

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA**

(IN THE DISTRICT REGISTRY)

AT MWANZA

PC CIVIL APPEAL NO. 20 OF 2022

*(Arising from the Decision of Nyamagana District Court in Civil Appeal No. 41 of
2021 originated from Mkuyuni Primary Court in Civil Case No 62 of 2021)*

ALICE JOYCE KAMBONA ----- APPELLANT

VERSUS

ELIZABETH NYANGETA KWIYOLECHA ----- RESPONDENT

JUDGMENT

Last Order: 05.07.2022

Judgment Date: 13.07.2022

M. MNYUKWA, J.

This is a second appeal by the appellant challenging the concurrent findings of the two lower courts below namely, Mkuyuni Primary Court (trial court) and Nyamagana District Court (1st appellate court) over the dispute of the ownership of a Motor vehicle with Registration No T. 221 DQS make Ford Explorer which is allegedly to belong to the deceased, one Japhet Methusela Gilyoma.

The concurrent findings of the trial court and the 1st appellate court declared the respondent as the lawful owner of the disputed motor vehicle



as the appellant failed to prove that the said motor vehicle is the property of the deceased so as to adjourn the matter and to implead the administrator of the deceased's estate as claimed by the appellant. This decision aggrieved the appellant, hence the present appeal.

The brief facts that have given rise to this appeal as per the records in the trial court goes that; the appellant in this appeal was the wife of the deceased, and the respondent is allegedly to have marital relationship with the deceased. The respondent herein, instituted a suit against the appellant claimed before the trial court her right over the above-mentioned motor vehicle which she gave it to the appellant's husband to use from and to the office during his lifetime. The disputed motor vehicle is claimed to be in possession of the appellant after the demise of the late Japhet Methusela Gilyoma. It is from there, when the respondent requested the appellant to hand over the disputed motor vehicle on the reason that she is the lawful owner. The request was without success. She therefore, seeks judicial redress by filling a case before the trial court to declare her as the lawful owner of the disputed motor vehicle and the appellant be ordered to hand over the said motor vehicle.

During the hearing of the matter at the trial court, the respondent (who was the plaintiff in the trial court) gave her evidence to the effect



that on the year 2019 she gave the deceased, the late Japhet Methusela Gillyoma who is allegedly to be her husband and who is also the husband of the appellant (the defendant in the trial court), a motor vehicle in dispute so as to use it to and from work. That the deceased met his death while the disputed motor vehicle was in the house of the appellant. That, after the demise of the late Japhet Methusela Gilyoma, she requested the appellant to hand over the said vehicle but in vain. To prove her case before the trial court the respondent called two witnesses and tendered the motor vehicle registration card and the release order which all bears her name and the same were admitted by the trial court as Exhibit D and Exhibit D1 respectively. The two witnesses called by the respondent at the trial court testified that the deceased is their relative, a brother and that when they congratulated him for purchasing the disputed motor vehicle, he told them that they should congratulate the respondent as the owner of the motor vehicle and that the same belonged to her.

On her part the appellant denied the claim as she alleged that the disputed motor vehicle belonged to his late husband, and that she did not recognize the respondent as the wife of the appellant and that her husband told her that he bought the disputed property and he was on the way to effect transfer of the ownership. To prove her assertion, the

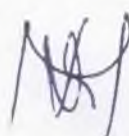


appellant called one witness, her child who testified that, her father told her that he bought the disputed motor vehicle and therefore it belonged to him. The appellant did not tender any document to prove that the disputed motor vehicle belonged to the late Japhet Methusella Gillyoma.

After hearing of the evidence of both parties, the trial court declare the respondent as the lawful owner of the disputed motor vehicle on the reason that she proved the claim and proceeded to order the appellant to hand over the disputed motor vehicle to the respondent.

Aggrieved by the above decision, the appellant herein appealed to the District Court of Nyamagana (the 1st appellate court) by advanced three grounds of appeal which are reproduced hereunder:

- 1. That the trial court erred both in law and fact to entertain the dispute of ownership of the Motor Vehicle No T. 221 DQS which belonged to the deceased Prof. Japhet Methusela Gilyoma without impleading the administrator of estate of the deceased.*
- 2. That the trial court erred in law by failure to properly analyze the evidence of the Appellant which would have led to adjourning the suit sine die waiting for the appointment of the administrator of estate of the late Prof. Japhet Methusela Gilyoma*



3. That the trial court erred in law and fact to hold that the suit vehicle belongs to the Respondent disregarding evidence that since 2019 the suit vehicle was in hands of the deceased Prof. Methusela Gilyoma.

The appellant prayed for the appeal to be allowed, the decision of the trial court be set aside and in alternative, the 1st appellate court be pleased to order the joining of the administrator of the estate of the late Prof. Japhet Methusela Gilyoma once appointed to defend properly the deceased property.

