

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

PC. PROBATE APPEAL NO. 3 OF 2021

REVOCATUS ZUMBA APPELLANT

VERSUS

LAURIANA MBALAZI RESPONDENT

(Appeal from the Judgment and decree of the District Court of Sumbawanga at
Sumbawanga)

(G. J. William, RM)

Dated 20th day of August 2021

In

(Probate Appeal No. 4 of 2020)

JUDGMENT

Date: 20/05 & 18/07/2022

NKWABI, J.:

The trial court failed in its attempt to appease both sides in the probate administration cause when it ruled in favour of the appellant in respect of a piece of land on the one side and appointing the respondent, on the other side, administrator of the estate of the late Sevelino Alois Zumba who died intestate on 25th December 2003. The appointment and grant of letters of administration to the respondent in probate and administration cause No. 67 of 2020, followed a clan meeting that proposed the respondent be granted letters of administration, the meeting was held on 31/07/2020.

The application for grant of letters of administration of the estate met a road block when the appellant in this appeal preferred a caveat filed in court on 17/09/2020 which is titled *Pingamizi dhidi ya mali za marehemu Severino Aloyce Zumba zilizo orodheshwa kwenye muhtasari wa kikao cha ukoo na majirani wa marehemu Severino Aloyce Zumba kilichofanyika tarehe 31/07/2020*. The gist of the written caveat is that:

1. One Leocadia Zumba Kieya to be legal Attorney (under power of attorney) of the proposed administrator.
2. That the piece of shamba included in the estate of the deceased is the property of the caveator (appellant). The piece of shamba the property of the caveator has the size of 20.7 acres.

The respondent successfully appealed to the District Court where the District Court. The District Court allowed the appeal with costs. The District Court was satisfied that the appellant in this appeal had manifested evil intention including to mislead the land allocating authority to the effect that Severino Aloyce Zumba is the appellant in this appeal. The District Court thus found that the appellant in this appeal had obtained the said title deed fraudulently: I will let the court speak for itself:

"From the above analysis and from above reasons I'm of settled opinion that, the respondent had obtained the said title deed fraudulently and having said so I'm of the opinion that the said disputed land is part of the deceased Estate (the late Severino Aloyce Zumba)."

The above decision piqued the appellant. He lodged with in this Court a petition of appeal which has eight grounds of appeal. The appeal was heard by way of written submissions, Mr. Peter Kamyalile, learned advocate, appeared and argued the appeal on behalf of the appellant while the respondent enjoyed the services of Mr. Mathias Budodi also learned advocate.

Before I embark on the merits or demerits of this appeal, I find it germane to state the obvious, if not the position of the law in respect of what should a court do when it is having a matter that concerns appointment of administrator of a deceased's estate and what ought to be contained in a caveat and what the court should do in respect of the caveat.

I first revisit the position of the law on what a court of law should do when an application for appointment as administrator of a deceased's estate is lodged in the Court. The Court of Appeal of Tanzania and this Court have already spoken it all. For instance, in the case of **Michael Ngoti v. Mariam Kimaro Civil Appeal no. 7 of 2003** (PC) Moshi registry, Rutakangwa, Judge, as he then was, held:

"...in a probate matter ...court should confine itself to the suitability of a person to administer the estate ..."

In **Mohamed Hassani v Mayasa Mzee and Mwanahawa Mzee [1994] TLR 225** (CA), Kisanga JJA, Mnzavas JJA and Mfalila JJA where their lordships held:

"It is up to the person challenging the validity of appointment of an administrator by the court to show that the person so appointed does not have the required qualifications to administer the estate."

Further, in the case of **Mariam Juma v. Tabea Robert Makange [2016] T.L.R. 517 CAT** it was held:

"In fact, the trial court was supposed to determine one crucial issue, that is, to appoint an administrator who will diligently and faithfully administer the estate of the late Robert Makange. This was to be done after making a decision on the caveat opposing the application. It is unfortunate that the High Court faltered and incorporated other issues and went ahead to adjudicate upon them."

"The proceedings were focused on the Appellant's and Respondent's status of marriages under the LMA. Was that the right forum?"

"We are inclined to agree with Mr. Lutema that the High Court Judge went beyond his jurisdiction of handling a caveat filed opposing the Appellant's petition for letters of administration. The findings he made that the Appellant was not the legal wife of the deceased and that the Appellant's children were not entitled to inherit from the deceased's

estate were beyond the scope of his mandate in handling the caveat filed by the Respondent."

"The High Court Judge did not have any mandate to determine who should be a beneficiary from the deceased's estate. This role was to be played by the Administrator of the deceased's estate."

In my arsenal of authorities, I cannot forget the decision in **Naftary Petro**

v. Mary Protas [2019]¹ T.L.R. 560 In that case it was held:

- (i) *Sub-paragraph (a) of Paragraph 2 of the Fifth Schedule to the Magistrates' Courts Act [Cap 11 R.E. 2002] is unambiguous and thus it should be construed in its plain and ordinary meaning. In essence, it empowers a primary court, either of its own motion or upon an application, to appoint one or more persons "interested in the estate of the deceased" to be the administrator or administrators thereof. The primary consideration, therefore, is holding of an interest in the estate of the deceased. The term*

interest in the deceased's estate has not been given any statutory definition.

(ii) Thus, any person, who, according to the rules for the distribution of the estate of the intestate applicable in the case of such deceased person, is entitled to a share of the deceased person's estate qualifies as an interested person. Invariably, this will include any heir, a spouse, a devisee or even a creditor of the deceased.

(iii) In addition to the above mandatory qualification, the court, in selecting any such administrator, is enjoined to have regard to any wishes which may have been expressed by the deceased unless it considers, for any reason, inexpedient so to do. While proof of holding a beneficial interest in the estate is of peremptory requirement, the obligation to consider and give effect to the wishes of the deceased can be waived on account of inexpediency."

