

IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

PROBATE APPEAL NO. 04 OF 2022

(Arising from probate Appeal No.12/2021, Originating from Probate and Administration of Estate No. 123/2021, Morogoro Urban Primary Court)

KILO RASHIDI LUSEWA.....APPELLANT

VERSUS

MWINJUMA HASSANI KILO.....RESPONDENT

JUDGMENT

Last Order: 28.09.2022

Judgment: 16.11.2022

HASSAN, J

The appellant herein instituted the instant appeal challenging the decision of the District Court of Morogoro in the Probate Appeal No. 12 of 2021, which sustained the decision of the Primary Court of Morogoro Urban in the Probate and Administration of Estate Cause No. 123 of 2021, that the court had no jurisdiction and that the disputed house, Plot No.3 Block "2Q" at Chanika area in Handeni Tanga is not among the property of the deceased Rashidi Hassani Lusewa.



The background of the matter can be briefly narrated as follows; that the appellant's Father Rashidi Hassani Lusewa (the deceased) died intestate on the 4th day of July, 2020. After his death, the appellant herein was appointed the administrator of the deceased's estate on the 4th day of August, 2021 by Morogoro Urban Primary Court in the Probate Cause No.123 of 2021.

In another juncture, on 14th day of September, 2021 the respondent herein filed an application in the same Primary Court in the hunt for an order of the court to remove the said house (Plot No.3 Block 2Q) from the list of the deceased properties. After the hearing, the Primary Court decided in favour of the respondent, that the house Plot No.3 Block 2Q be removed from the list of the deceased's property in probate course No. 123 of 2021, since it was not his property.

Dissatisfied by the decision of the Primary Court, the appellant appealed to the District Court in Probate Appeal No. 12 of 2021, challenging decision of the Primary Court to remove the said house Plot No.3 Block 2Q from the list of the deceased's property in the Probate Cause No. 123 of 2021.

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Upon hearing the parties, the District Court steadied the decision of the Primary Court and ordered that, the court had jurisdiction to entertain the matter as it was a probate matter. Thus, the Primary Court Magistrate was right to remove the house from the list of the deceased's property.

With that outcome, the appellant was again aggrieved by the decision of the District Court, hence marshalled the instant appeal to the court as hereunder:

- *That the appellate Court erred in law when assumed powers of determining dispute based on ownership of landed property between parties without jurisdiction*

IN ALTERNATIVE;

- *That both courts below misdirected themselves in fact and law when determining that the house No.3 Block 2Q Chanika Handeni Tanga is not property of the deceased Rashid Hassani Lusewa because of various reasons to wit: the appellant not being the beneficiary, the property not having being canvassed and listed in the family meeting.*

During the hearing, the appellant was represented by learned advocate



Prof. Binamungu, while on the other part, the respondent Mwijuma Hassani Killo entered appearance unrepresented.

In his oral submissions the learned advocate for the Appellant Prof. Binamungu abandoned the first ground of appeal and proceeded with the second ground of which he argued as follow:

That the District Court erred in Law by holding that Primary Court was right in its decision to remove the disputed property in the inheritance form. He averred that the District Court has advanced four reasons in its decision which can be found at page 4 of the judgment.

He pointed out the First reason that, the family meeting of 21st November, 2020 did not list the said house as the property of Rashid Lusewa. On this point, the learned advocate argued that if the house was the property of the deceased the meeting could have admitted it.

The Second reason is that, if Rashid Lusewa had been given that property as a gift by his father since December, 1989 as per affidavit, why he did not change the title until his death come.

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The Third reason is that, the TRA demand note of 2021/2022 which was admitted as exhibit "A" in the Primary Court have the name of Hassani Killo Mohamedi. Therefore, the Court held that the owner of the property was not Rashid Lusewa. In this point the advocate argued that, if we consider these reasons, they are baseless since there is no document of title which could prove that Rashid Lusewa was not the owner of the disputed property.

He also averred that there is no statutory law or case law which provide that the minute of the family meeting has to consist of specific items or conditions. The family minute is the matter of practice which this court has encouraged to be conducted. To strengthen his argument, he referred the court to the High Court case of **Hadija Said Matika Vs Awesa Said Matika**, PC. Civil Appeal No. 2 of 2016 (unreported).

He further argued that the family minute is not conclusive in itself though it is a good practice. The family member who has been appointed by the meeting can fill form No. I to request administration of estate property. He can also enlist the estate property and that is not an error. He pressed further that, the reason that a person who had been given the property delay



to change the name of title is a baseless argument, which the court should have not considered.

