IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

LAND APPEAL NO. 65 OF 2021

(Arising from Appeal No. 10 of 2020 of the DLHT for Muleba at Muleba, Original Civil Case No.11 of 2018 of Ruhanga Ward Tribunal)

PROJEST ENERY.....APPELLANT

VERSUS

EVELINA GEORGE .....RESPONDENT

JUDGMENT

02/09/2022 & 22/09/2022
E. L. NGIGWANA, J.

This appeal traces its origin from the decision of Ruhanga Ward Tribunal in Civil Case No. 11 of 2018 whereby the respondent, Evelina George successfully sued the Appellant herein to recover a farm and a house left to her and her children by her deceased husband, one George Henry Magini.

Having been dissatisfied by that decision of the Trial Ward Tribunal, the Appellant decided to appeal to the District Land and Housing Tribunal for Muleba at Muleba in Land Appeal No. 10 of 2020 but he lost the same. In other words, his Appeal was dismissed with costs for want of merit.

Following that decision, the appellant knocked the doors of this court for redress. His petition of appeal contained three (3) grounds of appeal as follows;

1. *That, the learned Chairman of Tribunal erred in law and fact by failure to consider the testimony and evidence adduced by the Appellant of him having an authority/mandate to deal with the*

properties of the late George Henry Migini by virtue of being an administrator of his estate.

2. *That, the learned Chairman of Tribunal erred in law by failure to consider that trial tribunal had no jurisdiction to entertain such matter.*

3. *That, the learned Chairman of Tribunal erred in law by failure to take into consideration that trial tribunal failed to comply with the rules of judgment writing as it is not containing the points of determination and reasons for the decision which amounts to failure of justice.*

Wherefore, the appellant is praying for the following orders; that, this appeal be allowed. That, the decision of the Ward tribunal and the DLHT be quashed, and set aside. Costs of this appeal and any other relief as the court may deem fit and just to grant.

At the hearing, the appellant was represented by Mr. Mbekomize learned advocate while the respondent was represented by Mr. Gildon Mambo, learned advocate. Before the commencement of the hearing, the learned advocate for the appellant prayed to abandon grounds No. 2 and 3, the prayer which was not objected by the respondent's side, hence was duly granted.

Submitting on the remained ground of appeal, to wit; fist ground; Mr. Mbekomize stated that, in the trial tribunal, the appellant was claiming the properties to wit; one house and a farm left by her late husband, George Henry who died testate. The learned counsel added that, though the

respondent alleged that there was a **Will,** the same was not tendered in the Trial Tribunal. It was Mr. Mbekomize's submission that, without being appointed as an Adminitratix of the estate of her late husband, the respondent had no legal mandate to deal with the deceased's estate. The learned counsel referred this court to the case of **Marison Samwel versus Furugensi,** Misc. Land Case No. 16 of 2014 where the High court – Bukoba registry held that; a party who is interested in defending the estate of the deceased must apply and obtain letters of administration of estates. Mr. Mbekomize added that the respondent had no **locus standi** to institute Civil Case No. 11 of 2018 before Ruhaya Ward Tribunal because she was no appointed an Adminitratix of the deceased's estate. The learned counsel added that the proceedings of the Ward Tribunal did not explain/describe the size of the disputed land or neighbours. He ended his submission in chief urging the court to allow this appeal and grant other reliefs as stated in the petition of Appeal.

On his side Mr. Gildon Mambo submitted that, before the commencement of the hearing, the learned counsel for the appellant has dropped grounds No. 2 and 3, and remained with the first ground but, it is unfortunate that he did not confine himself to the remained ground of appeal, instead, he argued two different issues to wit; *locus standi* and size of the disputed land, issues which are not part of ground No.1.

Mr. Gildon went on submitting that, the issue of *locus standi* raised by the learned counsel for the appellant is very weak owing to the reason that respondent's husband demised in 1995, and the Land Case was filed in 2019, thus according to law, the respondent was already the owner of the disputed land she inherited from her deceased husband.

He added that, according to law, every person who wants to complain over the land left by the deceased must do so within twelve (12) years after the deceased's death regardless of the existence of a **Will** or not.

He further submitted that, any claim which is brought after twelve (12) years is time barred, and even where an administrator is appointed, he has no power to disturb the occupier who has occupied the land for over twelve (12) years.

