

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

**AT KIGOMA**

**(APPELLATE JURISDICTION)**

**MISC LAND APPEAL NO. 21 OF 2020**

(Arising from Land Appeal No. 62/2018 of the District Land and Housing Tribunal – Kigoma  
before F. Chinuku, Original Land Dispute No. 47 of 2017 from Buhigwe Ward Tribunal)

**MALIETHA D/O GABO..... APPELLANT**

**VERSUS**

**ADAMU S/O MTENGU..... RESPONDENT**

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

10<sup>th</sup> & 24<sup>th</sup> February, 2021

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

The case by the respondent filed against her was determined *ex parte* by the Buhigwe Ward Tribunal. Being aggrieved she appealed to the District Land and Housing Tribunal where she lost too. Dissatisfied with the decision of the District Land and Housing Tribunal, the appellant has challenged it by way of this appeal. Her petition of appeal carries the following grounds of appeal: -

- 1. That, both the trial tribunal's erred in determining the dispute as they had no jurisdiction basing on the fact that the*



*dispute was purely based on probate and administration of the estate of the late Gabo Mtengu, the appellant being the Administratrix (sic) of the same estate.*

*2. That, both the trial tribunal's (sic) erred in law and fact as the said dispute was settled in probate and Administration cause No. 25/2016 before the Primary Court at Kasulu town and the respondent never appealed against the same, hence the ward tribunal was purely and strictly bound by the said decision and had no jurisdiction to entertain the land dispute No. 47/2017.*

*3. That, both the trial tribunal's (sic) erred in law and in fact by entertaining the dispute as the appellant was sued under the wrong/improper capacity basing on the fact that the issue at dispute is based on the administration of the estate of the late Gabo Mtengu which she is the appointed administratrix (sic).*

*4. That, both the trial tribunal's (sic) erred in law and in fact by failing to properly analyze the defence tendered by the Appellant herein but proceeded in determining the matter in favor of the respondent herein despite of contradictory testimonies by the respondent.*

The appellant is represented by Joseph Mathias, learned Advocate, while the respondent appeared in person. Hereunder, are the brief facts of the case.

The appellant and the respondents are siblings. Better facts on their relationship are not reflected in the record at the Ward Tribunal because the case proceeded *ex parte*. However, the parties' submissions on appeal before the District Land and Housing Tribunal show that their father died in 2004. In 2017 the appellant obtained letters of administration and started to interfere with the respondent's peaceful enjoyment of his land. The respondent took the matter to the Buhigwe Ward Tribunal. The record of the Ward Tribunal shows that the appellant refused to appear before it on 01/02/2018 as directed. Consequently, the Tribunal proceeded *ex parte* and declared the respondent the lawful owner of the dispute land. The Ward Tribunal made the following special findings: -

- (i) *The deceased distributed his land to his children before he died. Each child to stay within his/her boundaries.*
- (ii) *Part of the dispute land is personal property of the respondent which he bought and the other parcel of land is his rightful property which he inherited from his maternal side.*
- (iii) *1/3 of the eucalyptus farm along the road falls within the land given to the appellant and therefore, it belongs to her.*

The Ward Tribunal delivered its decision on 26/2/2018 and on 26/3/22018, the appellant lodged her appeal in the District Land and Housing Tribunal. Among the issues raised in the appeal are that the appellant was denied the right to be heard and that the dispute land forms part of the deceased estate which land she had allocated to herself vide probate No. 1/2017 and, therefore, the respondent being not an administrator had no *locus standi* to sue on the estate.

On the right to be heard, the District Land and Housing Tribunal held that the appellant deliberately defaulted appearance before the ward tribunal.

On whether the dispute land formed part of the deceased estate the District Land and Housing Tribunal found that the respondent sued on his personal property not the deceased estate and, therefore, he had the *locus standi*.

At this court the appeal was heard orally. When he argued the appeal, counsel for the appellant combined the first and second grounds of appeal. He submitted that the trial tribunal had no jurisdiction to entertain the dispute because the land in issue had been declared part of the deceased estate in probate cause No. 1/2017 of the Primary Court of Kasulu District at Manyovu. He argued that once there is a dispute on whether the property forms part of the deceased estate, the dispute ought to be determined by the court presiding over the probate and administration cause. To buttress his argument he cited the case decided by my brother (Matuma J.) in **Kigozi Amani Kigozi (Administrator of the estate of the late Juma Seleman) Vs. Ibrahim Seleman & 5 others**, Land Appeal No. 2/2019, High Court – Kigoma (unreported) at page 10 where it was held:-

*'It is only the probate court which is vested with powers to determine whether a dispute property belongs to the deceased person or not through the probate cause by way of*



*petition for letters of administration and  
objection thereof if any'*

In his reply, the respondent acknowledged existence of the probate and administration cause at the primary court. He submitted that after appointment of the appellant as administratrix, the primary court referred them to the ward tribunal to determine the dispute on ownership of the land listed as forming part of the deceased estate. That he filed the case thereafter.

