

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

MISC. CIVIL APPLICATION No. 61 OF 2022

*(Arising from Land Case No. 9 of 2022 of High Court of Tanzania
Shinyanga District Registry)*

MARIAM HAMIS IDD.....APPLICANT

**(Administratrix of the estate of the late
Mwajuma Mohamed Ally)**

VERSUS

HADIJA SAID.....1ST RESPONDENT

MHOJA MKWABI KABALO.....2ND RESPONDENT

RULING

15th February, & 24th March, 2023

Massam J:

In this ruling the applicant **one Mariam Hamis Idd** under the umbrella of Administratrix of estate of the late **Mwajuma Mohamed Ally** by Chamber summons filed this application under the provision of **Order XXXVIII Rule 1(1) (a)**, section **68 (e)** and **section 95 of the Civil Procedure (Cap 33 R.E 2019)**, where applicant prayed this court to

grant the following prayers. **One**, the court appoint the impartial person to supervise and collect rent in the commercial building/disputed property at Plot No. 1 Block C High Density Kahama Urban Area with Title No. 23983 with 22 rooms used for shops and 7 rooms used for stores belonging to the late Mwajuma Mohamed until determination of the main suit Land Case No. 09/2022 its finality. **Two**, this court to may please grant any other Order as this Court may deemed fit, convenience and just to grant. And **three**, costs of this application be borne by the respondents jointly and severally.

The Chamber Summons in support of affidavit, was taken out at the instance of Rwangobe & Co Advocate and the Affidavit Affirmed on 24th October 2022 by the applicant **Mariam Hamis Idd**. At the hearing of this application, the grounds were advanced by Evaduis Godian Rwangobe Advocate.

The historical background of this application as gathered from the records are that applicant sued 1st respondent and the 2nd respondent for a claim that the two disposed the land in dispute of which, 1st respondent sold the said land to 2nd respondent. It is alleged that applicant is daughter of the late Mwajuma Mohamed who passed away on 23/10/2011. The said Mwajuma Mohamed was co-wife with Hadija Said (the 1st Respondent) to

the late Hamis Idd who was demised in 1996. After the death of the said Hamis Idd, one Mwajuma Mohamed was appointed as administrator of the estate of the said Hamis Idd. Later Mwajuma Mohamed on 2011 passed away then the applicant petitioned in Kahama Primary Court in Mirathi No. 90 of 2017 was appointed as Administratrix to administer the estate of the late Mwajuma Mohamed.

Being administratrix, she noticed that the estate of the late Mwajuma Mohamed (her mother) was disposed by the 1st respondent to the 2nd respondent, she decided to sue them by filing the Land Case No. 9 of 2022 for a claim that the 1st respondent unlawfully disposed by sale the disputed landed property to the 2nd respondent at price of Tsh. 350,000,000/= and the proceeds after that sale were distributed to the 1st respondent and her children namely Dotto Hamis, Tatu Malale, Said Hamis Kulwa Hamis, Taus Hamis and Bakari Hamis leaving other beneficiaries.

In the other hand respondent in counter affidavit averred that, after the death of Mwajuma Mohamed, the 1st respondent and one Mohamed Hamis (the son of the late Mwajuma Mohamed) were appointed as administrator of the estate of the late Hamis Idd through Probate Cause No. 29 of 2004 which on 22/04/2014 the court granted them the letters of

administration, before they distributed the estate to heirs, one Mohamed Hamis died and one Hadija Said was remain sole administratrix of the estate of the said late Hamis Idd, thereafter being sole administratrix, in 2014 she transferred by sale the disputed property to the 2nd respondent at a price of 350,000,000/=, since then up to the date the applicant instituting the main case the 2nd respondent have had been collecting the rent from the tenants.

It is from those summarily facts, the applicant knocked the door of this court to pray this court to appoint the impartial person to supervise and collect rent in the mentioned building at the landed property.

At the hearing the applicant was under the legal service of Evodius Godian Rwangobe learned Advocate and the respondents were represented by Mr. Simon Kamkolwe learned Advocate.

