

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO. 18 OF 2020

(Originating from the decision of the District Court of Temeke at Temeke in
Misc. Application No. 44 of 2018 before Hon. K.T. Mushi, **RM** dated
04/11/2019)

**AFUA SELEMANI MAGANGA (As Administratrix
of the estate of the Late Selemani Maganga
and Kesi Selemani)** } **..... APPELLANT**

VERSUS

**AMINA HASSAN MAGANGA (As administratrix
of the estate of the late Hassan Maganga) RESPONDENT**

JUDGMENT

11th May & 25th June, 2021.

E. E. KAKOLAKI J

In this appeal which is contested by the respondent, the appellant is challenging the ruling of the District Court of Temeke at Temeke in Misc. Application No. 44 of 2020 dated 04/11/2019, that dismissed her application for revision. She has fronted three grounds the appeal going thus:

1. That the trial District Court erred in law and fact by determining the issues of ownership of the landed property while the court has no jurisdiction.
2. That the trial District Court erred in law and fact by determining the Death Certificate of Kesi Selemani Maganga was procured fraudulently while the same was issued by competent authority and is genuine.
3. That the trial District Court erred in law and facts by failing to determine the issues brought on trial court and focused to matters which were not relevant.

The appellant is therefore praying this court to allow the appeal and set aside the ruling of the trial court with costs.

Briefly the administration of the estate of the late Kesi/Hassan Selemani Maganga is the epicentre of the dispute in this matter where there are two sets of administratrixes of his estate. The first set is claiming to administer the estate of the late Selemani Maganga and Kesi Selemani Maganga while second set is doing for the late Hassan Selemani Maganga. As to the first set, before the Primary Court of Temeke in Probate Cause No. 316 of 2006, one **Ashura Selemani Maganga** the appellant's mother successfully petitioned and appointed administratrix of the estate of her late father one Selemani Maganga. The said estate included two houses in Plot No. 1 Block B Mwaka Street, Temeke and Plot No. 23 Block L, Chihota Street, Temeke that were bought by the said late Seleman Maganga in the 1960's but registered in the names of Kesi Selemani Maganga, the inclusion which was unsuccessfully objected by one **Ahmed Seleman Maganga** who claimed to be the administrator of the estate of the late Hassan Selemani Maganga.

Having lost in objection proceedings in Probate Cause No. 316 of 2006, the said **Ahmed Seleman Maganga** successfully appealed to the District Court, Civil Appeal No. 49 of 2007 and managed to remove the said two above named properties belonging to the late Kesi Selemani Maganga from the estate of the late Selemani Maganga. Subsequent to that he petitioned in Probate Cause No. 170 of 2007 before Mbagala Primary Court and successfully appointed as administrator of the estate of the late **Kesi or Hassan Selemani Maganga** who according to the affidavit affirmed by the said Ahmed Seleman Maganga is one and the same person and owner of the two properties above named, thus the second set of administration. It is worth noting however, **Ashura Selemani Maganga** who was once part of the proceedings in that Probate Cause No. 170 of 2007 never disputed registration of the two properties in the names of the late Kesi Selemani Maganga, though she claimed them to form part of her late father's estate (Seleman Manganga) the claim which was dismissed by the court and never appealed against. The said **Ahmed Selemani Maganga** (administrator in the second set) passed away before he had even distributed the estate of the late Kesi or Hassan Selemani Maganga to the beneficiaries and his office was replaced by **Amina Seleman Maganga** (respondent) vide the letter of appointment issued on the 24/08/2012 in the same Probate Cause No. 170 of 2007.

With regard to the first side set of administration, **Ashura Selemani Maganga** also passed away her office was taken over by the appellant. The Appellant having affirmed an affidavit on the 05/09/2012 to the effect that the late Kesi Selemani Maganga died in 1969 at home, and therefore she

had no death certificate, on the same date through Probate Cause No. 496 of 2012, was successfully appointed administratrix of the estate of the late Kesi Selemani Maganga.

Being the administratrix of the estate of late Kesi Sulemani Maganga duly appointed in Probate No. 496 of 2012, the appellant lodged with the District Court of Temeke, Misc. Application No. 44 of 2018, seeking to revise and cancel the decision of the Mbagala Primary Court in Probate Cause No. 170 of 2007 that granted administration of estate of the late Kesi/Hassan Seleman Maganga to the respondent, on the ground that, the grant of letters was procured fraudulently and the estate included properties not belonging to the said the late Kesi/Hassan Selemani Maganga but rather the late Seleman Maganga. Upon full hearing the District Court found the Primary Court had jurisdiction to grant the said letters of administration to the respondent and that, there was no evidence to prove the disputed properties were included in the estate of the late Kesi or Hassan Seleman Maganga fraudulently, hence dismissal of the application. It is from that decision which aggrieved the appellant this appeal has been preferred to express her dissatisfaction.