The learned counsel added that, the appellant, having seen that the respondent has been in occupation of the said land and that, he was sued before Ruhanga Ward Tribunal for interfering the respondent's land, he petitioned for letters of administration of the estate of the deceased brother vide Probate and Administration of Estate No. 1 o 2019 of Kamachumu Primary Court just to cause annoyance and disturbance to the respondent because the deceased passed away in 1995. The learned advocate urged the court not to allow such act by the appellant to stand because it is against the interest of justice.

The learned counsel referred this court to section 9 (1) of the Law of Limitation Act Cap. 89 R.E 2019 and the case of **Yusufu Same and Another versus Hadija Yusuph** [1996] TLR 346 where it was emphasized that a person cannot institute a cause of action beyond twelve (12) years over a property left by the deceased. He also made reference to the case of **Aloysius Benedicto Rutaihwa versus Emanuel Bakundukize Kendurumo**, Land Appeal No. 23 of 2020 Bukoba High Registry (unreported) where the doctrine of adverse possession was extensively discussed.

As regard the case of **Marison Samwel versus Furugensi** (Supra) Mr. Gildon Mambo prayed to the court to disregard it because the case is unreported but the copy was not supplied to him.

Mr. Gildon further stated that, the issue of size and boundaries is an afterthought issue because it was not raised in the lower tribunal, thus cannot be raised at this stage. The learned counsel referred this court to the case of **Sospeter Kahindi versus Mbeshi Mashini**, Civil Appeal No. 56 of 2017 CAT (unreported) where it was held that the question of jurisdiction ought to have been raised at the earliest opportunity. In the same line, Mr. Gildon submitted that, the issue of size and boundaries ought to have been raised in the trial tribunal or the 1st appellate tribunal, and since it was not raised, it cannot be raised in this court.

In his rejoinder, Mr. Mbekomize stated that the fact that the respondent was the deceased's wife does not give her an automatic right to institute a case in court of law without first being appointed as an administratix of the deceased's estate. He added that, since the respondent told the trial tribunal that there was a **Will** of the deceased, it is apparent that she was aware that appointment of the administrator was necessary. He also submitted that since the respondent is the one who filed the case against the appellant, the issue of time limitation does not apply against the appellant.

Mr. Mbekomize added that the matter at hand is not Probate matter, therefore the reasons given by the appellant why he delayed to petition for letters of administrations does not feature in the record of this case. As regard the issue of size and boundaries, Mr. Mbekomize stated that, it is trite that the issues of size and boundaries/neighbours of the disputed land

have to be ascertained at the earliest possible stage otherwise, there would be a possibility of creating more chaos/ land disputes.

Mr. Mbekomize added that, the respondent had the right to challenge the appointment of the appellant including objecting the disputed land from forming part of the deceased's estate, but she did not do so.

I have earnestly gone through the rival submissions by parties and the record of the trial Tribunal and the grounds of appeal. The issue for determination is whether this appeal is meritorious.

However, I would like to state at the outset that the 1st ground is all about *locus standi*, therefore the argument by Mr. Gildon that, the issue locus standi was new ground is baseless. The only new issue is the issue of size and boundaries of the disputed land but same should not detain me because it was not raised in both lower tribunals.

The appellant faults the lower tribunals for failure to recognize that the respondent had no **locus standi** to institute the matter owing to the reason that she was not appointed as an adminitratix of the deceased's estate. Both sides to this appeal are in agreement that since the demise of the deceased in 1995, up to 2018 when Civil Case No.11 of 2018 was instituted by the respondent before Ruhanga Ward Tribunal, neither an adminitratix nor an administrator of the deceased's estate was appointed.

An inevitable question here is whether the respondent had **locus standi** to institute the Civil Case No.11 of 2018?

The law on locus standi is very clear as the same had been repeatedly in many cases in this Land. The Locus Standi has been defined in the famous

case of **Lujuna Shubi Balonzi versus Registered Trustees of Chama cha Mapinduzi** [1996] TLR, 203, 208 as:-

"A Principle governed by common law whereby in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the court has power to determine the issue but also that he is entitled to bring the matter before the court".

Further, in Halbury's Law of England 4th Edition paragraph 49 at page 52 which states as follows:-

"Locus standi means a party must not only show how that the court has power to determine the issues but also that the party is entitled to bring the matter before the court."