Did the ward tribunal act without jurisdiction for a reason that the issue of ownership had been determined by the primary court in the probate and administration cause? With respect to the learned counsel, there is no evidence on record that any primary court had determined any dispute between the parties. Further, as a matter of law and practice, a primary court exercising jurisdiction on a probate and administration cause has no jurisdiction to determine a dispute on title of any property forming part of the estate. The powers of such courts are limited to appointing the administrator, approving the rightful heirs and supervising the administrator to account for his/her administration. In case of a dispute on whether the estate or part thereof forms part of the deceased estates, that dispute ought

to be determined first by the normal civil or land court, as the case may be. The exception to the above rule of law and practice is when the claim of ownership stemming from the right of inheritance or purchase for value arise while the probate and administration court is still seized with the matter meaning the administrator has not filed a final account and the court having not approved the same. In such cases the probate and administration court must determine whether title properly passed through administration of the estate. When the dispute over title is not in those two categories, or falls in those categories but the probate and administration cause has been closed by filing and approval of the final account, the probate court cannot have jurisdiction. On the relevance of the holding in Kigozi Amani Kigozi case (supra) I am of the view that the facts of that case are distinguishable as I shall demonstrate hereunder.

In Kigozi Aman Kigozi's case (supra) the court, having heard submissions by both parties on which court had jurisdiction between the land court and the probate and administration court, had this to say at page 10: -

*'My finding on this ground is that since neither Amri Ibrahim nor the respondents claimed ownership over the dispute*

*property, but each tried to establish that the property in question belong to their respective deceased persons, then the suit at the trial tribunal was not purely a land dispute whose jurisdiction is vested in the probate and administration court and not a land court’.*

This finding is in a paragraph that precedes the holding quoted by counsel for the appellant (see page 5-6 above). When they are read as a whole, the principle established is clear that when the claim of title to land listed as part of the deceased does not stem from the right of inheritance or purchase for value from the administrator of the estate, the dispute is a pure land matter which must be determined by the land court. The learned counsel, therefore, with respect, misconstrued the holding in Kigozi’s case.

The learned counsel for the appellant is, however, not alone in this misconstruction. Several advocates have appeared before me with similar argument relying on the holding in **Mgeni Seif v. Mohamed Yahaya Khalfani**, Civil Application No. 1/2009, Court of Appeal – Dar es Salaam (unreported) where, at page 14, it was held: -



*'As we have said earlier, where there is a dispute over the estate of the deceased, only the probate and administration court seized of the matter can decide on the ownership'*

In that case the issue for determination before the court as stated at page 6 was: -

*'...who the rightful success or is, to the estate of the deceased Ibrahim Athuman Ngunde who died intestate way back in 1952'*

In the course of determination of this issue the Court of Appeal held that since all claims of title to the land in that case owed their genesis to inheritance of the estate and purchase for value from the administrator the dispute ought to be decided by the probate and administration court which was still seized with the matter. The *ratio decidendi* of that holding is at page 8 of the judgment where the Court of Appeal had this to say: -

*'It seems to us that there are competing claims between the applicant and the respondent over deceased person's estate. In the circumstances, only a probate and administration court can explain how the*

*deceased person's estate passed on to a beneficiary or a bona fide purchaser of the estate for value. In other words, a person claiming any interest in the estate of the deceased must trace the root of title back to a letter of administration, where the deceased died intestate or probate, where the deceased passed away testate'.*

It follows, therefore, that like in Kigozi's case, the holding at page 14 in Mgeni Seif case should be considered in the context of that case and its application ought to be applied in case of similar facts, namely, where the root of title is the letters of administration or granted probate and purchase for value through the administration process. In that context it is a misnomer to think that the two cases set a principle of general application that all disputes involving the deceased estate are determinable by the probate and administration court.

The question of what to do when a dispute over title of a property listed in the deceased estate arise was lucidly dealt with **in Ibrahim Kusaga v. Emmanuel Mweta** [1986] TLR 26 where it was held: -

*'...there may be cases where the property of the deceased may be in dispute. In such*

*cases all those interested in the determination of the dispute or establishing ownership may institute proceedings against the administrator or the administrator may sue to establish claim of the deceased's property'*(page 30).

The learned judge, at the same page, further held: -

*'The law regarding institution of civil claims has not been changed by the administration of estate enactments. It only provides a machinery where a legally recognized person is placed in the place of the deceased person in all matter relating to the deceased's estate'.*

This case discussed the position of the law relating to law and practice in primary courts. As the issue before me relates to the powers of a primary courts too, for avoidance of doubts, the discussion in this case is limited to that court level too. I firmly believe that the above holding in Ibrahim Kusaga's case is in line with the provisions of paragraph 6 of the fifth schedule to the Magistrates Court Act [Cap. 11 R.E. 2019] which reads:-

*'An administrator may bring and defend proceedings on behalf of the estate'*

Considering this provision of the law, I am certain in my mind that stating as a general principle of law that all matters relating to deceased persons' estates ought to be determined by the probate and administration court would render paragraph 6 of the Fifth Schedule nugatory. I am also aware of the provisions of rule 8 of the **Primary Court (Administration of Estate) Rules**, G.N. 49 of 1971 which provides for other matters which may be decided by a primary court. The listed matters in rule 8 (d) includes any question as to property, assets or liabilities which vested in or lay on the deceased person at the time of his death. On account of this law, it may be argued that such powers include a dispute involving title to property. However, that construction would be stretching the rule beyond its plain meaning. I hold that view because the said rule is not independent. Its application is subjected to other laws. It reads: -

