



**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN DISTRICT REGISTRY BUKOBA
AT BUKOBA**

LAND CASE APPEAL NO. 59 OF 2019

(Arising from Application No.81/2017 of Muleba DLHT)

EDWARD SIJAONA MWINAMILA..... APPELLANT

(Administrator of the late Idd Almas Katende)

VERSUS

ABDUL IDD ALMAS KATENDE.....RESPONDENT

JUDGMENT

2/3/2021 & 11/6/2021

KAIRO, J.

Being dissatisfied with the decision of Muleba DLHT at Muleba in Land Application No.81 of 2017 delivered on 10th September, 2019, the Appellant registered an appeal No.59/2019 to this court with four grounds to challenge the matter.

To appreciate the context in which this appeal was brought, a brief background from the record is as follows: That the Respondent sued the Appellant at the DLHT for Muleba claiming that the Appellant, as an administrator of the estate of his late father, had wrongly included his Plot No.64 Block C located at Kyabona Street, Muleba Township in the Estate of

the late Idd Almas Katende and thereby distributed it to the deceased heirs while the same had already been handed over to him through an agreement which he entered between him and his late father on consideration that the Respondent build one class room as "Madrassa". He therefore prayed for a declaratory order that he be (Respondent) declared as the legal owner of the plot in dispute, among other reliefs.

After hearing and evaluating evidence from both parties, the DLHT decided in favor of the Respondent. Hence this appeal raising 4 grounds in the memorandum of appeal as quoted in verbatim hereunder:

- 1. That the trial tribunal erred in law and facts for not considering the evidence adduced by the Appellant, thus unjust for the part of the Appellant.*
- 2. That the trial tribunal erred in law and fact for not anticipating that the legal requirement to pass waqfu was not complied with, and on that regard would not decide that the late Idd Katenda passed "waqfu"*
- 3. That the trial tribunal erred in law and facts for holding that the suit premise was not among the properties of the late Idd Almas Katenda.*
- 4. That the trial tribunal erred in law and facts for ignoring exhibits R2, R3, and R4 tendered by the Appellant during hearing, thus unjust on part of the Appellant. A copy of the judgment and decree are herein attached.*



The Appellant enjoyed the legal services of Advocate Muswadiku while the Respondent was represented by Advocate Derick Zephrene.

When invited to take the floor to amplify the grounds of Appeal, Advocate Muswadiku, for the first ground stated that the Appellant produced exhibits R2, R3, R4 and R6 which were not considered. He went on that if the said Appellant's evidences were considered, the tribunal would have held that the Appellant had heavier evidence compared to the Respondent and therefore to entitle him a judgment. He invited this court to refer the case of **Hemed Said vrs Mohamed Mbillu** (1984) TLR1 113 that **"the party with heavy evidence is the one to win the case"** Giving the reasons as to why they had heavier evidence, the Appellant's counsel stated that on 2/7/2017, the Appellant convened a meeting which the Respondent also attended (Exhibit R4). In the said meeting, they identified the properties of the deceased one Idd Almas Katende and the Respondent didn't object the identification of the said properties by virtual of his signature appearing thereat. Further to that Exhibit "A1" which is a letter alleged to have been given to the Respondent to verify his ownership shows at para 3 that at the back of the property in dispute, there should be rooms for girls to which the Appellant's counsel argues that the said letter also verifies the property at issue is not of the Respondent otherwise the girl's room couldn't have been mentioned.

He further argues that exhibit "A3" at pg 6 to 7 of the typed judgment was fraudulently obtained as by that time the deceased had died already.

He also cemented that even the act of the Respondent to agree to compensate for the two girls' rooms and those left for the deceased (Katende) whereby the agreement to that effect had been signed/^{ed}executed shows that the Appellant knew that the property was not his. Thus, turning hostile by the Respondent and refusal to fulfil his part of bargain; confirms that he wanted to benefit from the property which didn't belong to him.

With regards to the 3rd ground that the trial tribunal erred in law and fact for holding that the suit premises was not among the properties of the late Idd Almas Katenda. He submitted that according to Exhibit "A1" and the submission above given authenticate that the property was among the properties of the late Idd Almas Katenda, as such it was to be included in his estate.