I have also been also persuaded by one of the Kenyan case; **Julian Adoyo Onginga versus Francis Kiberenge Abano Migori,** Civil Appeal No.119 of 2015, where the High Court of Kenya held that;

"*The issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and /or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of the deceased person since in most cases the case involves several other beneficiaries or interested parties".*

From the herein above authorities, it is apparent that *locus standi* is one of the thresholds of instituting a suit. The same can affect the jurisdiction of the court, and therefore, can be raised at any time in the proceedings or on appeal like in the present matter. If a party does not have *locus standi* to institute an action, the court would have no jurisdiction to entertain the suit. This rule was developed to protect the courts from being used as a playground by professional litigants, busy bodies and meddlesome interlopers who have no real interest in the subject matter of the litigation. It restricts access to the courts to persons with only genuine grievances.

The general rule known worldwide is that, when the property in dispute belongs to the deceased person, the only person with *locus standi* to sue on behalf of the estate is the one who has sought and obtained letters of administration of the deceased's estate. See **Omary Yusuph (Legal representantive of the late Yusuph Haji) versus Albert Munuo,** Civil Appeal No.12 of 2018 CAT (Unreported) and **Dominica Pius versus Kasese@John Lumoka,** Civil Appeal No.93 of 2010 CAT (Unreported)

In the case of **Tatu Adui versus Malawa Salum and Another**, Misc. Civil Application No. 8 of 1990 HC DSM that;

"*Only administrator of the estate who is also a personal legal representative of the deceased can sue or be sued over the estate.*"

Furthermore, the High court of Tanzania Kigoma Registry in the case of **Kagozi Amani Kagozi (Administrator of the estate of the late Juma Selemani versus Ibrahim Seleman,** Land Appeal No. 2 of 2019 had asked itself whether the suit by the respondents at the trial tribunal was competent in the absence of letters of administration while the disputed

property being alleged to be the property of the deceased person. The court (Matuma J) answered that question in the negative. The court emphasized that; **locus standi** to sue or defend the estates of the deceased person vests to the administrators. See also **Hosea Emmanuel versus Sophia E. Rintenge** (PC) Land Appeal No.9 of 2020. In the case of **Morrison Samwel versus Frugensi Bikale** (Supra), Bongole. J held that;

"If the respondent thought that he was interested to in defending the late Faustin's estates, he ought to have applied for the letters of administration of the estates."

However, in the case of **Abeli Kajoki and 2 Others versus Innocent Jams,** land appeal No. 27 of 2016 – HC Bukoba Kairo, J. (as she then was) quoted with approval the case of "**Felix Constantine versus Jofrey Modesti**, Land Appeal No.9 of 2010 " Bukoba Registry where it was held that;

To be a heir of the estate creates an interest on the part of the heir but that does not give him an automatic locus standi to sue or to be sued over the property of the deceased."

I am alive of the decision given by Hon. Nyangarika, J. (as he then was) in the case of **Jackson Nyasari versus Nyama Sagare Nyasari**, Probate No. 6 of 2007 that;

"*Where one spouse dies, the entire estate remains in the hands of his wife as both parties have equal rights in that estate. He added that the essence of filing a probate cannot arise until both spouses had died... it can only arise where there is a "will" which is being disputed or where there is more*

than one surviving wives of the deceased in Islamic or customary law disputing on the administration of the estate."

I am also alive of the decision of this court in the case of **Paul Bwishaku versus Magdalena Bwishaku,** Misc. Land Appeal No. 33 of 2013 HC Bukoba (unreported) where Mwangesi, J. (as he then was) held that;

"*The fact that there was ample evidence to establish that, indeed, the respondent was the wife of the deceased as held by the learned chairman of the District Land and Housing Tribunal the respondent was the co-owner of the land and homes,* ***in which she was left by her late husband and as a result, there was no requirement for her to apply to administer the property which was partly hers.*** *Put it in their way, following the death of her husband the respondent remained to be the owner of the properties which she previously owned jointly with her husband. The late Pantaleo Mugizi did distribute all his properties to those whom the opined deserved while he was still alive, meaning during his death, every property had its specific owner."*

In my view, the decision of my learned brothers (rtd) na Mwangesi J (ask then was) Nyangarika J, Profess the school of thought which recognizes customary distribution of the estate which does not necessarily entitles parties to file a probate matter to have the estates distributed. This school of thought was also followed by Mwangsei J in **Julius Fundi and Others versus Ernest Pancras,** Probate and Administration Appeal No.03/2013.The court had this to say;

"*That being the case, there was no question of application for letters of administration in so far as the estate of the late Yustace Kalutegwa was*

concerned.....Application for letters of administration can only be invoked where, the Will left by the deceased falls under what has been stipulated under paragraph 29 of GN.436 of 1963 (Customary Law Declaration Order.....To proceed to appoint an administrator, who in actual sense would have nothing to administer rather creating some unfounded claims in respect of the estate of the deceased, which already indicated above, already have owners."

