

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

CIVIL APPEAL NO. 245 OF 2021

(Originating from the decision of the District Court of Ilala at Kinyerezi, in Civil Case No. 54 of 2020, by Hon. Kinywafu-RM dated 30th day of March, 2021)

FREDDY DAVID KATEMBO *(Administrator of
the Estate of the Late* **DAVID CRISPIN KATEMBO)** **APPELLANT**

VERSUS

NATIONAL BANK OF COMMERCE **RESPONDENT**

JUDGMENT

18th May, & 9th June, 2022

ISMAIL, J;

This appeal seeks to reverse the decision of the District Court of Ilala at Kinyerezi, in respect of Civil Case No. 54 of 2020. The trial proceedings were commenced at the instance of the appellant, a co-administrator of the estate of the late David Crispin Katembo. His claim was founded on the respondent's refusal to act on a request (Exhibit P3) that required the latter to issue a bank statement that would confirm the balance in the deceased's bank account. Issuance of the statement would establish the quantum that

would be remitted to Kawe Primary Court where the probate proceedings were due. The respondent's response that probate and administration proceedings for which the statement was sought were closed irked the appellant. He chose to institute a case in the trial court and a few reliefs were prayed. They included a declaration that the respondent's refusal to issue a statement amounted to *detinue*.

After a one sided hearing, the trial court took the view that the suit was incompetent for want of original jurisdiction to entertain it. In the trial court's wisdom, this matter ought to have been placed in the hands of the Primary Court that handled the probate and administration matter.

This decision did not sit well with the appellant. Feeling that the trial court's decision is faulty, he has preferred the instant appeal with a single ground of appeal which reads as follows:

- 1. The trial magistrate erred in law when he held that the District court has (sic) no jurisdiction to entertain tort of detinue.*

When the matter came up for hearing, Mr. Jackson Liwewa, learned counsel, featured for the appellant, whilst Ms. Mariam Ismail, learned advocate, had her services enlisted by the respondent.

In his support submission, Mr. Liwewa argued that the settled law is that facts constituting the cause of action and reliefs sought determine

jurisdiction. He argued that this is in terms of the decisions in ***Ibrahim Ibata Sanane v. Nationa Bank of Commerce***, HC-Land Appeal No. 44 of 2014; and ***Iranna Felix Teri v. MIC Tanzania Public Ltd Company***, HC-Civil Case No. 5 of 2019 (both unreported). It was learned counsel's contention that, since the plaint showed that the claim was founded on the tort of detinue then the trial court had jurisdiction to try the matter. Mr. Liwewa further contended that, noting that tort is civil in nature, then section 40 (2) of the Magistrates' Court's Act, Cap. 11 R.E. 2019 vested powers in the trial court to hear and determine cases of a civil nature. He bolstered his position by citing the Court of Appeal of Tanzania's decision in ***Petro Kazi v. John Ramadhani***, CAT-Civil Appeal No. 195 of 2016 (unreported).

He urged the Court to hold that the trial court's decision was erroneous and allow the appeal.

For her part, Ms. Ismail supported the trial court's position and held that, since the matter had some aspects of probate, then it was right for the trial court to refuse to entertain the matter while the probate proceedings were pending in the Kawe court. She argued that, in terms of rule 8 (f) of the Primary Court (Administration of Estates) Rules, 1971 GN. No. 49 of 1979, matters relating to probate must be filed in the probate case that is pending in court. Ms. Ismail argued that the appellant's request related to

distribution of the deceased's estate that ought to have been resolved in the court that was handling the probate issues. She fortified her contention by citing the decisions in ***Mohamed Kihago v. Abbas Kihago*** [1999] TLR 319; and ***Kijakazi Mbegu & Others v. Ramadhan Mbegu*** [1999] TLR 175. Ms. Ismail blamed the appellant for not informing the probate court that the demand to the respondent had not been honoured.