After hearing the appeal by way of written submissions, the 1st appellate court upheld the decision of the trial court on the reason that the appellant failed to prove that, the disputed vehicle was the property of the deceased and dismissed the appeal with costs.

Aggrieved further by the decision of the 1st appellate court, the appellant come to this court with only one ground of appeal that:

- 1. That the 1st appellate court erred in law and fact to hold that the dispute of ownership of the Motor Vehicle No. T. 221 DQS which belonged to the deceased Japhet Mathusela was proper before the trial court without impleading the administrator of estate of the deceased.*



On the day of hearing, the appellant was represented by the learned counsel Mr. Silas John, while the respondent afforded the services of Mr. Adam Robert, the learned counsel too and the hearing was done by way of oral submissions.

Arguing in support of the appeal, the appellant counsel submitted that the main controversy is, what should be done when the property is purportedly claimed to be the deceased property. He refers to the decision of this Court in the case of **Ibrahim Kusaga v Emmanuel Mweta** [1986] TLR 26 that, where the property of the deceased is in dispute, the case may be instituted against the administrator of the deceased estate or the administrator may sue on a claim of the disputed property.

He went on to submit that, in the trial court through the evidence adduced by the parties, it was established that the disputed motor vehicle was used by the late Prof. Japhet Methusela Gilyoma, from the day it came from Japan and after his demise is when the respondent sued the appellant over the ownership of the disputed motor vehicle.

The counsel for appellant further claimed that, the trial court and the 1st appellate court erred to declare the respondent as the lawful owner of the disputed motor vehicle as the respondent has to wait until the



administrator of the estate of the deceased is appointed and to his view that was the proper person to be sued and to establish the ownership over the disputed motor vehicle.

He retires his submission in chief by stating that, the appellant had no locus stand to be sued. He therefore, prayed the court to be persuaded by the decision of **Ibrahim Kusaga** (supra) and overturn the decision of lower courts.

In response, the respondent's counsel opposes the appeal and prayed the same to be dismissed with costs. He claimed that the evidence adduced by both parties and their respective witnesses in the trial court shows that, the disputed motor vehicle was the property of the respondent and that it came into possession of the appellant after the demise of the late Prof. Japhet Methusela Gilyoma. He remarked that, the deceased had marital affairs with the respondent during his lifetime and it was upon that relationship, when the respondent gave the deceased her motor vehicle for use to and from his work place.

The counsel for the respondent went further to submit that, the disputed motor vehicle cannot be treated as one of the properties of the deceased so that it can wait the appointment of the administrator and the administration process so as the respondent to repossess the same. He

referred to the Fifth Schedule of the Magistrates Courts' Act, Cap 11 R.E 2019 on item V which provides that the function of the administrator is to collect the property of the deceased and the debts that were due to him. He added that, looking at the evidence of the trial court, the motor vehicle in dispute is neither the property of the deceased nor the debt of the deceased which is supposed to be collected or paid by the administrator of the deceased's estate.

He finalizes his submission by distinguish the case cited by the counsel for the appellant that, in the present case the motor vehicle in dispute is not the property of the deceased as its ownership was proved by evidence that it belongs to the respondent and therefore cannot be treated as the property of the deceased.

In rejoining, the appellant counsel reiterated his submission in chief as the main question of determination is who is supposed to be sued on the property allegedly to belong to the deceased. And, since the issue of ownership was also in dispute, the right person to be sued is the administrator of the deceased's estate and therefore it was wrong for the two courts below to overrule the decision of **Ibrahim Kusaga** cited above. He retires by praying the Court to waive the costs of this appeal due to the relationship of the parties.



From the above competing submissions, I will now determine this appeal in which I will have one issue to tackle which is, whether this appeal has merit. In answering this issue, I will determine the sole ground of appeal argued by the parties.

Before I determine the appeal on merit, I find it crucial to state the settled position of law that the second appellate court should be reluctant to interfere with concurrent findings of the two courts below unless it is obvious that the findings are tainted with misapprehension of evidence or violation of principle of law or procedure or have occasioned a miscarriage of justice. See the case of **Helmina Nyoni v Yerima Magoti**, Civil Appeal No 61 of 2020, CAT at Tabora.

The above being the settled position of the law, this Court will not easily interfere the concurrent findings of the lower courts unless it is satisfied beyond doubt that there is misapprehension of evidence or violation of the principle of procedure which occasioned a miscarriage of justice.

My careful perusal of the available court record is apparent that, the issue in dispute which is claimed by the respondent, is all about the ownership of the disputed motor vehicle. The respondent claimed that, the disputed motor vehicle belonged to her and that she gave it to the



deceased as her husband, to use it to and from work place. On the other hand, the appellant impleaded that the disputed motor vehicle is the property of her deceased husband and denied the assertion of the respondent that she is the wife of the deceased and that if she claimed the disputed property to belong to her, she could wait until the administrator of the deceased's estate is appointed so that she can sue the proper person.

