

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF KIGOMA)**

AT KIGOMA

LAND DIVISION

APPELLATE JURISDICTION

LAND APPEAL NO. 04 OF 2022

(Arising from the decision of decision of the District Land and Housing Tribunal in Land Application No. 132 of 2016, before Hon. F. Chinuku -Chairperson)

BETWEEN

BASOA S/O MFAUME..... APPELLANT

VERSUS

ULIMWENGU S/O SONGURA HAMIMU.....RESPONDENT

J U D G M E N T

22/4/2022 & 17/5/2022

L.M. MLACHA, J.

This is an appeal against the decision of the District Land and Housing Tribunal for Kigoma (the DLHT) made in Application No. 132 of 2016 (Chinuku Chairperson). The appellant, Basoa Mfaume was the respondent in the application. The respondent, Ulimwengu Sungura Hamimu, the Administrator of the estate of the late Sungura Hamimu Omary was the applicant. He filed the application seeking the following orders:

- 1. A declaration that the suit properties, a house on plot No. 959 Block 'O' Ext. Majengo registered in the name of Sungura*

Hamimu Omary (deceased), Kigoma/Ujiji Municipal, a house on unregistered plot at Taifa street Buzebazeba ward, Kigoma/Ujiji Municipal and shamba located at Mgumile Kagera Ward Kigoma/Ujiji Municipal with Michikichi plants be subjected to the administration of the applicant.

- 2. The respondent be ordered to hand over all the original documents in her custody concerning the property on plot No. 959, Block 'O' Ext. Majengo.*
- 3. Costs of the suit*
- 4. Any other relief the court can deem fit.*

The DLHT granted the application. It declared the house on plot No. 959 Block 'O' Ext. Majengo to be the property of the late Sungura Hamimu Omari. The respondent was given a right to control it as the administrator of the estate of the late Sungura Hamimu Omari. The DLHT ordered the appellant to hand over to the respondent all original documents in respect of the house. It was ordered further that the appellant being one of the beneficiaries of the estate as mother of the deceased has to wait for her share in the distribution which was to follow. The appellant was aggrieved hence this appeal.

The grounds upon which this appeal is based read thus:

1. *That, the trial tribunal erred in law and fact by determining the matter without having requisite jurisdiction.*
2. *That, the trial tribunal erred in law and fact by failure to avail and read the opinion of assessor in the presence of the parties before the judgment was composed and it is not clear as to how and what stage the said opinion of the assessor found it is (Sic) way in the tribunal's judgment.*
3. *That, the trial tribunal erred in law and fact by admitting a copy of an offer (exhibit P2) as an exhibit while the proper procedures of tendering the same was not followed.*
4. *That, the trial tribunal grossly erred in law and fact for failure to scrutinize the cogent evidence as it was adduced by the Appellant which shows that the Appellant is the lawful owner of the suit property (Land plot No. 959 Block 'O' Ext. Majengo). Hence relied upon the weak and flimsy evidence that was adduced by the Respondent during the trial.*
5. *That, the trial tribunal erred in law and fact in holding that the Appellant ought to have proved her ownership in the suit property by tendering a sale agreement with one Yahaya Issa Sakoma while a contract can be oral or written.*
6. *That, the trial tribunal erred in law and fact in declaring the suit property to be among the estates of the late Sungura Hamimu Omary while form No. IV which was tendered by the respondent shows that the deceased died in 1995 and the suit property was acquired a year later i.e. 1996.*

- 7. That, the trial tribunal erred in law and fact by holding that the court on probate proceedings has mentioned the suit property Land Plot No. 959 Block 'O' Ext. Majengo to be among the estates of the deceased while there was no copy of the judgment nor proceedings were tendered to prove the same.*
- 8. That, the trial tribunal erred in law and fact for stepping into the shoes of the probate court.*
- 9. That, the trial tribunal erred in law and fact by admitting a document purported to be written by one MASURI MAULIDI BUKEZI for identification purposes without following procedures of tendering the same.*

Mr. Moses Rwegoshora appeared for the appellant. The respondent appeared in person fending for himself. Hearing was done by oral submissions.