Mr. Mswadiko further argued that, if the Respondent alleges that he got Certificate of title basing on the agreement (Exhibit A) then he was also supposed to abide to even para 4 of the agreement by ensuring that the rooms for girls and for the deceased were to be distributed to the deceased rightful heirs/beneficiaries and not to confiscate them as well.

For the second ground, which they argue that the trial tribunal erred in law and fact for not anticipating that the legal requirement to pass "waqfu" was not complied with and on that regard would not decide that the late Idd Katenda passed "waqfu". The Appellant's advocate elaborated that according to the evidence adduced, the deceased gave other property as *waqfu* but not the land in dispute adding that the property given as *waqfu* was at Ijumbi. Thus, the Respondent's claim that he was told to build the



Madrasa at the Mosque given as *waqfu* as the condition for him to own the property was an afterthought and geared to enable him get the ownership of the property illegally. He further argues that the certificate of title acquired by the Respondent was illegal as the administrator of the late Katenda and other children of the deceased weren't involved. Advocate Mswadiku prayed for the court to quash the entire proceedings of the trial tribunal and a declaration that the property in dispute is part of the estate of the late Katenda.

Invited for the reply, Advocate Derick submitted that the Appellant's grounds of appeal have no basis and that the decision of the DLHT in this matter is correct. Replying the 1st and 4th grounds collectively, the learned counsel stated that the evidence for the Respondent were heavier than that of the Appellant. He argued that exhibit R4 which are minutes of the clan meeting that identified the deceased properties including the one in dispute during the meeting at the presence of the Respondent without objection from him does not renounce the Respondent of the property. Rather, that it is a normal procedure that even the properties which were already distributed could be mentioned. He reasoned that the objection is done at the court where parties could be heard and the ownership determined unlike at the clan meeting where ownership cannot be determined.

Concerning exhibit "A1" which in para 3 is the essence of the Respondent claim of ownership of the plot at issue, Advocate Derick refuted the contention that the certificate was procured fraudulently as the same was



obtained after the deceased's death. He further submitted that exhibit A1 and A3 weren't objected at the trial court nor proved otherwise with regards to the status of the plot. Thus, to challenge the purchase agreement into which the Respondent was required to build the Madrassa is an afterthought. He went on that in the last para on pg 16 & 1st para of pg 17 of the decision of the trial tribunal, the argument that there was fraud in obtaining a certificate was clearly analyzed to be an afterthought as well. Thus, the Appellant failed to prove the allegation on balance of probabilities.

With Regards to exhibit "R6" which was argued to show the presence of an agreement whereby the Respondent was to compensate for the two girls' room and deceased rooms; the DLHT dismissed the same at pg 20 after its analysis resolving that the agreement had no legal force. With Regard to the referred case of **Said Mohamed**, He submitted that it is irrelevant to the present case as the Respondent's evidence shows that it was heavier than that of the Appellant's. Besides, the Appellant didn't object the documents to verify the ownership of the Respondent and incase of dispute of the land ownership, it is the court with jurisdiction to determine. Thus grounds nos.1 & 4 are bound to be dismissed for want of merit.

The 3rd ground was dismissed by the Respondent's Advocate arguing the same to be baseless. Relying on exhibit "A1" (the agreement), he submitted that it should be read holistically. He contended that in the said agreement the deceased changed the ownership to the Respondent and thus not proper to look in the agreement in piece-meals as there was no



co-ownership and the issue is the ownership. He went on that the house in question was built by the Respondent on the land in dispute and thus, the Respondent was given a bare land. Further, since the ownership was transferred to the Respondent, then the same wasn't part of the estate of the deceased; argued the Advocate.

Replying to the second ground that the deceased didn't give "*waqfu*", the Respondent's Advocate relying on exhibit "A1" submitted that the word "*waqfu*" is defined under section 140 of the Probate Act. He went on submitting that at pg. 16 of the judgment the witness Hassan Juma testified that the Respondent fulfilled the giving of the *waqfu* which was a pre-condition of the Respondent to get ownership of the land in dispute. The essence of *waqfu* is a building of Madrasa by the Respondent which was fulfilled. Finally, the Respondent's counsel prayed that this appeal be dismissed with costs and the declaration that the Respondent is the owner of the land in dispute. He prays for other reliefs this court would deem fit to grant.

