IN THE HIGH COURT OF TANZANIA
(MUSOMA DISTRICT REGISTRY)

AT MUSOMA

LAND APPEAL NO. 18 OF 2020
(Arising from decision of the District Land and Housing Tribunal for Mara at Musoma in Land Appeal No. 107 of 2019)

NYARYANGA VS NYAMARASA .....APPELLANT

VERSUS

NYAKAHO NYAMARASA MASIKO .....RESPONDENT

JUDGEMENT

3rd and 23rd March, 2020

E. S. KISANYA, J.:

In Rig'wani Ward Tribunal, the respondent, Nyakaho Nyamarasa Masiko, successfully sued the appellant claiming for ownership of a piece of land allocated to her by her late husband, one Nyamarasa Masiko, during his life time. Aggrieved, the appellant appealed to the District Land and Housing Tribunal for Mara at Musoma (hereinafter referred to as "the appellate Tribunal"). In its decision, the appellate Tribunal decided in favour of the respondent.

Still aggrieved, the appellant has approached this Court by way of appeal, on the following grounds:

1. *That, the first appellate tribunal erred in law to underestimate and or deny observing and abiding to the clear laws and locus standi which was submitted by the appellant's as the appellant had not appointed as an Administratix of the estate of her late husband.*

2. *That, the first appellate tribunal erred in law for failure to discharge its duty of analysing and evaluating on record as result caused miscarriage of justice to find that the respondent was given the suit land before demise of her late husband.*
3. *That, the first appellate tribunal erred in law to upheld non-executable decision of the trial tribunal as there was no description of the suit eg. Size, bounderies and location for sufficient identification. Thus, the matter was incompetent before the trial tribunal for uncertainty of the subject matter.*

The Respondent filed a reply to petition of appeal where she opposed all grounds of appeal.

The brief facts of the case as gathered from the evidence on record is that: The respondent is among of twelve wives of the late Nyamarasa Masiko, who passed away in **October 2016**. The suit land was allocated to the respondent when the said Nyamarasa Masiko was still alive. After his death, the clan members confirmed the allocation of the suit land to the respondent. As the appellant encroached on the suit land, the respondent referred the matter to the Ward Tribunal where she was declared the lawful owner. The respondent called two witnesses, namely Aniset Vanas Wambura (PW1) and Chacha Nyambura Masiko (PW2) who testified on decision made by the clan members regarding the suit land.

In his defence, the appellant stated that he is the one who started to build on the suit land upon attaining the age of majority. Thereafter, the respondent came to build on the same area. The family put a boundary

between them only to find that the respondent had instituted the application before the Ward Tribunal.

At the hearing this appeal, Mr. Constantine Ramadhan, learned counsel appeared for the appellant while the respondent appeared in person, legally unrepresented.

Submitting in support of the appeal, Mr. Ramadhan argued this being a second appeal, this Court may inquire only on and re-examine evidence if the first appellate court misapprehended the evidence. He submitted that the appellate Tribunal did not address the grounds of appeal filed before it.

Arguing on the first and second ground, Mr. Ramadhan was of the view that the respondent had no *locus standi* to institute the application before the Ward Tribunal. The learned counsel pointed out that, the appellant averred that, she was given four hectors of land by her late husband. However, contradictory evidence was given on the same matter in that, she testified to have been allocated the suit land by the clan members. Such evidence was also stated by PW1 and PW2. They testified further that the suit land was vacant. Therefore, Mr. Ramadhan submitted that, the appellate Tribunal erred in holding that the suit land belonged to the respondent even before the death of Nyamarasa Masiko (the respondents' husband). He contended that the land belonged to the appellant's farther. Both the appellant and respondent were entitled to inherit it. Citing the case of **Victoria Daud Chanila vs Doroth Biseko**, Land Appeal No. 9 of 2015, High Court of Tanzania, at Mwanza (unreported), the learned counsel argued that, the respondent had no

locus standi to institute the case because she was not an administratix of the estates of the deceased.

On the regard the third ground, Mr. Ramadhan argued that the land size, boundary and location were not proved. The learned counsel submitted that the respondent gave a contradictory evidence to that fact. That, while in her claims before the Ward Tribunal the respondent stated that the suit land had 4 hectors, in her evidence she testified it had seven hectors. On the other hand PW1 stated that the suit land had 4 or 5 hectors while PW2 did not state the size of the land. Mr. Ramadhan argued that, since the size and location of the suit land were not proved, the judgement and decree cannot be executed. He cited the case of **Daniel Dagala Kanunda vs Masaka Ibeho and 4 Others,** High Court of Tanzania at Tabora, Land Appeal No. 26/2015 (unreported) to support his argument.

The learned counsel concluded his submission by urging this Court to quash to the proceedings and decision of the trial Tribunal and appellate Tribunal and advise the parties to institute the case after nominating the administrator of estate of the deceased.

In reply, the Respondent contended that, she had been using the suit land since 1986 and that she built a house thereon in 2012. The respondent averred further that her late husband had 12 wives whereby each wife, including the appellant's mother was given her own land. She reiterated her evidence that, the suit land was allocated to her before the death of her husband.

