

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN THE DISTRICT REGISTRY OF KIGOMA)**

**AT KIGOMA**

**LAND DIVISION**

**(APPELLATE JURISDICTION)**

**LAND APPEAL NO. 21 OF 2020**

(Arising from Misc. Land Application No. 47 of 2020 of the High Court – Kigoma, original Land Application No. 106 of 2015 from the District Land and Housing Tribunal – Kigoma before F. Chinuku – Chairperson)

**ASHA MATULIKE..... APPELLANT**

**VERSUS**

**ELIDADI ELIAS MATHAYO..... RESPONDENT**

**J U D G M E N T**

18<sup>th</sup> Feb. & 4<sup>th</sup> March, 2021

**I.C. MUGETA, J.**

The appellant was sued by the respondent at the District Land and Housing Tribunal for a declaration that the respondent is the lawful owner of the suit land after purchasing it from Mwelakale Muhene by a sale agreement which was tendered as exhibit P1. At paragraph 6 (a) (ii) of the application at the tribunal, the respondent acknowledged that the appellant is the administrator of the estate of Mwelakale Muhene who sold him the dispute land before she died. Upon being appointed administrator of the deceased's estate, the appellant meddled with the respondent's enjoyment of the land,



hence, this case. Besides the acknowledgement that the appellant is the administrator, the record shows that she was sued in her personal capacity. In paragraph 5 of the Written Statement of Defence, (WSD) the appellant admitted the contents of paragraph 6 (b) (ii) of the application. She also raised a counter claim to which the respondent filed a Written Statement of Defence. After trial, the tribunal found for the respondent and declared him the owner of the suit plot. Aggrieved, the appellant filed this appeal on the following grounds: -

- 1. That, since the Respondent had not objected to the appointment of the Appellant as an administratrix of the estate of the late Mwelakale @ Tausi Mhene in Ujiji Primary Court Probate Cause No. 100 of 2015 in which all the suit property in land Application No. 106 of 2015 were adjudged as belonging to the late Mwelakale and hence administrable by the Appellant, then that the trial tribunal had no jurisdiction of the Respondent's claims.*
- 2. That, since the Respondent's land application had been instituted after the ' Appellant had been dully appointed an administratrix of the estate of the late Mwelakale, then that the said application was in law, wrongly instituted and entertained in the Appellant's own names as Respondent and or without joining her as an Administratrix of the estate rendering the decree un-executable against the Administratrix.*

3. *That, the trial tribunal grossly erred in law and in fact in basing the Respondent's victory over Exhibit PI being purported sale agreements of all the property of the late Mwelakale dated 2009 and 2011 before her death in 2015 without through scrutiny on the veracity and authenticity of the documents themselves, the deceased's age of 90 years and state of health at the time of execution, matters that were objected by the Appellant.*
4. *That, since Form No. 1 filled in by the Respondent to commence the case indicated the suit land (whatever he had in mind) as being located at Bushabani area, Kibirizi ward and without clear elaboration so as to be properly identified, then that the trial Tribunal grossly erred in law and in fact in declaring the Respondent a lawful owner of estate property of the late Mwelakale situated at Katale - Simbo village and ward, the Respondent's evidence and exhibits contradicting Form Na. 1.*
5. *That, since the Appellant had raised a counter claim in the written statement of defense which the Respondent had not defended, then that the trial tribunal grossly erred in law and in fact in not entering judgment against the Respondent on the counter claim and or deliver judgment on the main application in total disregard to the counter claim contrary to required procedure.*

Both parties are represented. Igantus Kagashe, learned advocate, represents the appellant. The respondent is represented by Daniel Rumenyela, learned advocate.

On the first ground, Mr. Kagashe submitted that since the dispute land is a part of the deceased estate, the tribunal had no jurisdiction as the dispute ought to have been determined by the probate and administration court where the appellant has already been appointed as administrator of the estate. He cited the case of **Mgeni Seif Vs. Mohamed Yahaya Khalfan**, Civil Application No. 1/2009, Court of Appeal – Dar es Salaam (unreported) to support his argument.

Mr. Rumenyela responded that according to section 3 (1) and (2) of the Land Disputes Courts Act [Cap. 216 R.E. 2019] land disputes are justiciable by land courts. He distinguished the Mgeni Seif case (supra) in that its principle applies when the dispute arise while the probate and administration cause is still pending which is not the case here.