Both parties in this appeal are represented and the matter proceeded by way of written submissions in which the filing schedule orders were complied with save for the appellant who waived her right to file rejoinder submissions. The appellant had representation of Mr. Egbert Milanzi learned advocate whereas the respondent was defended by Mr. Philemon Mutakyamirwa learned advocate.

During his submission in chief in support of the appeal Mr. Milanzi opted to argue all the grounds jointly since they are interrelated and were aiming at faulting the trial court for its failure to correctly determine what he termed the core and basic issue as to ***“whether the late Kesi Selemani Maganga and Hassan Selemani Maganga was one and the same person using different names”***. It was his view that, once this issue is resolved then the centre of dispute as to whose estate are the two landed properties belonging to will be resolved too, hence disposal of all three grounds of appeal. It was his argument concerning the two landed properties that, the same belonged to the late Kesi Selemani Maganga whose administration of estate is under the appellant and that she rightly included them in his estate. He said, the respondent and her predecessor (Ahmed Selemani Maganga) fraudulently included the said two disputed houses registered in the names of Kesi Selemani Maganga into the estate of Hassan Selemani Maganga after affirming the affidavit exhibiting that Hassan and Kesi is one and the same person. He contented, the appellant presented two separate death certificates for Hassan and Kesi genuinely issued by competent authority (RITA), which were admitted by the District court as evidence to disprove the respondent’s affidavit submitted in Probate Cause No. 170 of 2007, exhibiting that the two were different persons but the court completely failed to consider them, despite the fact that they were not contradicted. He stressed, Hassan and Kesi were blood brothers and children of the late Selemani Maganga and that the said Kesi died at infant stage and survived with no issues, thus his properties were entitled to be inherited by his brothers and sisters. Mr. Milanzi submitted therefore, this appeal has

merits and prayed the court to allow it by quashing the decision of the District Court with costs.

Opposing the appeal Mr. Mtakyamirwa argued, the appellant's submissions attacking the respondent's affidavit when petitioning for appointment of administration of the estate of Kesi/Hassan Selemani Maganga in Probate Cause No. 170 of 2007 is misleading and unrealistic for the following reasons.

One, during the said Probate Cause No. 170 of 2007, **Ashura Selemani Maganga** predecessor of the appellant was part of the proceedings and never raised objection on the two names of the late Kesi/Hassan Seleman Maganga when Ahmed Seleman Maganga the predecessor of the respondent was appointed administrator of his estate. **Second**, whereas the certificate of death of Hassan Seleman Maganga who died 1999 was procured in 2007 with view of supporting Probate Cause No. 170 of 2007, the purported death certificate of Kesi Seleman Maganga showing his death occurred the year 1969 was obtained on 19/09/2012 five (5) days passed the appointment of appellant as administratrix of the estate of Kesi Seleman Maganga in Probate Cause No. 496 of 2012 on 14/09/2012. Mr. mtakyamirwa said the procurement of the said death certificate after his appointment was actuated with ill intent and fraudulence, as she had affirmed the affidavit before on 05/09/2012 stating that, the deceased died at home and she had no death certificate something which creates more doubt and confusion, thus a proof that, the said certificate was fraudulently obtained. He concluded the certificate was intended to deprive the respondent of her properties by suggesting that Kesi and Hassan were two different persons while in fact he

is one and the same person. He therefore urged this court to dismiss the appeal for want of merits.

I have carefully and painstakingly visited the entire record as well as paying the parties' fighting arguments the deserving attention and consideration. What is discerned from them is that both parties are at one that the said two landed properties were registered in the name of Kesi Selemani Maganga and that ownership had never changed until when he passed away. They are only at loggerheads when it comes to the names of the said Kesi Selemani Maganga and the period he died, as the respondent through Mr. Mutakyamirwa alleges he is known as Kesi or Hassan Seleman Maganga who passed away in 1999. To the contrary Mr. Milanzi for the appellant claims Kesi and Hassan Selemani Maganga are two different persons and that Kesi passed away in 1969, as the names of Kesi/Hassan Seleman Maganga were fraudulently claimed by Ahmed Seleman Maganga, the predecessor of the respondent when affirmed an affidavit to support his appointment as administrator of estate of the purported late Hassan/Kesi Seleman Maganga in Probate Cause No. 170 of 2007. With due respect to Mr. Milanzi's attractive submissions, I don't find merit in the appellant's claims. It is the law that where the issue of fraud is raised in civil matter the standard of proof is higher than in the normal suit given its criminality nature. This has been a long standing position of the law in our jurisdiction as there is plethora of authorities on the subject such as **Ratilar Gordhanbhai Patel Vs. Lalji Mekanji** (1957) E.A 314 and **Omary Yusuph Vs. Rahma Ahmed Abdulkadr** (1987) T.L.R 169. This court in the case of **Othuman Kawila Matata Vs. Grace Matata** (1981) LRT 23 at page 26 and 27 the late Mr.