On the issue of location of land, the respondent argued that the boundaries are known and that the Ward Tribunal visited the locus in

quo and noted the said boundaries. She submitted further that, every wife was given land depending on number of children she had and that, the appellant did call any witness to prove his allegation. That said, the respondent argued that she is entitled to own the suit land.

Having considered the evidence on record, petition of appeal, reply to petition of appeal and submissions by both parties, the issues for determination are as follows: One, whether the appellant had *locus standi* to institute the matter; and two; whether the area, location and size of the suit land are not clear thereby making the decision of the Ward Tribunal and the appellate Tribunal not executable.

Starting with the first issue on *locus standi* of the respondent to institute the application before the Ward Tribunal, it is trite law that any suit against estate of the deceased should be made by the executor or administrator of the estates of deceased persons. This is pursuant to item 6 of the 5th to the Magistrate Court's Act [Cap. 11, R.E. 2002] and section 100 of Probate and Administration of Estates Act [Cap. 352, R.E. 2002]. For instance, section 100 of the Probate and Administration of Estates Act reads:

> *"an executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same powers for the recovery of debt due to him at the time of his death, as the deceased had when living"*

This Court (Rugazia, J.) in the case of **Victoria Daud Chanila vs Doroth Biseko Mazula**, Land Appeal No. 9 OF 2005, High Court of Tanzania (unreported) was of the position that proceedings before the

Tribunal cannot be allowed to stand if the administrator has not been appointed.

The issue at hand is whether the suit land was an estate of the deceased for the suit to be instituted by the administrator of the estates of deceased person. Both the Ward Tribunal and appellate Tribunal were satisfied that the suit land had been allocated to the respondent by her husband during his life time. As rightly argued by Mr. Ramadhan, this being the second appeal, I can only interfere with the concurrent findings of the trial Tribunal and Appellate Tribunal if there is miscarriage of justice or misapprehension of evidence. I have read the evidence on record, the respondent testified as follows on how she acquired the suit land:

> *"...eneo ambalo mme wangu alinipa alafu tukaka ukoo kusudi nijenge ukoo ukaandika muhtasari na kila mjumbe akasaini... eneo hilo nilipewa na ukoo ili nlishi na kulima, tangia mme wangu akiwa hai alikuwa anasema mimi niishi katika eneo hilo bahati mbaya mme wangu akafariki, baada ya kufuata kauli ya marehemu mme wangu aliyosiema leo hii nashangaa mtoto wangu anavamia eneo iangu bila idhini yangu, wakati mme wangu alipanga."*

In the light of the above, I find that, it was the deceased's wish that the suit land be allocated to the respondent. Therefore, the suit land was part of the estate of deceased person. That is why the clan meeting is said to have confirmed that the said land should be allocated to the respondent as directed by the deceased. This is reflected in the evidence of PW1 who stated:

"kutokana na kauli zilizotolewa na marehemu Nyamarasa Masiko, kwamba mama Nyakaho utafute katika maeneo yake amjengee na kwa sababu hatua ya kumjengea haikufikiwa, wanafamilia tulilidhia kauli ya marehemu mama Nyakaho aangalie eneo lolote ili ajenge ndipo mama Nyakaho alichagua Gwisese eneo lililokuwa wazi na wanafamilia tukakubaliana pamoja na ukoo....baada ya hapo mama Nyakaho akaanza ujenzi."

Therefore, since the respondent has interest on the estate left by the deceased, she had no locus to sue on his own. As the suit land was part of the estates of deceased, it was required to be dealt with in accordance with the law governing the inheritance and administered in accordance with the Probate and Administration of Estate Act [Cap. 352, R.E. 2002]. It follows therefore that, the proceedings before the Ward Tribunal could only stand if filed by the administrator of the estate of the deceased. Only the administrator of the deceased has powers to sue person challenging decision made by the deceased during his life time. This was not done in the case at hand as the application was filed by the respondent who is one of beneficiaries of the estates of deceased.

For the aforesaid reasons, I agree with the unanimous opinion of assessors and the submission by Mr. Ramadhani for the appellant that, the respondent had no *locus standi* to institute the application before the Ward Tribunal. Therefore, I find no need of addressing the second issue on practicability of executing the decision of the Ward Tribunal and appellate Tribunal.

That said, the appeal is allowed. I invoke the revisional power vested in this Court by section 43 of the Land Disputes Courts Act [Cap. 216, R.E.

2002] to nullify, quash and set aside the proceedings, decision and decree made by the Ward Tribunal and the District Land and Housing Tribunal. Considering that the respondent has built a house on the suit land following decision made by the deceased and clan members, the appellant may, if still interested to pursue the matter, institute a fresh suit against the administrator of the deceased' estate. Likewise, if the appellant has encroached on the disputed, the suit against him may be instituted through the administrator of the estate of deceased person. I make no order for costs because the parties are relatives and due to the nature of this case.

Order accordingly.

DATED at MUSOMA this 23rd day of March, 2020.

E. S. Kisanya
JUDGE
23/03/2020

Court: Judgement delivered in Chamber this 23rd day of March, 2020 in the presence of Mr Constantine Ramadhan, learned counsel for the appellant and the respondent, in person.

E. S. Kisanya
JUDGE
23/03/2020