*'Subject to the provisions of any other law for the time being applicable the court may, in exercise of the jurisdiction conferred on it by the provisions of the Fifth Schedule to the Act, but not in derogation thereof, hear and decide any of the following matters, namely:-'*



It is my view that other laws to which rule 8 of G.N. 149 of 1971 is subjected to include sections 3(1) and 3(2) of the **Land Disputes Courts Act** [Cap. 216 R.E. 2019], section 167 of the **Land Act** [Cap. 113 R.E. 2019] and section 62 of the **Village Land Act** [Cap. 114 R.E. 2019] which removes jurisdiction over disputes relating to title to land from ordinary civil courts. That is why I agree with the holding in Ibrahimu Kusaga (supra) (quoted above) that the law regarding institution of civil claims has not been changed by the Administration of Estate enactments.

Back to our case; Did the respondent claim his title to inheritance or purchase for value through letters of administration? The answer is in the negative. The respondent's right to the land dates back before death of the parties' father in 2004. The undisputed evidence at the Ward Tribunal is that the deceased distributed the land to his children in 2002 before he died. It was until in 2017 when the appellant obtained letters of administration and started to meddle with the respondent's land. Under the circumstances, the respondent who did not claim interest in the estate by inheritance or purchase for value was entitled to sue at the Ward Tribunal. The Probate and administration court cannot have jurisdiction over such a dispute whether the parties are siblings and related or not. I therefore, hold that



both the Ward Tribunal at Buhigwe and the District Land and Housing Tribunal had jurisdiction. The complaint as to jurisdiction of the lower tribunals has no merits. I dismiss it.

Submitting on the third ground, the learned counsel for the appellant argued that the suit was incompetent as the appellant was sued in her personal capacity and not as administratrix of the deceased estate. The respondent did not respond to this argument. His failure might be due to being a lay person who failed to appreciate the legal argument.

I agree to the fact that while the appellant interfered with the respondent's land upon being granted letters of administration, indeed, she was sued in her personal capacity. This was an irregularity. She was supposed to be sued in her assumed capacity as administratrix. The question which follows is how far did the irregularity affect the proceedings? In normal practice, this amounts to suing a wrong party which vitiates the proceedings. However, this is not always the case with proceedings in the Ward Tribunals and District Land and Housing Tribunals. According to section 45 of the Land Disputes Courts Act [Cap. 216 R.E. 2019] proceeding in those tribunals can be vitiated by an irregularity identified on appeal or revision only if that irregularity occasioned a failure of justice.

In one of its several findings the ward tribunal had this to say:-

*'Ni kweli Adam Mtengu Mashamba ambayo anadai kuwa yameingizwa kwenye mgawo wa mirathi ambayo yalinunuliwa na mdai Adam Mtengu ni kweli yapo na baraza lilipoinuka liliyakuta na kuyaona'.*

It follows, therefore, that the Ward Tribunal was aware that it dealt with a matter involving a claim for wrongful inclusion of another person's properties in the deceased's estate. Since in the Ward Tribunal cases are not initiated by filing any document, it was upon the Ward Tribunal to record the appellant as administratrix of the deceased's estate. Such failure cannot be blamed on the respondent. This notwithstanding, such irregularity, I hold, did not occasion any injustice. It is saved by section 45 of Cap. 216 which provides: -

*'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'.*

In the end, I find the complaint in the third ground without merits too. I dismiss it.


Regarding the fourth ground, counsel for the appellant submitted that the lower court rejected the defence of the appellant that the probate and administration court had determined the dispute between the parties. Again, the respondent did not reply to this argument. This notwithstanding, I have failed to understand when the alleged defence was raised because the trial proceeded *ex parte*. In case it was stated at the District Land and Housing Tribunal, that was a mere submission which is not evidence. There are no merits in this argument as there was no defence to be rejected. It is dismissed.

To summarize, I have held that except where the dispute involves title to property by inheritance or purchase for value from administrators and the dispute arise when the primary court is still seized with the matter, a primary court exercising probate and administration jurisdiction has no powers to

determine a dispute over title or ownership of property listed as forming part of the deceased estate. The jurisdiction lies with normal civil or land court, as the case may be. In this case the respondent did not claim title to land by inheritance or purchase for value from administrators so the land courts had jurisdiction.

In the event, I find the appeal devoid of merits. I accordingly dismiss. As the parties are relative, in the spirit of fostering reconciliation, I award no costs. The decision of the Ward Tribunal is hereby confirmed.



  
**I.C. Mugeta**  
**Judge**  
**24/2/2021**

**Court:** Judgment delivered in chambers in the presence of the appellant and his advocate Mr. Joseph Mathias and the respondent in person.

**Sgd: I.C. Mugeta**  
**Judge**  
**24/2/2021**