In support of the application Mr. Rwangobe before the submission in merit of the application he prayed first the court to adopt the applicant's affidavit to form part of his submissions. In merit of application, he submitted that applicant is an administratrix of the estate of Mwajuma Mohamed Ally she filed this application pending Land Case No. 9 of 2022.

He noted that applicant prayed the court to appoint the impartial person to supervise and collect rent in commercial building disputed property which is block Plot No. 1 Bock C Kahama high density Area with Title number 23983 with 22 rooms used for shops which belongs to the late Mwajuma Mohamed. He said the collection be in due course until the determination of the main suit (Land Case No 9 of 2022). He contended that the said Mwajuma Mohamed acquired the property since 1974, she made improvement and built a residential house and commercial buildings with 22 rooms which used for shops, and 7 shops which used for store, the estimated amount which collected per month is not less than 10 million. He said that 1st respondent in 2014 without any legal base, he sold the disputed property to 2nd respondent by pretence to be administratrix of deceased husband Hamis Iddi while she had not yet fulfilled the requirement of being appointed as the administratrix of the transaction of sale and transfer when made the title of right of occupancy was read the name of Mwajuma Mohamed.

He further submitted that the sale amounted to Tshs 350,000,000/= million, to the 2nd respondent since 2014 1st respondent went to the Shinyanga District Land and Housing Tribunal where he told the tribunal

that the house was sold Tshs 50,00,000/= while the house was sold at Tshs350,000,000/= as per sale agreement and the proceeds of sale were not distributed to the other heirs, with thus he prayed the court to appoint the impartial person to collect the said rents until determination of the main suit.

In reply, Mr. Kamkolwe (Adv) before taking the follow of submissions, he prayed first the court to adopt the respondent's joint counter affidavit. in supporting his counter affidavit, to form part of his submission he submitted that the disputed property is not belonged to Mwajuma Mohamed but it belonged to Hamis Idd, he argued that the joint counter affidavit on para 14 it shows the letter from the ministry of lands and Housing and Human Settlement proved by evidence that the disputed property belongs to Hamis Idd.

He went on submitting that since 1996 after the death of Hamisi Idd (the first owner), in 2004 Mwajuma Mohammed applied and appointed as administratrix of the late Hamisi Idd in the process of her administration, she was supposed to administer all properties and distribution to all heirs including the children of Khadija Said, in the cause of Administration Mwajuma Mohamed change the name of property to her name, that was in

2009, in 2011 Mwajuma Mohamed passed away, after the death of her, then Khadija Said (1st respondent) and Mohamed Hamisi Idd the son of Mwajuma Mohamed prayed to administrate the estate of Hamisi Idd and Mohammed was appointed as co administrators.

He further submitted that, in the cause of administration the said Khadija Said wanted to sell the disputed property in order to be distributed to all heirs then Mohammed Hamisi Idd (co-administrator) contested that the said property is belonged to his mother (Mwajuma Mohamed) so they filed a land application No. 31/2010 Shinyanga District Land and Housing Tribunal. On 2014 Mohamed Idd passed away. On the result, the tribunal later declared the disputed plot belonged to Hamisi Idd therefore the tribunal allowed Khadija Said to proceed with the sale, before the sale she did change from the name of Mwajuma Mohamed to her name (Khadija Said) then proceeded to sale to the 2nd respondent at Tsh. 350,000,000/= and the said money was distributed equally to among beneficiaries who were 11 and including the daughter of Mwajuma Mohammed.

On point of appointment of receiver, he submitted that he knows the provision of order XXXVIII and 1 of CPC R.E 2019 confers this court jurisdiction to appoint a receiver as claimed, he said it is trite law that the

said power must be exercised judiciously, by taking it consideration the case at hand, he referred the court to find the case of **Amana Bank Ltd Vs. Omary Mohamed Omary and 4 others**, misc. commercial application No. 70/2020 at page 11. He insisted that the court must exercise that power in considering that not to be harsh, and must be used when there was no any other way. He cemented his position by citing the case of **MTI investment Ltd Vs. Chobo investment Co. Ltd**, Misc. commercial application no. 94 of 2019 at page no. 8 last line.