In rejoinder, Advocate Muswadiku insisted that since the Respondent was at the meeting to identify the properties of the deceased and the property in dispute was identified as a deceased property and the Respondent did not object but signed to signify his agreement, then his signature is an indication that he knew that the property at issue belonged to the deceased. That since the essence of ownership was exhibit A1 then the said exhibit can't be read in isolation but as a whole whereby into it at



paragraph 4, two rooms were given to two girls and other two to the late Almas Katenda himself.

With the Respondent's argument that the Respondent's exhibits were not objected (exhibit A1 and A3) the Appellant's learned counsel rejoined that one might not object the admissibility of evidence but the contents of the same. With regard to assessors, we argue that one assessor dissented (Pg 21 last para). Thus, what was submitted by the Respondent's learned counsel is not correct. He further added that it is not true that the building of Madrassa is the issue that gave the Respondent the ownership rather the said issue is being used by the Respondent as a shield to make him take the ownership of the property at issue. He reiterated the prayers in his submission in chief.

I have thoroughly considered the submissions of both parties in this dispute, the raised grounds of appeal as well as the entire record. The main issue this court is called upon to determine is whether or not this appeal has merit.

In this case, parties are at one on the followings:

1. That the late Iddi Dauda Almas Katenda gave one building of a class as Madrassa to Muslims intending to be his *waqfu* after his demise. Exhibit R4 which is a clan meeting and evidence from the Respondent confirm this.
2. That the late Dauda Almas Katende died on 20/3/2007



3. Following his death, the Appellant was nominated by clan meeting to petition to be appointed by Primary court as administrator of the deceased estate and was accordingly appointed.
4. The administrator convened a meeting to identify the properties of the deceased including Plot 64 Block C in Muleba Township which is in dispute and the Respondent was among the attendees in the said clan meeting.

The only main Centre of controversy between the parties is whether Plot 64 Block C in Muleba Township forms part of the estate of the late Idd Almas Katende. The Appellant contending that it does while the Respondent refutes.

The High Court being the first appellate court is mandated to make an assessment of evidence adduced at the trial and test such evidence against the finding of the trial court. **[Refer case of Ruwala VS R [1957] EA 570 as quoted in the case of Damson Ndaweka VS Ally Saidi Mtera: Civil Appeal No 5/1999 CA Arusha (unreported)].**

In order to prove that the property in dispute does not belong to the Respondent, the Appellant's counsel referred the court to exhibit R4 which was the clan meeting convened to identify the properties that formed the estate of the deceased. Keen perusal to the said exhibit R4 the court observed that the task of identifying the deceased estates was the 4th agenda and the property in dispute was identified as well. The Respondent was among the clan members attended and he signed without objection



verifying as correct the properties identified. The Respondent's counsel had argued that he could not have objected as the clan meeting is not a court to determine ownership. With much respect I don't subscribe to his assertion. In my view, one of the rationales behind convening such procedural clan meeting before the administrator of the estate is appointed is to identify the deceased properties which will form part of the estate and therefore intended to avoid unnecessary future disputes which would result by including other people's properties in the estate of deceased. To say the least, the dispute at hand would have been resolved at family or clan level and might not have reached the court corridors. In-fact I would say the practice intends clan members who are blood related to amicably exhaust local remedies available at their family level. That is why in the prescribed Form No.1 under primary court probate administration Rules the petitioner is required to fill in the deceased estates as a condition before the court can start hearing a probate cause. I fail to comprehend how the Respondent who attended the clan meeting of identifying the deceased estates agreed to the identification while he had a property registered in his name included in the estate of the deceased. Instead, he kept mum with no objection and proceeds to sign the resolution of the meeting, alleging to wait to object it at the court. In my conviction the doctrine of estoppel operates against him. This takes this court to deduce that the property in dispute does not belong to him but to the deceased estate as rightly argued by the Appellant's counsel.