From the above competing arguments, the main controversy to my view is, who is the lawful owner of the disputed motor vehicle. It is my strong opinion that, in the circumstance prevailing in this case, it was proper for the proof of ownership to be determined first so as the court to be in position to know who is the proper person to be sued between the possessor of the disputed motor vehicle who is the appellant or the administrator of the deceased estate who is yet to be appointed. I say so because the nature of the claim by the respondent is that, the deceased was just a mere user of the disputed motor vehicle and not the owner.

Suffice it to say that, I am live with the laws applicable in the trial court and the standard of proof in civil cases to be on the balance of probabilities which means that the court will accept evidence which is worth of belief and stronger that prove the allegation brought before it as



it is provided for under section 19(2) of the Magistrates' Courts Act, Cap 11 R,E 2019 and Regulation 6 of the Magistrates Court (Rules of Evidence in Primary Courts) Regulations 1964 GN No 22 of 1964, which gives power to the primary court to accept such evidence of one party which is greater than the evidence of the other and ultimately declare him the winner over the other party whose weight might not be greater.

The evidence on record, shows that the respondent apart from her oral testimony, she proved ownership of the disputed motor vehicle by tendering Exhibit D and D1 respectively which is the motor vehicle registration card and the release order which bears her name. On the other hand, the appellant's proof of ownership that the property belonged to the deceased is her own evidence and the evidence of her daughter which is of the effect that, the deceased told them that the disputed motor vehicle belonged to him without the support of any of the documentary evidence.

It is my considered view that, absence of the single documentary evidence to show that the disputed property belonged to the deceased, this Court find it difficult to believe the mere words of the appellant on the reason that, the same deceased as per the evidence on record, told SM2 and SM3 that the disputed motor vehicle belonged to the respondent.

Thus, to my view, to form the decision on the contradictory words of the deceased as it is alleged to be uttered with him during his lifetime, is very dangerous and for that reason the only strong proof is that of the documentary evidence.

In our case at hand, there is no other proof from the appellant's side that the disputed motor vehicle belonged to the deceased apart from the mere words. Therefore, it is my considered view that, the case cannot await the appointment of the administrator of the deceased estate because what is in dispute was not the property of the deceased as there is no prima facie evidence which proves the same.

In further determining this appeal, I had time to go through the cited case of **Ibrahim Kusaga**, where this Court had this to say:

"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 the determination of the dispute or establishing ownership may institute proceedings against the administrator or the administrator may sue to establish claim of the deceased's property. "

To my understanding, though the above case is persuasive, still it is distinguishable with our case at hand because there is no prima facie proof that the disputed motor vehicle is the property of the deceased. It



is my further view that, what makes the property to be termed as the deceased's property is proof of ownership. Ownership can either be proved by the documentary evidence or oral evidence as it was stated by the Court of Appeal in the case of **Loitare Medakenya v Anna Navuya**, Civil Appeal No 7 of 2018 when it held that:

"We think with due respect, the learned Judge in the High Court grossly misdirected herself by holding in effect that only documentary evidence can support a sale oral evidence is also admissible."

It is my strong opinion that, in the circumstance of our case at hand, the proof of ownership of the disputed motor vehicle can be well established through documentary evidence. Since the respondent proved her ownership through the motor vehicle registration card and the release order, thus it is upon the appellant to exhibit through documentary evidence, as to whether the deceased possess the sale agreement or any other document to disprove the respondent's claim. This is because the motor vehicle registration card to my view, serves the purpose of establishing a link between the vehicle and the owner while the sale agreement proved that the motor vehicle in question has been sold to the named person which connotes that, transfer process may be done at any time by the purchaser. Thus, if there is no sale agreement, the appellant



may prove with any other document to show that the property was perhaps gifted to the deceased. This is because, I still hold the view that documentary evidence add weight in proving ownership

For the aforesaid discussion, I still hold the view that, the circumstance of the case at hand does not require the administrator of the deceased estate to be appointed so as to be sued since the motor vehicle in dispute is not the property of the deceased as per the evidence tendered before the trial court, which shows that, the deceased was a mere user of the disputed motor vehicle.

In the final analysis, I find this appeal, not merited and it is hereby dismissed. I also upheld the decision of the two courts below and I make no order as to costs based on the nature of the dispute and the relationship of the parties.

It is so ordered.

Right of appeal explained to the parties.




M. MNYUKWA
JUDGE
13/07/2022

Court: Judgment delivered on 13th July, 2022 in the presence of the parties.



M. MNYUKWA
JUDGE
13/07/2022