Before considering the grounds of appeal and the submissions of parties, some background is reproduced to put the court in a clear picture to understand the dispute. I had a chance of perusing the records of the application filed at the DLHT and the probate cause which was called by the court. I could also hear relatives who attended the court in a big number (off record). It is a fact not disputed that Sungura Hamimu who is son of the appellant died on 14/5/1995. There was no problem from that

date up to 19/12/2014 (more than 9 years). Life went on smoothly. Difficulties developed at the family between the appellant and her husband, the late Hamimu Omari over properties of the family. Hamimu Omari who was sick sensed a future problem. He convened a meeting to discuss the fate of assets left behind by his son Sungura Hamimu Omary who left 4 children. The respondent attended the meeting and is one of them.

On 19/12/2014, the respondent while with full backing of his relatives and the late Hamimu Omari, filed the probate matter seeking to be appointed the administrator of the estate of his father. The petition was advertised. The appellant and her daughter Kibibi Hamimu came to object. The ground of their objection was that the house was merely registered in the name of the deceased but was her property. They also denied the respondent as being one of the children of the deceased. The late Hamimu Omari appeared at the primary court and gave evidence to the contrary. He said that the respondent is son of the deceased and the fit person to administer the estate. He supported the respondent. Other relatives supported him also. The objection was found to be baseless and dismissed. The primary court appointed the respondent to be the administrator of the

estate of the late Sungura Hamimu Omari. It made a finding that the houses and the farm were properties of the deceased. The respondent was directed to administer the estate. His grandfather died somewhere in between. The appellant refused to release the documents and the properties to the respondent. The matter became complicated. On the advice of the primary court, the respondent moved to the DLHT to sue the appellant. The case was decided in his favour as aforesaid. The appellant was aggrieved hence the appeal.

Mr. Moses Rwegoshora dropped the 6th and 9th grounds in the course of submissions. Submitting on ground one, counsel said that the DLHT had no jurisdiction to hear the case. He had the view that the DLHT had no jurisdiction to declare that the properties were properties of the deceased and order the respondent to handle the documents because those were matters outside its mandate. They were probate matters within the jurisdiction of Ujiji Primary Court. He referred the court to **Mgeni Seifu v. Mohamed Yahaya Halfani** Civil Application No. 1/2009 quoted in **Steven Kandamila Revocatus Mwananyoto and another**, Land Appeal No. 27 of 2019 (High Court Sumbawanga unreported).

In ground two, counsel had the view that the tribunal erred to make the decision before reading the opinion of assessors as required in regulation 19(2) of the 2003 Regulations. He referred the court to **Kibone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287/2017 Pages 13-17.

In ground 3 counsel submitted that the DLHT erred in receiving a photocopy of an offer of a right of occupancy without following the procedure contained under section 67 of the Evidence Act. He argued that the respondent was supposed to give a notice to produce or ask the court to compel the appellant to produce the original. He referred the court to **Apieli Urio v. Exim Bank** Civil Appeal No. 185/2019 page 15. Counsel submitted that failure to follow the procedure cannot be cured by the overriding objective principal.

In ground 4 counsel submitted that the DLHT failed to take into account the evidence of the appellant that she bought the land from Yahaya Issa Sokoma in 1996 and registered it in the name of her son Sungura Hamimu Omari and making her the owner of the land. He referred the court to **Hemed Said v. Mohamed Mbilu** [1984] TLR 113 where it was said that the party who have heavier evidence must win.

In ground five, counsel had the view that the DLHT erred in requiring the appellant to produce documents to prove ownership. He submitted that the oral evidence of the appellant was enough to establish her ownership of the land.

In ground seven, counsel submitted that the DLHT erred in finding that there was a probate matter while the probate judgment was not tendered in court. And finally on ground eight, counsel said that the DLHT erred in entering into the shoes of the probate court and say that the respondent had power to administer the estate.