I have taken into account the rival arguments of the parties and I proceed to hold that the Tribunal had jurisdiction. In **Merietha Gabo Vs. Adamu Mtengu**, Misc. Land Appeal No. 21/2020, High Court – Kigoma

(unreported), I had the opportunity to discuss the jurisdiction of ordinary courts including land courts against probate and administration courts where a dispute involves a property allegedly forming part of the deceased estate. I held that the jurisdiction is with civil or land courts, as the case may be, except where the claim to title originates from inheritance or purchase for value from the administrator and the probate court is still seized with the matter which is the principle that was enunciated in Mgeni Seif case (supra). In this case, the respondent's right to the dispute land does not fall in the category of inheritance or purchase for value from the administrator. His claim is that he purchased the land from the deceased before she died. The first ground of appeal, therefore, has no merits. I dismiss it.

The complaint in the second ground is that the respondent wrongly sued the appellant in her personal capacity. Mr. Kagashe submitted that the appellant ought to have been sued as administrator. Mr. Rumenyela replied, trying to avoid the reality, that the respondent was not sure if she had letters of administration a fact she never proved. In rejoinder, Mr. Kagashe reminded his learned friend about the pleadings of the respondent in paragraph 6 (b) (ii) of the application where he pleaded that the appellant is the administratrix of the deceased's estate.

From the facts on record, there is no dispute that the respondent sued the appellant in her personal capacity being fully aware that she dealt with the dispute land as administratrix of the estate. Therefore, he ought to have sued her in that capacity. Did this occasion a failure of justice? In Marietha Gabo case (supra) I faced a somewhat similar situation. In that case the complainant sued the administrator in the Ward Tribunal but she was recorded in her personal capacity. In the judgment the Ward Tribunal acknowledged that the dispute involved the administratrix inclusion of another person's properties in the deceased estate. I held that it was upon the tribunal to record the administratrix in that capacity and that such failure cannot be blamed on the complainant because in those tribunals the parties files no pleadings. Therefore, I held, the omission is saved by section 45 of the Disputes Courts Act [Cap. 216 R.E. 2019]. Unlike in Marietha Gabo's case, in this case the parties filed the pleadings, therefore, they carry the blame in case of improper citation of the parties' names. Therefore, the respondent erred to sue the appellant in her personal capacity. The question that follows is whether the error is saved by section 45 of Cap. 216 which reads: -

*'No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice'.*

As I indicated herein above, the respondent pleaded and the appellant admitted that she is the administratrix of the estate of Mwelakale Muhene. Therefore, she was aware that she was sued in that capacity. Under the circumstance, I hold that improper citation of the appellant by itself did not occasion failure of justice. Such error, omission or irregularity, I hold, is saved by section 45 of Cap. 216. I, consequently, find that the second ground of appeal has no merits too.

The third ground challenges the authenticity and weight that the trial tribunal attached to the sale agreement between the respondent and Mwalekale Muhene exhibit P1. In his submissions, Mr. Kagashe argued that the District Land and Housing Tribunal believed exhibit P1 upon admission despite allegation of forgery by the appellant. That had the learned Chairman



scrutinized the document properly, she would have accorded it little weight and ruled that the case was not proved. Mr. Rumenyela replied that the allegation of forgery was not raised at the lower Tribunal. This notwithstanding, he submitted, forgery is a criminal offence and no criminal complaint or charge has ever been preferred against the respondent. In his view, the evidence on record proved that the respondent, indeed, acquired title to the dispute land by purchase and grant.

Starting with the question of authenticity, I have read the record of the tribunal it shows that the issue of forgery was raised as an allegation by Pili Kiza (DW4). However, she made unsubstantiated allegations. In case of forgery allegations it is not enough to allege without giving further and better particulars. As submitted by Rumenyela, forgery is a criminal offence and when alleged in civil cases it is not a question of stating it without concrete proof. In the case of **Omary Yusuph V. R.A. Abdulkadr** [1987] TLR 1678 it was held: -

*'When the question whether someone has committed a crime is raised in civil proceedings that allegation need to be established on a higher degree of probability than that which is required in ordinary civil case.'*



In this case, besides the allegation, there was no slightest attempt to prove it by evidence. Therefore, the evidence in exhibit P1 was properly admitted and acted upon. The learned Chairman had no reason to doubt it. This takes me to the second part of the complaint which concerns the probative value or weight to be attached to that document, exhibit P1.

