

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO.53 OF 2020

(Arising from Civil Case No.37 of 2017 Kinondoni District Court, dated 30th

January, 2020, Hon. K.C. Mshomba, RM)

YAO LISHILINGI.....APPELLANT

VERSUS

MWANJAA ALLY JONGO.....RESPONDENT

JUDGMENT

Date of last Order: 22/09/2022

Date of Judgment: 3/10/2022

POMO, J.

The Appellant is aggrieved with the decision of the trial court which dismissed his suit on 30th January, 2020. In challenging the said decision he has filed in this court three grounds of appeal.

The background to the case can briefly be gathered as follows. The Appellant is the son of the late Simon Mkweni Lishilingi who passed away in 1994 while the Respondent is the widow to the said Simon Mkweni Lishilingi (the Deceased). He died leaving behind landed property at Goba area in Dar es Salaam. The Respondent is an appointed administratrix of the estate of the deceased having been so appointed by Kimara Primary Court in Probate and Administration Cause No. 86 of 2011 which fact the appellant is aware of per paragraph 8 of his plaint he presented before the trial court. Paragraph 5 of the Respondent's Written Statement of Defence (the WSD) admitted the fact that she is the Administratrix of the estate of the said deceased. The dispute leading the Appellant to institute Civil Case No.37 of 2017 against the Respondent in Kinondoni District Court is his claim that he has a share in the estate the deceased having been customarily inherited the same immediately after the death of the deceased (see Paragraphs 3 to 6 of the plaint and prayer (a) thereto).

During trial, the parties adduced their evidence whereby the Appellant testified as Pw1 Saimon Lishingi (PP. 11 – 15) followed by PW 2 Symon Lishingi (see PP. 16 – 18 of the typed trial proceedings) and for the defence side DW1 Mwanjaa Ally (PP.23–25 of the typed proceedings); DW2

Eva Symon Lishilingi (see PP.26 – 29 of the typed proceedings); DW3
Hamad Symon Lishilingi (see PP.29 - of the typed proceedings); DW3
Amani Saimon Lishilingi (see PP.33 – 37 of the typed proceedings); DW4
Walivyo Simon Lishilingi (see PP.43 – 46 of the typed proceedings).

In their adduced testimonies and evidence, all the witnesses are at one that Probate and Administration Case No. 86 of 2011 Kimara Primary Court appointed the Respondent as the Administratrix of the estate of the late Simon Mkwani Lishilingi (the Deceased) and the inventory so is the statement of account are yet to be filed.

Basing on the evidence so adduced, the trial court found itself lacking jurisdiction to determine the merits of the case as such dismissed it for want of jurisdiction. It is out of the said trial court findings and decision which has prompted the Appellant to file this appeal. The grounds of appeal are three and are hereby reproduced as they appear in the memorandum of appeal which stand filed, to wit: -

- 1. That, the trial magistrate erred in law and fact by deciding in the favour of the Respondent without regarding the limitation of inventory closure matters*

2. *That, the trial magistrate erred in law and fact by not awarding damages to the Appellant due to the distribution made customarily*
3. *That, the trial magistrate erred in law and fact by not considering the strong evidence adduced by the Appellant including the evidence of the Appellant's witnesses.*

Pursuant to the order date 23/7/2020, this court ordered hearing of the Appeal to proceed *ex parte* against the Respondent having served summons to her through publication in Uhuru Newspaper dated 16/7/2020.

When the appeal came for hearing on 7th June, 2022 the Appellant appeared in person unrepresented and the court ordered hearing of the appeal be by way of written submission of which the Appellant dully complied with.

Submitting in support of the first ground of appeal, the appellant argued that the respondent has never filed inventory and if any she has never shown it to the beneficiaries that is why he lodged civil Case No. 37 of 2017 before Kinondoni District Court. He concluded that the trial court did not consider the Appellant's concern that the Respondent is misappropriating the estate of the late Simon Mkwani Lishilingi (the



Deceased) hence it was proper to sue her in her personal capacity for the action committed in in her position as administratrix.

On the second ground of appeal, the appellant submitted that he admits that the district court doesn't have jurisdiction to hear and determine land dispute but according to him the trial district court could have order the distribution of the landed property under its supervisory powers. He cited the decision of this court in **Annath Athumani Maseko Vs Lilian Kirundwa Rajabu as administratrix of the estate of the late Joel Simbo Kirundwa, Civil Revision No. 1 of 2021 High Court at Temeke (unreported)** at p. 47.

Having gone through the grounds of appeal and the appellant's submission in support of the grounds, this court has dispassionately visited the parties pleadings before the trial court, the evidence adduced by both side and the findings reached by the trial court to the effect that it lacked jurisdiction. As alluded above in the background of the dispute between the parties, it is on record that Probate and Administration Cause No.86 of 2012 Kimara Primary Court appointed the Respondent to administer the estate of the late Simon Mkwani Lishilingi as per the tendered exhibit P.2 the ruling and letter of appointment administratrix of estate (see page 24



of the trial court typed proceedings). That is not only enough, the appellant objected to the inclusion in the estate of the late Simon Mkweni Lishilingi the landed property under dispute (see last paragraph of page 24 of the typed proceedings read together with his plaint). All these are proof that their dispute concerns the administration of estate and what is at stake is the landed property the appellant is claiming to have already inherited, of which, according to him, was not supposed to be included in that probate and administration cause No. 86/2011 Kimara Primary Court as an estate of the late Simon Mkweni Lishilingi.

The law of the land is categorically clear. Any dispute concerning ownership of land its forum for adjudication is the Land courts of which the District Court is not among. There is nothing advanced in the grounds of appeal by the appellant which can move this court to interfere the findings of the trial court, that it does not have jurisdiction. The findings by the trial court, which is from pp.5 – 6 of the typed judgment, describes the correct position of the law and explained where this dispute should have been channeled. Any court of law cannot assume the jurisdiction it does not have. This position was so stated in **Shyam Thanki and Others v. New Palace Hotel** [1972] HCD n. 92 where it was held:



"All the courts in Tanzania are created by statutes and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess."

The only observation which this court has found as an error in the trial court decision is the end result reached of dismissing the suit instead of striking it out. It was wrong to dismiss the appellant's suit instead of striking it out. This is because, the trial district court didn't determine the merit of the suit rather the jurisdiction issue only. Under the circumstance, the order dismissing Civil Case No.17/2017 is hereby quashed and substituted with the order striking out the suit.

In the upshot, the appeal is dismissed for lack of merit with no order to costs.

It is so ordered

Right of Appeal explained

Dated at Dar es Salaam this 3rd day of October, 2022



Husk
Musa K. Pomo

Judge

03/10/2022

This judgment is delivered on this 3rd October, 2022 in presence of the Appellant and in absence of the Respondent.



Musa K. Pomo
Musa K. Pomo

Judge

03/10/2022