The case of **Paul Bwishaku versus Magdalena Bwishaku** (Supra) stresses that where the properties were distributed to specific owners before the occurrence of death, there will be no need to appoint the administrator/ adminitratix of the deceased's estate because he/she will have nothing to administer.

Reading Section 71 of the Probate and Administration of Estates Act Cap 352 R: E 2019 and Paragraph 6 of the Fifth Schedule to Magistrates Courts Act, Cap.11 R.E 2019, my interpretation is that, right after the grant of probate or letters of administration; only Administrator or Adminitratix, or Executor or Executrix of the estate of the deceased can sue or be sued over the estate.

For easy reference, Section 71 of the Probate and Administration of Estates Act Cap 352 R: E 2019, provides that

"After any grant of probate or letters of administration, ***no person other than the person whom the same shall have been granted shall have power to sue or prosecute any suit or otherwise act as a representative of the deceased, until such probate or letters of administration shall have been revoked or annulled"***

Paragraph 6 of the Fifth Schedule to Magistrates Courts Act, Cap.11 R.E 2019 provides that;

*"An administrator **may** bring and defend proceedings of behalf of the estate."*

The exception to the general rule has been explained in the following cases; In the case **of Amina Athumani versus Hadija Mohamed Ninga,** Land Appeal No.36 of 2013 HC Tabora, Sahel J (as she then was) held that;

*" For a person to have locus over the estate of the deceased must have been appointed as an administrator of the estate, is a general rule worldwide **but in certain circumstances especially when it is shown that it is necessary to preserve and protect the estate of the deceased one may bring the suit without necessarily obtaining first letters of administration"*** **(Emphasis added)**

In the case of **Amina d/o Athuman versus Hadija Mohamed** (Supra) the court held that despite the fact the respondent had no letters of administration, she had an interest to protect and preserve of herself as a wife of the deceased.

In the case of **Maulid Makame Ali versus Kesi Khamis Vuai,** Civil Appeal No.100 of 2004 CAT (Unreported) the Court of Appeal of Tanzania held among other things that;

"Also in instituting the suit, the respondent had locus standi as a heir of the estate (shamba) after the death of his father."

The holding of this case informs us that the locus stand to sue and protect the interest in the deceased estate can also be acquired by virtual of being a heir, survivor or co-owner. See also the cases of **Jackson Nyasari versus Nyamasagare Nyasari** (supra) and **Paul Bwishaku versus Magdalema Bwishaku** (supra).

I have been persuaded by the decision of the Supreme Court of Uganda in **Israel Kabwa versus Martin Banoba** SCCA.No.52 of 1995. In this case, the complaint was that; the trial judge erred in law and fact when he held that the respondent had sufficient locus standi to bring and maintain the suit against the appellant while he had not obtained letters of administration to the estate of his late father. The appeal was dismissed because the Supreme found that the respondent's locus standi is founded on his being the heir and son of his late father.

Being guided by the herein above authorities, it is apparent that in certain circumstances especially when it is shown that it is necessary to preserve and protect the estate of the deceased, the deceased's wife or heirs/children may bring the suit without necessarily obtaining first letters of administration.

In the present case, it is very clear from the record of both lower tribunals and submissions by advocates of both sides that the deceased George Henry Mugini who was the respondent's husband passed away in 1995, leaving her with two children in the disputed house and a farm in which they went on enjoying the same without interference until 2018 when the respondent instituted Civil Case No.11 of 2018 against the appellant at Ruhanga Ward tribunal for trespassing into the suit premises. Therefore, it is my considered view that, though the respondent had not petitioned for

letters of administration, she had an interest to protect and preserve of herself as a wife of the deceased, but also for her children.

Mr. Gildon viewed the appellant's act of petitioning for letters of administration as an act intended to fight, annoy and disturb to the respondent. Mr. Gildon further argued that, according to section 9 (1) of the Law of Limitation Act Cap. 89 R.E 2019 and the case of **Yusufu Same and Another versus Hadija Yusuph** [1996] TLR 346, a person cannot institute a cause of action beyond twelve (12) years over a property left by the deceased. I do agree that is the position of the law. However, as stated by Mr. Mbekomize, it is apparent that up to this moment, no suit had been instituted by the appellant over the deceased's properties therefore; the appellant cannot be faulted on that area.