The learned Chairman found that exhibit P1 proved that Mwalakale Muhene disposed of the land before she died and she believed the contents of exhibit P1. Mr. Kagashe has challenge the Chairman's trust in that document without explain anything wrong with it to warrant doubting it. Since there is no evidence on record that Mwelakale Muhene suffered any infirmity of either body or mind, I hold that the Tribunal Chairman rightly admitted and relied on exhibit P1. There is no merits in the third ground of appeal. I dismiss it.

The fourth ground is about the identification of the dispute land. Mr. Kagashe submitted that while the pleadings (application) said the location is at Bushabani, exhibit P1 says it is located at Simbo. He argued further that parties are bound by pleadings and the respondent is not expected to later claim for properties at Simbo. Mr. Rumenyela responded that it is immaterial whether there is an error in the pleadings if that error is corrected by evidence and the judgment and decree makes a correct reference to the

property. He submitted further that the decree and judgment sufficiently describe the location of the dispute property.

Admittedly, the application says the land is at Bushabani without details. However, the evidence, particularly exhibit P1 is clear that the land is in Simbo Ward. There is no evidence on record upon which I can decide if the said Bushabani area is within Simbo Ward or not. In the decree and the judgment, the tribunal referred to it as a "suit land". Therefore, it is not true, as stated by Rumenyela, that the two documents clarified the issue. Under the circumstances, it the District Land and Housing Tribunal which can decide if the land said to be in Bushabani is the same land described in exhibit P1. Such inquiry can be lodged with the Tribunal if the need be. I find no merits in this complaint I dismiss it.

Finally, is the complaint in the fifth ground which is that the learned Chairman in her judgment disregarded the counter claim. Mr. Kagashe submitted that the respondent never filed a written statement of defence to the counter claim and the learned Chairman did not consider it in the judgment. In his considered view this omission vitiates the whole judgments as the rights of the parties were not conclusively determined.

In reply, Mr. Rumenyela submitted that no counter claim was filed and in case it was filed, it was upon the respondent to remind the tribunal about its existence.

I have examined the record of District Land and Housing Tribunal, indeed, the appellant filed a counter claim in his written statement of defence. However, unlike the submission by Mr. Kagashe that no written statement of defence to the counter claim was filed, it is on record that the respondent filed a reply to the written statement of defence with a reply to the counter claim. That document which was endorsed as filed on 2/6/2016 shows that the filing fees were paid on 1/6/2016 as it was ordered on 18/5/2016. Since the filing date is the date fees are paid, it was filed in time. Further, as alleged by Mr. Kagashe there is no dispute that the tribunal judgment says nothing about the counter claim. I have examined the pleadings in light of the issues framed it is my view that inspite of the silence, the judgment determined the counter claim. Hereunder are the reasons for my finding.

The respondent claimed ownership of the land by purchase for value from the deceased before she died. In the counter claim the appellant alleged the land formed part of the deceased estate and prayed for Tshs. 15,000,000/= as compensation for the house that was on the suit land which the

respondent demolished. Based of the pleadings, the District Land and Housing Tribunal framed these issues for determination: -

- i. Whether the suit premises is part of the estate of the late Mwelakale Muhene.*
- ii. Whether the applicant is the lawful owner of the suit premises.*
- iii. To what reliefs are the parties entitled to (sic).*

It follows, therefore, that the first issue covered prayers in the counter claim while the second issue was for the prayers in the application. The learned Chairman determined each issue and, therefore, the counter claim was also determined upon deciding on the first issue. I find no merits in the fifth ground of appeal too. I dismiss it.

In the event, the whole appeal, I hold, has no merits. I dismiss it with costs.



  
**I.C. Mugeta**

**Judge**

**4/3/2021**

**Court:** Judgment delivered in chambers in the presence of the appellant and her advocate Mr. Ignatius Kagashe and in the absence of the respondent, represented by Mr. Daniel Rumenyela, advocate.

**Sgd: I.C. Mugeta**

**Judge**

**4/3/2021**