

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MUSOMA

AT MUSOMA

LAND APPEAL NO 18 OF 2021

RAPHAEL MAITARYA (Administrator of the

Estate of the late Maitarya Matiko Makorere**APPELLANT**

VERSUS

BENARD RAPHAEL**1ST RESPONDENT**

LOYCE RAPHAEL**2ND RESPONDENT**

SARA PHILIPO**3RD RESPONDENT**

(Arising from Application No. 55 of 2019)

JUDGMENT

8th September & 4th October, 2021

Kahyoza, J.

The district land and housing tribunal (the DLHT) dismissed the application instituted by Raphael Maitarya (the administrator of the late Maitarya Matiko Maharere) (Raphael) against Benard Raphael, Loyce Raphael and Sara Philipo ,for a declaration that he is the owner of the suit.

Aggrieved, Raphael appealed to this Court raising eight grounds of appeal as follow:-

1. That, the trial tribunal erred in law for failure to consider that the 1st and 2nd respondents sold the disputed land to the 3rd respondent without consent from the appellant.
2. That, the trial tribunal erred in law for failure to consider that the 3rd respondent did not take any measures to know if the appellant consented the land to be sold.
3. That, the trial tribunal erred in law for failure to give chance the appellant to call his key witness.
4. That the trial tribunal erred in law and fact for failure to consider that the sale agreement was void.
5. That, the trial tribunal erred in law and fact by holding that the 1st and 2nd respondent s sold legally the disputed land while knowing that the 1st and 2nd respondents was not an administrator of the estate of late MAITARYA MATIKO MAKORERE.
6. That, the trial tribunal erred in law and fact for failure to consider that the 1st respondent is insane.
7. That, the trial tribunal erred in law and fact for disregard of the appellant testimony.
8. That, the trial tribunal erred in law and fact to deliver judgment in favour of the 3rd respondent without considering that the 1st and 2nd respondents did not deserve to sale the land in disputes to the 3rd respondent.
9. That, the tribunal erred in law and fact for failure to consider that the 3rd respondent is still trespassing to the appellant land.

The background of this matter is that, Raphael is the father and husband of Benard Raphael and Loyce Raphael, respectively. Sometimes in 2014 Benard and his mother sold a piece of land to Sara Philipo for Tzs. 700,000/=. The size of the piece of land is said to be 93 paces to 63 paces. The sale agreement was executed before the hamlet chairman of Kiterere-Nyarero village. It is in the sale agreement that the family members consented to the sale of the land. Benard and his mother Loyce sold the disputed land to take Benard for treatment. The sale agreement was witnessed by one of the family members Makima Matiko Maitarya.

Raphael deposed that before he instituted the current matter he sued the respondents before the ward tribunal and lost. He appealed to the DLHT which nulled the proceedings as he had no letters of administration of the deceased's estate. The land in question is said to be the property of Raphael's late father, Maitarya Matiko Makorere.

This is the first appellate Court, thus, entitled to review the whole evidence on record. Upon perusal of the record, I find that Raphael sued the respondents before the ward tribunal in 2016, it was Land Case No. 17/2016, Nyarero ward tribunal. He appealed to DLHT which found that the applicant had no *locus standi* and ordered the matter to be tried *de novo*. He instituted a fresh application before the DLHT. It is on record that the appellant applied to administer the estate of his late father in 2017, who died on the 10/9/1964. The primary court's judgment shows that the appellant petitioned for letters of administration as the deceased left behind 20 acres of land. He told the primary court that his late father distributed part of his estate *inta vivos*.

Raphael (Pw1) told the DLHT that his father left behind 10 acres of land from which that Raphael and Loyce sold 2 acres of land. He added that the remaining 8 acres of land was not enough for the big family left behind.

Raphael and Loyce did not file their written statement of defence or testify. Sara, on her part, she explained that Benard and her mother, Loyce sold the disputed land to her. The sale was executed by the hamlet chairman and witnessed by Raphael's relative Makima Matiko Maitarya. Sara sought to hear from Raphael, if he had consented before she paid the purchase price, Bernand and Loyce assured her that Raphael consented to the sale of the land.