Similarly, the learned advocate contested that the demand note cannot give the right of ownership of the land/property. This is because, with respect to Land ownership, the Land Laws are the one which provide for Land ownership.

More so, he submitted that all reasons which were considered by the court to determine that the property is belong to Hassani Killo Mohamed was not enough. The affidavit of Hassan Killo Mohamed was admitted by the court as an exhibit, it shows that the property was given to Rashid and the other party did not Object that affidavit. He insisted that, due to that, it was wrong for the court to consider otherwise.

On the issue of contradiction of name, he submitted that it was only considered in Primary Court in page 7 and 8 of the judgment, where the court enquired as to whether Rashid Hassan Lusewa is a Rashid Lusewa?

On that point, the advocate argued that if the court thought that there was contradiction of names, the court should have resolved that by calling the family members but not to take its course to decide the matter. On that,



he submitted that, it was wrong for Primary Court to consider that evidence, together with the evidence of the rent payment.

Prof. Binamungu added more, that apart from all that argument, it is his submission that the correct place which can solve the conflict of who is the right owner of the property is the court which deals with land dispute. He averred that there is where the issue of land ownership can be determined and resolved.

In conclusion, he prays to the Court to allow the appeal, quash the judgment and set aside the order meted at the subordinate courts.

To protest what was submitted by the appellant's advocate, the Respondent Mwinjuma Hassan Killo forcefully submitted that the appellant ought to prove his allegation. He went on to succumb that the Primary Court and District Court were right to hear and finally decided on the matter in dispute. He argued that, since the matter was about probate and the arguments raised were to ask the court to remove the said house (plot No. 3. Block 2Q) from the list of the deceased person's properties in Probate case no 123/2021, because that house is not the property of Rashid Hassan



Lusewa the father of the appellant, therefore the courts bellow has arrived to the correct decision.

He asserted more that, the relevant exhibits were presented and admitted to the Court and that allows the court to make its decision. He added that the Courts bellow have evaluated the documents including affidavit which does not have signature of Hassan Killo Mohamed (respondent's father); no signature of Rashid Hassan Lusewa, (the deceased); and no signature of the relatives or friends of the late Hassan Killo Mohamed to testify what was processed.

Further to that, Mr. Mwinjuma Hassan Killo submitted that in the family meeting of the appellant, he did not invite them as the rightful heirs of the deceased in order to exclude the house in the list of estate property.

Therefore, according to him the Primary Court was satisfied that the house was belonged to them, as he called up a number of witnesses and all testified that, the house is belong to his father.

He also asserted that the contradiction of names in the Primary Court Between Rashid Hassan Lusewa Mdeve and Rashid Hassan Killo Mdeve was for the purpose of ascertaining who was given the disputed house. He further



stated that there is no problem of ownership to this house, as the same is belong to late Hassan Killo Mohamed and not Rashid Killo Lusewa Madeve who claimed to have been given by Hassan Killo Mohamed. Finally, he prayed for appeal to be dismissed with cost.

In rejoinder, the learned advocate for the Applicant submitted that the affidavit and other document that was said to be an irrelevant exhibit, were relevant exhibits and the court has admitted with the Signature of the Hassan Killo Mohamed. Prof. Binamungu went on arguing that, the argument that affidavit has had no signature of other person is baseless argument, since affidavit is not like a contract, that it should not contain the signature of the receiver.

Moreover, about filing the Probate Cause in Morogoro, he avowed that there was no bad intention and the late deceased used to live in Morogoro. With that, he reiterated the appeal to be allowed with cost.

Having gone through the submissions of the parties, two issues warrant determination of the court as follows

1. Whether or not, the Primary court has jurisdiction to entertain the issue of ownership of land arises from probate cause?



2. Whether or not, the District Court right to uphold the decision of the Primary Court to remove from the list the house Plot No.3 Block 2Q Chanika Handeni Tanga from the deceased property?

To answer these issues, I feel obliged to showcase position of law in this matter. That said, it is a trite principle of law that power to hear and decide dispute against estate property is vested to the court seized with the matter. This was well articulated in the case of **Mgeni Seifu v. Mohamed Yahaya Khalfani, Civil Application No. 1 of 2009**, the Court of Appeal of Tanzania, at Dar es Salaam (unreported), where it was held that:

"Where there is a dispute over the estate of the deceased, only the probate and administrative court seized of the matter can decide on the ownership".

Again, this is also the requirement of Rule 8(d) of the Rules G.N 49 of 1971, which states:

"That the primary court can hear and decide any question as to the property, assets or liability of the deceased".