For that reason, he contended that appointment of receiver is not a right, but rather the privilege, applicant to succeed on that he must make a proper case to satisfy a court to exercise its power as elaborated in the case of **Roko investment Co. Ltd Vs. CRDB PLC**, commercial application No. 17 of 2013 at page 2. He reminded the court to observe and to consider two circumstances that (1)To preserve the property from danger threatening it and (2) to allow someone who has a right over the property to obtain the benefit of that right where the ordinary legal remedy are not effective as well stated in similar cases of **Prim Aloyce Mushi and other Vs. Ibrahim TwahiliKusundwa and 3 others**, Misc. Land

Application No. 601 of 2018 as well as in the position established in the case of **MTI Investment Ltd Vs. Chibi Investment** (Supra)

The last point to the counsel for the respondents he submitted that in main case applicant claiming to be declared as the lawful owner on behalf of her late mother (Mwajuma Mohamed), he argued that she is not a direct party in the ownership of the property sold by Khadija Said as administrator to administer the property belonged to Hamisi Idd which bought by 2nd respondent therefore applicant cannot be said to have direct interest of property.

With thus he submitted that applicant did fail to meet the requirement of law in order to be given order of appointment of receiver, he prayed this court to dismiss the application with costs.

In rejoinder, Mr. Rwangobe rejoined by insisting the court to be appoint impartial person to supervise the same until the determination of the said main case as applicant has a right in that property as beneficiary.

Having considered of both advocates for applicant and for the respondent and upon read the affidavit and the joint counter affidavit

together with submissions, the issue to determine *is whether the application is meritoriously.*

In determination of this application the consideration to take for the court before granting a prayer of appointing a receiver, I must consider with other thing to check if applicant established primacies grounds in accordance with the law that application in his affidavit satisfy the court to warrant the exercise its discretion to grant the prayed prayer. I am held with the position in the cited case of **MT Investment Limited vs Chobo Investment Company Limited**, Misc. Commercial Application No. 94 of 2019 which the court cited the case of **Aloyce Mushi and Epimak S. Makoi Ibrahim Kusundwa and 3 others**, Misc. Land Application No. 601 of 2018 where the court observed that;

"Circumstances to which a receiver may be appointed can be categorized into two, one is to preserve property from some danger threatening it and two is to allow someone who has right over the property to obtain the benefit of that right where ordinary legal remedies are not effective"

In the instant application the applicant pray the court to place under receivership the commercial building located on Plot 1 Block C Kahama with certificate of Title No. 23982. Basing on the evidence stated in the affidavit on paragraphs 2 to 10 that the disputed land owned by the late Mwajuma Mohamed who acquired since 1974 continued to developed it by building partly for residential and partly for commercial. On 2011 she passed away. Applicant appointed to be administratrix of the estate. After the applicant being appointed, she come to realize that the land premise was disposed off to the 2nd respondent by the 1st respondent.

In joint counter affidavit, of the respondents did not dispute the fact that 1st respondentsold to the 2nd respondent, they noted that 2nd respondent is a Bonafide purchaser who said to purchase the disputed land the since 2014 from 1st respondent since purchased he then put tenants who are paying rents. The respondents justified the sale and purchase on joint affidavit at on paragraphs 12,13 and 14 which for the sake of reference I opt to reproduce them as follows;

12-That, the contents of paragraph 9 of the affidavit are strongly disputed and the applicant is put to strict proof thereof; to the contrary, the Respondents state to that following the death of

MWAJUMA MOHAMED who was the administrator of estate of MOHAMED IDD a family meeting of heirs of HAMIS IDD was convened on 23/03/2014 as the result of the meeting HADIJA SAID and MOHAMED HAMIS (the son of Mwachuma Mohamed) were appointed and together applied to be administrator of the estate of the late HAMIS IDD through Probate Cause No. 29/2004 and on 22/4/2014 they were granted letter of administration in the judgment delivered by Honourable Byarugaba PCCM in Kahama Primary Court. Herewith attached is a photostat copy of the minutes of the said meeting and the said judgment collectively marked as annexure A-4 with the leave of this honourable court to form part of this joint counter affidavit.