Makoba Muhabe Muhere (Dw2) the hamlet chairman supported the contention that Raphael and Loyce assured Sara that Raphael consented to sale the land. Makoba Muhabe Muhere (Dw2) added that he demarcated the land sold in the present of Sara, Benard and Loyce and went home and prepared a written document.

It is against the above facts, I set to determine the issues raised by the ground of appeal.

The appellant raised eight ground of appeals, but his advocate, Mr. Philipo abandoned seven grounds of appeal and retained one ground of appeal. He retained the first ground of appeal, that

- 1) the trial tribunal erred in law for failure to consider the Benard (1st respondent) and Loyce (2nd respondent) respondent sold the

disputed land to Sara (3rd respondent) without consent from the appellant.

Did the DLHT err for failure to consider that Benard and Loyce sold land without consent?

Raphael, the administrator of the deceased's estate, the appellant complained that Benard (his son) and Loyce (his wife) sold land to Sara without his consent. In support of the complaint, Mr. Philipo learned advocate submitted that it is not disputed that the appellant is the administrator of the deceased's estate. He submitted that there was no consent from the administrator of the deceased's estate. He added that the proceedings do not indicate when the appellant was appointed the administrator of the deceased's estate. He added that it was not clear that the appellant was the administrator of the deceased estate. He prayed the decision of the DLHT to be set aside as seller had no right to sell. He concluded that Benard and Loyce sold the land to pay hospital bills of Benard without consulting the appellant who was hospitalized at Dodoma.

Sara replied by narrating how she bought land in question. Her submission was a reproduction of her evidence on record. I will not reproduce it here. She submitted finally that if they wanted their land they should give her another plot of land or return her money.

In his short rejoinder, Mr. Philipo insisted that the seller had no mandate to sell land to Sara. It was the appellant who had mandate to do so.

I am total agreement with Mr. Philipo that when the property of the deceased is in dispute it is the administrator of the deceased's estate who may sue or be sued or who may deal with the property of the deceased's estate. See **Ibrahim Kusaga V. Emmanuel Mwita** [1996] TLR 26 where the court stated that-

"I appreciate that there may be cases where the property of a deceased person may be in dispute. In such cases, all those interested in determination of the dispute or establishing ownership may institute proceedings against the Administrator or the Administrator may sue to establish claim of deceased's property."

In the present case, Mr. Philipo submitted that the appellant the deceased's legal representative was not consulted before the sale of the land and that the record does not show when he was appointed.

I guess the appellant's advocate did not wish to disclose the truth. The proceedings speak loud as to when his client was appointed to administer the estate of the deceased. Raphael, the administrator of the deceased's tendered Exh. P1, the letter of administration of deceased's estate. Exhibit. P1 shows that Raphael was appointed on 5/12/2017 to administer the estate of the late Maitarya Matiko Makorere. Exh P1 shows that Maitarya Matiko Makorere died intestate on 10/9/1964. A part from Exh. P1, Raphael attached a copy of the primary court's judgment showing that Raphael, was appointed the administrator on 5/12/2017.

It was wrong, and I am unable to buy the contention that the record does not show when Raphael was appointed as the administrator of the deceased's estate. It is beyond disputed that Raphael the administrator was appointed on 5/12/2017 to administer the estate of his late father who died on 10/9/1964. It is also not disputed that Benard and Loyce sold land to Sara on the 12/01/2014. For that reasons, at the time of the transaction Raphael the administrator of the deceased's estate was not in existence. Benard and Loyce cannot be faulted for not consulting the non-existing person.

In the addition, I find no evidence on record to prove that the disputed land was part of Raphael's late father's estate. If the land in dispute was the deceased's land as alleged, how was the same managed for period of 50 years? The period of fifty years is from 1964 when the alleged owner passed away to 2014, when Benard and Loyce sold that piece of land to Sara. It is very possible that Bernad and Loyce sold their land allocated to them by Raphael or by another person. Raphael may have raised the issue that the disputed land is part of the deceased's estate to outwit Sara.

