

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. 14 OF 2021

(Arising from Misc. Land Application No. 26/2020 of the District Land and Housing Tribunal for Kigoma Before M. Mwinyi - Chairman)

FESTO S/O NJAUAPPELLANT

VERSUS

RETISIA D/O NZOZI (The Administratrix of the estate

of the late **TOLEGWA S/O MUHEHE.....1st RESPONDENT**

ZAINABU D/O NZOZI.....2nd RESPONDENT

J U D G M E N T

19th & 19th August, 2021

A. MATUMA, J.

In the District Land and Housing Tribunal for Kigoma at Kigoma, the appellant herein sued the Respondents over ownership of the land in dispute. His claim was that he had obtained the dispute land from his deceased grandmother who had given him such land as a gift when she was still alive.

The first Respondent having been appointed as administratrix of the said deceased person trespassed into the dispute land in which the appellant

has built his house and residing therein alleging that such land is among the deceased's estate. The 1st and 2nd respondents are claiming that the property in dispute form part of the estate of their mother, now the deceased one Tolegwa Muhehe who is also the grandmother of the Appellant.

At the trial tribunal, the respondents raised among other preliminary issues, that the trial tribunal had no jurisdiction to entertain the suit as it relates to the property which forms part of the estate of the deceased person.

The trial tribunal having heard the parties on that issue sustained the objection on the reasoning that;

'... ni kweli mdaiwa wa kwanza ni msimamizi wa mirathi ya marehemu Tolegwa Muhehe na eneo la mgogoro kwa upande wa wadaiwa wanadai ni sehemu ya mirathi ya marehemu Tolegwa Muhehe na upande wa mdai anadai kwamba eneo la mgogoro alipewa zawadi na marehemu Tolegwa Muhehe hivyo si sehemu ya mirathi. Kutokana na hoja hizo nakubaliana na wakili wa wajibu maombi kwamba baraza hili halina mamlaka ya kusikiliza shauri hili, kwa maana ya kwamba, mleta maombi alitakiwa kupeleka maombi kwenye mahakama za kawaida kupinga ugawaji wa mali za marehemu kwa kuwa maombi yake mbele ya baraza hili ni ya mali iliyojumuishwa kwenye mirathi...'

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It is from such ruling the Appellant has preferred this appeal with four grounds whose major complaint is that;

The Hon. Chairman erred in law to sustain the preliminary objection that the trial tribunal had no jurisdiction over the matter while the same is purely a land dispute and not a probate dispute.

At the hearing of this appeal the Appellant was present in person while the Respondents were present in person with the services of Mr. Masendeka Ndayanse learned Advocate.

The Appellant submitted briefly that after having been given the dispute land by the deceased grandmother at the time she was still alive, he built four buildings thereon, planted three banana trees and installed water tape and electricity. That he even pays to TRA the requisite revenues for the buildings.

The appellant went on that the dispute land is his lawful property which does not form part of the deceased's estate but the respondents have invaded him claiming the same to be the property of the deceased. He winded up that in the circumstances that the property was no longer belonging to the deceased and the fact that he is not among the beneficiary to the estate of the deceased, the District Land and Housing

Tribunal had jurisdiction to entertain the dispute and thus wrongly dismissed it. He called this court to order restoration of the suit at the trial tribunal for determination on merit by another Chairman with a new set of assessors.

Mr. Ndayanse learned advocate objecting this appeal submitted that the Chairman was right to dismiss the suit because the property in dispute was part of the deceased's estate and therefore only the Probate Court is enjoined jurisdiction to determine ownership thereof.

The learned advocate further submitted that the probate court has already appointed the 1st Respondent to administer the estate of the deceased person including the current dispute land and therefore only it, can determine the dispute between the parties over the ownership thereof.

After having heard the parties, it is obvious that the preliminary objection was not raised from the facts pleaded on the pleadings (Application) of the Appellant but from the facts pleaded in the Written Statement of Defense of the Respondents.

The Appellant in his Application (pleadings) claimed to be lawful owner of the dispute land which he had acquired as a gift from his late



grandmother. Among the attachments to his application was a gift deed (Mkataba wa Kupewa eneo).

In that respect he did not plead the property in dispute to belong to the deceased person nor forming part of the deceased's estate. Even in his written submission against the preliminary objection at the trial tribunal he was very clear that he was not claiming title over the dispute land by way of inheritance.

Therefore, issues of probate or that the dispute land is part of the estate of the deceased were raised by the Respondents in their own Written Statement of Defense. In that respect, the Respondents created their own facts and then raised objection thereon against the appellant. That is bad in law as the Preliminary Objection must always be a point of law raised from the facts pleaded by the Applicant/Plaintiff himself. One cannot create his own facts and use the same to blow out the claimant/complainant thereof. Allowing such a trend would prejudice Plaintiffs or Applicants as the Defendants/Respondents would always be creating their own facts to attract legal course for the purposes of pre-empting the suits against them.