Now, I consider the merits or otherwise of this appeal. I have to start with the 4th ground of appeal which touches the very root of the matter, that is the jurisdiction of the District Court in deciding by directing the Registrar of Titles to make rectification of the land register by removing the name of the appellant and replaces the name of the respondent while it had no such jurisdiction.

With respect, the submission of the learned counsel for the parties were what is clearly contested is the jurisdiction of the District Court in as far as the 4th ground of appeal is concerned. This is clearly manifested in submission reply by the counsel for the Respondent and submission in rejoinder by the counsel for the appellant.

The counsel for the respondent had argued, in favour of the Primary Court's jurisdiction in entertaining the dispute on land in the probate and administration cause in the following manner:

"It should be born in mind that it is the appellant who moved the court through objection on the issue of dispute of the

suit farm. Indeed, according to the court of Appeal case of Mgeni Seif versus Mohamed Yahayah Khalfani, Civil Application No. 1 of 2009 CAT at Dar-es-Salaam (unreported) at last paragraph of page 14. As per the said case it the trial court dealing with probate issue which is seized with jurisdiction to determine any dispute arising out of the deceased estate property and in this case, it was the Sumbawanga Urban Primary Court."

Then the counsel for the Appellant replied in rejoinder submission as follows:

"My Lord it is our humble submission that the appellant moved the court (trial court) through objection on the suit farm through probate cause No. 67B of 2020 where the appellant was praying for the order of the court to remove the disputed farm from the list of deceased property. And proved to the court that he is the legal owner of such land and the judgment from primary court ordered that part of land to be removed from the estate of deceased because it is owned by Revocatus Zumba."

With the greatest respect to the counsel of both parties, I do not think that the trial court had the jurisdiction to entertain the dispute over the land where it is claimed that the land or at least 20.6 acres of land is not part of the estate of the deceased. The Court of Appeal of Tanzania authoritatively decided on the situation as per the case of **Salima Moshi Athuman v Asha Kimolo**, [2010] TLR 367 (CAT) where it was held inter alia:

"We have had occasion to consider the case between Ibrahim Kusaga v. Emmanuel Mweta [1986] TLR 26 at p. 30 referred to us by Mr. Mchome (with leave as it was not listed in the list of authorities submitted). Though this is a High Court decision by which we are not bound, we however find the principle laid there in to be sound. In that case the learned Judge observed:-

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.

We are of the settled mind that the above is the approach that ought to have been taken in the circumstances of this particular case."

and the case of **Fatma Fatehali Nazarali Jinah v Mohamed Alibhaai Kassam**, [2016] 1 T.L.R. 262 where it was held:

*"We are aware of the Appellant's strong point that she bought the house which forms part of the estate of the late Kulsum Velji or Kulsum Kachra from the previous administrator of that Estate, one Firozali Rawji Kachra, and that she has been in occupation of that house for not less than 22 years. **In our view however, much as the point appears attractive, the remedy to her claim may be realized in a separate suit, and not in an application for annulment of the grant.**"* (Emphasis mine)

In my view, the decision in the case of **Mgeni Seif** (supra) is distinguishable to the case at hand because, the issue in the case of **Mgeni Seif** was not as whether the property was the property of the deceased or not because there was no dispute that the alleged house was the product of the sale of the house which is part of the estate of the deceased. In this case, the

appellant claims he is the owner of the 20.6 acres of the piece of shamba in exclusion of the deceased.

To that end the appeal by the appellant is meritless. If the appellant is still minded to pursue what he claims to be his right in respect of the 20.6 acres of the piece of farm he has to sue the administrator of the estate. Otherwise, the administrator has to sue the appellant in a court or tribunal with competent jurisdiction. The approach as per the case of **Salima Moshi Athuman** (supra) in my view, will do away with confusion between a probate case and a case of ownership of property for instance land. Land disputes might take a long time to determine which is detrimental to the interests of the beneficiaries to the estate of the deceased.

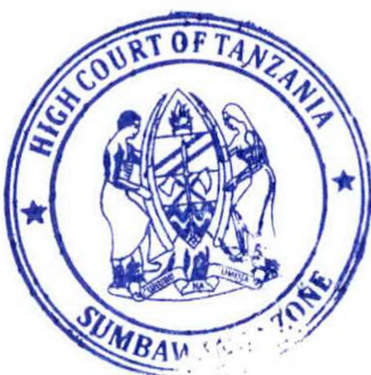
Having decided as I have done in respect of the jurisdiction of the District Court in deciding on the dispute over ownership of the land, that decision affects the decision of the trial court as well in that the trial court had no jurisdiction to entertain the dispute over the ownership of land. This is because, either of the party (the administratrix of the estate or the appellant) may file a land dispute in a proper forum (Land Tribunal or the High Court

whichever has the requisite jurisdiction) for the determination as to who between the deceased and the appellant.

Having said as above, there is no need of discussing the rest of the grounds of appeal. To sum up, this appeal is partly allowed to the extent that the order of the District Court ordering the rectification of the Land Register removing the name of the appellant and in lieu relate with the name of the respondent is quashed. If the administratrix is still interested in pursuing the 20.7 acres of land (plot) in relation to allegation of acquisition by fraud or other reasons on the part of the appellant she has to institute a land dispute in the competent court or tribunal with requisite jurisdiction just as I have said above. The administratrix may also institute a criminal charge against the appellant if she finds it appropriate. In the circumstances, each party has to bear their own costs.

It is so ordered.

DATED at **SUMBAWANGA** this 18th day of July, 2022




J. F. NKWABI

JUDGE