Couched by the above provision, it is obvious that the Primary Court has jurisdiction to **hear and decide any question as to the property, assets**



or liability of the deceased. To this end, it is my considered view that this provision of Rule 8 (d) (supra) is too generous, and it should be applied with cares.

At this juncture, it is also important to recall provision of Rule 1(1) of the fifth schedule to the Magistrate Court Act, Cap 11 R.E 2002 which denotes that:

"The jurisdiction of a Primary Court in the administration of the deceased estates, where the law applicable to the administration or distribution or the succession to the estate is customary law or Islamic law, may be exercised in case where the deceased at the time of his death, had a fixed place of abode within the local limit of the court's jurisdiction".

In my view, the power mandated to the Primary Court to administer deceased estates is instinctive to the **deceased estates**, that means, where the property is in dispute with respect to ownership, say it land dispute as in this case, the same should be resolved first to determine the disputed ownership.


In the upshot, based on the decision of **Mgeni Seifu v. Mohamed Yahaya Khalfani** (supra) the aforesaid analysis answers the first issue as to Whether or not, the Primary court has jurisdiction to entertain the issue



of ownership of land arises from probate cause? In the simple term, the answer is in affirmative. It is clear from the above decision and provisions of laws that, the Primary Court can determine issue of ownership of the deceased estate arising from probate course.

Upon that observation, I wish to differ with the learned advocate Binamungu in his submission that when it comes to land dispute with respect to ownership, the correct place where the conflict could be solved is the Tribunal which is inclined with powers to deal with land matter. In my opinion, as I have held above, if the circumstance in question is of probate and administration of estate, the proper authority to hear and determine the dispute is the Primary Court. See **Mgeni Seifu v. Mohamed Yahaya Khalfani** (supra) and also Rule 8 (d) of the Rules G.N 49 of 1971. See also **Ally Omari Abdi V. Amina Khalil Ally Haldid (As an Administratrix of Estate of the Late Kakile Ally Hildid)**, Civil Appeal No. 103 of 2016 (unreported) where the Court of Appeal had this to say:

"....it seems to us that once parties have submitted probate matters for administration by the Primary Courts under the Magistrate Court Act, Cap. 11, they must as a consequence thereof follow through the remedies provided by the Primary Court concerned".



Adding to that, it worth noting that the court in Tanzania has made its position when it comes to the issue of probate and administration of estate property. See the case of **Mgeni Seifu** and **Ally Omari Abdi** (supra), as well as the high court decision in the case of **Mbaraka Selemani v. Nuungano Selemani**, Land Appeal No. 17 of 2018 HC, Land Div (Maghimbi, J), the DLHT Chairman found property belonged to deceased and divided it equally among Plaintiff and defendant who he found were deceased's heirs. The court held that Chairman had no jurisdiction to determine probate matters.

Moving to the 2nd issue as to whether or not, the District Court was right to uphold the decision of the Primary Court to remove from the list, the house Plot No.3 Block 2Q Chanika Handeni Tanga from the deceased property. In my view the answer is also in affirmative. Since the matter was natured as Probation cause, then it is apparent that the Morogoro Urban Primary Court had jurisdiction to determine whether the house Plot No.3 Block 2Q Chanika Handeni Tanga be included or otherwise, in the list of the deceased's estate property.

As reckoned above, that the properties which were belong to the deceased shall be entitled to be listed for determination of inheritance. Thus,



whenever dispute of ownership arises to the estate property, the matter should be resolved first within the parameter of law. Making references to the case of **Ibrahimu Kasaga V. Emmanuel Mweta [1986] TLR 26 (HC)**, the court gives direction as hereunder:

*"There may be cases where the property of the deceased person may be in dispute. In such cases all those interested in determination of dispute or **establishing ownership** may institute proceedings against the administrator or the administrator may sue to establish claim of the deceased property".*

That being the case, I concur with the respondent submission that the Primary Court as well as the District Court were right to hear and finally decided on the matter. In the consequences, I find the argument fronted by appellant advocate lacks merit and cannot stand. In the event, since the dispute of ownership has arised, party who claim ownership can institute proceeding for determination of the same. To that end, I dismissed the appeal with costs.

Ordered accordingly.

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S. H. HASSAN

JUDGE

16th November, 2022

This Judgment delivered this 16th day of November, 2022 in the presence of appellant's advocate and respondents appeared in person, both electronically linked to the court from Morogoro High Court by video conferencing facility.



S. H. HASSAN

JUDGE

16th NOVEMBER, 2022