The Preliminary Objection can only be raised from the facts which are apparent on record and are not in dispute by the parties but the same

attracts some other legal course (preliminary issues). If some evidence would be required (out of the facts pleaded) to ascertain the objection, then the objection would be not a point of law at all to qualify being called as a competent preliminary objection. See the decision in a landmark case on preliminary objection issues; ***Mukisa Biscuits Manufacturing Company Limited versus West End Distributors (1969) EA 696.***

In this case the parties were at issue whether the property in question was an independent property of the Appellant or formed part of the deceased's estate. Therefore, the evidence was required to ascertain the fact. In the circumstances, the appellant's claim could have not been blown out by preliminary objection. To do so is as good as if the chairman was already satisfied by the allegations of the respondents that the property in dispute was among the properties of the deceased. That was condemnation of the appellant unheard.

My Learned brother Justice Mugeta in addressing the issue of a similar nature in the case of ***Asha Matulike versus Elidadi Elias Mathayo, Land Appeal No. 21 of 2020***, High Court at Kigoma held that the jurisdiction on disputes involving properties allegedly forming part of the deceased estate is vested to both Civil and Land Courts depending on the

nature of the dispute. He was clear in that decision that the probate court would only have jurisdiction over such dispute;

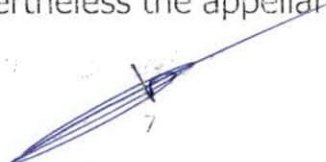
'Where the claim to title originates from inheritance or purchase for value from administrator and the probate court is still seized with the matter'.

He referred to the Court of Appeal decision in reaching to such decision.

That is the case of ***Mgeni Seif vs. Mohamed Yahaya Khalfan***, Civil Application No. 1/2009 (CAT at Dar es salaam).

I also had opportunity to rule out in the case of ***Kagozi Amani Kagozi (Administrator of the estate of the late Juma Selemani) versus Ibrahim Seleman and 6 others***, Land Appeal No. 2 of 2019, High Court at Kigoma that when the dispute over ownership of land is purely a land matter, the court vested with jurisdiction to determine the dispute would be a land court. The Probate and Administration Court would only be vested with such jurisdiction when the dispute over ownership thereof revolves around probate issues perse.

In the instant case it is a battle between the administratrix of the estate of Tolegwa Muhehe and a third party to the probate who does not claim ownership by way of inheritance. The dispute in the circumstances, is not purely a probate issue nevertheless the appellant's title is alleged to have



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been acquired from the deceased person during her life hood. It is difficult to drag a third party into the Probate Court to determine his title on land while his claims over ownership are independent of the estate in question.

A third party can only be involved in the probate court where he has seen a notice of intent to administer his property as part of the estate of the deceased estate. Under such situation he is entitled in law to enter into the probate court by way of objection to have his property excluded from the pending probate cause. But when there is no evidence that a third party was made aware of the intent to have his property included in the probate and becomes aware only when the administrator is collecting the estate then such third party would be entitled to go to the relevant land court to protest for his ownership.

This is because the probate court would have already passed the stage of entertaining objections and cannot be said to still have seized with the matter.

The question is; in which court the administrator of the estate would go to have a third party to the probate be evicted from a landed property when collecting the estate of the deceased? Putting this question in this respective case; In which court would the Respondents go to have the

appellant evicted from the dispute land which he has already built some houses and residing thereon?

It is my firm stand that in the circumstances, the eviction order would only be sought and obtained from the relevant land court and not the probate court because the third party is not subject to the probate court where his ownership on the property is not claimed to have been tied to inheritance or purchase for value from the administrator of the estate as held by Justice Mugeta supra.

If that is the case, why then should a third party be denied opportunity to sue an administrator of the estate in the land court where it is alleged that the administrator of the estate is wrongly trespassing to the property which is not belonging to the deceased's estate.

With the herein observations, I allow this appeal. The ruling of the trial tribunal is quashed and the drawn order thereof set aside.

It is hereby ordered that, Land Application No. 26 of 2020 between the parties herein in the District Land and Housing Tribunal is restored and be heard and determined on merits before a different chairman with a new set of assessors. This appeal is allowed with costs.

It is so ordered.



A. Matuma

Judge

19/08/2021

Court: Judgment delivered in the presence of both parties in person and Advocate Ndayanse for the Respondents. Right of appeal explained.

Sgd: A. Matuma

Judge

19/08/2021