It should not escape our attention that Raphael, Benard and Loyce are members of the same family. Raphael and Loyce, husband and wife and Benard their issue. It is on record that Benard and Loyce did not bother to file their defence. Sara (Dw1) and Makoba Muheb Muhere (Dw2) deposed that Bernad and Loyce assured them that they consulted Raphael in his personal capacity and he allowed them to dispose the disputed land.

Makima Matiko Maitarya, the member of the family witnessed the sale agreement.

It is stated in sale agreement in black and white that Raphael in his person capacity consented the disputed land to be sold to Sara. Raphael disputed to be consulted in his personal capacity. Raphael is a witness whose evidence should be treated with caution. He testified before the DLHT that his father gave him 12 acres of land and that out of that one acre was sold to Sara. The same person told the primary court and his evidence is reproduced in the primary court's judgment in **Prob. No. 38/2015, Petitioner: Raphael Maitarya Matiko Makorere** and in the **Matter Petition for Letters of Administration of deceased Maitarya Matiko Makorere**, that-

"Mali pekee ambayo haikugawiwa kwa warithi had leo ni shamba kwenye ukubwa wa eekari (Ekari 20) lililopo katika Kijiji cha Nyarero na ndiyo sababu iliyopelekea mwombaji kumba usimamizi wa mirathi". Meaning that, the deceased left behind 20 acres of land situated Nyarero village, which was subject of administration of the estate.

Raphael attached a copy of the primary court judgment to the application. S. 43 of the Evidence Act, [Cap. 6 R.E. 2019] provides that the decision of the probate court is relevant as far as what it declared in the case. The probate court declared that there were 20 acres of land subject was the estate of Raphael's later father's estate. This Court is justified to make reference to primary court's judgment in probate case.

Section 43 of the Evidence Act, states that-

43.-(1) A final judgement, order or decree of a competent court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character or the title of any such person to any such thing, is relevant."

(Emphasis is added)

Given the above findings, the evidence of Raphael is to be treated with caution. I find that Raphael was consulted in his personal capacity by Benard and Loyce. However, since Raphael, the legal representative of **Maitarya Matiko Makorere** was not in existence at the time the sale transaction was concluded, Benard and Loyce cannot be faulted for not consulting him.

The appellant's advocate submitted that it was not clear whether Raphael was appointed the administrator of the deceased's estate. I disassociate myself with that submission. It is as clear as daylight that Raphael is the administrator of the estate. However, what I find not clear is whether the disputed land is the property of the deceased Maitarya Matiko Makorere. Raphael told the primary court shown in the judgment that his late father left behind 20 acres' land. He contended that he was petitioning for letters of administration of his father's estate to manage that piece of land. He also instituted the application in the DLHT as the legal

representative of the deceased's father. However, when one of the DLHT assessors asked him a question he replied that the land belonged to him, as his late father gave it to him in 1964. Thus, title passed from **Maitarya Matiko Makorere** to **Raphael** *inter vivos*. If Raphael was given land *inter vivos*, he was not required to institute the current case to claim the disputed land as a legal representative. The disputed land was not part of his deceased father's estate. Title to the passed to Raphael in 1964.

I will reproduce his reply for sake of clarity:-

*"I was given that land **by my father in 1964**. I was given 12 acres. One acre was sold for Tzs 700,000/= I am claiming my land".*

Raphael did not give evidence or call his siblings or any other person to establish that the land in dispute was his father's land. In my considered view, I find that Raphael did not prove that the disputed land was part of his deceased father's estate.

In the end, I find that the complaint, that Benard (1st respondent) and Loyce (2nd respondent) did not consult the appellant, the administrator of his deceased father's estate baseless. It is baseless for two grounds; **one**, Raphael, the administrator of the deceased's estate was not existing in 2014 when the transaction between Benard and Loyce, on one side, and Sara, on the other, was concluded; **two**; that there is no evidence on record to prove that the disputed land was part of the estate of the late Maitarya Matiko Makorere.

Consequently, I dismiss the appeal and uphold the decision of the DLHT with costs.

I so ordered.



J. R. Kahyoza

JUDGE

4/10/2021

Court: Judgment delivered in the virtual presence of Mr. Philipo Advocate and Mrs. Sara Philipo. B/C Ms. Millinga present.



J. R. Kahyoza

JUDGE

4/10/2021