13 -further to what is stated under paragraph 12 of this Joint Affidavit above the 1st respondent approached MOHAMED HAMIS (the co administrator of HAMIS IDD) for sale of the disputed property so that it can be divided among the heirs HAMIS IDD. This was contested by MOHAMED HAMIS through Application Cause No. 31/2014 of which after the death of MOHAMED HAMIS, Judgment was given on 1st July,2014 in the District Land and Housing Tribunal

granting HADIJA SAID (the administrator of the estate of HAMIS IDD) the right to sell the disputed property and divide the proceeds to the beneficiaries. Herewith attached is a photostat copy of the said judgment of Application Cause No. 31/2014 marked as annexure A-5 with the leave of this honourable court to form part of this joint counter affidavit.

14- Further to what stated under paragraph 13 of this joint counter affidavit, the respondents states that after Application Cause No. 31/2014 which granted order of sale by the administrator. HADIJA SAID, applied for title transfer by operation of law to the Ministry of Land and Housing which in turn wrote a letter to MWAJUMA MOHAMED to surrender the granted right of Occupancy with C.T. No. 23983 TABORA to HADIJA SAID who in turn sold and transferred the same to the 2nd Respondent (MHOJA MKWABI). Herewith attached is a photostat copy of the said transfer and letter collectively marked as annexure A-6 with the leave of this honourable court to form part of this joint counter affidavit.

The abstract above clearly show that the disputed land premise was sold to the 2nd respondent since 2014 so the current situation of the said

property is in the hand of the 2nd respondent with no evidence in any how canceled by any competent authority, evidentially from both affidavits prove that since on 2014 the 2nd respondent purchased the suit premise and is in occupation uninterrupted until 2022 when the applicant filed the pending Land Case No. 09 of 2022.

It is important to note that the appointment of receiver is discretion of the court, though if the court intend to appoint the receiver, it must act in judicial mind, the court of appeal in the case of **Dino Katsapas vs Thinamy Entertainment & 2 others**, Civil Revision No. 1 of 2014 the court stated that;

*According to MULLA: **THE CODE OF CIVIL PROCEDURE** 16th e.d Vol. 4 p. 278, the object of appointing a receiver is to protect, preserve and manage property during the pendency of a suit, so as to prevent the ends of justice from being defeated. But MULLA also goes on to caution (on p. 3789):-*

"appointment of a receiver is a serious matter involving serious consequences and orders for appointment of a receiver should be

made in open court, and not in the summary manner in which directions are given in Chambers in commercial causes."

In the light of the above guiding procedure and the fact that the suit premise was sold since 2014 to the 2nd respondent who is in occupation the landed property uninterrupted, proves the 2nd respondent holds some rights in the suit premise purchased. The court at this stage refrain to disturb the 2nd respondent or nothing this court can do to prevent the enjoyment of the purchaser who's purchased and transfer had blessed with competent authority. I think, the only way for the applicant to do, is to challenge the sale and transfer in the main case rather than to disturb the bonafide purchaser at the current stage.

Moreover, it is true that under **Order xxxviii Rule 1 (1) (a) of the Civil Procedure Code Cap 33 RE 2022** the provides that;

1.-(1) Where it appears to the court to be just and convenient, the court may, by order, do any of the following-

(a) appoint a receiver of any property, whether before or after decree,

However, for the applicant to be granted with prayer he must comply with the directions stated under the provisions of **Rule 3 of Order xxxviii** of the Civil Procedure Code (Supra) as that

3- Every receiver so appointed shall-

(a) furnish such security (if any) as the court thinks fit, duly to account for what he shall receive in respect of the property;

(b) submit his accounts at such periods and in such form as the court directs;

(c) pay the amount due from him as the court directs and...

At the hearing of this application failed to mention a person who shall and ready to comply with the above provisions, rather applicant prayed by merely words that the court to appoint an impartial person without mentioning the capable receiver who shall be able to accord the requirement of the law and who shall be accountable to the court for what he/she shall be collecting or receiving from the property.

With thus, I proceed to find that the application is devoid and for that reason is rejected. No order of the costs, according to the relationship between parties.

Order accordingly.

Dated at SHINYANGA this 24th day of March, 2023




R.B. Massam
JUDGE
24/03/2023