With regards to the decisions cited by the appellant, learned counsel argued that the same merely provide for general powers of the District Court, but they don't address the matter. She urged the Court to be persuaded by the decision of the Court in ***Salama Ismail Hanya & 2 Others v. Tunu Ismail Hanya***, HC-Land Appeal No. 88 of 2020 (unreported).

She concluded by urging the Court to hold that the appeal is barren and liable to dismissal with costs.

Submitting in rejoinder, Mr. Liwewa contended that detinue and probate matters are two distinct causes of action. He contended that refusal to issue a bank statement is what founded the claim that bred the instant appeal and it was wrong to hold that the case was filed prematurely.

Mr. Liwewa took the view that the decisions cited by the respondent are inapplicable as they relate to probate and land matters. He reiterated his prayer for allowing the appeal.

From the parties' impressive submissions, the crucial and sole question for determination is whether this appeal is meritorious.

As rightly stated by Mr. Liwewa, the contention by the appellant, as gathered from the plaint, was that the respondent committed the tort of *detinue* when it refused to issue a bank statement. This is the contention in respect of which the trial magistrate held that the court had no jurisdiction. The appellant is not convinced that jurisdiction of the trial court on the allegation of *detinue* was ousted, on the reason that the matter related to probate proceedings.

Before I delve into the merits or otherwise of the ground of appeal, it is apt that a general understanding be drawn on what constitutes a *detinue*. The article published on ***Gibbswritinglawyers.com.au***, gives an overview of what *detinue* is and circumstances under which it may be invoked. It postulated as follows:

"The tort of detinue occurs when a person wrongfully detains a person's property and unreasonably refuses to return that property to the rightful owner. Detinue is similar to the Tort of Conversation, except for a specific element: it is a condition of the action of detinue that the plaintiff has made demand for the return of goods, and the demand has been refused. The plaintiff must also have a right to immediate possession of the chattel Detinue is established by a demand by the

defendant. A conditional demand that later becomes unconditional will also be enough to prove a cause of action in detinue. Detinue can arise in two ways:

- 1. Where the defendant has actual possession of the chattel (any goods – for example, a lawn mower or excavator) and refuses to return it to the plaintiff on their demand; or*
- 2. Where the defendant was in possession of the plaintiff's chattel under bailment (i.e. the good had been temporary provided to the defendant for a particular purpose) and has wrongfully parted with that chattel."*

In the trial proceedings, the demand that bred the proceedings was for the status of the account constituting part of the deceased's estate in respect of which the powers of administration were granted. It would be interesting to see what the trial magistrate would make of the claim of *detinue*, though little or nothing convinces me that *detinue* was committed.

Coming back to the question of jurisdiction, my view is that the appellant has admitted that, at the time of applying for the bank statement, the proceedings in respect of Mirathi No. 261 of 2018 were still open in the Primary Court of Kawe, and that the statement was meant to guide on the distribution of the estate of the deceased. This means that the statement was meant for the consumption of the probate court. This is quite evident in

the letter of request (Annexure A to the plaint). It is what triggered the respondent's advice that the feasible way was to re-open the proceedings to allow the request to be channeled through the court process.

Thus, while the appellant was quite within his right to protest the respondent's refusal to honour his obligation, the question is whether the recourse was to institute a claim founded on the tort of *detinue*. My unflustered answer to this question is in the negative. To the extent that the applicant's action was part of execution of his mandate under the proceedings in Mirathi 261 of 2018, the recourse that was available was to enlist the probate court's assistance and issue an order for the release of the requested information. It would not require founding a new claim in a matter that is a subject of the proceedings which were alive and kicking in court.

In my considered view, the trial magistrate was spot on in his contention that the court was not vested with jurisdiction to try the matter, the subject matter of which is a subject of the probate matter which had not been closed.

In consequence of all this, I dismiss the appeal and uphold the trial court's decision. The respondent will have the costs of the matter.

Order accordingly.

Rights of the parties have been explained.



M.K. ISMAIL,

JUDGE

09/06/2022

DATED at **DAR ES SALAAM** this 9th day of June, 2022



M.K. ISMAIL,

JUDGE

09/06/2022