Submitting in reply, the respondent said that the appellant is his grandmother, the mother of his father, the late Sungura Hamimu Omari. He said that the appellant has agreed that the two houses and the farm are properties of the deceased. He went on to say that he is the administrator of the estate dully appointed by the primary court in probate cause No. 50/2014. The appellant objected but her objection was dismissed. She refused to handle the title deed. The court adviced him to go to the DLHT obtain orders to compel her to release the documents. He proceeded to submit that the deceased left 4 children. Their mothers are also dead.

The respondent went on to say that the appellant had 3 children, 2 are dead. Their aunt Kibibi Hamimu Omari is the only child of the appellant who is alive. She lives with the appellant. He added that his relation with the appellant and the aunt is bad because of his involvement in the case. He prayed to be allowed to control the two houses and the farm.

I will address the grounds of appeal as they appear.

In ground one, counsel submitted that the DLHT had no jurisdiction to hear the case. He had the view that the matter was probate in nature and therefore within the jurisdiction of the primary court of Ujiji and not the DLHT. The respondent being a layman could not address this area. He only said that he was advised to go to the DLHT to get forceful orders. I have read the case he cited and tried to relate it with this case. I think that much as I am not bound to follow that case but the facts of this case are different from the facts in that case. The record is clear that the DLHT was engaged at a later stage. It was called for assistance as a land court to compel the appellant to release the documents of title in respect of the house. The probate court had already appointed the administrator. It appointed the respondent and gave him mandate to administer the estate. The appellant did not appeal so the appointment was settled. She refused

to release the documents of title thereby preventing the respondent to do his job. In such a situation, the respondent had no other way but to go to the DLHT for redress. Things could have been different if the respondent was not an administrator of the estate.

For future guidance to the counsel, I find it necessary to restate a principles which are also well known. An administrator of the deceased estate dully appointed by a competent court can file a suit against any person to recover anything which he has a reasonable belief that it belongs to the deceased. In so doing he is not offending the probate court but is trying to get what cannot be given by a probate court for where there is an issue of ownership of a thing with a third party the probate court has no power to resolve the issue. This is common for landed properties. In land cases, the principle can be stated thus, where there is a dispute of ownership of land between the deceased and any person, the probate court cannot determine the issue of ownership be cause that is the domain of the land court.

The power of the probate court is limited to appointing the administrator and giving him mandate to collect the assets of the deceased, paying debts and distributing the balance to the heirs. If in the course of collecting the

assets he meets resistance from a person who says that the property is his, he has to move to the proper court for redress. He will sue as an administrator of the deceased estate against the third party. He can also be sued in that name. See **HADIJA SAID MATIKA vs AWESA SAID MATIKA** (HC Mtwara) PC.CIVIL APPEAL NO. 2 OF 2016 (Original from Ruangwa District Court Probate No. 1 of 2015). That discussion resolves the first issue.

In ground two, counsel speaks of the requirement to read the opinion of assessors to the parties. He has in mind regulation 19(2) of GN 173/2003. I could not get difficult with this ground. The record shows that the chairperson sat with Mzee Juma and Mama Aziza. Mzee Juma could not hear the case to the end because he was sick in Muhimbili hospital at the time of the subsequent proceedings. Mama Aziza gave his opinion and it is on record. The chairperson discussed the opinion in the judgment. The parties were aware of what was said by the assessor. Then if the opinion was not read in court before the composing of the judgment as was said in the cited case, then that can be cured under the overriding objective principle contained under section 3A of the Civil Procedure Code Act, cap 33 R.E. 2019 so long as there was no injustice caused to any of the parties.