Justice Lugakingira, J (as he then was) quoting the case of **Batter** (1951)³⁵ at page 37 by Lord Denning and the case of **Ratilar Gordhanbhai Patel** (supra) had the following to say on the standard of proof of allegation of fraud in civil suits:

*"It is trite law that fraud must be strictly proved. In **Batter** (1951) P.35,P37 Lord Denning said:*

*"A civil court when considering a charge of fraud will naturally require a higher degree of probability than that which it would require if considering whether negligence were established" "And even more pertinently the Court of Appeal for East Africa said in **R.G. Patel Vs. Lalji Makanyi** (1957)EA 314 at P.316:-
"**Allegation of fraud must be strictly proved, although the standard of proof may not be as heavy as the required proof beyond reasonable doubt, something more than were balance of probabilities is required.**" It is upon that standard that the plaintiff allegations are to be considered. I will require something more than a balance of probabilities". (Emphasis added)*

The principle was reiterated by the Court of Appeal in the case of **Omary Yusuph** (supra) where it had this to say:

"... it is now established that when the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases..."

Similar views were aired by the Court of Appeal when cemented on the principle in the case of **Joseph Mgege Vs. Joseph Amos Mhiche**, Civil Appeal No. 137 of 2017 (CAT-unreported) where it had this to state:

“...it is obvious that the burden of proof of fraud in civil case is heavier than a balance of probabilities generally applied in civil.”

With the above authorities it is clear to me that, whoever alleges fraud in civil suit must prove it to the required standard. It is also a principle of law under section 110 of Evidence Act, [Cap. 6 R.E 2019] that, anyone who wishes the court to give judgment or liability depending on existence of certain facts which he asserts must prove existence of those facts. The said section 110 reads:

110.-(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

In this matter the appellant having alleged the letters of administration of estate of the late Kesi/Hassan Selemani Maganga by the respondent in Probate Cause No. 170 of 2007 was procured fraudulently by presenting affidavit depicting names of Kesi and Hassan Seleman Maganga as one and the same, she ought to have proved it to the required standard as articulated in the above cited cases. Annexing the copy of death certificate of the late Kesi Seleman Maganga issued on 19/09/2012 to the affidavit in support of Misc. Application No. 44 of 2018 before the District Court which its

genuineness was also called into question by the respondent in her paragraph 7 of the Counter affidavit for being fraudulently obtained, in my firm view was not enough evidence to prove the date of his death as well as existence of two different persons, meaning Kesi Selemani Maganga and Hassan Selemani Maganga. My view is premised on the fact that authenticity of the said copy of death certificate would be well established through inquiry for having it tendered by the officer from issuing authority who could be subjected to cross examination, the procedure which could not have been taken during revisional proceedings unless a new and fresh suit is preferred for that purpose.

As if that is not enough, as rightly submitted by Mr. Mutakyamirwa during the proceedings for appointment of **Ahmed Selemani Maganga**, predecessor of the respondent as administrator of the estate of the late Hassan Selemani Maganga in Probate Cause No. 170 of 2019 which was preferred after removal of the two disputed properties from the estate of the late Selemani Maganga via Civil Appeal No. 49 of 2007, **Ashura Selemani Maganga** the predecessor of the appellant was present and never raised any issue over names of the said Kesi/Hassan Selemani Maganga. It is even surprising to learn that, the alleged certificate of death relied upon by the appellant was obtained on 19/09/2012 after his appointment as administratrix of the estate of the late Kesi Selemani Maganga and Selemani Maganga in Probate Cause No. 496 of 2012 on 05/09/2012, and after having affirmed the affidavit on the same date deposing that, the deceased died in 1969 at home, thus there was no death certificate. All those material facts leave this court with full of doubt on the genuineness of the said death

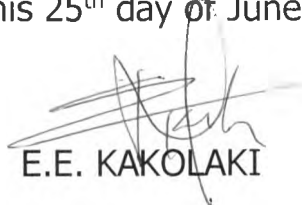
certificate. It is my conviction therefore that, the same could not have proved the alleged respondent's fraudulent act of obtaining letters of administration of the estate of the late Kesi/Hassan Selemani Maganga nor disprove the fact that the deceased is one and the same person. Therefore the three grounds of appeal have no merits as I find no materials before me to fault the District Court findings.

In the premises and for the fore stated reasons, I am inclined to hold the appeal was lodged without scintilla of merit and the same is hereby dismissed in its entirety.

For the purposes of creating peace and harmony between the parties who are one family members, I order each party to bear her own costs.

It is so ordered.

DATED at DAR ES SALAAM this 25th day of June, 2021.



E.E. KAKOLAKI

JUDGE

25/06/2021

Delivered at Dar es Salaam in chambers this 25th day of June, 2021 in the presence of Mr. Egbert Millanzi advocate for the appellant, Mr. Jediness Jasson advocate for the respondent and Ms. Asha Livanga, court clerk.

Right of appeal explained.

A handwritten signature in black ink, appearing to be 'E. E. Kakolaki', written over a faint circular stamp.

E. E. Kakolaki

JUDGE

25/06/2021