. Whether the respondent was denied of an opportunity of being heard before the trial court.**

It was the respondent's insistence that an issue regarding ownership of the disputed plots had been decided by the High Court. The learned advocate for the appellant was of the firm view that the issue was never decided. In the first place, the parties in Miscellaneous Land Case Appeal No. 3 of 2012 were one Lazaro Sungura as the appellant and Christopher George Hopkin as the respondent. Not without respect to the respondent, nowhere Miscellaneous Land Case Appeal No. 3 of 2012 appears to have decided an issue of

ownership of the disputed plots conclusively. The High Court was of the view that, Christopher George Hopkin had sued a wrong party, a mere caretaker of the estate of the late Anatory Kapufi instead of suing the administrator. That is why, at page 3 of the High Court's judgment, his Lordship had the following to say: **"Based on what I have stated hereinabove, if the respondent thinks that plot No. 35 do not (sic) belong to Anatory Kapufi then, he has the obligation of instituting a suit against the administrator of the estate of the late Anatory Kapufi and not the appellant. It goes without saying that the appellant was wrongly sued in this case.** It is because of the holding and advice of the High Court hereinabove, the appellant approached the trial court for determination of the issue of ownership. Therefore, as correctly submitted by Mr. Budodi learned advocate it was wrong on part the learned first appellate Magistrate, to hold that the matter was res-judicata. The 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal are held to be meritorious. They are upheld.

It was correct for the appellant to approach the trial court in view of deciding an issue of ownership of the disputed plots. The learned advocate submitted that, when the respondent was summoned before the trial court in view of adducing evidence in support of his position, the latter refused accepting summons. On the other hand, the respondent insisted that, he was never served with a summons regarding Probate Cause no. 108 of 2010 in view of establishing ownership of the disputed plots on part of the late Anatory



Kapufi. The learned advocate for the appellant conceded that, actually, the summons dated 18/01/2019 alleged to have been directed to the respondent in view of inviting him to come for hearing of the ownership dispute, does not reflect Probate Cause No. 108 of 2010 but Civil Case No. 11 of 2019. The learned advocate submitted that, for convenience purposes, the trial court opted to determine the claim in Civil Case No. 11 via Probate Cause No. 108 of 2010 and that, in doing so, the respondent suffered no injustice for having chosen not to attend the hearing, despite service.

In the case of **Mgeni Seifu** (supra), the Court of Appeal held that, **where there is a dispute over the estate of the deceased only the probate and administration court is seized of the matter and can decide on the ownership.** Therefore, in the first place, it was wrong for the trial court to register the claim over ownership dispute as a distinct Civil Case that is, Civil Case No. 11 of 2019 instead of conforming with what the Court of Appeal directed through **Mgeni Seifu's Case**, deciding the issue of ownership in the probate and administration court. And, as a result of wrongly registering unwarranted Civil Case, the trial court ended up issuing a wrong summons to the respondent. Since there is no denial that the respondent was never summoned in view of attending Probate Cause No. 108 of 2010, the inevitable conclusion is that, the respondent was denied of an opportunity of being heard in Probate Cause No. 108 of 2010, particularly, on the issue regarding ownership of the disputed plots.

For the foregoing reasons, the trial court's proceedings and judgment regarding ownership of the disputed plots are nullified. Equally, the first appellate court's judgment and orders are set aside. It is directed that, the matter be remitted to the trial Primary Court for expeditious determination of the ownership issue. No order is made for costs. Appeal partly allowed.

Dated at SUMBAWANGA this 28<sup>th</sup> day of DECEMBER, 2020.

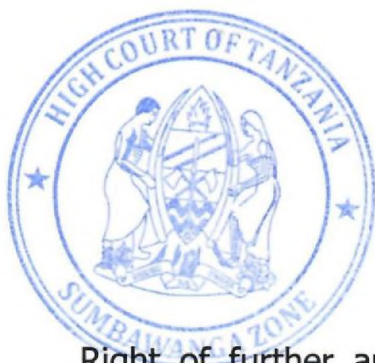


  
**C.P. MKEHA**

**JUDGE**

**28/12/2020**

**Court:** Judgment is delivered in the presence of the parties.



  
**C.P. MKEHA**

**JUDGE**

**28/12/2020**

**Court:** Right of further appeal to the Court of Appeal of Tanzania is explained.



  
**C.P. MKEHA**

**JUDGE**

**28/12/2020**