However, as a matter of law, any claim which is brought after twelve (12) years is time barred, and even where an administrator is appointed, he/she has no power to disturb the occupier who has occupied the land for over twelve (12) years after the occurrence of death. Section 9 (1) of the Law of Limitation Act, Cap 89 R.E 2019 provides that;

"*Where a person institutes a suit to recover land of a deceased person, whether under a will or intestacy and the deceased person was, on the date of his death, in possession of the land and was the last person entitled to the land to be in possession of the land, the right of action shall be deemed to have accrued on the date of death.*"

In the case at hand, the respondent and her children have been in occupation and peacefully enjoying the house and farm in dispute for over 23 years since the death of the respondent's husband in 1995, thus

according to law, she is recognized as a lawful owner of the said properties thus she had also locus standi as the owner of the disputed properties.

It is a legal principle that each case has to be looked at its own circumstances. See **Citibank (TZ) Ltd versus TTCL and Others,** Civil Appeal No.97 of 2003 (Unreported).

After hearing both parties in the trial tribunal, the trial tribunal had this to say; I quote;

"Mwl.Henry anashindwa kwa kuingilia mali za mjane na watoto wake na kutumia mazao yaliyopo katika eneo hilo kwa maslahi yake. Evaline George anashinda, aenedelee kutunza shamba na watoto wake wawili.Nyumba iliyojengwa na Henry ilyotamkwa kuwa ni ya George Henry Mjane ambaye ni Evaline George aendelee kuitumia na watoto wake."

The decision of the trial court was upheld by the DLHT as the appeal No.10 of 2020 was dismissed for want of merit. Indeed, it is my considered view that the ground of appeal by the appellant that the respondent had no locus standi over institute Land case No.11 of 2018 or over the disputed properties is devoid of merit, hence dismissed.

In the present case, the disputed properties being the properties of the respondent and her children, there is no way they can be dealt with the appellant in his capacity as an administrator of the estate of the late George Henry Mugini. It is trite law that one of the factors to be considered in the appointment of an administrator is that, the petitioner should have interest in the estate as a heir. See Paragraph 2 (a) of Fifth Schedule to the MCA [Cap 11 R.E 2019]

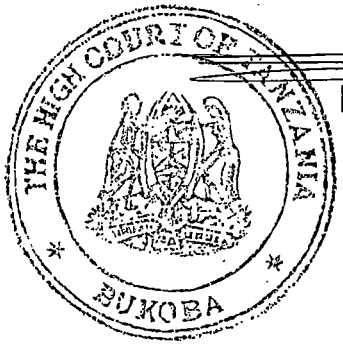
In my opinion, it appears that the appellant had applied for administration in 2019 that is to say; after 23 years since the death of his brother not for the good reason of administration of the deceased's estate but to fight the respondent and her children something which is contrary to the interest of justice.

It is settled law that a second appellate court like this one should not lightly interfere with the concurrent findings of fact by the two courts below except where it is evident that such concurrent findings of fact, were a result of misapprehension, misdirection or non- direction of the evidence or omission to consider available evidence.

In the instant case, there was no ground of appeal attacking the evidence. The complaint was on the issue of locus standi as the appellant alleged that the respondent had no lous standi.

Basing on what I have endeavored to explain, I find no good basis to differ with the concurrent findings of the lower tribunals. Their decision is accordingly upheld as I dismiss this appeal for lack of merit.

Dated at Bukoba this 22nd day of September, 2022.



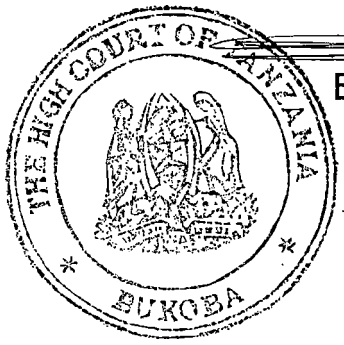
E. L. NGIGWANA

JUDGE

22/09/2022

Judgment delivered this 22nd day of September, 2022 in the presence of both parties in person, Mr. Gildon Mambo, learned advocate for the

respondent, Mr. E. M. Kamaleki, Judges Law Assistant and Ms. Tumaini Hamidu, B/C.



E. L. NGIGWANA

JUDGE

22/09/2022