In ground three, counsel spoke of secondary evidence. That a photocopy of the title deed was tendered instead of the original. That, the respondent was supposed to file a Notice to produce under section 127 of the Evidence Act or ask the DLHT to compel the appellant to produce the original but could not do so. With respect, this ground is also devoid of merits because it did not take into account of the records and the nature of the case before the DLHT. The records show that the case was filed to compel the appellant to bring the title deed which she denied to have. The document was the case itself. That was the reason why the respondent came to court. The respondent was compelled to tender a copy as a way of showing the DLHT that there was a title in respect of the house. He could not tender the original because it was not in his possession. He could not file a Notice to produce because the respondent denied its existence. The DLHT received the copy to get some picture of the existence of the document before making its finding and decision.

In ground four, counsel submitted that the DLHT erred in failing to find that the appellant bought the land and registered it in the name of her son, but the house was hers. The respondent said that the house is the place where they lived. It is registered in the name of their father and

therefore their house. I think that this question whether the house was merely registered in the name of the deceased but was actually the property of the appellant could be resolved by an examination of the credibility of witnesses and the record of the two courts below. The appellant's husband gave evidence in the probate case but could not support the appellant. I think that he was the best witness on this aspect. This was also an issue which could be resolved by an examination of credibility of witnesses. The DLHT had an opportunity of seeing the appellant. It could not believe her. Credibility of witnesses is a subject with numerous authorities. I find it proud to be guided by the words of the late Lugakingira J (as he then was) in **PIA JOSEPH v REPUBLIC [1984]** TLR 161 (HC) at page 163 where it was said thus:

*"The law as regards the role of an appellate court in matters of credibility is settled beyond peradventure. The trial court which has seen and heard the witnesses, thereby being privileged to observe their manner and demeanour, is certainly in a better position to assess their credibility than an appellate court which has not had these advantages. It has therefore been consistently held that **an appellate court will not lightly***

interfere in the trial court's finding on credibility unless the evidence reveals fundamental factors of a vitiating nature to which the trial court did not address itself or address itself properly. (Emphasis added)

It was the DLHT which had opportunities to see the witnesses and measure their credibility. If the DLHT which had the opportunity of seeing the witnesses found the appellant less credible, this court cannot interfere with the finding lightly. The evidence did not reveal fundamental factors of a vitiating nature to which the trial court did not address itself or address itself properly. This discussion goes also solve to ground five which says that, the trial tribunal erred in law and fact in holding that the appellant ought to have proved her ownership in the suit property by tendering a sale agreement with Yahaya Issa Sakoma while a contract can be oral or written. The appellant had no document to tender to prove that the house belonged to her. Her evidence was oral. If her evidence was oral, it depends on whether she could be believed or not. And if she could not be believed by the lower court, this court cannot believe him at the stage of appeal on the reasons given above. Neither can I accuse the DLHT for failing to believe her.

In ground seven, counsel had the view that the DLHT erred in finding that there was a probate matter without having a copy of the judgment of the primary court. My look of the evidence on records have shown me that the DLHT had a lot of evidence from the parties regarding the probate matter to the extent that the lack of the copy of the judgment could not prevent it to know the existence of the probate case and its decision. The respondent spoke of it very clearly on this aspect and was backed by the letters of administration. The appellant did not deny. See the case **Anna Moises Chissano Vs The Republic**, CAT Criminal Appeal No. 273/2019 at pages 23-24 where it was said that once certain evidence goes into the record unchallenged it is, in Law, taken to have been admitted.

The DLHT was thus justified to find that there was a probate matter and that the respondent was appointed the administrator. That takes us to ground eight. The DLHT, in my view, did not error in talking about the probate case because the respondent did not come to it in person. She came as an administrator of the estate of the deceased claiming rights of the deceased in the house. Neither did it step to the shoes of the probate court on the orders it made. It only gave effect to the decision of the

probate court for as I have said earlier, it is only the DLHT which can issue forceful orders on land matters.

That said the appeal is found to be devoid of merits and dismissed. The appellant is directed to comply with orders of the DLHT immediately. It is ordered so.

Given the relations, I give no order for costs.




L.M. Mlacha

Judge

17/05/2022

Court: Judgment delivered in front of the parties present in person. Right of appeal explained.




Sgd: L.M. Mlacha

Judge

17/05/2022