Further scrutiny to exhibit A1 (the agreement of 17/01/2005 between the Respondent and his late father) which the Respondent relied on to initiate the ownership change process of the land in dispute (originally was Plot 11 Block C) from the name of the deceased to his name, still this document did not give him the sole ownership of the entire plot to the Respondent, even if it is assumed the agreement to be genuine. Paragraph four (4), of the said agreement which I wish to quote reads "*Pia katika jengo la uani kutakuwepo na vyumba viwili vya Mzee Idd Almas Katenda na vyumba viwili vya wasichana*". The Appellant's counsel concludes and rightly so, that the property was subject to distribution to deceased respectful heirs and not to be solely owned by the Respondent. Confirming this premise, there was another piece of evidence from Aziza Idd Katende (RW2) (pg. 11-12) as per the typed judgment who testified that in exhibit A1 the Respondent was not given a plot permanently instead was given to own it for 10 years from 2003 and this was after the Respondent had renovated two rooms of the suit plot. Further that after the expiry of the said term in 2013 the ownership of the suit plot reverted to the deceased. The same was later distributed by the Appellant being an administrator of the deceased estate out of which she was given room No.2 and the report of the distribution was taken to court which process dissatisfied the Respondent. She further testified that the Respondent thus offered Tshs.30,000,0000 to give to girls so that they can vacate but he changed his mind and opted to institute this case.



Reacting to the Appellant's argument on exhibit "A", the Respondent's counsel stated that para 3 of the exhibit is what answers how the Respondent obtained the plot. I join hands with argument advanced by the Appellant's counsel that exhibit "A1" shouldn't be read in isolation and doesn't give solely ownership to the Respondent. Similarly, I also wish to hasten to add that it cannot also be read in isolation concentrating on para 4 and concludes that the entire plot belongs solely to girls. The proper interpretation of exhibit "A1" is to read it holistically and in harmonization. That being the case, the plot in my conviction was intended to be distributed to respectful heirs/beneficiaries and was not for one person. As such it was correct to include it in the deceased estate subject to distribution by the administrator.

Another controversy was centered on exhibit R6 which the Appellant counsel submits that it vividly indicates that the property in dispute was not for the Respondent as the Respondent agreed to compensate the girls Thsh.30,000,000 on the two rooms, but later on, he changed his mind and went to court. This was also confirmed by RW2 who gave the story explained above that the Respondent wanted to compensate them after the administrator had finished distributing the said property to them. As a response, the Respondent's counsel referred the court to page 20 of the typed judgment arguing that the trial Chairman rightly dismissed it. Visiting the referred page 20 of the judgment, the trial Chairman ruled that the agreement did not have force of law as there was no order from court confirming it. Analyzing the assertions, the Respondent's counsel does not

dispute the existence of the said contract nor the assertion that the Respondent had agreed to pay Tshs.30,000,000/= as compensation for two rooms of girls and deceased rooms. The only dispute is the legal validity of the said agreement. Passing through the exhibit R6 it can be decerned that this was a genuine documentary evidence which speaks for itself wherein the Respondent attempted to compensate Tshs.30,000,000/= for the two rooms and deceased rooms so that the Appellant withdraws the probate case No.15/2017. Looking at it, the same was an agreement to settle the matter outside the court between the administrator of estate and the Respondent as it bares names of parties to contract and respectful witnesses. It further bears the primary court stamp/seal. In this regard therefore, the contention that the agreement had no legal force, in my view was a misconception with due respect. Besides, I don't see the reason of having a court order to confirm the agreement or compel the Respondent to fulfil it as his failure to part with the consideration has made the contract die a natural death. Despite being a defaulting party, he rushed to institute the case. However, I am of the considered view that the Respondent's willingness to pay Tshs 30,000,000/= as compensation to the other co-heirs and later on changed his mind, has made this court draw an adverse inference against him that he clearly knows that the said property was not his but belonged to the deceased estate, thus subject to distribution to all respectful heirs.

