

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

LAND APPEAL No. 39 OF 2021

ESTER PAUL ITULE

NEEMA PAUL ITULE

} APPELLANTS

VERSUS

ALBERT PAUL ITULE RESPONDENT

JUDGMENT

6/4/2022 & 5/8/2022

ROBERT, J:-

The Respondent herein is the administrator of the estate of the late **Paul Albert Itule** and the Appellants are the daughters of **Tabitha Jeremiah Malongo Itule**, the second wife of the late Paul Albert Itule. The Respondent herein successfully filed an application at the District Land and Housing Tribunal (DLHT) for Mwanza seeking, among others, a declaratory order that the house located on Plot No. 50 Block KK, Nyakato, Mwanza is a matrimonial asset jointly acquired by the late **Paul Albert Itule** and **Tabitha Jeremiah Malongo Itule**. Aggrieved, the Appellants preferred this appeal against the judgment and decree of the trial Tribunal on the following grounds: -

- 1. That the trial tribunal erred in law and in fact by delivering a judgment in favor of the respondent herein without taking into consideration that the appellants herein were not the proper person to be sued in application No. 376 of 2019.*
- 2. That, the trial tribunal erred in law and in fact by entering a judgment in favour of the respondent herein by entertaining matrimonial issues in application No. 376 of 2019 which was beyond the tribunal's jurisdiction.*
- 3. That, the trial tribunal erred in law and in fact by entering a judgment in favour of the respondent herein without considering the strong evidence adduced by the appellants and their witness concerning the disputed land.*

When this appeal came up for hearing on 6th April, 2022 the appellants were represented by Mr. Daniel Susuma, learned counsel whereas the Respondent was under the services of Mr. Msafiri Henga, learned counsel. Hearing proceeded orally whereby, counsel for the appellants opted to argue the second and third grounds of appeal together and the first ground separately.

Highlighting on the 2nd and 3rd grounds, counsel for the appellants faulted the impugned judgment of the DLHT for declaring the house located at Plot No. 50, Block "KK" Nyakato, Mwanza City as a matrimonial property. He submitted that, according to section 76 of the Law of Marriage Act, jurisdiction in matrimonial proceedings is vested in the High Court, a court of a resident magistrate, a district court and a primary court. Hence, the DLHT has no jurisdiction to declare a property in dispute to be a matrimonial property. To bolster his argument, he cited the case of **Elias Masenga Vs Joas Meshack** Misc. Land Appeal No. 3 of 2019 (unreported).

Coming to the first ground, the learned counsel argued that, one Thabitha Malongo Itule is the deceased, thus, the proper person to be sued was the administrator of the estate. The appellants in this matter were the children of the deceased and not the administrators of the state. He argued further that in the case of **Malietha Gabo vs Adamu Mtengu, Land Appeal No. 21 of 2020** the court established that the proper person to be sued is the administrator of the estate.

In response to the first ground, counsel for the Respondents submitted that, Land Application No. 376/2019 is the result of an objection raised by the appellants in Probate Cause No. 1 of 1996 at the Primary Court of Mwanza Urban. The appellants having raised the objection that the house located at Plot No. 50 Block KK, Nyakato, Mwanza was not the property of the estate of the late Paulo Albert Itule but of their late mother Thabita Itule, they were the right people to be sued at the DLHT since they are the ones who filed objections and therefore they were required to prove that the property belonged to their mother.

Coming to the second ground, the respondent submitted that, the proceedings and judgment of the DLHT indicate that the dispute in question is related to land described as Plot No. 50 Block "KK" Nyakato, Mwanza. The respondent's prayers at the DLHT were related to ownership

of land between parties, it was difficult for DLHT to decide on the matter without addressing the marriage of Paul Albert Itule and Thabita Itule.

Concerning the 3rd ground, counsel for the respondent disputed the argument that, DLHT did not consider evidence adduced by appellants. He argued that, the DLHT considered the evidence of both parties and decided that the land in question belonged to Albert Paul and Thabita Itule. He prayed for the appeal to be dismissed for want of merit.

In rejoinder submissions, counsel for the appellants maintained that the respondent did not address the court if there is a provision of law that allows a party to be sued in relation to the estate of the deceased if he is not the administrator of the estate. Therefore, he prayed for the appeal to be allowed.

From the submissions of parties in this appeal, this Court is now in a position to make a determination on the issues raised in this appeal.

Starting with the 2nd and 3rd grounds, the question for determination is whether the DLHT had no jurisdiction to declare the disputed property to be a matrimonial property. Counsel for the respondent maintained that although the respondent's prayers at the DLHT were related to ownership of land between parties, it was difficult for the DLHT to decide on the matter without addressing the marriage of Paul Albert Itule and Thabita Itule.

It should be noted that, in Probate Cause No. 1/1996 which was decided by the Primary Court of Mwanza Urban on 16th September, 2019, the Primary Court desisted from distributing the disputed property because there was a dispute on whether the disputed property forms part of the deceased estate. As a consequence, the Court decided that it had no jurisdiction to make a determination on the ownership of the disputed property and advised parties to bring their dispute at the Land and Housing Tribunal for a determination on the ownership of the disputed property. This Court is not invited to determine whether the Primary Court in exercising its jurisdiction on the probate and administration cause was right to advise parties to approach the Land and Housing Tribunal to make a determination on the claims of title to the disputed property. Hence, this determination is limited to the proceedings at the DLHT.

At the DLHT, the respondent vide Application No. 376/2019 moved the Tribunal specifically to declare the house on Plot No. 50 Block KK, Nyakato, Mwanza to be a matrimonial asset jointly acquired by the late Paul Albert Itule and Thabitha Jeremiah Malongo Itule and not to determine ownership of the disputed property as directed by the primary Court. Undoubtedly, the above claims relate to matrimonial concerns, however, the DLHT having heard both parties decided in favour of the respondent herein by declaring the disputed property a matrimonial property.

This Court is aware that, claims related to matrimonial concerns are governed by the Law of Marriage Act. Section 76 of the Act vests original jurisdiction in matrimonial proceedings in the High Court, a court of the Resident Magistrate, a District Court and a primary Court. In the circumstances, the path taken by the respondent in seeking matrimonial claims in the DLHT was improper and misguided.

Further to that, section 77(4) of the Act envisages availability of both parties where reliefs related to matrimonial proceedings are sought. Thus, where a spouse or both spouses are dead, the administrators of their respective estates cannot seek distribution of matrimonial assets as a matrimonial cause as any claims or perceived rights thereto must be sought in a Probate and Administration cause (see the Court of Appeal decision in the case of **Leticia Mtani Ihonde vs Adventina Masonyi (Administratrix of Estate of the Late Buhacha Bartazari Kichinda), Civil Appeal No. 521 of 2021, CAT, at Musoma (unreported)**).


In the circumstances, this Court finds and holds that, the respondent's claims at the DLHT having been related to matrimonial concerns, the DLHT had no jurisdiction to decide on the matter and declare the disputed property to be a matrimonial property. That said, I

find this ground sufficient to dispose of this appeal. Therefore, I find no pressing need to address the remaining ground.

In the event, the appeal is allowed, the proceedings before the DLHT are hereby nullified and the judgment thereof quashed. If the parties are still interested to pursue their right in this matter, they are at liberty to institute a fresh cause in a proper forum with competent jurisdiction to try it.

It is so ordered.




K.N.ROBERT
JUDGE
5/8/2022