The other glittering issue which this court cannot leave it unresolved concerned the certificate of title of the plot in dispute (Exhibit A3). The



Appellant's counsel alleges that it was fraudulently obtained as it was procured after the death of the deceased. The Respondent's counsel refutes that the said assertion is an afterthought but referred to the analysis of the trial tribunal that there was no forgery reported. The Respondent's counsel defended that at the trial the exhibits were not objected before admission. But it should be noted that admitting an exhibit is one thing and an assessment of the exhibit to determine its weight/ its probative value is another thing altogether. Thus, admission of the exhibits is not synonymous with its relevance. The weight and content of it can still be objected as rightly submitted by the Appellant's counsel. However, this court is not in a position to rule out whether exhibit A3 is forged or not but what the court can do is to assess and evaluate its weight before it can rule out on its probative value. With the entire evidence already evaluated this certificate leaves a lot to be desired as analyzed below:

First, it was initiated from exhibit A1 which is alleged to be a sale agreement in consideration of the Respondent to build a madrassa class and it was proved that the madrasa was built. But the said exhibit A1 as analyzed above has a co-ownership element wherein as there were rooms for girls and for deceased spelt therein. Surprisingly, the Respondent proceeded to initiate the process of acquiring a certificate of ownership alone using a sale agreement which is encumbered with other people's rights.

Secondly, it is not known as to who was filling dispositions forms in all processes of dispositions having in mind that the certificate was obtained while the deceased had died already.

Thirdly, the death certificate of the deceased shows that he died on 20/3/2007 while the certificate of the right of occupancy (Exhibit A3) of the disputed plot was registered on 12/12/2007. It is therefore not certain if the disposition process survived the deceased or not.

The above analysis lives a lot to be desired with regards to the obtaining of the said certificate at issue. As such the court declares that its allocation to the Respondent is a nullity.

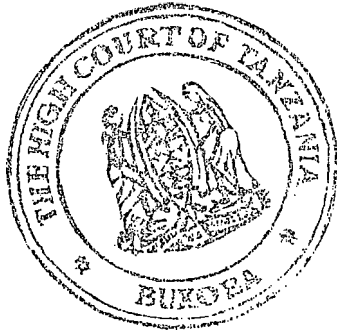
I see no need to venture in the argument of whether the "*waqfu*" was passed or not as the record show that it was not in dispute as well that the property given as "*waqfu*" to Muslims is distinct from the property in dispute.

In the event and basing on the above analysis, the court orders as follows:

- i) the appeal against the trial tribunal judgment and decree is allowed.
- ii) The court declares that the suit land is part of the estate of the late Idd Almas Katenda thus subject to distribution to respective heirs.
- iii) The court further declares that the allocation of the land in dispute to the Respondent is void.
- iv) Each party to bear his own cost as the dispute concerns relatives.

It is so ordered.

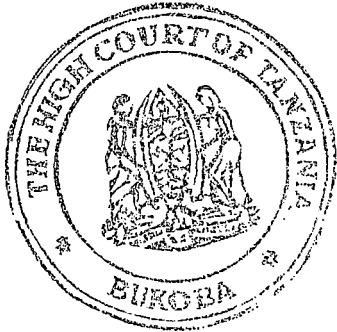





L.G. Kairo
Judge

11/6/2021

R/A explained;




L.G. Kairo
Judge

11/6/2021

Date: 11/6/2021

Coram: Hon. J. M. Minde, DR

Appellant: Present

Respondent: Present

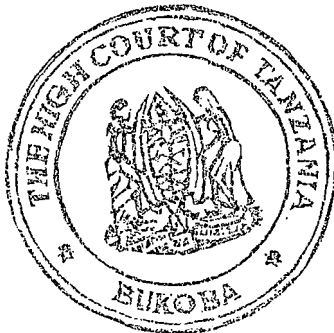
B/C: Lilian Paul

Advocate Mswadick for the Appellant:

Advocate Zephrine for the Respondent:

This matter was scheduled for ruling. We are ready to receive the ruling if it is ready.

Order: Ruling delivered this 11/6/2021 in the presence of the parties, and their advocates.




J.M. Minde
Deputy Registrar
11/6/2021